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T R E A T I S E

ON

CRIMES AND MISDEMEANORS.

BY SIR WILLIAM OLDNALL RUSSELL, KNT.,
LATE CHIEF JUSTICE OF BENGAL.

BY CHARLES SPRENGEL GREAVES, ESQ.
OF LINCOLN'S INN, AND THE INNER TEMPLE;
BARRISTER AT LAW;
AND A MAGISTRATE FOR THE COUNTY OF STAFFORD.

Eighth American Edition.

WITH THE NOTES AND REFERENCES CONTAINED IN THE FORMER EDITIONS,
BY DANIEL DAVIS AND THERON METCALF, ESQRS.

AND WITH
ADDITIONAL NOTES AND REFERENCES TO ENGLISH AND AMERICAN DECISIONS,

BY GEORGE SHARSWOOD.

IN TWO VOLUMES.
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PREFACE

TO THE

SECOND EDITION.

A SECOND Edition of this Treatise has long been delayed by the pressure of professional engagements, and by the changes effected in the criminal laws during several successive sessions of parliament. It has of course been an object that it should embrace, as far as possible, the statutes of consolidation and improvement, for which the country is so much indebted to the able and judicious exertions of Mr. Peel.

“The crime of high treason was not originally included in the plan of this Work, on account of the great additional space which the proper discussion of this important subject would have occupied; and because prosecution for that crime, happily not frequent, are always so conducted as to give sufficient time to consult the highest authorities.” These reasons, which were given in the Preface to the First Edition, have still been allowed to operate; and the crime of high treason is not, therefore, one of the subjects discussed in the following pages. The law upon all other indictable offences will, it is hoped, be there found in an appropriate arrangement: and a chapter or book upon the law of Evidence in criminal prosecutions, which formed a part of the original plan of the Work, has now been supplied by the kind assistance of my friend, Mr. E. Vaughan Williams, whose professional attainments abundantly assure the value of the addition.

WM. OLDNALL RUSSELL.

Lincoln's Inn, May, 1826.

relative to *Accomplices* in a separate section, in the hopes that I might by that means be enabled to introduce it in the last section of the Book: and I have to regret that those hopes have been disappointed.

It was hoped that this Edition would have been published at a considerably earlier period; but that has unfortunately been prevented by unforeseen circumstances. I feel assured, however, that every due allowance will be made for any delay that has arisen from those bodily and mental sufferings, which it has been my lot to undergo, whilst the work was passing through the press.

CHARLES S. GREAVES.

1, *Harcourt Buildings, Temple,*
July 11th, 1843.

ADVERTISEMENT

TO THE

FIFTH EDITION.

IN the American editions of this work which have been heretofore published, many entire chapters were omitted for the reason that as they related to statute offences, they could have no applicability to this country. The publishers of this edition, however, have resolved to offer to the public the complete work, considering that the chapters omitted, besides containing much useful information on the actual state of the criminal law of England, abound in very interesting decisions on the construction of words in acts of the legislature, to which it must, at times, be useful every where to resort. They have included the notes of the former American Editors with a few exceptions, and the references to American authorities have been carefully brought down to the present time.

G. S.

Philadelphia, Dec., 1844.

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TO THE

EIGHTH EDITION.

THE references to American cases have been carefully brought up to the present time; and the Editor has also added the most important decisions, so far as he considered them applicable in this country, from the English Common Law Reports, since 1843, the date of the third English edition.

G. S.

Philadelphia, May, 1857.

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A
T R E A T I S E
ON
C R I M E S A N D M I S D E M E A N O R S .

B O O K T H E F I R S T .

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS
AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAPTER THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES.

It is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, unless he be expressly defined and exempted by the laws themselves. (a) The inquiry, therefore, as to those who are capable of committing crimes, will best be disposed of by considering the several pleas and excuses which may be urged on behalf of a person who has committed a forbidden act, as grounds of exemption from punishment.

Those pleas and excuses must be founded upon the want or defect of *will* in the party by whom the act has been committed. For without the consent of the *will*, human actions cannot be considered as culpable; nor where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences. (b) The cases of want and defect of will seem to be reducible to four heads:—I. Infancy. II. *Non compos mentis*. III. Subjection to the power of others. IV. Ignorance.

I. The full age of man or woman by the law of England is twenty-one years: (c) under which age a person is termed an *infant*, and is exempted from punishment in some cases of misdemeanors and offences that are not capital. (d) But the nature of the offence will *make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one; (e) and if an infant judicially perjure himself in point of age or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c. : (f) but if the offence charged by the indictment be a mere non-feazance (unless it be of such a thing as the

(a) 4 Bla. Com. 20.

(b) 1 Hale, 14.

(c) It is the full age of male or female according to common speech, Lit. s. 104, 259.

(d) 1 Hale, 20.

(e) 4 Bla. Com. 23; 1 Hale, 20; Co. Lit. 247.

(f) Bac. Abr. Inf. (H.); Sid. 258.

party be bound to by reason of tenure or the like, as to repair a bridge, &c.) (*g*) there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such a case shall not be imputed to him. (*h*) (1)†

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned; (*i*) and the law is said to be, that though an infant at the age of eighteen or even fourteen, by his own acts may be guilty of a forcible entry, and may be fined for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine. (*j*) An infant cannot, however, be guilty of a forcible entry or disseisin by barely commanding one, or by assenting to one to his use; because every command or assent of this kind by a person under such incapacity is void: but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor. (*k*)

Infants committing capital crimes.

With regard to capital crimes the law is more minute and circumspect: distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. (*l*) But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex presumptione juris* such an infant cannot have discretion; and against this presumption no averment shall be admitted. (*m*)

On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age. (*n*) But during the interval between fourteen years and seven, an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with

(*g*) 2 Inst. 703; Rex v. Sutton, 3 Ad. A. E. 597, post, Bridges.

(*h*) 1 Hale, 20; Bac. Abr. Inf. (H.)

(*i*) 1 Hale, 21.

(*j*) Bac. Abr. Inf. (H.); Dalt. 422, Co. Lit. 357; And see 1 Hawk. P. C. c. 64, s. 35, that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

(*k*) Bac. Abr. Inf. (H.); Co. Lit. 357; 1 Hawk. P. C. c. 64, s. 35.

(*l*) 4 Bla. Com. 23.

(*m*) 1 Hale, 27, 28; 1 Hawk. c. 1, s. 1, note (1.); 4 Bla. Com. 23. A pardon was granted to an infant within the age of seven years, who was indicted for homicide; the jury having found that he did the act before he was seven years old, 1 Hale, 27, (edit. 1800,) note (*e*.)

(*n*) Dr. and Stu. c. 26; Co. Lit. 79, 171, 247; Dalt. 476, 505; 1 Hale, 25; Bac. Abr. Inf. (A. & H.)

(1) MASSACHUSETTS.—The proceedings against an infant upon the statute of 1805, for not appearing at a military muster, are not *civiliter*, but *criminaliter* for an offence against the law; and in these proceedings he may appear and answer in person for the same reason that to an indictment for an offence against an infant, he may personally answer. If the law were otherwise, no proceedings could be had against infants having no guardian appointed by the probate court to recover penalties for offences committed by them; for in those cases a justice is not authorized by law to assign guardians to them. 4 M. R. 377, Winslow v. Anderson.

† [VIRGINIA.—Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and to defend himself in person or by attorney; and it is error to assign him a guardian, and to try the case on a plea pleaded for him by a guardian. Wood v. Commonwealth, 3 Leigh's Rep. 743. An infant only a year or two old, upon whose land a nuisance is created, cannot be made criminally answerable for it. The People v. Townsend et al., 3 Hill, 479.]

* Eng. Com. Law Reps. xxx. 168.

guilt; yet this presumption will diminish with the advance of the offender's years, and will depend *upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.(o) Thus, it is said, that an infant of eight years old may be guilty of murder, and shall be hanged for it:(p) and where an infant between eight and nine years old was indicted, and found guilty of burning two barns, and it appeared, upon examination, that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was executed accordingly.(q)(2)

*3

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examination, it was found that he hid the blood and the body. The justices held that he ought to be hanged, but they respited the execution that he might have a pardon.(r) Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet aetatem*.(s) And a girl of thirteen was burnt, for killing her mistress.(t) Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the jury to say whether at the time of committing the offence, such person had guilty knowledge that he was doing wrong.(n)

In the case of *rape*, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore he cannot be guilty of it;(u) but this is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion.(v)†

(o) 1 Hale, 25, 27; 4 Bla. Com. 23. The civil law as to capital punishment distinguished the ages into four ranks:—1. *Ætas pubertatus plena*, which is eighteen years. 2. *Ætas pubertatis*, or *pubertas* generally, which is fourteen years, at which time persons were likewise presumed to be *doli capaces*. 3. *Ætas pubertati proxima*; but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven; before which the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence. 1 Hale, 16–19.

(p) Dalt. Just. c. 147.

(q) Dean's case, 1 Hale, 25, note (u.)

(r) 1 Hale, 27; F. Corone, 57; B. Corone, 133.

(s) Spigurnal's case, 1 Hale, 26; Fitz. Rep. Corone, 118.

(t) Alice de Waldborough's case, 1 Hale, 26.

(n) Rex v. Owen,^a 4 C. & P. 236, Littledale, J.

(u) Rex v. Groomdale,^b 7 C. & P. 582, Gaslee, J., after consulting Lord Abinger, C. B., as to whether the words "every person" in the 9 Geo. 4, c. 31, s. 16, altered the former law. So an infant cannot be guilty of an assault with intent to commit a rape. Rex v. Eldershaw,^c 3 C. A. P. 396, Vaughan, J.

(v) 1 Hale, 630.

(2) An infant cannot be naturalized upon his own petition, but he may upon the petition of his parent or legal guardian. By *person*, in the statutes upon the subject of naturalization, must be understood a person capable of contracting the obligations of allegiance. To enable an infant to annul his obligations of allegiance to his native sovereign, and enter into new ones with the United States, the provision (in the statutes) ought to be express, but there is no such provision. 2 M. R. 420, Le Forestiere, Petitioner.

† [The legal presumption that an infant under the age of fourteen years is incapable of committing the crime of rape may be rebutted by the proof that he has arrived at the age of puberty. *Williams v. The State*, 14 Ohio, 222. A boy over fourteen years of age will be presumed capable of committing rape. *The State v. Handay*, 4 Harrington, 566.]

^a Eng. Com. Law Repts. xix. 362.

^b Id. xxxii. 641.

^c Id. xiv. 367.

The following is an important case as to the capability of an infant of ten years old being guilty of the crime of murder ; and as to the expediency of visiting such an offender with capital punishment.

Case of
murder by
a boy of ten
years old.

*4

At Bury summer assizes, 1748, William York, a boy of ten years of age, was convicted, before Lord Chief Justice Willes, for the murder of a girl of about five years of age, and received sentence of death ; but the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity *of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case ; which he reported to the judges at Serjeants' Inn in Michaelmas Term following.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing ; and the boy, being asked what was become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed that a heap of dung near the house had been newly turned up ; and upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person, capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed ; that she did so that morning, (which was not true, for the bed was searched and found to be clean,) and thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap ; placing the dung and straw that was bloody under the body, and covering it up with what was clean ; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself ; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession :—upon which he was committed to jail.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace ; and of many declarations to the same purpose which the boy made to other people after he came to jail, and even

down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

*Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to be have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls *mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savor of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency; in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner, suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

*5

Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace, who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length, he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state: and at the summer assizes, 1757, the prisoner had the benefit of his majesty's pardon, upon condition of his entering immediately into the sea service.^(w)

It is said that an act making a new felony does not extend to an infant under the age of discretion, namely, fourteen years old;^(x) and that general statutes which give corporal punishment are not to extend to infants; and that, therefore, if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the statute of Merton, c. 6, be general in that case.^(y) But this must be understood, where the corporal punishment is, as it were, but collateral to the offense, and not the direct intention of the proceeding against the infant for his misdemeanor; in many cases of which kind the infant under the age of

How far statutes extend to cases of infancy.]

(w) York's case, Fost. 70, *et seq.*

(x) 1 Hale, 706; Eyston and Studde's case, Plowd. Com. 465, *a.* And see 1 Hale, 21, 22; Bac. Ab. Inf. (H.)

(y) Bac. Ab. Inf. (H.); Plowd. 364; 1 Hale, 21.

twenty-one shall be spared, though possibly the punishment be enacted by parliament.(z)

*6 But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by *several acts of parliament, as by 1 Jac. 1, c. 11,(a) of felony for marrying two wives, in which there was a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years: so that if the marriage were above the age of consent, though within the age of twenty-one years, it was not exempted from the penalty. So by the statute 21 Hen. 8, c. 7,(b) concerning felony by servants that embazzle their masters' goods delivered to them, there was a special provision that it should not extend to servants under the age of eighteen years, who certainly had been within the penalty if above the age of discretion, namely, fourteen years, though under eighteen years, unless there had been a special provision to exclude them. And so by the 12 Anne, c. 7, (b) (by which it was made felony without benefit of clergy to steal goods to the value of 40s. out of a house, though the house were not broken open,) where apprentices who should rob their masters were excepted out of the act.(c)†

Of delaying execution where an infant is convicted.

In many cases of crimes committed by infants, the judges will in prudence respite the execution in order to get a pardon: and it is said that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon.(d) But this authority to dismiss him, must be understood of a reprieve before judgment; or of a case where the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil.(e)

Of persons non compos mentis.

II. It has been considered that there are four kinds of persons who may be said to be *non compos*. 1. An idiot. 2. One made *non compos* by sickness. 3. A lunatic. 4. One that is drunk.(f) But it should be observed, that every persons at the age of discretion is presumed sane, unless the contrary is proved; and if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper.(g)

Idiots.

An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals: and such a one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.; but these are mentioned as instances only; for whether idiot or not is a question of fact for the jury.(h) One who is *surdus et mutus a nativitate* is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done, or under what penalties: but if it appear that he has the use of understanding, which many of that condition discover

(z) Bac. Ab. Inf. (H.); 1 Hale, 21.

(b) Repealed, 7 & 8 Geo. 4, c. 31, s. 1.

(c) Bac. Ab. Inf. (H.); Co. Litt. 147; 1 Hale, 21, 22.

(d) 35 Hen. 6, 11 and 12.

(e) 1 Hale, 27; 1 Hawk. P. C. c. 1, s. 8. And, *quare*, whether in any case of an infant convicted by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon.

(f) Co. Litt. 247; Beverley's case, 4 Co. 124.

(g) 1 Hale, 33, 34.

(h) Bac. Ab. Idiots, &c. (A.); Dy. 25; Moor, 4 pl. 12; Bro. Idiot, 1; F. N. B. 233.

† [Although a minor cannot be made responsible *civilliter* for goods obtained on credit, procured by false representations, he may be proceeded against *criminaliter*, under the statute in respect to obtaining goods by false pretences. *The People v. Kendall*, 25 Wend. 399.]

by signs to a very great measure, then he may be tried, and suffer judgment and execution; though great caution should be used in such a proceeding.(f)(3)

*A person made *non compos mentis* by sickness, or, as it has been sometimes expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused in criminal cases from such acts as are committed while under the influence of his disorder.(g) Several causes have been assigned for this disorder; such as the distemper of the humors of the body; the violence of a disease, as fever or palsy; or the concussion or hurt of the brain: and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect to some particular matters, to a *total alienation* of the mind, or complete madness.(h)

A *lunatic* is one labouring also under a species of the *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder only at certain periods and vicissitudes; having intervals of reason. Such a person during his frenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent.(i) The name of *lunacy* was taken from the influence which the moon was supposed to have in all disorders of the brain; a notion which has been exploded by the sounder philosophy of modern times.

(f) 1 Hale, 34. And see the note(o) where it is said that according to 43 Assis. pl. 30, and 8 Hen. 4, c. 2, if a prisoner stands mute, it shall be required whether it be wilful, or by the act of God; from whence Crompton infers that if it be by the act of God, the party shall not suffer; Crompt. Just. 29, a. But if one who is both deaf and dumb, may discover by signs that he hath the use of understanding, much more may one who is only dumb, and consequently such a one may be guilty of felony. It may be observed, that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of those unfortunate people have at the present day a very perfect knowledge of right and wrong. In Steele's case, 1 Leach, 451, a prisoner who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in Jones' case, 1 Leach, 102, where the prisoner (who was indicted on 12 Anne, c. 7, for stealing in a dwelling house,) on being put to the bar appeared to be deaf and dumb, and the jury found a verdict, "Mute by the visitation of God;" after which a woman was examined upon her oath, to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried, and convicted of the simple larceny. The proper course in such cases is. 1. To swear a jury to determine whether the prisoner be mute of malice or by the visitation of God. 2. Whether he be able to plead. 3. Whether he be sane or not; on which issue the question is, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence. *Rex v. Pritchard*, 7 C. & P. 303, Alderson, B.; *Rex v. Dyson*, *Ibid.* 305, n. (a), Parke, B.; S. C. 1 Lewin, 64. In *Rex v. Pritchard*,^a the jury were sworn on each of the three issues separately. See *Rex v. Dyson*, for the form of the oath administered to the interpreter. See Thompson's case, 2 Lewin, 137, where the prisoner being deaf and dumb, but able to read, the indictment was handed to him with the usual questions written upon paper, and he wrote his plea on paper. The jurors' names were then handed to him, with the question, "Whether he objected to any of them?" and he wrote for answer, "No." The judge's note of the evidence of each witness was handed to him, and he was asked, in writing, if he had any questions to put.

(g) Hale, 30. Bac. Abr. Idiots, (A).

(h) 1 Hale, 30.

(i) 4 Co 125; Co. Lit. 247; 1 Hale, 31.

(3) MASSACHUSETTS.—This is the common practice in Massachusetts. A person with whom the party is able to converse by signs, is sworn by order of court, truly to interpret and explain the proceedings to the prisoner, and he accordingly interprets or explains the indictment as it is read on the arraignment, and then informs the court of the prisoner's answer or plea. Whereupon the trial proceeds as in other cases; and any questions are put to the witnesses which the prisoner desires, which questions he explains to the person appointed to interpret the proceedings.—EDITOR. {14 Mass. R. 207, Commonwealth v. Hill.}—[See *The State v. De Wolf*, 8 Conn. R. 93.]

^a Eng. Com. Law Rep. xxxii. 517.

When a man was indicted for shooting at his wife with intent to murder her, and, previous to the commencement of his trial, he applied to the judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests; the counsel for the prosecution stated that he should not call her; and the judge told the prisoner that although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution to negative the supposition that he was insane; and his lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence was an incorrect one, and, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity.^(a)

Persons
drunk.

With respect to a person *non compos mentis* from drunkenness, a species of madness which has been termed *dementia effectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime,^(k) but on the contrary must be considered as an aggravation of whatever he does amiss.^(l)† Yet if a person, by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices an habitual or fixed frenzy be caused, though this madness was *contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily.^(m)(A). And, though voluntary drunkenness cannot excuse from the commission of crime, yet where, as on a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and

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(a) Reg. v. Pearce, 9 C. & P. 667.

(k) Co. Lit. 247; 1 Hale, 32; 1 Hawk, P. C. c. 1, s. 6.

(l) 4 Bla. Com. 26; Plowd. 19; Co. Lit. 247. *Nam omne crimen ebrietas incendit et detegit.* And see also Beverley's case, 4 Co. 125.

(m) 1 Hale, 32.

(A) {Insanity, of which the remote cause is habitual drunkenness, is an excuse for an act done by the party, while so insane, but not at the time under the influence of liquor. The crime must take place during a fit of intoxication, and be the immediate result of it, and not a remote consequence superinduced by the antecedent drunkenness of the party. In cases, therefore, of *delirium tremens*, or *mania a potu*, the insanity excuses the act, if the party be not intoxicated when it is committed. U. States v. Drew, 5 Mason, 28. See also American Jurist, vol. iii. p. 5-20.} [Acc. *Burnett v. The State*, Martin & Yerger (Tenn.) Rep. 133; *Cornwell v. The State*, id. 147; *State v. McCants*, 1 Spears, 384.] Long continued insanity, although resulting in occasional insanity, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required when general insanity is proved. When the indulgence has produced permanent derangement of mind it would be otherwise. *Gardner v. Gardner*, 22 Wend. 526.

† [Voluntary drunkenness will not excuse a crime committed by a man otherwise sane, while acting under its influence. *State v. John*, 8 Iredell, N. C. 330; *The State v. Bullock*, 13 Alabama, 413; *Schaller v. State*, 14 Missouri, 502. If a person while sane and responsible, makes himself intoxicated, and while intoxicated commits murder by reason of insanity which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible. *United States v. McGlue*, 1 Curtis C. C. 1. When an habitual and fixed frenzy is produced by drunkenness, the man is in the same condition as if it was contracted involuntarily. *United States v. Forbes*, Crabbe, 558.]

• Eng. Com. Law Repts. xxxii. 517.

impulse, the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration. (n)(B) †

So in a case of maliciously stabbing, a very learned judge observed, that with regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used. If a man used a stick, a jury would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party. (o) So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. (p) So where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the party uttering them is proper to be considered. (q) But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse. (q) So upon an indictment for stabbing, the jury may take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bona fide* apprehension that his person or property was about to be attacked. (r)

But though this subject of *non compos mentis* may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein in law is between *idiocy* and *lunacy*; the first, a *fatuity*, a *nativitate*, or *dementia naturalis*, which excuses the party as to his acts; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid

(n) By Holroyd, J., in *Rex v. Grindley*, Worcester Sum. Ass. 1819, MS. But in a case of murder by stabbing with a bayonet, where *Rex v. Grindley* was relied upon, Park, J. J. A., in the presence of Littledale, J., said, "highly as I respect that late excellent judge (Holroyd), I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law" *Rex v. Carroll*, 7 C. & P. 145.

(o) *Rex v. Meakin*, 7 C. & P. 297, Alderson, B. in *Reg. v. Cruse*, 8 C. & P. 546, Patteson, J., said, "although drunkenness is no excuse in any crime whatever, it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention and yet he may be guilty of very great violence."

(p) *Rex v. Thomas*, 7 C. & P. 817, Parke, B; *Pearson's case*, 2 Lewin, 145, Park, J. A. J.

(q) *Rex v. Thomas*, *ibid*.

(r) *Marshall's case*, 1 Lewin, 76, Park, J. A. J.; *Goodier's case*, *ibid*, Parke, J.

(B) {Addison's Rep. 247, *Pennsylvania v. M'Fall*, acc.}

† [He, who is in a state of voluntary intoxication, is subject to the same rule of conduct and the same legal inferences as a sober man; but where a provocation has been received, which, if acted upon instantly, would mitigate the offence of a sober man; and the question in the case of a drunken man is, whether that provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question; *State v. McCants*, 1 Spears, 384. Drunkenness of the accused at the time of passing a counterfeit bill is a circumstance proper to be submitted to the consideration of the jury, and should have its just weight in determining whether he knew the bill to be counterfeit; *Pigman v. The State*, 14 Ohio, 555; *Kessy v. The State*, 3 Smedes & Marshall, 518.]

* Eng. Com. Law Repts. xxxii. 471.

† *Id.* xxxii. 514.

• *Id.* xxxiv. 522.

intervals, goes under the name of *lunacy*, and excuses equally with idiocy as to acts done during the frenzy.^(s)

Difficulty of
the subject.
*9

The great difficulty in cases of this kind is to determine where a person shall be said to be so far deprived of his senses and memory *as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Lord Hale, speaking of partial insanity, says, that it is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And he says further, "Doubtless most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences: it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes." And he concludes by saying, "the best measure I can think of is this: such a person as, labouring under melancholy distempers, hath yet ordinarily as great understanding as, ordinarily, a child of fourteen years hath, is such a person as may be guilty of treason or felony."^{(t)†}

It will be proper to mention some of the cases which have been decided upon this difficult and most important subject.

(s) Bac Abr. Idiots. &c. (A).; 4 Co. 125.

(t) 1 Hale, 30.

† [Insanity, to constitute a proper ground of defence to a criminal accusation, must be shown to exist to such an extent as to blind its subject to the consequences of his acts and deprive him of all freedom of agency. *Commonwealth v. Mosler*, 4 Barr, 264.

If a man has reason sufficient to distinguish between right and wrong, in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule, however, is when a man has reason sufficient to distinguish between right and wrong as on a particular act about to be committed, yet in consequence of *some delusion* the will is over-mastered; and there is no criminal intent, provided the act itself is connected with the peculiar delusion under which the prisoner is labouring. *Roberts v. The State*, 3 Georgia, 326.

Where the delusion of the party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act. Nor is a party responsible for an act done under an uncontrollable impulse which is the result of mental disease. *Commonwealth v. Rogers*, 7 Metcalf, 500.

A party indicted is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity and nerve sufficient to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. *Commonwealth v. Rogers*, 7 Metcalf, 500.

Where no more than the homicide is proved, the overwhelming barbarity of the act will not be admitted as a presumption of insanity; for then the more unnatural and brutal the crime the stronger would become the ground of defence. *State v. Stark*, 1 Strobbart, 479.

On a trial for murder, a physician having stated on examination in chief, that the prisoner was insane, he may be asked on cross-examination, whether, in his opinion, the prisoner knew right from wrong, or that it would be wrong for him to commit murder, rape or arson. *Clarke v. The State*, 12 Ohio, 483.

The test of such insanity in criminal cases as will excuse the commission of the crime, is whether the accused at the commission thereof, was conscious that he was doing what he ought not to do.

In order to acquit a person on the ground of insanity, the proof of insanity at the time of committing the act ought to be as clear and satisfactory as the proof of committing the act ought to be, in order to find a sane man guilty.

That the accused had formerly been insane is no excuse for crime if it be shown that he

In the case of *Lord Ferrers*, who was tried before the House of Lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed. (u)

Lord Ferrers' case.—Murder.

(u) Lord Ferrer's case, 19 St. Tri. (by Howell), 947.

recovered from it previously to the commission of the crime; but otherwise if there is no evidence of such recovery.

Partial insanity on other subjects does not excuse crime. *The State v. Spencer*, 1 New Jersey, 196.

A question which has created considerable difficulty, especially of late years is, how far what is termed *monomania*, excuses from the commission of crime.

It is the case of a partial derangement arising either from physical or moral causes, producing in the individual a hallucination on some particular subject.

An eminent medical writer of our own country, Dr. Ray, who from his official position as superintendent of the main hospital, had very extensive opportunities for observation, had written a book on this subject, entitled "A Treatise on the Medical Jurisprudence of Insanity," which may be consulted with advantage by the advocate on all cases, when this question arises.

He lays it down as a principle which the progress of pathological anatomy during the present century has established beyond the reach of a reasonable doubt, that *mania arises from a morbid affection of the brain*.

Insanity then observes the same pathological laws as others diseases, and it is the conclusion of this intelligent writer that "it is the prolonged departure without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in the mind." He then proceeds to trace this disorder through its different classes of general or partial, intellectual or moral mania.

In 1843, in consequence of the acquittal of an individual charged with murder on the ground of insanity—several questions were propounded by the House of Lords, to the judges. These questions and the answers will be found in a note to 1 Carr. & Kirw. 130; 4 Eng. Com. Law, 130, and also in the last edition of Roscoe on Criminal Evidence, p. 949. So far as regards the question of monomania, C. J. Tindal said: "The first question proposed by your lordships is this, 'what is the law respecting alleged crimes committed by persons afflicted with insane delirium in respect of one or more subjects or persons; as for instance, when at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but 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 supposed public benefit.'"

In answer to which question assuming that your lordships' inquiries are confined to those persons who labour under such partial delirium only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delirium, 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 law, by which expression we understand your lordships to mean the law of the land." Again, "we have to submit our opinion to be that the jury ought to be told in all cases that 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 to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing 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 that he was doing wrong*. The mode of putting the latter part of the question to the jury on those occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode though rarely if ever leading to any mistake with the jury, is not we conceive so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." See an able article on the subject in the American Law Magazine, Vol. 2, p. 346.]

Arnold's case.—
Shooting at Lord Onslow.

In *Arnold's* case, who was tried at Kingston, before Mr. J. Tracey, for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Mr. Justice Tracey left the case to the jury, observing that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will properly be exempted from justice or the punishment of the law. (*v*)

*10

Parker's case.—
aiding the king's enemies by entering into the French service.

*In *Parker's* case, who was indicted for aiding the king's enemies, by entering into the French service in time of war between France and this country, the defence of the prisoner was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellects; so weak that it excited surprise in the neighbourhood when he was accepted for a soldier. But the evidence for the prosecution had shown the act to have been done with considerable deliberation and possession of reason; and that the prisoner, who was a marine, having been captured by the French, and carried into the Isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney-General replied to the defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong. And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty. (*v*)

Bowler's case.—
Shooting at a person and wounding him.

Thomas Bowler was tried at the Old Bailey on the 2d July, 1812, for shooting at and wounding William Burrows. The defence set up for the prisoner was, insanity occasioned by epilepsy; and it was deposed, by the prisoner's housekeeper, that he was seized with an epileptic fit on the 9th July, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them for causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected

(*v*) *Arnold's* case, MS. Collision on Lunacy, 475; 8 St. Tri. 318; 16 St. Tri. (by Howell,) 764, 765. The jury found the prisoner guilty; but at Lord Onslow's request he was reprieved; and was confined in prison thirty years, till he died.

(*w*) *Parker's* case, tried by a special commission, in Horseonger-lane, 11th of February, 1812, for high treason, Collis. 477.

upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated the 17th of June, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March last. (x)

Mr. Justice Le Blanc, after summing up the evidence, concluded by observing to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit: since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the *influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. (y)

*11

In *Bellingham's* case, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence, not urged by himself but by his counsel, was insanity; and upon this part of the case, Mansfield, Chief Justice, is reported to have stated to the jury, that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. (z)

Bellingham's case.—Murder.

So where on an indictment for murder, it appeared that the prisoner laboured under a notion that the inhabitants of Hadleigh, and particularly the deceased, were continually issuing warrants against him, with intent to deprive him of his liberty and life, the great judge who tried the case, told the jury, that "they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with refer-

Offord's case.

(x) The report of this case, in *Collison on Lunacy*, 573, does not state the day on which the prisoner shot at W. Burrows.

(y) *Bowler's case*, Old Bailey, 2d July, 1812, *Collis*. 673, in the note.

(z) *Bellingham's case*, Old Bailey, 15th May, 1812, *Collis*. Addend. 636. "I will not refer to *Bellingham's case*, as there are some doubts as to the mode in which that case was conducted." Per Sir J. Campbell, Atty. Gen. in *Reg. v. Oxford*, 9 C. & P. 533.

“ence to the crime of murder. The question was, did he know that he “was committing an offence against the laws of God and nature?” and his lordship expressed his complete accordance in the observations of C. J. Mansfield in the last case.^(a)

Oxford's
case.

In the recent trial of *Oxford*, for shooting at the Queen, Lord Denman, C. J., told the jury, “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 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.” “On the part of the “defence, it is contended that the prisoner was *non compos mentis*, that “is, (as it has been said,) unable to distinguish right from wrong, or, in *12 “other words, that from the *effect of a diseased mind he did not know “at the time that the act, he did was wrong.” “Something has been “said about the power to contract and to make a will. But I think that “those things do not supply any test. 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?”^(b)

Hadfield's
case.—
Shooting at
the king.

James Hadfield was tried in the Court of King's Bench, in the year 1800, on an indictment for high treason, in shooting at the king in Drurylane theatre; and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in the dragoon regiment, and in the year 1793 received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been, dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by this disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptoms of mental incapacity or disorder. On the 11th of May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed-post, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this having upset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king,

(a) *Rex v. Oxford*, 5 C. & P. 168, Lord Lyndhurst, C. B.

(b) *Reg. v. Oxford*, 9 C. & P. 525. Lord Denman, C. J., Alderson, B., and Patteson, J.

^a Eng. Com. Repts. xxiv. 259.

^b Id. xxxvii. 221.

the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that at the moment when the audience rose, on his majesty's entering his box he got up above the rest, and presented a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; *and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that "he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed." These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that "his plan was to get rid of it by other means; he did not intend any thing against the life of the king; he knew the attempt only would answer his purpose."

*13

The counsel for the prisoner,^(c) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being he ought to be acquitted.^(d)

The application of the rules and principles laid down in these cases to each particular case as it may arise, will necessarily in many instances be attended with difficulty; more especially with regard to the true interpretation of the expressions, which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity, should appear to have been unable "to distinguish right from wrong," or to discern "that he was doing a wrong act," or should appear to have been "totally deprived of his understanding and memory;" as even in *Hadfield's* case his expressions when apprehended, that "he was tired of life," that "he wanted to get rid of it," and that "he did not intend any thing against the life of the king, but knew that the attempt only would answer his purpose;" seem to show that he must have been aware that he was doing a *wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humours, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will

Applica-
tion of the
rules and
principles
of the fore-
going
cases.

(c) The late Lord Erskine, then at the bar.

(d) *Hadfield's* case, Collis. 480. The verdict of the jury was "Not Guilty; it appearing to us that he was under the influence of insanity when the act was committed."

sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. And it seems that though if there be a total permanent want of reason, or if there be a total temporary want of it when the offence was committed, the prisoner will be entitled to an acquittal; yet, if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design, a faulty to distinguish the nature of actions, to discern the difference between moral good and *evil; then, upon the fact of the offence proved, the judgment of the law must take place.(e)(4)†

*14

In Alison's Principles of the Criminal Law of Scotland,(f) and there is no difference between the law of England and the law of Scotland with reference to insanity, it is said, that "to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, in his own case, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal act."(g)

Proceedings with respect to lunatic offenders.

If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if after he has pleaded, the prisoner become mad, he shall not be tried, as he cannot make his defence. If after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall he stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.(h)

(e) Per Yorke, Solicitor-General, in Lord Ferrers's case, 19 Howell's St. Tr. 947, 948, et per Lawrence J. Rex v. Allen, Stafford Lent Assizes, 1807, MS. And see also upon the subject of insanity, Lord Thurlow's judgment in the Attorney-General v. Parnter, 3 Br. Cha. Ca. 441.

(f) P. 654.

(g) Cited by Sir J. Campbell, Atty. Gen. in Reg. v. Oxford,^a 9 C. & P. 532.

(h) 4 Bla. Com. 25; 1 Hale, 35.

(4) In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears sanity is to be presumed. This is taken for granted in all the elementary writers, and in all the adjudged cases, both in law and equity. The rule has its qualifications; one of which is, that after a general derangement has been shown, it is then incumbent on the other side, to show that the party who did the act, was sane at the very time when the act was performed. To say that sanity is not to be presumed, until the contrary is proved, is to say that insanity or fatuity is the natural state of the human mind. 5 Johns. 158-9; Jackson v. Van Dusen. See the authorities quoted in this case by Van Ness, J., in delivering the opinion of the court.

† [Where previous insanity is shown, the burden of the proof is thrown on the party who seeks to establish an act as done in a lucid interval. But proof that the act done was in itself natural and rational will control evidence of habitual insanity. *Griffin v. Griffin*, Charlton, 217. Where a prisoner was tried for murder four months after the crime was alleged to have been committed, *held*, that it was competent for the prisoner to prove by professional witnesses that he was insane at the time of the trial, with a view to establish the defence of insanity when the act was done. *Freeman v. The People*, 4 Denio, 9.]

^a Eng. Com. Law Repts. xxxviii. 213.

And by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatic, be such in truth or not, the fact shall be investigated. (i) And it appears that it may be tried by the jury, who are charged to try the indictment (k) by an inquest of office to be returned by the sheriff of the county wherein the court sits, (l) or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded returnable *instanter*, in the nature of an inquest of office. (m) And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute, (n) but now a plea of not guilty may be entered under the 7 & 8 Geo. 4, c. 28, s. 2.

But in case a person in a frenzy happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching his guilt, *and this *in favorum vite*; and if there be no colour of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit that the trial proceed in order of his acquittal. (o)

By the 39 and 40 Geo. 3, c. 94, it is enacted, that in all cases when it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required (p) to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until his majesty's pleasure shall be known; and it shall thereupon be lawful for his majesty to give such order for the safe custody of such person during his pleasure, in such place and in such manner as to his majesty shall seem fit. (q)

By sec. 2, "if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment; or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the court, before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till his

(i) 1 Hawk. P. C. c. 1, s. 4. If there be a *doubt* as to the prisoner's sanity, a jury ought to be sworn to try the question. Ley's case, 1 Lewin, 239, Bullock, B.

(k) Bac. Abr. Idiot, (B.); 1 Hale, 33, 35, 36; 1 Hawk. P. C. c. 1, s. 4, note (5.)

(l) 1 Hawk. P. C. c. 1 s. 4; Somerville's case, 1 And. 107; 1 Sav. 50, 56; 1 Hale, 35.

(m) Post. 46, Kel. 13; 1 Lev. 61; 1 Sid. 72. And the proceedings by inquest *ex officio* is recommended in cases of importance, doubt, or difficulty, 1 Hale, 35; Sav. 56; 1 And. 104; See 1 Hawk. P. C. c. 1, s. 4, note (5.)

(n) 1 Hawk. P. C. c. 1 s. 4.

(o) Bac. Ab. Idiot, (B.); 1 Hale, 35, 36, per Foster, J.; 18 St. Tri. 411.

(p) It is the duty of the judge to ask the jury whether they acquit on the ground of insanity. Burrow's case, 1 Lewin, 238, Holroyd, J.

(q) And see as to Ireland, the 1 & 2 Geo. 4 c. 33, s. 16, and the 1 & 2 Vict. c. 72.

Or, upon discharge for want of prosecution.

majesty's pleasure shall be known." And it is further enacted, "that if any person charged with any offence shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impannelled to try the sanity of such person; and if the jury so impannelled shall find such person to be insane, it shall be lawful for such court to order such person to be kept in strict custody, in such place and in such manner as to such court shall seem fit, until his majesty's pleasure shall be known."(*r*)

*16

This section extends to all offences, and is not confined like the first to cases of treason, murder, and felony. The prisoner was indicted for assaulting one Elizabeth Earl, and beating her with intent to murder her. The jury found specially that he was insane at the time of committing the offence, and also at the time of the trial, and declared that they acquitted him on account of such insanity, and the learned judge ordered him to be kept in strict custody till his majesty's pleasure should be known. But a doubt being suggested, whether the judge had authority under the statute to take such a finding and make such an order, the offence being a misdemeanor only and not felony, the point was submitted to the consideration of the judges. They were unanimously of opinion that the second section applies to all cases, though only misdemeanors,—and that though mere insanity at the time of the offence would not have warranted the order, yet insanity found at the time did warrant it.(*o*)

The jury may judge from the demeanor without hearing evidence.

Where a prisoner, indicted for a misdemeanor in uttering seditious words, upon his arraignment showed symptoms of insanity, and an inquest was forthwith taken under the statute, it was held that the jury might form their judgment of the state of the mind of the prisoner from his demeanor while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state. And that it was unnecessary to ask him whether he would cross-examine the witnesses or offer any remarks or evidence, as that would be an useless prolongation of a painful proceeding.(*p*)

Unless the facts necessary to constitute the crime charged be proved, the case is not within the act.

If the jury are of opinion that the prisoner did not in fact do all that the law requires to constitute the offence charged, supposing the prisoner had been sane, they must find him not guilty generally, and the court have no power to order his detention under this act, although the jury should find that he was in fact insane. Where, therefore, on an indictment for treason, which stated as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet, the jury found that the prisoner was insane at the time when he discharged the pistol, but whether the pistol was loaded with ball or not there was no satisfactory evidence,

(*r*) The 1 & 2 Vict. c. 24, repeals the third section of this act, and contains provisions for sending insane persons apprehended under circumstances denoting an intention to commit crime, to lunatic asylums, and for their maintenance therein. See 9 Geo. 4, c. 40, as to the restraint, removal, and maintenance of pauper lunatics by order of two justices, and the 3 & 4 Vict. c. 54, s. 7, as to the maintenance of insane criminals. As to such cases in Ireland, see 1 & 2 Geo. 4 c. 33, s. 17, and 1 & 2 Vict. c. 27.

(*o*) *Rex v. Little, cor. Wood, B., Surrey Summer Assizes, 1820, Hil. T. 1821, MS. Bayley, J., and Russ. & Ry. 430.*

(*p*) *Reg. v. Goode, 7 Ad. & E. 536.* The jury were sworn *in hac verba*, "You shall diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen, whether J. G., the defendant, be insane or not, and a true verdict give to the best of your understanding; so help you God."

* Eng. Com. Law Repts. xxxiv. 150.

the court expressed a strong opinion that the case was not within the statute.(g)

If the acts proved to have been done by the prisoner be such as would have amounted to the crime charged, if they had been done by a person of sane mind, the grand jury are *bound* to find a bill in order that the prisoner may be confined under this act.(r)

Grand jury must find the bill.

If a prisoner have not at the time of the trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody under this act.(s)

The 3 & 4 Vict. c. 54, s. 3, enacts, that "in all cases where it shall be given in evidence, upon the trial of any person charged with any misdemeanor that such person was insane at the time of the *commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing of such offence, the court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until her majesty's pleasure shall be known; and it shall thereupon be lawful for her majesty to give such order for the safe custody of such person, during her pleasure, in such place and in such manner as to her majesty shall seem fit: and in all cases where any person before the passing of this act has been acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person, by order of the court before whom such person has been tried, and still remains in custody, it shall be lawful for her majesty to give the like order for the safe custody of such person during her pleasure, as her majesty is hereby enabled to give in the case of any person who shall hereafter be acquitted on the ground of insanity."

Insane persons charged with misdemeanors. *17

The 56 Geo. 3, c. 117, enacts, that if any person, after conviction for any offence, and during imprisonment or continuance in any goal, prison, hulk, &c., under sentence shall become insane, one of the principal secretaries of state may direct that such person shall be removed to a lunatic asylum or other proper receptacle for insane persons, where such person shall be kept until he has become of sound mind; upon which the secretary of state may, in case such person is still subject to imprisonment, by his warrant direct him to be removed back to the goal, prison, hulk, &c., or if the period of his imprisonment be expired, may direct him to be discharged.

Persons becoming insane after conviction, and during confinement, may be removed to a lunatic asylum.

III. Persons are properly excused from those acts which are not done of their own free will, but *in subjection to the power of others*.(t) Thus, though a legislator establish iniquity by law, and command the subject to do an act contrary to religion and sound morality; yet obedience to

Subjection to the power of others.

(g) Reg. v. Oxford,^a 9 C. & P. 525, Lord Denman, C. J., Alderson, B., and Patteson, J. If this had been an indictment for shooting, as the evidence seems to have proved an assault, and the prisoner might have been convicted thereof under the 1 Vict. c. 85, s. 9, *qu.* whether he might not have been ordered to be kept in custody under sec. 2 of this act or sec. 3 of 3 & 4 Vict. c. 54. C. S. G.

(r) Reg. v. Hodges,^b 8 C. & P. 195, Alderson, B.

(s) Rex v. Dyson,^c 7 C. & P. 305, n. (a.) S. C. 1 Lewin, 64, Parke, B.

(t) 1 Hale, 43; 4 Bla. Com. 27.

^a Eng. Com. Law Reps. xxxviii. 221.

^b *Ib.* xxxiv. 350.

^c *Ib.* xxxii. 518.

such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced in *foro conscientie*.(u) And actual force upon the person and present fear of death may, in some cases, excuse a criminal act. Thus, although the fear of having houses burnt or goods spoiled is no excuse in law for joining and marching with rebels, yet an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains with the rebels.(v)† And in general the 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.(w) An idiot* or lunatic, or a child so young as not to be punishable for his criminal act, when made use of for the purpose of committing crimes, are merely the instruments of the procurer, who will be answerable as a principal.(x) As to persons in *private relations*, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceeds upon the matrimonial subjection of the *wife* to her husband; for neither a *child* nor a *servant* are excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master.(y)

*18

Feme covert
under the
coercion of
her hus-
band.

But a *feme covert* is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion.(z)‡ But this is only the presumption of law; so that if upon the evidence it clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole.(a) And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole.(b)

(u) 4 Bla. Com. 27.

(v) *Per Lee, C. J.*, 18 Sta. Tri. 393, 394; *Reg. v. Tyler*,^a 8 C. & P. 616.

(w) 1 Hale, 433; 1 East, P. C. c. 5, s. 12, p. 225.

(x) 1 Hawk. P. C. c. 31, s. 7; 1 East, P. C. c. 5, s. 14, p. 228.

(y) 1 Hale, 44, 516; 1 Hawk. P. C. c. 1 s. 14; Moor, 813; Kel. 34.

(z) 1 Hale, 45; 1 Hawk. P. C. c. 1, s. 9; 4 Bla. Com. 28; Kel. 31. According to some, if a wife commit a larceny by the command of her husband, she is not guilty; which seems to be the law if the husband be *present*, but not if he be absent at the time and place of the felony committed. 1 Hale, 45.

(a) 1 Hale, 516; 2 Hawk. P. C. c. 29, s. 24.

(b) 1 Hawk. P. C. c. 1, s. 11; 1 Hale, 45, 47, 48, 516; Kel. 31; 2 Bla. Com. 29. The reason given is the heinousness of those crimes. I find no *decision* which warrants the position in the text, as to treason, murder or robbery. Somerville's case, 1 And. 104, which is the only case where husband and wife have been convicted of treason, only shows that a

† [United States v. Vigot, 2 Dal. 346; United States v. Haskell et al., 4 Wash. C. C. Rep. 402.]

‡ [If a wife join with her husband in the commission of a crime less than murder, she is presumed to act under the coercion of her husband and in law is not guilty. Davis et al. v. The State, 15 Ohio, 72.]

^a Eng. Com. Law Repts. xxxiv. 553.

And she will be guilty in the same manner of all those *crimes which, like murder, are *mala in se*, and prohibited by the law of nature.^(c) *19
 And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence; though her husband was with her when she took the oath.^(d)
 But upon an indictment for disposing of forged notes, it was ruled that a woman was protected by being the wife of a man with whom she was indicted, who disposed of them in her presence.^(e)

Where, upon an indictment against husband and wife for jointly receiving stolen goods, it appeared that a burglary was committed, on Thursday or Friday, by their two daughters, who were traced on Saturday to Cranbrook, where their father and mother then lived, with a quantity of the property stolen, with which they went towards their father's house; and on the same night, between nine and ten o'clock, the mother and her two daughters went to the house of a draper, and brought^(f) two trunks, a red and blue one; and a person who lived next door to the prisoners saw them and their two daughters, on the Sunday in the kitchen, where the two daughters were packing a blue box; and the two boxes were afterwards found in London, in consequence of a statement made by the wife, who on the Monday, when the house was searched, denied that any of the stolen goods were in it, and made various others false statements: and a quantity of the stolen property was found concealed in different parts of the house; the jury found both the husband and wife guilty; it was held, upon a case reserved, that as the charge against the husband and wife was joint, and

wife may be convicted of treason with her husband. There Arden and his wife were charged with procuring Somerville to destroy the Queen, and both found guilty; but as none of the evidence is stated, it may have been that the wife was the instigator, and both properly convicted. In Somerset's case, which is the only case of a wife convicted as well as her husband, as an accessory to a murder, according to the 3 Inst. 50, the Earl and Countess were indicted as accessories before the fact, to the murder of Sir T. Overbury; the wife was arraigned alone first, and pleaded guilty, and being asked what she had to say why judgment of death should not be given against her, she said, "I can much aggravate, but nothing extenuate my fault." (2 St. Tr. 957.) Assuming, therefore, that the indictment was joint against both, the case only proves that the wife *may*, properly, be convicted upon her own confession, which indicates that she was the more guilty party; as it is clear she was in this case. See Hume's Hist. Eng. vol. 6, p. 68, &c. But as the Earl and Countess were separately arraigned, and on different days, and as the indictment against the Earl, as recited in his pardon, (2 St. Tr. 1014,) is against him alone, I infer that the Countess was indicted alone: if so, the case is merely that of a wife pleading guilty to an indictment charging her alone as accessory, and unless in such a case she either pleaded that she committed the offence in company with her husband, (as it seems she may, 1 Hale, 47, M. 37, Ed. 3, Rot. 34,) or such appeared to be the case upon her trial, no question as to coercion could arise. In Reg. v. Allison,^a 8 C. & P. 418. Mr. J. Patteson mentions an old case where a husband and wife, intending to destroy themselves, took poison together, the husband died but the wife recovered, and was tried for the murder, and "acquitted 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;" but I know from the best authority that the very learned judge guarded against subscribing to the reason given for this decision. Probably the case referred to is an anonymous one, Moor. 754, where it is said, the question was, whether it was murder in the woman, and the recorder caused the special matter to be found; but no decision is stated, nor have I been able to find the case elsewhere. See further on this subject, note (y) *post*, p. 25. C. S. G.

(c) 4 Blac. Com. 29. This position of Mr. J. Blackstone is obviously much too large, as it includes larceny and burglary. C. S. G.

(d) Rex v. Dicks, in 1781, 2 MS. Sum. *tit.* Of offenders, and MS. Bailey, J.

(e) Rex v. Atkinson, *post*, 24.

(f) So in the report, *quare*, bought.

^a Eng. Com. Law Reps. xxxiv. 458.

it had not been left to the jury to say whether she received the goods in the absence of her husband, the conviction of the wife could not be supported, though she had been more active than her husband. (g)

Not answerable for her husband's breach of duty.

*20

But where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. *Charles Squire* and his wife were indicted for the murder of a boy, who was bound as an apprentice to the prisoner Charles, and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds, &c., which he had received. Upon which Lawrence J., directed the jury, that, as the wife was the servant of the husband, it was not her duty to provide*the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in *foro conscientie* the wife was equally guilty with her husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment. (h)

In inferior misdemeanors a wife may be indicted, together with her husband; (i) and she may be punished with him for keeping a bawdy house, for this is an offence to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex. (k) So a wife may be jointly convicted with her husband of an assault, upon an indict-

(g) *Rex v. Archer*, R. & M. C. C. R. 143. The marginal note is "upon a joint charge against husband and wife, of receiving stolen goods, the wife cannot properly, be convicted, "if the husband is," which seems not to be warranted by the case, which, at most, only decides that where there is no evidence whatever that the wife was present when the goods were received, or of her conduct when they were received, that she ought not to be jointly convicted with her husband. There is some error in the dates mentioned in the case. C. S. G.

(h) *Rex v. Squire* and his wife, Stafford Lent Assizes, 1799. MS.

(i) See *Reg. v. Martin*,^a 8 A. & E. 481, where husband and wife were convicted of obtaining goods by false pretences, and the judgment reversed on another ground. There is no doubt that in all misdemeanors a wife may be jointly convicted with her husband as she may be proved to have acted voluntarily; but I find no authority that the same rule as to coercion, which applies to felonies, does not extend to misdemeanors. On the contrary, *Rex v. Price*,^b 8 C. & P. 19, and *Anon. Matth. Dig. Cr. Law*, 262, show that the rule applies to the misdemeanor of uttering base coin; and the reason given in *Rex v. Dixon*, 10 Mod. 335, and *Reg. v. Williams*, Salk, 384, as to the keeping of gaming and bawdy houses, that the wife may probably have as great, nay, a greater share in the criminal management of the house, than the husband, tends, to show, that in order to convict the wife she must be acting voluntarily, and not under coercion. In *Reg. v. Cruse*,^c 8 C. & P. 541, the wife had taken a very active part. *Reg. v. Williams*, and *Reg. v. Ingram*, Salk, 384, were in arrest of judgment, and therefore the court would presume, is necessary that the wife had acted voluntarily; *Rex v. Dixon* was on demurrer, and the court would, and, it seems, did hold the indictment good, because it might be proved that the wife was not under coercion. There is no authority, therefore, that the rule does not extend to misdemeanors, and the tendency of the authority certainly is that it does. C. S. G.

(k) 1 *Hawk. P. C. c. 1*, s. 12; *Williams's case*, 10 Mod. 63; Salk. 384, S. C., in arrest of judgment. So also for keeping a gaming house. *Rex v. Dixon* and wife, 10 Mod. 335, on demurrer, where by the indictment the husband and wife, *et uterque eorum*, were charged with the offence. See 1 *Burr.* 600.

^a Eng. Com. Law Reps. xxxv. 443.

^b Ib. xxxiv. 277.

^c Ib. 522.

ment against both, or feloniously inflicting a bodily injury dangerous to life, under 1 Viet. c. 88, s. 5. (l) But where the husband and wife were indicted for a misdemeanor, in uttering counterfeit coin, it was held that the same rule which applied to felonies should apply to that case. (m) But a prosecution for a conspiracy is not maintainable against a husband and wife only: because they are esteemed but as one person in law, and are presumed to have but one will. (n)

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any feme sole. (o) Thus she may be indicted alone for a riot; (p) may be convicted of selling gin against the injunctions of the 9 Geo. 2, c. 23, (q) or for recusancy. (r) And she may be indicted for being a common scold; (s) for assault and battery; (t) for forestalling; (u) *for forcible entry; (v) or for keeping a bawdy house, if her husband do not live with her; (w) and for trespass or slander. (x) And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; (y) and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet if he be so ignorantly, by the artifice of the wife, she alone is punishable. (z) And generally a *feme covert* shall answer as much as if she were sole for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment: which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is in no way privy. (a) †

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. Coercion of the husband not to be presumed.

(l) Reg. v. Cruse, 2 Moo. C. C. R. 53; S. C. 8 C. & P. 541.ª

(m) Reg. v. Price, 8 C. & P. 19; Mirehouse, C. S., after consulting Bosanquet and Coltman, Js., and *vide* Matth. Dig. Cr. Law. 262; anon. S. P. per Bayley, J.

(n) 1 Hawk. P. C. c. 72, s. 8.

(o) 4 Blac. Com. 29. But if a wife incur a forfeiture by a penal statute, the husband may be made a party to an action or information for the same, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. c. 1, s. 13.

(p) Dalt. 447.

(q) Croft's case, Str. 1120. And she may be committed for disobeying an order of bastardy. Rex v. Ellen Taylor, 3 Burr. 1679.

(r) Hob. 96; Foster's case, 11 Co. 63; 1 Sid. 410; Sav. 25.

(s) Foxley's case, 6 Mod. 213, 239

(t) Salk. 384.

(u) Sid. 410; 2 Keb. 634; *Qu.* and see Bac. Ab. *Baron and Feme* (G) notes.

(v) 1 Hale, 21; Co. Lit. 357; 1 Hawk. c. 64, s. 35. That is in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.

(w) 1 Hawk. P. C. c. 1, s. 13, n. 11, where 1 Bac. Abr. 294, is cited: *sed. qu.*

(x) 1 Bac. Abr. *Baron and Feme* (G) notes.

(y) 22 Ass. 40; Dalt. c. 157.

(z) Hammond's case, 1 Leach, 447.

(a) 1 Hawk. P. C. c. 1, s. 13. 1 Bac. Abr. *Baron and Feme* (G,) where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39. is cited. But *qu.* and see 1 Hawk. P. C. c. 81, s. 6, and *post*, Book II. Chap. xxii.

† [Commonwealth v. Lewis, 1 Metcalf. A feme covert upon whose lands her husband erects a nuisance is not criminally responsible. *The People v. Townsend & al.*, 3 Hill. 479.

If a married woman commits a misdemeanor with the concurrence of her husband, the husband is liable to indictment. *Williamson v. The State*, 16 Alabama, 481.]

ª Eng. Com. Law Rep., xxxiv, 522.

¸ Ib. 277.

ed when he is not present at the commission of the crime, though it were committed by his procurement. The husband may be accessory before the fact to the felony of the wife.

Sarah Morris was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of the uttering did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring. (b) In a previous case, where the prisoner, *Martha Hughes*, was indicted for forgery and uttering Bank of England notes, the principal witness stated, that, in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop: that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two pound notes, at one pound four shillings each; that he paid her for the notes, and was to receive eight shillings in change; and that when he was putting the notes into his pocket book, and before he had received the change, the husband looked into the room, but did not come in or interfere with the business further than by saying, "Get on with you." After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. Upon this evidence the counsel for the prisoner objected that she acted under the coercion of her husband; that the *evidence would have been sufficient to have convicted the husband, if both the husband and wife had been upon their trial; and that therefore the prisoner ought to be acquitted. (c) But Thompson, B., (stopping the counsel for the prosecution) said, "I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* and *prima facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion: (d) but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came; and it was sufficient if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of tenderness refers it *prima facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence. (e) And it seems that the correct rule is, that if a felony be shown to have been committed by the wife in the presence of the husband, the *prima facie* presumption is that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity in the husband

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Presumption of coercion *prima facie* presumption only, and may be rebutted.

(b) *Rex v. Morris*, East T. 1814, MS. Bayley, J., and Russ. & Ry. 270.

(c) He referred to 2 East, P. C. c. 16, s. 8, p. 559; 1 Hale, 46; Kel. 37.

(d) 1 Hale, 516.

(e) *Rex v. Martha Hughes*, *coram* Thompson, B., Lancaster Lent Assizes, 1813, MS. 2 Lewin, 239, S. C.

to coerce. Thus if the husband were a cripple, and confined to his bed, his presence then would not be sufficient to exonerate the wife. (f) Where, therefore, in a case of arson a husband and wife were tried together, and it appeared that the husband, though present, was a cripple and bed-ridden in the room, it was held that the circumstances under which the husband was, repelled the presumption of coercion. (g)

A *feme covert* is not guilty of felony in stealing her husband's goods, because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them: *for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband. (h)

The wife is not guilty of felony in stealing her husband's goods.

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The wife of a member of a friendly society is not guilty of larceny if she should steal the money of the society deposited in a box in her husband's custody, which box is kept locked by the stewards, of whom he is not one; for the husband has a joint property in such money. (i)

Or goods deposited in his custody, in which he has a joint property.

And in a case where the prisoner was an apprentice to the prosecutor, and it appeared that the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and that she had pawned some articles of it in order to supply the prisoner with pocket money, but the articles she pawned were not those which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken, the prisoner was acquitted. The court held that the prosecutor's wife, having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her *privity or consent*, it might be presumed that he had received it from her. (k) But it should be observed, that if the wife steal the goods of her husband, and deliver

And a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he is her adulterer.

(f) *Per Tindal, C. J., in Reg. v. Crute, 2 M. C. C. R. 53.*

(g) *Reg. v. Henry and Elizabeth Pollard. Maidstone Sp. Ass. 1838, before Vaughan, J., who so held, after consulting Tindal, C. J., cited in Reg. v. Cruse, 2 M. C. C. R. 53.*

The following positions seem fairly deducible from the cases upon this subject. 1st. There is no objection on demurrer to an indictment which charges husband and wife jointly with the commission of an offence; for the indictment is joint and several, and both may be convicted, if it appear the wife was not acting under the coercion of the husband, or either of them. 2dly. There is no objection, either in arrest of judgment or on error, to the joint conviction of husband and wife of the same offence; for she may have been the instigator, and both guilty. 3dly. Upon the trial of husband and wife, *primâ facie* presumption is, that she acted under his coercion, provided he were actually present at the time the felony was committed. If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife. 4thly. This presumption is *primâ facie* only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple, and bed-ridden, or that the wife was the stronger of the two. C. S. G.

(h) 1 Hale. 514, where it is put thus: "If she take or steal the goods of her husband, and deliver them to B., who knowing it carries them away this seems no felony in B.; for they are taken *quasi* by the consent of the husband. Yet trespass lies against B. for such taking; for it is a trespass; but *in favorem vite* it shall not be adjudged a felony: and so "I take the law to be, notwithstanding the various opinions." And he cites Dalton, cap. 104, p. 268, 269, *ex lectura Cooke* (new edit. c. 157, p. 504) And see 1 Hawk. P. C. c. 33, s. 32; 3 Inst. 110; 2 East. P. C. 558.

(i) *Rex v. Willis, R. & M. C. C. R. 375.* So of goods delivered to the husband to keep. Dalt. c. 157.

(k) *Harrison's case, 1 Leach, 47; 2 East, P. C. 559.*

them to B., who knowing it carries them away, *B. being the adulterer of the wife*, this, according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed.(*l*)

Where an adulterer takes the goods in company with the wife, he is guilty of larceny.

Thus where the prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, &c., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings. He soon afterwards brought her with him to the lodgings, where they lived together till he was apprehended, and the wife, who took a small basket with her, swore that there was none of the property but what she had herself taken, or given to the prisoner to take; and the jury found that the prisoner stole the property jointly with the wife; it was held, on a case reserved, that this was larceny in the prisoner, for though the wife consented, it must be considered that it was done *invito domino*.(*m*)

If no adultery has actually been committed, but the goods of the husband are removed from the house by the wife and the intended adulterer, with an intent that the wife should elope with him, this taking of the goods is, in point of law, a larceny. If a wife elope with an adulterer, who takes her clothes with him, it is a larceny; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal any thing else that is his property. If, on the trial of a man for larceny, the jury are satisfied that he took any of the prosecutor's goods, there then being a criminal intention or there having been a criminal act between the prisoner and the prosecutor's wife, the jury ought to convict, even though the goods were delivered to the prisoner by the prosecutor's wife; but if the jury should think that the prisoner took away the goods merely to get away the wife from the husband as a friend only, and without any reference to any connexion between the prisoner and the wife, either actual or intended, they ought to acquit.(*b*)

*24

Feme covert not accessory for receiving her husband.

A *feme covert* shall not be deemed accessory to a felony for *receiving her husband who has been guilty of it, as her husband shall be for receiving her; nor shall be a principal in receiving her husband when his offence is treason; for she is *sub potestate viri*, and bound to receive him.(*n*) Neither is she affected by receiving, jointly with her husband, any other offender.(*o*)

Indictment against husband and wife.

It is no ground for dismissing an indictment for burglary or larceny as to the wife, that she is charged with her husband and described as his wife; for the indictment is joint and several according as the facts may appear: and on such an indictment the wife may be convicted, and the husband acquitted.(*p*)

Evidence of the woman being the wife.

And in burglary or larceny, if a man and woman are indicted, and the woman pretends to be the man's wife, but is not so described in the indictment, the onus of proving that she is his wife is upon her. Thus where *Thomas Wharton* and *Jane Jones* were indicted for burglary and the woman pleaded that she was married to Wharton, and would

(*l*) Dalton, cap. 104, pl. 268, 269, (new edit. c. 157, p. 504.)

(*m*) *Rex v. Tolfree*, R. & M. C. C. R. 248, overruling *Rex v. Clark*, R. & M. C. C. R. 376, n.(*a*)

(*b*) *Reg. v. Tollet*, 1 C. & Mars. 112, Coleridge, J.

(*n*) 1 Hale, 47; 1 Hawk. P. C. c. 1, s. 10.

(*o*) 1 Hale, 48, 621. But if the wife alone, the husband being ignorant, do knowingly

receive B., a felon, the wife is accessory and not the husband. 1 Hale, 621.

(*p*) 1 Hale, 46.

not plead to the name of Jones, the grand jury who found the bill was sent for; and in their presence, and with their consent, the court inserted the name of Jane Wharton, otherwise Jones, not calling her the wife of Thomas Wharton, but giving her the addition of spinster, upon which she pleaded; and the court told her that if she could prove that she was married to Wharton before the burglary, she should have the advantage of it; but on the trial she could not, and was found guilty, and judgment given upon her. (q) If a woman be indicted as a single woman, and pleads to the felony, that is *primâ facie* evidence that she is not a *feme covert*, but is not conclusive of the fact. (r) And in such a case such evidence must be given to satisfy the jury that the prisoners are in fact husband and wife, in the same way as to convince them of any other fact. (s) But cohabitation and reputation will be sufficient evidence upon such point.

William Atkinson and *Mary Atkinson* were indicted for disposing of forged country bank notes; and it appeared that the man disposed of them in the presence of the woman at a public house, to which they went together to meet the person to whom they were disposed of; that the man went thither by appointment, and the woman had a bundle of the same notes in her pocket. There was evidence on the part of the prosecution, that they had lived and passed for man and wife for some months; upon which it was put to Gibbs, C. B., whether the woman was not entitled to an acquittal, and he thought she was; and the counsel for the prosecution at once acquiesced. (t) Where, however, the indictment states the woman to be the wife of the person with whom she is jointly indicted, no evidence is necessary to show that she is the wife. (u)

IV. Upon the plea or excuse of ignorance, it may be shortly observed that it will apply only to ignorance or mistake of fact, and not to any error in point of law. For ignorance of the municipal *law of the kingdom is not allowed to excuse any one that is of the age of discretion, and *compos mentis*, from its penalties when broken; on the ground that every such person is bound to know the law, and presumed to have that knowledge. (v) And it is no defence for a foreigner charged with a crime committed in England, that he did not know he was doing wrong, the act not being an offence in his own country. (w) But in some instances an ignorance or mistake of the fact will excuse; which appears to have been ruled in cases of misfortune and casualty; as if a man, intending to kill a thief or house-breaker in his own house, by mistake kills one of his own family, this will not be a criminal action. (x)(y)†

(q) *Rex v. Jones*, Kel. 37.

(r) *Quinn's case*, 1 Lewin, 1; *Reg v. Woodward*, 2 C. & P. 561. *Patteson, J.*

(s) *Rex v. Hassall*, 2 C. & P. 434. *Garrow, B.* *Quære*, whether the proper course for a woman so indicted is not to plead the wrong addition on arraignment, as by pleading to the felony she answers to the name by which she is indicted. C. S. G.

(t) *Rex v. Atkinson*, O. B. Jan. Sess. 1814. MS. *Bayley, J.*

(u) *Rex v. Knight*, 1 C. & P. 116, *Park, J. J. A.*

(v) 1 *Hale*, 42; 4 *Blanc. Com.* 27, *ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim of our own law as it was of the Roman. *Plowd.* 343; *Ff.* 22, 6, 9.

(w) *Rex v. Esop*, 7 C. & P. 456. *Bosanquet and Vaughan, Jr.*

(x) *Levett's case*, *Cro. Car.* 548; 4 *Blac. Com.* 27; 1 *Hale*, 42, 43.

(y) Before *Somerville's case*, 26 *Eliz.* and *Somerset's case*, A. D. 1615, I find no exception

† [It is a sound principle of criminal jurisprudence, that the intention to commit the crime is of the essence of the offence; and to hold that a man shall be held criminally responsible for an offence, of the commission of which he is ignorant at the time would be intolerable tyranny. *Duncan v. The State*, 6 *Humphreys*, 148.]

^a *Eng. Com. Law Repts.* xxxiv. 524.

^b *Ib.* xii. 207.

^c *Ib.* xi. 335.

^d *Eng. Com. Law Repts.* xxxii. 584.

*26

*CHAPTER THE SECOND.

OF PRINCIPALS AND ACCESSORIES.

WHERE two or more are to be brought to justice for one and the same felony, they are considered in the light either,—I. of principals in the first degree; II. principals in the second degree; III. accessories before the fact; or, IV. accessories after the fact. And in either of these characters they will be *felons* in consideration of law; for he who takes any part in a felony, whether it be a felony at common law, or by statute, is in construction of law a felon, according to the share which he takes in the crime. (a)

Principals
in the first
degree.

I. Principals in the first degree are those who have *actually and with their own hands committed the fact*; and it does not appear necessary to say anything in this place by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

Principals
in the
second de-
gree.

II. Principals in the second degree are those who were *present, aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accomplices; but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (b) The distinction between principals in the first, and principals

to the general rule that the coercion of the husband excuses the act of the wife. (See 27 Ass. 40, Stamf. P. C. 26, 27, 142; Pulton de Pace Reges, 130; Br. Ab. Coron. 108; Fitz. Ab. Coron. 130, 160, 199.) But after those cases I find the following exceptions in the Books:—Bec. Max. 57, excepts treason only. Dalton, c. 147, treason and murder, citing for the latter, Mar. Lect. 13, (which I cannot find, perhaps some reader of some Inn of Court.) 1 Hale, P. C. p. 45, 47, treason, murder, homicide! and p. 434, treason, murder, and manslaughter. Kelyng. 31, an *obiter dictum*, murder only; Hawk. b. 1, c. 1, s. 11, treason, murder, and robbery. Bl. Com. vol. 1, p. 444, treason and murder; vol. 4, p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without an authority for so doing; and, on the contrary, in Reg. v. Cruse,^a 8 C. & P. 545, a case is cited, where Borough, J., held that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion, (see 4 Bl. Com. 28,) and it was so contended in Reg. v. Cruse; and Bac. Max. 56, expressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will, and in the next page he says, “If husband and wife join in committing treason, the necessity of obedience does not excuse the wife’s offence, as it does in felony.” Now if this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somerville’s case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule, as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seems to have sprung from Somerville’s and Somerset’s case, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion. See note (b), p. 18, *ante*, and the learned argument of Mr. Carlington in Reg. v. Cruse,^b 8 C. & P. 541. C. S. G.

(a) Post. 417.

(b) Post. 341.

^a Eng. Com. Law Repts. xxxiv, 522.

^b *Ib.*

in the second degree; or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law, who considered the persons present aiding and abetting in no other light than *accessories at the fact.* (c)† But as such accessories they were not liable to be brought to trial till the principal offender should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And with a view to obviate this mischief the judges by degrees adopted a different rule; and at length it became settled law that all those who are present, aiding and abetting when a felony is committed are principals in the second degree. (d)(A)

(c) Fost. 347.

(d) Coalheaver's case, 1 Leach, 66. And see Fost. 428, and *Rex v. Towle* and others, Mich. T. 1816, Russ. & Ry. 314. This law was by no means settled till after the time of Edw. 3; and so late as the first of Queen Mary, a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time.

† [The distinction between principals in the first and second degree, is a distinction without a difference, and therefore it need not be made in indictments. *State v. Pley et al.*, 2 Brevard, 338.]

(A) MASSACHUSETTS.—Judge Phillips was indicted in the Supreme Judicial Court in the County of Middlesex, as an accessory to a burglary, in which one Thomas Daniels was alleged to have been the principal felon. The death of Daniels (who had committed suicide in prison after his commitment for trial) was alleged in the indictment: and the question was, whether the prisoner Phillips could lawfully be put upon his trial. The court was unanimously of opinion, that by the common law, an accessory cannot be put on his trial, but by his own consent, until the conviction of the principal. "Our only doubt," says the Chief Justice, "arose from the peculiar circumstances in this case, that the person charged as principal is dead. If he were alive and on trial, it is possible he might establish his innocence, strong as the evidence has appeared in support of his guilt.—In such case the prisoner could not be found guilty."—16 M. R. 425.

An indictment against one for feloniously receiving stolen goods, cannot be maintained, unless there is evidence that the principal has been convicted. If the accessory plead to the indictment and suffer a trial, without demanding the previous trial and conviction of the principal, it is not a waiver of this right. No assent can be implied from his submission to the course directed by the Attorney General or the court. In criminal cases, an express relinquishment of a right should appear before the party can be deprived of it—here is no such relinquishment, but merely a silent submission, which might have arisen from ignorance at the time that such right existed. And judgment was arrested accordingly, notwithstanding the accessory had been convicted, it not appearing that the principal had ever been tried. 3 M. R. 126, *Commonwealth v. Thomas Andrews*.

{ But by a statute of Massachusetts, passed Feb. 19, 1831, accessories before, and accessories after the fact, in cases of felony, may be indicted and convicted, though the principal felon may not have been previously convicted, or is not amenable to justice. This is similar to the English Statute 7 Geo. 4, c. 64, sections 9, 10, and 11 }

NEW YORK.—No person charged as accessory in an indictment shall be outlawed until the principal be attainted—but such indictment may be nevertheless prosecuted, and the exigent against the accessory shall remain until the principal be attainted by outlawry or otherwise; 1 New York Laws, 247, Ed. of 1807.

{ By the revised statutes of New York, "an accessory, before or after the fact, may be indicted, tried, convicted, and punished, notwithstanding the principal felon may have been pardoned or otherwise discharged after his conviction." }

Where a murder or felony shall be committed in one county, and any person shall be accessory thereto in any other county, such accessory may be tried in the county where the offence of the accessory was committed. For the proceedings as directed in such case, see 1 New York Laws, p. 260. Accessories are liable, although the principal be pardoned before conviction.—*Ibid.*—And receivers of stolen goods are punishable for a misdemeanor without convicting the principal, which shall exempt the offender from being punished as an accessory after the fact, if the principal shall afterwards be convicted. *Ibid.* p. 261.

RHODE ISLAND.—By the 19th section of the "act to reform the penal laws," the same punishment is inflicted upon accessories before the fact, in the crime of murder, (either in the first or second degree,) rape, sodomy, arson, robbery or burglary, as is inflicted upon the principal offenders.—And by the twentieth section of the same statute, accessories after the fact are liable to be punished by fine and imprisonment, "although the principal

How far a principal In order to render a person a principal in the second degree, or an aider or abettor, he must be *present, aiding and abetting* at the fact,

offender cannot be taken so as to be prosecuted" Rhode Island Laws, 490, 491, Ed. of 1798—and by section 24 of the same statute the same penalties and punishments are inflicted upon the receivers of stolen goods, as are prescribed in the act for stealing the same. *Ibid.* p. 592.

VERMONT.—A person may be holden to answer to an information for receiving stolen goods, knowing them to be stolen, *contra formen statuti*, though the principal has not been convicted. This decision is founded upon a construction of the statute of Vermont, for the reasons and grounds of which, see 2 Tyler's Rep. 249; State against S. L.

[PENNSYLVANIA.—Where a murder or felony is committed in one county, and one or more persons are accessory in another county, the accessory may be tried in the county where the offence of such accessory has been committed. And the conviction or attainder of the principal shall be certified by the Keeper of the Records of the county where he has been tried, convicted or attainted. Act of 1718. 1 Smith's Laws, 119. An accessory is not entitled to his discharge at the second term on *habeas corpus* if the principal has absconded and proceedings to outlawry against him were commenced without delay, but there had not been time to finish them. *Commonwealth v. The Sheriff and Gaoler of Allegheny County*, 16 S. & S. 304.]

MARYLAND.—For the law relative to accessories, see 3 vol. Laws of Maryland, Ed. of 1811. Title Criminal Code, new; Burglary, 1, 2, 3; Burning of house, s. 3; Counterfeiters, 2; Horse Stealing, 1; Mayhem, 1, 2; Murder, 6, 7; Rape, 1; Trial, 2, 4.

NEW JERSEY.—If A. is charged in the indictment as principal, and B. as accessory, and the jury find B. to be the principal and A. the accessory, the indictment is supported. 1 Cox's Rep. 457, *The State v. Mairs and Mairs*.

VIRGINIA.—An accessory to a murder or a felony committed, shall be examined by the court of that county or corporation, and tried by the court of that district in which he became accessory, and shall answer upon his arraignment, and receive such judgments, order, execution, pains, and penalties as are used in other cases of murder and felony.—Virginia Revised Laws, vol. i., p. 104.

If any be accused of an act done as principal, they that be accused as accessory shall be attached also, and safely kept in custody until the principal be attainted or delivered.—*Ibid.*, p. 126.

Persons knowingly harboring horse-stealers, or receiving from them stolen horses, are to be deemed and punished as accessories. And if the principal felon cannot be taken so as to be prosecuted and convicted of such offence, nevertheless the accessory may be punished as for a misdemeanor, although the principal felon be not before convicted of the felony, which shall exempt the offender from being punished as accessory, if the principal offender shall afterwards be taken and convicted. *Ibid.* p. 179.

If any principal offender shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above twenty persons returned to be of the jury, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if the principal felon had been attainted thereof, notwithstanding such principal felon shall be admitted to the benefit of his clergy, pardoned or otherwise delivered before his attainder; such accessory to suffer the same punishment as the principal if he had been attainted—and receivers of stolen goods, knowing the same to be stolen, may be punished for a misdemeanor, although the principal felon be not before convicted of the felony—which shall exempt the offender from being punished as an accessory, if the principal shall be afterwards convicted. *Ibid.* p. 206.

SOUTH CAROLINA.—If any principal offender shall be convicted of any felony, or shall stand mute, or shall challenge peremptorily more than twenty persons returned of the jury, it shall be lawful to proceed against the accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall be admitted to the benefit of his clergy, pardoned or otherwise delivered before attainder. And every such accessory if convicted, or shall stand mute, or shall peremptorily challenge above the number of twenty persons returned to serve of the jury, as he should have suffered if the principal had been attainted.—1 Brevard's Digest, title 1, p. 2.

Buyers of stolen goods are declared to be accessories after the fact, and made punishable as for a misdemeanor before the conviction of the principal: To receive or buy stolen goods, or receive or conceal any burglar or thief, subjects the offender to punishment as an accessory, and if the principal cannot be made amenable, the receiver may be prosecuted and convicted, as for a misdemeanor.—Brevard's Digest, title, 142, p. 180.

KENTUCKY.—An accessory to a murder or felony committed, shall be examined by the court of that county and tried by the court in whose jurisdiction he became accessory, and shall answer upon his arraignment, and receive such judgments, order, execution, pains and penalties as is used in other cases of murder and felony.—1 Kentucky Laws, 198.—[Morehead and Brown's Digest, 530.]

UNITED STATES.—Every person who shall, either upon the land or seas, knowingly and

or ready *to afford assistance if necessary : but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him ; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be the escape of those who are more immediately engaged ; they are all, provided the fact be committed, in the eye of the law, present at it ; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise. (e) † But there must be some participation ; therefore, if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, aiding and assisting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted. (f) So if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered as principals in that maiming. (g) And it is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up a little before he uttered it, joined him again in the street a short time after the uttering, and at a little distance from the place of uttering, and ran away when the utterer was apprehended. (h) This case has, however, been considered as having been decided upon the principle, that the circumstances which will amount

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the second degree must be present at the time of the fact committed.

There must be some participation.

(e) Fost. 350 ; 2 Hawk. P. C. c. 29, s. 7, 8, see Reg v. Howell, 9 C. & P. 437, Little-dale, J. (f) Rex p. Borthwick, Dougl. 207. (g) Rex v. White and Richardson, 111l. T. 1806 ; Russ. & Ry. 99, post, Book III. Chap. x. (h) Rex v. Davis & Hall, East. T. 1806 ; MS. Bayley, J., and Russ. & Ry. 113.

wittingly aid and assist, procure, command, counsel or advise any person to commit murder or robbery, or other piracy upon the high seas, which shall affect the life of any person, and such person shall thereupon commit any such piracy or robbery, such person so aiding, &c., counselling, &c., shall be adjudged to be accessory before the fact, and upon conviction, shall suffer death. Any person who shall on the land or at sea, receive, entertain or conceal any pirate or robber, knowing that such pirate or robber has committed piracy or robbery, or shall receive or take into his custody, any ship, vessel, goods or chattels, which have been by any such pirate or robber, piratically or feloniously taken, shall be deemed and adjudged to be an accessory after the fact ; and suffer fine and imprisonment.—1 Story, 85.

† [The abettor must be in a situation where he may actually give aid, not merely where the perpetrator erroneously supposes he may. Proof that a person conspired to commit a murder, is not in itself a legal presumption of his having aided ; but it is to be weighed as evidence of it. But if it be proved that there was a conspiracy, and that one of the conspirators was in a situation in which he might have given aid at the time of the murder, it is a legal presumption that he was there to carry into effect the preconceived crime, and it is for him to rebut the presumption by showing that he was there for a purpose unconnected with the conspiracy. *The Commonwealth v. Knapp*, 6 Pickering, 496. One who is present and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. It is necessary, in order to make him an aider or abettor, that he should do or say something, showing his consent to the felonious purpose and contributing to its execution. *State v. Hildreth*, 9 N. Carolina, 440 ; *Grier v. The State*, 13 Missouri, 382.]

* Eng. Com. Law Repts. xxxviii. 179.

to a constructive presence at common law will not be sufficient for the same purpose upon an indictment under a statute.⁽ⁱ⁾ The general rule, however, applies to offences by statute as well as at common law, viz., that all present at the time of committing an offence are principals, although one only acts, if they are confederates, and engaged in a common design, of which the offence is part.^(j) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or by any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such acts constitute distinct felonies.^(k) And also that what was found upon each may be proved against each to make out such confederacy, although it were not found until some interval after the commission of the offence.

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The party must be so near as to be able to assist in the felony.

Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal if he was at such a distance, at the time of the felonious taking as not to be able to assist in it. The prisoner and J. S. went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking.^(l)

Where three persons are jointly indicted for maliciously wounding, and it appeared that two of them first attacked and wounded the prosecutor, and the third did not come up until after one of the first two had gone away, and then kicked the prosecutor whilst he was on the ground struggling with the other: it was held that the two who jointly assaulted the prosecutor and wounded him, might be found guilty either of the felony or an assault only, but that the third must, under the circumstances, be acquitted altogether.^(m)

Party receiving goods thrown out of a window is a principal.

But where a man committed a larceny, in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion. The accomplice was indicted and convicted as a receiver; and the learned judge before whom he was tried was of opinion, that as the thief stole the property in his own room, and required no assistance to commit the felony, the conviction of the accomplice as a receiver might have been supported, if the jury had found that the thief had brought the goods out of the house, and delivered them to the accomplice: but as the jury had found that the thief threw the things out of the window, and that the accomplice (whose defence was that he had picked up the bundle in the street) was in waiting to receive them, he thought the point fit for consideration. And the judges were of opinion that the accomplice in this case was a principal, and that the conviction of him as a receiver was wrong.⁽ⁿ⁾

Where an offence is committed through the medium of an innocent

⁽ⁱ⁾ by Graham B., in the case of Brady and others, O. B., June, 1813, 1 Stark. Crim. Flead. 80, in the note.

^(j) Rex v. Tattersal, Sedgewick & Hodgson, East. T. 1801. MS. Bayley, J.

^(k) Rex v. Tattersal, Sedgewick & Hodgson, East. T. 1801. MS. Bayley, J. ^(l) Id. ibid.

^(l) Rex v. Kelly, Mich. T. 1820, MS. Bayley, J.; and Russ. & Ry. 421. And see *post*, Book IV., chap. xxi. Of receiving stolen goods.

^(m) Reg v. M'Phane, 1 C. & Mars. 212, Tindal, C. J.

⁽ⁿ⁾ Rex v. Owen, East. T. 1825. Ry. & Mood. C. C. R. 96.

^{*} Eng. Com. Law Reps. lxi. 119.

agent, the employer, though absent when the act is done, is answerable as a principal. Thus, if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a murder or other crime, the inciter is the principal *ex necessitate*, though he were absent when the thing was done. (o) And if a man give another a forged note that the other may utter it, if the latter be ignorant of the note being forged, the uttering by the latter is, it seems, the uttering of the former, though the former were absent at the time of the actual uttering. (p) But if the person who received the note knew that it was forged, the person who gave it would not, as it would seem, be punishable as a principal. For where a person having incited another to lay poison, is absent at the time of laying it, he is an accessory only, though he prepared the poison, if the person laying it is amenable as a principal; but is punishable as a principal if the person laying the poison is not so amenable. (q) Where poison is laid for a man, and all who were present and concurred in laying it are absent at the time it is taken by the party killed by taking it, all are principals; otherwise all would escape punishment. (r)†

It has been held, that to aid and assist a person to the jurors unknown to obtain money by the practice of *ring-dropping* is felony, if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice. (s) And *if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods off, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. (t) So where a prisoner asked a servant, who had no authority to sell, the price of a mare, and desired him to trot her out, and then went to two men, and having talked to them, went away, and the two men then came up and induced the servant to exchange the mare for a horse of little value, it was held that if the prisoner was in league with the two men to obtain the mare by fraud and steal her he was a principal. (u)

If a fact amounting to murder should be committed *in prosecution of some unlawful purpose*, though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed *in prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow

(o) Fost. 349; Kel. 52, *post*, Book III., chap. i.

(p) *Rex v. Palmer and Hudson*, 1 New Rep. 96; *Post*, Book IV., chap. xxx.

(q) Fost. 349. (r) Fost. 349; Kel. 52; 4 Co. 44 b. (s) *Moore's case*, 1 Leach, 314.

(t) *Rex v. Standley*, East, T. 1816; *MS. Bayley, J.*, and *Russ. & Ry.* 305; *Rex v. County, MS. Bayley, J.*, *post*, Book IV., chap. vi., s. 1.

(u) *Reg. v. Sheppard*, 9 C. & P. 121. *Coleridge, J.*

† [Personal presence at the place where a crime is committed is not always necessary to constitute the offender a principal, e. g., where it is perpetrated by means of an instrument, as by the discharge of a gun taking effect in another county or by an innocent living agent. *People v. Adams*, 3 Denio, 190. When an offence is committed in one state by means of an innocent agent, the employer is guilty as a principal, though he did not act in that state, and was at the time the offence was committed in another. *Adams v. The People*, 1 Comstock, 178.]

may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt. (v) Thus where three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by, collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither with a general resolution against all opposers; for then the murder would have been committed in prosecution of their original purpose. (w)

Or, where there is a general resolution against all opposers.

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But where the purpose was lawful, it will be murder only in the party killing and his actual aiders and abettors.

For where there is a *general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behaviour, at or before the scene of the action, and homicide is committed by any of the party, *every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow (x)

But it must be observed that this doctrine respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying some common purpose, *unlawful in itself*, into execution. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case: but the persons engaged with him will not be involved in his guilt, *unless they actually aided or abetted him in the fact*; for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention. (y)†

(v) Fost. 351, 352; 2 Hawk. P. C. c. 29, s. 9. See Reg. v. Howell, 9 C. & P. 437, per Littledale, J.

(w) Fost. 353. Case at Sarum Lent Assizes, 1697, MS. Denton & Chappel, 2 Hawk. P. C. c. 29, s. 8. And see Rex v. Hodgson and others, 1 Leach, 6; and an Anon. case at the Old Bailey, in December Sessions, 1664, 1 Leach, 7, note (a) where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C. J., citing the case, says, "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first; yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands."

(x) Fost. 353, 354; 2 Hawk. P. C. c. 29, s. 8.

(y) Fost. 354, 355; 2 Hawk. P. C. c. 29, s. 9. And see further upon this point, *post*, Book III., chap. iii., on *Homicide*.

† [One may aid and abet another, in the commission of the offence of manslaughter, and be punishable accordingly. So under an indictment, charging one with being present, aiding, helping, abetting, comforting, assisting and maintaining S. K. in the commission of murder,—the prisoner may be well convicted of manslaughter. *The State v. Coleman*, 5 Porter, 32.

As a general rule, where a statute creates a felony, all present aiding and abetting are guilty as principals. *McGowan v. The State*, 9 Yerger, 184.]

When several are present and abet a fact, an indictment may lay it generally as done by all, or specially, as done by one and abetted by the rest.^(z) And even in offences in which there could have been only one principal in the first degree, as in rape, a charge against all as principals in the first degree is valid, if there be no difference in the punishment between the principals in the first and those in the second degree; though it should seem that the more correct form in a case of this kind would be to charge the parties according to the facts as they will be proved.^(a)

An indictment against the principal in the second degree in murder should show distinctly that he was present when the mortal stroke was given; and it should seem that it would not be sufficient to state that both of their malice aforethought made the assault; that the principal in the first degree then and there gave the mortal stroke, and so that both murdered; at least it would not be sufficient if, before the allegation that both murdered, it is stated that the one (the principal in the second degree) counselled and incited the other to do the act.^(b)

III. *An accessory before the fact* is he who, being absent at the time of the offence committed, doth yet procure, counsel, command or abet another to commit a felony.^(c) And it seems that those who by hire, command, counsel, or conspiracy, that those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact. But words that amount to bare permission will not make an accessory, as if A. says he will kill J. S., and B. says "you may do your pleasure for me," this will not make B. an accessory.^(d) And it seems to be generally agreed that he who barely conceals a felony which he *knows to be intended, is guilty only of misprision of felony, and shall not be adjudged an accessory.^(e) The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C. and afterwards actually joins with him in the fact.^(f)

Where upon an indictment against Tuckwell for stealing thirty sovereigns in a dwelling-house, and against Perkins for inciting him so to do, it appeared that Perkins let Tuckwell into his master's house on a Saturday afternoon, and concealed him there during the night, in order that he might rob the house; and on the Sunday morning Perkins left the house in pursuance of a previous arrangement, and Tuckwell in his absence stole the money out of the master's cash-box; it was held that Perkins was properly indicted as an accessory before the fact, as the crime was not commenced when he left the premises.^(g)

(z) 2 Hawk. P. C. c. 23, s. 76, and c. 25, s. 64; Rex v. Young, 3 T. R. 98.

(a) Rex v. Vide, Fitz. Corone, Pl. 86; Rex v. —, Tr. T. 1813. Post, Book III., chap. vi.

(b) Rex v. Winifred & Thomas Gordon, 1 Leach, 515; 1 East, P. C. 352.

(c) 1 Hale, 615.

(d) Hawk. P. C. c. 29, s. 16.

(e) 1 Hale, 616; 2 Hawk. P. C. c. 29, s. 23.

(f) 2 Hawk. P. C. c. 29, s. 1, where it is said also that he may be charged as principal and accessory in the same indictment; but this would not be allowed at the present day. Rex v. Madden, R. & M. C. C. R. 277; Rex v. Galloway, *ibid.* 234. In Atkins' case, who was tried for the murder of Sir E. Godfrey, two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second: the verdicts appear, however, to have been pronounced successively. 7 Howell's St. Tri. 231.

(g) Reg. v. Tuckwell, 1 C. & Mars. 215, Coleridge, J.

Offence of accessory before the fact differs from that of principal in the second degree. The offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present*, aiding and abetting. *(g)*

Where *Danelly* was indicted for a burglary, and *Vaughan* as an accessory to such burglary, and *Danelly* had been acquitted of the burglary but found guilty of larceny, and *Vaughan* found guilty as accessory, it was objected that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. But as a great majority of the judges upon a case reserved were of opinion that *Danelly* was free from any felonious intent, the charges against *Vaughan*, as accessory, of course could not be supported. *(h)*

Description of accessories before the fact in different statutes.

It is to be observed that the legislature, in statutes made from time to time concerning accessories before the fact, has not confined itself to any certain mode of expression: but has rather chosen to make use of a variety of words all terminating in the same general idea. Thus some statutes make use of the word accessories, singly, without any words descriptive of the offence: *(i)* others have the words abetment, procurement, helping, maintaining, and counseling; *(j)* or aiders, abettors, procurers, and counselors. *(k)* One describes the offence by the words command, counsel or hire; *(l)* another calls the offenders procurers or accessories. *(m)* One having made use of the words comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards, in describing the same offence in another case used the words counsel, hire, or command only. *(n)* One statute calls them counselors and contrivers of felonies; *(o)* and many others make use of the terms counselors, aiders, and abettors, or barely aiders and abettors. Upon these different modes of expression, all plainly descriptive of the same offence, Mr. Justice Foster thinks it may safely be concluded, that in the construction of statutes we are not to be governed by the bare sound, but by the true legal import of the words; and also that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the legislature an accessory before the fact: unless he is present at the fact, and in that case he is undoubtedly a principal. *(p)*

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(g) *Rex v. Winifred & Thomas Gordon*, 1 Leach, 515; S. C., 1 East, P. C. 352. And see *Haydon's case*, 4 Co. 42 b. In *Gordon's case*, it was the opinion of all the judges that the prisoner who was discharged upon this objection might be indicted again as principal. So in 1 Hale, 625, it appears that if one person be indicted as principal and another as accessory, and both be acquitted, yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. So if a person be indicted as principal and acquitted, he may be indicted as accessory *before*. *Rex v. Birchenough*, R. & M. C. C. R. 447, overruling 1 Hale, 626. It seems to be admitted, that if a man be indicted as principal and acquitted, he may be indicted as accessory *after*; and so if he be indicted as accessory before and acquitted, he may be indicted as accessory after, 1 Hale, 626.

(h) *Rex v. Danelly & Vaughan*, Mich. T. 1816, 2 Marsh. 571, and 1 Russ. & Ry. 310, *Post*, Book IV., Chap. vi., s. 1. It was urged that *Vaughan* could not be guilty as accessory to the "said felony and burglary," as charged in the indictment, the jury having negatived the burglary; that an accessory must be convicted of a felony of the same species as the principal; and that his offence, though distinct, is yet derivative from that of the principal.

(i) 31 Eliz. c. 12, s. 5; 21 Jac. 1, c. 6.

(j) 23 Hen. 8, c. 1, s. 3.

(k) 1 Ed. 6, c. 12, s. 13.

(l) 4 & 5 Ph. & M. c. 4.

(m) 39 Eliz. c. 9, s. 2.

(n) 3 & 4 W. & M. c. 9.

(o) Anne, st. 2, c. 9.

(p) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor, *Fost. 131*. And see *Fost. 130*, where, speaking of a case in 1 And. 195, in which an indictment was held to be sufficient, though the words

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counseling, aiding or abetting, which may not be effected by the intervention of a third person, without any direct immediate connection between the first mover and the actor. It is a principle in law which can never be controverted, that he who procures a felony to be done is a felon. So that if A. bid his servant hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and his servant procure C., a person whom A. never saw nor heard of, to do it, A., who is manifestly the first mover or contriver of the murder, is an accessory before the fact.^(g) And a nobleman was found guilty of murder by his peers, upon evidence which satisfied them that he had contributed to the murder, by the intervention of his lady and of two other persons who were themselves no more than accessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message.^(r) For with respect to an accessory before the fact, it is not necessary that there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit a felony: and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.^(s)

Accessories by the intervention of a third person.

He who procures a felony is a felon.

In *high treason* there are no accessories but all are principals, on account of the heinousness of the crime.^(t) But in murder, and felonies in general, there may be accessories, except only in those offences which by judgment of law are sudden and unpremeditated, *as manslaughter and the like: which therefore cannot have any accessories before the fact.^(u) In *forgery* it is laid down generally in the books that all are principals, and that whatever would make a man accessory before in felony would make him a principal in forgery;^(v) but it is conceived that this must be understood of forgery at common law, and where it is considered only as misdemeanor.^(w)

In what crimes there may be accessories. *33

If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, they are all principals, though they are

If several execute

of the statute of Ph. & M. were not pursued, the words *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has met with where the words of the statute have been totally dropped.

(g) See the case of M'Daniel, Egan, and Berry, Fost. 125; 2 Hawk. P. C. c. 29, s. 10; 19 Howell's St. Tri. 746, 789. The opinion was, that the parties clearly would have been answerable as accessories in the manner charged if the offence had been a robbery: but as it appeared that the person robbed was a party to the conspiracy, and gave his money freely, so that there was no robbery, judgment was given for the prisoners.

(r) The case of the Earl of Somerset, indicted as an accessory before the fact to the murder of Sir Thomas Overbury, 19 St. Tri. 804.

(s) *Rex v. Cooper*,^a 5 C. & P. 535, per Parke, J. J.

(t) 2 Hawk. P. C. c. 29, s. 2, 5; 1 Hale, 613; Fost. 341; 4 Blac. Com. 35.

(u) 4 Blac. Com. 36; 1 Hale, 615; 2 Hawk. P. C. c. 29, s. 24. There may be accessories after in manslaughter, and if the principal be found guilty of manslaughter, upon an indictment for murder, a party charged as accessory after the fact to the murder, may be found guilty as accessory to the manslaughter. *Rex v. Greenacre*,^b 8 C. & P. 35. Tiudal, C. J., Coleridge and Coltman, Js.

(v) *Bothe's case*, Moor, 666; 1 Sid. 312; 2 Hawk. c. 29, s. 2, and authorities cited in 2 East, P. C. 973

(w) 2 East, P. C. 973. And see *post*, Book IV., Chap. on *Forgery*. And see *Morris's case*, 2 Leach, 1096, note (a).

^a Eng. Com. Law Reps. xxiv. 235

^b Ib. xxxiv. 280.

distinct parts of a forged instrument, in pursuance of a common design they are all principals, though they are not together when it is completed.

not together when the instrument is completed. On an indictment for forgery against *Bingley, Dutton* and *Batkin*, it appeared that *Bingley* and *Dutton* bought the paper, and cut it into pieces of the proper size at their house; it was then taken to *Batkin*, who struck off in blank all the printed part of the note except the date line and the number, and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of *Bingley* and *Dutton*, where the water-mark was introduced into the paper; after which *Bingley* in the presence of *Dutton*, impressed the date line and number, and *Dutton* added the signature. It did not appear that *Batkin* was present at this time. The jury found that all three concurred and co-operated in the design and execution of the forgery, each taking his own part, and that *Bingley* and *Dutton* acted together in completing the notes. Upon a case reserved the judges were of opinion that, as each of the prisoners acted in completing some part of the forgery, and in pursuance of the common plan each was a principal in the forgery; and that although *Batkin* was not present when the note was completed by the signature, he was equally guilty with the others.(x)

And though each does not know by whom the other parts are executed.

So if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.(y)

On an indictment against *Dade, Kirkwood* and *Stansfield*, for forging a note, and against *Collins* and *Campbell* as accessories before the fact, it appeared that *Stansfield* made the paper, *Kirkwood* engraved the plate and struck off the impression; and *Dade* in the absence of *Stansfield* and *Kirkwood*, filled up and finished the note. *Stansfield*, when he made the paper, did not know that *Kirkwood* or *Dade* were to have any thing to do with the forgery; nor did *Kirkwood* know, when he engraved the plate and made the impression, that *Dade* or *Stansfield* were, or were to be, concerned. *Collins* and *Campbell* were the movers, and through them all the parties were set to work. *Dade* was not upon his trial, and *Collins* and *Campbell* could not properly be tried, unless *Stansfield* and *Kirkwood* were to be deemed principals. Upon *a case reserved, the judges were unanimous that *Kirkwood* and *Stansfield* were principals, and that the ignorance of *Stansfield* and *Kirkwood* of those who were to effect the other parts of the forgery was immaterial: it was sufficient if they knew it was to be effected by somebody.(z) There was another indictment against *Dade* and *Kirkwood* for forgery, and against *Collyer* and *Calvert* as accessories before the fact. *Kirkwood* engraved the plate, and worked off the impression from it, and *Dade*, in his absence, filled up the notes: *Dade* was not on his trial. It was held on a case reserved, that *Kirkwood* was a principal.(a)

*34

Accessories in forgery. It follows, from the two last cases, that those who procure and cause an instrument to be forged, but execute no part in the forgery, and are not present when it is executed, are accessories before the fact, and not principals.

And where three persons agreed to utter a forged bank note and one uttered it at Gosport, and the other two, by previous concert, waited at

(x) *Rex v. Bingley, R. & R. C. C. R. 446.*

(y) *Rex v. Kirkwood, R. & M. C. C. R. 304; Rex v. Dade, Ibid. 307; Rex v. Bingley, R. & R. 446.*

(z) *Rex v. Kirkwood, 3 Burn, J. D. & W. Ed. 286, MS. Bayley, B. S. C.; Rex v. Dade, 1 R. & M., C. C. R. 307.*

(a) *Rex v. Kirkwood, 3 Burn, J. D. & W. Ed. 286, MS. Bayley, B. S. C.; 1 R. & M., C. C. R. 304.*

Portsmouth; the two latter were held to be accessories; and having been tried and convicted as principals were recommended for a pardon.(b)

In crimes under the degree of felony there can be no accessories: but all persons concerned therein, if guilty at all, are principals.(c)†

It should be observed as to felonies created by acts of parliament, that regularly if an act of parliament enact an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequently those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offenders are accessories after.(d)

It is a maxim that *accessorius sequitur naturam sui principalis*:(e) and therefore an accessory cannot be guilty of a higher crime than his principal. Certain accessories after the fact, namely, receivers of stolen goods, are in some instances punished with more severity than the principal offenders.(f)

It has been occasionally much considered how far an accessory is involved in the guilt of the principal when the principal does not act in conformity with the plans and instructions of the accessory. With regard to this, it appears that if the principal totally and substantially varies from the terms of the instigation, if being solicited to commit a felony of one kind he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt.(g) Thus if A. command B. to burn C.'s house, and he in so doing commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un-consequential nature.(h) And if A. counsels B. to steal goods of C. on the road, and B. breaks into C.'s house and steals them there, A. is not accessory to the breaking the house, because that is a felony of another kind.(i) He is however accessory to the stealing.(j) But if the principal complies in substance with the instigation of the accessory, varying

In felonies created by statute.

How far an accessory is implicated when the principal varies from the terms of the instigation.

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(b) *Rex v. Soares, Atkinson and Brighton*, MS. S. C., 2 East, P. C. 974; *Russ. & Ry.* 25 and see *Rex v. Badcock*, R. & R. 249.

(c) 4 Blac. Com. 36; 1 Hale, 613.

(d) 1 Hale, 613, 614, 704; 3 Inst. 59.

(e) 3 Inst. 139; 4 Blac. Com. 36.

(f) Fourteen years' transportation, by 7 & 8 G. 4, c. 29, s. 54.

(g) *Fost.* 369.

(h) 1 Hale, 617; 4 Blac. Com. 37.

(i) *Plowd.* 475.

(j) 1 Hale, 617.

† [*Acc. Commonwealth v. Burns*, 4 J. J. Marshall's (Kentucky) Rep. 182. *State v. Westfield*, 1 Bailey (S. Car.) Rep. 132; *Curlin v. The State*, 4 Yerger (Tenn.) Rep. 143. See also *Commonwealth v. Gillespie*, 7 Serg. & R. 469; *The U. S. v. Morrow*, 4 Wash. C. C. Rep. 733; *Ward v. The People*, 3 Hill, 385; *Commonwealth v. M'Atee*, 8 Dana, 28.

One who invites others to commit an assault and battery is guilty and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it. *State v. Lymburn*, 1 Brevard, 397.

Where the agent who does the act constituting the offence is himself guilty, he is the principal if it be a felony, and the employer is an accessory before the fact; but if it be a misdemeanor both are principals. *People v. Adams*, 3 Denio, 190.

All those who aid or abet the commission of a misdemeanor, are principal offenders. Therefore one who demises a house with the intent that it shall be kept, and which is accordingly kept, for the purposes of public prostitution, and who derives a profit from that mode of using the property, is punishable by indictment for a misdemeanor. The indictment should charge the defendant as the keeper of a common bawdy-house in the ordinary form; and the lessee who lives in and conducts the house may be joined with the lessor in the indictment. *The People v. Erwin*, 4 Denio, 129.

In all offences less than felonies those who in felonies would be accessories before the fact, become principals, and must be proceeded against accordingly. *Williams v. The State*, 11 Smedes & Marshall, 58.

There can be no accessories in inferior offences; but whatever will make one an accessory before the fact, will make him a principal in trespass and other misdemeanors, as in battery, forgery at common law and others. Procurers and aiders, therefore, are principals in such cases, and may be so charged in the indictment. *The State v. Cheek*, 13 Iredell, 114.]

only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. command B. to murder C. by poison, and B. does it by a sword or other weapon, or by any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected. (k) And it seems that if A. counsels B. to steal goods in C.'s house, but not to break into it, and B. does break into it, A. is accessory to the breaking. (l) And where *the principal goes beyond* the term of the solicitation, yet if, in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. As if A. advise B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery: or if A. solicit B. to burn the house of C., and B. does it accordingly, and the flames take hold of the house of D., that likewise is burnt. In these cases A. is accessory to B. both in the murder of C. and in the burning of the house of D. The advice, solicitation, or orders, were pursued in substance, and were extremely flagitious on the part of A.; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influences and at the instigation of A. (m)†

Counseling a pregnant woman to murder her child. Where A. counseled a pregnant woman to murder her child when it should be born, and she murdered it accordingly, A. was held to be accessory to the murder; the procurement before the birth being considered as a felony continued after the birth, and until the murder was perpetrated by reason of that procurement. (n)

A. being counseled to murder B., murders C. But more difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kill D., A. will not be accessory to this murder, because it differs in the person. (o) And in support of this position *Saunders's case* (p) is cited; who, with the intention of destroying his wife, by the advice of one *Archer*, mixed poison in a roasted apple, and gave it her to eat; and the wife having eaten a small part of it, and having given the remainder of it to their child, Saunders (making only a faint attempt to save the child whom he loved, and would not have destroyed) stood by and saw it eat the poison, of which it soon afterwards died. And it was held, that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to that murder. But Mr. Justice Foster thinks that this case of Saunders does not support the position (which he calls a merciful opinion) to its full extent; and he proposes the following cases as worthy of consideration:—"B. is an utter stranger to the person of C.; A. therefore takes upon him to describe him "by his stature, *dress, age and complexion, &c., and acquaints B. when "and where he may probably be met with. B. is punctual at the time "and place; and D., a person possibly, in the opinion of B., answering

(k) Fost. 369, 370; 2 Hawk. P. C. c. 29, s. 20.

(m) Fost. 370.

(o) 1 Hale, 617; 3 Inst. 51.

(l) Bac. Max. Reg. 16.

(n) Rex. v. Parker, Dy. 186, a. pl. 2.

(p) Plowd. 475; 1 Hale, 431.

† [It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods or otherwise, he is guilty as accessory of the offence. *Keithler v. The State*, 10 Smedes & Marsh. 192.]

“the description, unhappily comes by and is murdered, upon a strong belief on the part of B. that this is the man marked out for destruction. Here is a lamentable mistake;—but who is answerable for it? B undoubtedly is; the malice on his part *egreditur personam*. And may not the same be said on the part of A.? The pit which he, with a murderous intention, dug for C., D. *through his guilt* fell into and perished. For B. not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequence of the flagitious orders he gave, since that consequence appears, in the ordinary course of things, to have been highly probable.”(g)

Mr. Justice Foster then proposed the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn. “Did the principal commit the felony he stands charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject?”(r)

Criteria in such cases.

A. commands B. to kill C., but, before the execution thereof, repents and countermands B., yet B. proceeds to the execution thereof; A. is not accessory, for his consent continues not, and he gave timely countermand to B.; but though A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessory (s)

Accessory repents and countermands the principal.

IV. *An accessory after the fact* is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon.(t) And it seems to have been agreed, that any assistance given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory of this description: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbours or conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his own house and openly protects such a felon, by reason whereof the pursuers dare not take him.(u)

Of accessories after the fact.

Where a lad robbed a banking-house, in which he was clerk, and the same evening went to the room of the prisoner, a man, where he stayed twenty minutes, and both of them proceeded together that evening, by coach, to Bristol, and thence to Liverpool, where they were apprehended before they set sail for America, whither the prisoner had *said they were going; it was held that this was evidence to go to the jury, upon an indictment charging the prisoner with harbouring, receiving, and maintaining the boy, although the places in the coaches were paid for by the boy.(x) So a man who employs another person to harbour the principal may be convicted as an accessory after the fact, although he himself did no act of relieving or assisting the principal.(y)

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(g) Fost. 370, 371.

(r) Fost. 372,

(s) 1 Hale, 617.

(t) 1 Hale, 618; 4 Blac. Com. 37. So one who receives stolen property, knowing it to have been stolen, is an accessory after the fact.

(u) 2 Hawk. P. C. c. 29, s. 26; 1 Hale, 618, 619; 4 Black. Com. 38.

(x) *Rex v. Lee*,^a 6 C. & P. 536, Williams, J. (y) *Rex v. Jarvis*,^b 2 M. & Rob. 40, Gurney, B.

^a Eng. Com. Law Repts. xxv. 530.

^b Ib. xxxviii. 150.

Also whoever rescues a felon from an arrest for the felony, or voluntarily or intentionally suffers him to escape, is an accessory to the felony : (z) and it has been said, that those are in like manner guilty who oppose the apprehending of a felon. (a) It is agreed, by all the books, that a man may be an accessory after the fact by receiving one who was an accessory before, as well as by receiving a principal. (b) And it has been holden, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself by harbouring or concealing the thief, or assisting in his escape. (c)

In order to support a charge of receiving, harbouring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally ; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen. (d)

In offences created by statute.

Where an act of parliament enacts an offence to be felony, though it mentions nothing of accessories, yet virtually and consequentially those that knowingly receive the offender are accessories *after*. (f) It has however, been said, that if the act of parliament that makes the felony in express terms, comprehend accessories *before*, and make no mention of accessories *after*, it seems there can be no accessories *after* ; the expression of procurers, counselors, abettors, all which import accessories *before*, making it evident that the legislature did not intend to include accessories *after*, whose offence is of a lower degree than that of accessories *before*. (g) But by others it is considered to be settled law, that in all cases where a statute makes an offence treason or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. (h) And although it be generally true, that an act of parliament creating a felony renders consequentially accessories *before* and *after* within the same penalty, yet the special penning of the act sometimes varies the case : thus the 3 Hen. 7, c. 2, (now repealed) for taking away women, made the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies and excluded from clergy. So that acts of parliament may diversify the offence of accessory or principal according to their various penning, and have done so in many cases. (i)

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The accessory must know of the felony committed, and the felony must be complete.

*There is no doubt but that it is necessary for a receiver to have had notice, either express or implied, for the felony having been committed, in order to make him an accessory by receiving the felon ; (k) and it is also agreed, that the felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. So that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent ; this does not make him accessory to the homicide, for till death ensues there is no felony committed. (l)

(z) 2 Hawk. P. C. c. 29, s. 27 ; 1 Hale, 619 ; but not the merely suffering him to escape, where it is a bare omission. 1 Hale, 619 ; 2 Hawk. P. C. c. 29, s. 29.

(a) 2 Hawk. P. C. c. 29, s. 27.

(b) 2 Hawk. P. C. c. 29, s. 1.

(c) Fost. 123 ; Crompt. Just. 41, b. pl. 4 & 4.

(d) Reg. v. Chapple, 9 C. & P. 355. Law, R., after consulting Littledale, J., and Alderson, B.

(f) 1 Hale, 613 ; ante, p. 34.

(g) 1 Hale, 614.

(h) 2 Hawk. P. C. c. 29, s. 14.

(i) 1 Hale, 614.

(k) 2 Hawk. P. C. c. 29, s. 32.

(l) 2 Hawk. c. 29, s. 35 ; 4 Blac. Com. 38, but I apprehend it would make him accessory to the felony of maliciously wounding. C. S. G.

* Eng. Com. Law Repts. xxxviii. 151.

The law has such a regard to the duty, love, and tenderness which a wife owes to her husband, that it does not make her an accessory to felony by any receipt whatever which she may give to him; considering that she ought not to discover her husband. ^{Femo covert.} (m)

It is not thought necessary to discuss further the general principles of law relating to accessories after the fact, since prosecutions against such persons grounded on the common law are seldom instituted at the present time; no do they appear to have been frequent for many years past, nor to have had any great effect. (n) It should seem, however, that the enactment of 7 & 8 Geo. 4, c. 28, will apply to accessories after the fact where no punishment is specially provided for their felony. The eighth section enacts "that every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes especially relating to such felony, and that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment." The late consolidation acts, 7 & 8 Geo. 4, c. 29; 7 & 8 Geo. 4, c. 30, and 9 Geo. 4, c. 31, make accessories after the fact to felonies punishable under those acts respectively, liable to imprisonment for any term not exceeding two years. The principal and accessory may be indicted in the same indictment, and tried together, which is the best and most usual course. Formerly the accessory could not, without his own consent, have been brought to trial till the guilt of the principal was legally ascertained by conviction or outlawry, unless they were tried together. (o) And an accessory could not in such case have been tried, unless the principal had been attained, so that if the principal had stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial. (p) † *But the 7 Geo. 4, c. 64, has made the following salutary provisions for the effectual prosecution of accessories. *39

Sec. 9, for the more effectual prosecution of accessories before the fact to felony, enacts, "that if any person shall counsel, procure, or command any other person to commit any felony, whether the same be

(m) 2 Hawk. c. 29, s. 31; 1 Hale. 621, ante, p. 23. But this applies to no other relation besides that of a wife to her husband; and the husband may be an accessory for the receipt of his wife. 1 Hale, 621. (n) Post. 372.

(o) 1 Hale, 623; 2 Hawk. c. 29, s. 45; Post. 360. (p) Post. 362, where the doctrine is reprobated; and see 1 Hale, 625, where it is said that it was for this reason that Weston, the principal actor in the murder of Sir Thomas Overbury, could not for a long while be prevailed upon to plead, that so the Earl and Countess of Somerset, who were the movers and procurers, might escape. 1 St. Tr. 314.

† [Where the accessory is tried alone, the record of the principal's conviction must be produced; but if there are counts charging the accessory with "being present, aiding and abetting," the guilt of the principal may be proved by parol testimony, although he may have been actually convicted. *The State v. Taylor*, 2 Bailey, 49; *sed quere*.

Indictment. The first count, after stating that A. B. had committed larceny at &c., on &c., charged the defendant with then and there aiding and abetting A. B., &c. The second count charged the defendant as an accessory to the larceny before the fact. Plea, not guilty. Verdict and judgment against the defendant. *Held*, 1. That the want of an averment in the indictment, that the principal had been convicted, was no ground for arresting the judgment. 2. That an accessory must be tried after the conviction of the principal, or be tried with him. *Harty v. The State*, 3 Blackf. 386.]

- fore the fact may be tried. "felony at common law, or by virtue of any statute or statutes made or to be made, the person so counseling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted either as any 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 be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counseling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within his majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counseling, procuring, or commanding, shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished, in either of such counties: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."
- If offences committed in different counties, accessories may be tried in either. "Sec. 10, for the more effectual prosecution of accessories after the fact to felony, enacts, "that if any person shall become an accessory after the fact to any felony, whether the same be felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the same offence."
- Only one trial. "Sec. 11, in order that accessories may be convicted and punished in cases where the principal felon is not attained, enacts, "that if any principal offender shall be in any wise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attained thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainer; and every such accessory shall suffer the same punishment, if he or she be in any wise convicted, as he or she should have suffered if the principal had been attained.(p)
- S. 10. How accessory after the fact may be tried. "Sec. 10, for the more effectual prosecution of accessories after the fact to felony, enacts, "that if any person shall become an accessory after the fact to any felony, whether the same be felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counseling, procuring, or commanding, shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished, in either of such counties: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."
- If offences be committed in different counties, accessory may be tried in either. "Sec. 11, in order that accessories may be convicted and punished in cases where the principal felon is not attained, enacts, "that if any principal offender shall be in any wise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attained thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainer; and every such accessory shall suffer the same punishment, if he or she be in any wise convicted, as he or she should have suffered if the principal had been attained.(p)
- One trial only. "Sec. 11, in order that accessories may be convicted and punished in cases where the principal felon is not attained, enacts, "that if any principal offender shall be in any wise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attained thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainer; and every such accessory shall suffer the same punishment, if he or she be in any wise convicted, as he or she should have suffered if the principal had been attained.(p)
- S. 11. Accessory may be prosecuted *10 after conviction of principal, though the principal be not attained, &c. "Sec. 11, in order that accessories may be convicted and punished in cases where the principal felon is not attained, enacts, "that if any principal offender shall be in any wise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attained thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainer; and every such accessory shall suffer the same punishment, if he or she be in any wise convicted, as he or she should have suffered if the principal had been attained.(p)

(p) See 7 & 8 G. 4, c. 29, s. 54, as to receivers of stolen goods, vol. ii.

An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried; and such an accessory is not now triable under the 7 Geo. 4, c. 64, s. 9, which does not make accessories triable except in cases where they might have been tried before. *Russel* was tried on an indictment which charged *Sarah Wormsley* with murdering herself with arsenic, and Russell with inciting her to commit the said murder. It appeared that Wormsley, who was about four months advanced in pregnancy, but not quick with child, died from taking arsenic, which she had received from Russell, for the purpose of procuring a miscarriage, and that she knowingly took it with intent to procure a miscarriage, in the absence of Russell. It was objected that there was no evidence to prove that she was *felo de se*: that the 9 Geo. 4, c. 31, s. 13, did not apply to a woman administering poison to herself, and that assuming her to have taken arsenic knowingly, and with intent to procure miscarriage, she was not guilty of any offence; and, consequently, if there were no principal there could be no accessory. Secondly, that the 7 Geo. 4, c. 64, s. 9, did not apply to the case of a principal who was *felo de se*. Upon a case reserved it was held that she was *felo de se*: that Russell was an accessory before the fact, but that he could not be tried as an accessory under the 7 Geo. 4, c. 64, s. 9, as he could not have been tried at all before that statute, which was to be considered as extending to those persons only, who, before the statute were triable either with or after the principal, and not to make those triable who before could never have been tried. (q) Where an accessory is indicted alone before his principal has been convicted, the indictment should be for a substantive felony; for if the indictment first charge the principal with the felony, and then the accessory as accessory, as is usual when principal and accessory are tried together, and the principal does not appear to take his trial, the accessory is not bound to plead. An indictment charged *Ashmall* with feloniously using an instrument with intent to procure a miscarriage, and *Tay* with procuring *Ashmall* to commit the said felony. *Ashmall* did not appear to take his trial; and it was held that *Tay* was not compellable to plead to this indictment, although he might have been to an indictment for a substantive felony. (r) Where the proceedings are against the accessory alone for receiving stolen goods, the name of the principal need not be stated. (s) So where the proceedings are against both principal and accessory, the indictment may contain counts for a substantive felony in receiving stolen goods without naming the principal, and upon such an indictment the receivers may be convicted, although the principals be acquitted. (t) But an indictment alleging that a certain evil-disposed person feloniously stole, and that before the said felony was done the prisoner did feloniously incite the said evil-disposed person to commit the said felony, is bad. (u)

Accessory to a *felo de se* not triable under 7 G. 4, c. 64, s. 9.

Accessory before, not bound to plead unless indicted for a substantive felony.

Indictment against accessories.

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Where an indictment charged that *Loose*, a certain vessel on a certain voyage on the high seas being, feloniously did cast away, with intent to prejudice certain persons; and that the prisoner, before the said felony

- (q) *Rex v. Russell*, R. & M. C. C. R. 356; *Reg. v. Leddington*, 9 C. & P. 79. *Alderson*, B.
 (r) *Reg. v. Ashmall*, 9 C. & P. 237; *Gurney*, B. & *Patteson*, J.
 (s) *Rex v. Jervis*, 6 C. & P. 156; *Tindal*, C. J., *Rex v. Wheeler*, 7 C. & P. 170; *Cole-ridge*, J., *Reg. v. Caspar*, 2 M. C. C. R. 101; S. C. 9 C. & P. 289.
 (t) *Reg. v. Pulham*, 9 C. & P. 280; *Gurney*, B., *Rex v. Austin*, 7 C. & P. 796; *Parke* and *Bolland*, Bs.
 (u) *Reg. v. Caspar*, *supra*, note (s.)

^a Eng. Com. Law Repts. xxxviii. 43.

^b Id. 97.

^c Id. xxv. 330.

^d Id. xxxii. 483.

^e Id. xxxviii. 124.

^f Id. xxxviii. 121.

^g Id. xxxi. 740.

was committed, did feloniously incite, move, aid, counsel, hire, and command Loose the said felony in manner and form aforesaid to do and commit; and it was objected that the indictment was not properly framed as an indictment for a substantive offence within the 7 Geo. 4, c. 64, s. 9, and as the principal had not been convicted the accessory before the fact could not be tried; the court overruled the objections, and upon a case reserved, the judges held the indictment sufficient. *(uu)*

A count charging a person with being accessory before the fact may be joined with a count charging the same person with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, and the party may be found guilty upon both. *(v)* A case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harbouring and comforting the felons, and the prisoner was convicted. *(w)*

An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state, that he was indicted for the offence, as the indictment is only an accusation, and it does not follow that he really committed the offence, because he was indicted for it. *(x)*

Formerly, if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but it was afterwards settled, that if a man were indicted as accessory to two or more, and the jury found him accessory to one, it was a good verdict, and judgment might pass upon him. *(y)*

If A. be indicted as principal, and B. as accessory, and both be acquitted, or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar. *(z)* So if A. be indicted as principal and acquitted, he may be afterwards indicted as accessory before the fact. *(a)* So if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact; and so if he be indicted as accessory before the fact and acquitted, he may be indicted as accessory after the fact. *(b)* The late statute, as we have seen, enacts that no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the same offence. *(c)*

Where the principal and accessory are tried together upon the same indictment, there is no doubt but that the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite*; and this sort of defence necessarily and directly tends to his own acquittal. And where the accessory is brought to his trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was charged*, the accessory may avail himself of this, and ought to be acquitted. *(d)* For though

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(uu) *Reg. v. Wallace*, 1 C. & Mars. 200.

(v) *Rex v. Blackstone*, 8 C. & P. 43; *Park, B. and Patteson, J.*, after full consideration.

(w) *Ibid.* per Parke, B.

(z) Lord Sanchar's case, 9 Co. 117, a.

(y) *Fost.* 361; 9 Co. 119; 1 Hale, 624; 2 Hawk. P. C. c. 29, s. 46; Plowd, 98, 99; *Fost.* 361.

(z) 1 Hale, 625; *Rex v. Winifred & Thomas Gordon*, 1 Leach, 515; S. C. 1 East, P. C. 35.

(a) *Rex v. Birchenough, R. & M. C. C. R.* 477, overruling 1 Hale, 626, 2 Hale, 244.

(b) 1 Hale, 626.

(c) 7 G. 4, c. 64, s. 10; and see also s. 9.

(d) *Fost.* 365; *Rex v. McDaniel and others*, 19 Sta. Tri. 806.

* Eng. Com. Law Reps. xxxi. 285.

it is not necessary upon such trial on the part of the prosecution to enter into a detail of the evidence on which the conviction was founded, and the record of the conviction is deemed sufficient evidence against the accessory to put him upon his defence; (e) (†) yet the presumption raised by the record that every thing in the form or proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and that as against the accessory the conviction of the principal will not be conclusive, being as to him *res inter alios acta*. (f) This was the opinion of Mr. Justice Foster; and upon this opinion the court, in a case at the Old Bailey, permitted the counsel for the prisoner indicted as an accessory to controvert the propriety of the conviction of the principal by *viva voce* testimony, and to show that the act done by the principal did not amount to a *felony*, and was only a *breach of trust*. (g) And in a later case, in the same court, it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction. (h)

But how far an accessory can defend himself *in point of fact*, by showing that the principal was *totally innocent*, has been considered as a question of more difficulty, and one which should be handled with caution; because facts for the most part depend upon the credit of witnesses; and when the strength and hinge of a cause happen to be disclosed, as they may be by one trial, daily experience convinces us that witnesses for very bad purposes may be too easily procured. Upon this point, however, Mr. Justice Foster cites some authorities, which he apprehends to be strong, to show that the accessory may insist upon the *innocence of the principal*; and then gives his own opinion. He says, "if it shall manifestly appear, in the course of the accessory's trial, that in point of fact the principal was innocent, common justice seems to require that the accessory should be acquitted. A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B.; C. is afterwards indicted as accessory to this murder; and it comes out upon the trial, by incontestible evidence, that B. is still living; (Lord Hale somewhere mentions a case of this kind.) Is C. to be convicted or acquitted? The case is too plain to admit of a doubt. Or, suppose B. to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the court and jury, that the witnesses against A. were mistaken in his person, (a case of

(e) But see *Rex v. Turner*, *post*, note (k)

(f) *Fost.* 365.

(g) *Smith's case*, 1 *Leach*, 288.

(h) *Prosser's case*, (mentioned in a note to *Smith's case*, 1 *Leach*, 290.) *Cor. Gould, J.*, who is considered to have been a very accurate crown lawyer. *Rex v. Blick*, 4 *C. & P.* 377, *S. P. Bosanquet, J.* And see *Rex v. M'Daniel and others*, 19 *St. Tri.* 806.

† [Where the principal and accessory are joined in one indictment, but are tried separately, the record of the conviction of the principal is *prima facie* evidence of his guilt, upon the trial of the accessory, and the burden of proof rests on the accessory, not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been convicted. *Commonwealth v. Knapp*, 10 *Pick.* 477. See also *State v. Cruik*, 2 *Bailey*, 66. It is not necessary to set out the conviction of the principal in the indictment. *Ibid.* The court may in its discretion permit an accessory to be tried separately from the principal. *State v. Yaney*, 1 *Const. Rep.* 237. An accessory cannot be put on trial before the conviction of the principal unless he consent thereto, or be put on his trial with his principal. *State v. Pybus*, 4 *Hamp.* 442; *Whitehead v. The State*, *ibid.* 278; *Commonwealth v. Woodward*, *Thacher's Crim. Cas.* 63; *Sampson v. The Commonwealth*, 5 *Watts & Serg.* 385. Accessory discharged by acquittal of principal. *United States v. Crane*, 4 *McLean*, 317.]

* *Eng. Com. Law Repts.* xix. 428.

“this kind I have known,) and that A. was not, nor could possibly have “been, present at the murder.”(i)

*43 Upon an indictment against an accessory, a confession by the *principal is not admissible to prove the guilt of the principal; it must be proved *aliunde*, especially if the principal be alive, and could be called as a witness; and it seems that even the conviction of the principal would not be admissible to prove the guilt of the principal.† The prisoner was indicted for receiving sixty sovereigns, which had been stolen by Sarah Rich. A confession by S. Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner, was tendered in evidence. Mr. J. Patteson refused to receive any thing that was said by S. Rich respecting the prisoner, but admitted what she said respecting herself only. S. Rich had been found guilty on another indictment, but had not been sentenced, and might have been called as a witness. Upon a case reserved, the judges (except Lord Lyndhurst, C. B., and Taunton, J.) (j) were unanimously of opinion that Rich’s confession was no evidence against the prisoner; and many of them appeared to think that had Rich been convicted, and the indictment against the prisoner stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means.(k) And upon the authority of this case, where an accessory before the fact to a murder was tried after the principal had been convicted and executed, Parke, B., ordered the proceedings to be conducted in the same manner as if the principal was then on his trial, and the evidence against the accessory was not gone into until the case against the principal was concluded.(l) Where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood, B., refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver.(m)

(i) Fost. 367, 368; and see 3 Esp. R. 134, (in the case of *Cook v. Field*,) where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal has been convicted it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent. And see *Rex v. McDaniel and others*, 19 St. Tri. 806.

(j) Who were absent.

(k) *Rex v. Turner*, R. & M. C. C. R. 347; 1 Lewin, 119.

(l) *Ratcliffe’s case*, 1 Lewin, 121.

(m) Anonymous, cited in *Rex v. Turner*, *supra*.

† [On the trial of a prisoner indicted as an accessory to murder, the record of the conviction of the principal is evidence to prove that conviction, and all its legal consequences, though not evidence of the fact of the guilt of the prisoner. *Keithler v. The State*, 10 Smedes & Marshall, 192.

Where a principal and accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has been first rendered against the principal. *State v. Duncan*, 6 Iredell, N. C. 98.

An accessory cannot take advantage of error in the record against the principal, and the attainder of the principal while unreversed is *prima facie* evidence against the accessory of the principal’s guilt. *State v. Duncan*, 6 Iredell N. C. 236.

The confession of a principal is not evidence against an accessory. *State v. Newport*, 4 Harrington, 567.

Upon the trial of a principal in the second degree, it is competent for the State to offer in evidence an admission of his own guilt made by the principal in the first degree, to establish the fact of such guilt, in addition to the record of his conviction. The original indictment verdict, and judgment against a principal in the first degree are admissible against one indictment in the second degree, and is *prima facie* evidence of the guilt of the principal in the first degree. *Studdstill v. State*, 7 Georgia, 2.

*CHAPTER THE THIRD.

*44

OF INDICTABLE OFFENCES.

OFFENCES which may be made the subject of indictment, and are below the crime of treason, may be divided into two classes, *felonies* and *misdemeanors*.(A)

(A) MASSACHUSETTS.—In indictments for misdemeanors, and for felonies not capital, if the offence have been committed in an unincorporated place, or in a town or district, where from the terms of the location by the act of incorporation, the court cannot conclude that the whole town or district lies in one county, the offence ought to be described as having been committed, not only in such town, district, or unincorporated place, but also in the county where the indictment is found. 7 Mass. Rep. *Commonwealth v. Inhabitants of Springfield*.

But in indictments for capital offences, the strictness of requiring the indictment to allege the offence as committed, not only in a certain town, but also in a certain county, has always been adhered to; and in favour of life, the court will not feel authorized to depart from the ancient rule. *Ibid*.

An indictment alleging in one count two distinct offences, for which distinct and several fines are provided by statute, is not good. 2 Mass. Rep. *Commonwealth v. Symonds*.

Where a person is feloniously stricken, poisoned or injured in one county, and die thereof in another county, the offender may be indicted and tried in the county where the death happens. And where a person shall be feloniously stricken, poisoned or injured on the high seas, and shall die thereof in any county within the commonwealth, the offender may be indicted and tried in the county where the death shall happen. St. 1795, c. 45.

NEW YORK.—If a prisoner confined in the county prison on a conviction of petit larceny, break prison, it is a felony for which he may be sentenced to imprisonment in the state prison, for a period not exceeding fourteen years. 3 John. Rep. 449, *The People v. Duell*.

PENNSYLVANIA.—Whatever amounts to a public wrong may be made the subject of an indictment. 1 Dall. 388; 2 Browne, 251.

The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to make it a riot, have heretofore been indicted in Pennsylvania. 1 Dall. 338. And an indictment may be maintained for a cheat of such a nature as may prejudice, although it does not charge that any person was actually defrauded. 1 Dall. 41.

It is an indictable offence in a public officer, to impose false marks on stores provided for the army of the United States, whereby the public is injured. 1 Dall. 47.

An indictment will lie for maliciously, wilfully and wickedly killing a horse. 1 Dall, 335. And for destroying a tree standing on public ground, if the tree was useful for public convenience or ornament. 2 Browne, 251.

An indictment will lie against one who was appointed to number and sign bills of credit issued under the funding act, for fraudulently embezzling them, and converting them to his own use. *Commonwealth v. Wade, Oyer and Terminer*, Philad. 1786, MS. *Wharton's Digest, Crim. Law, A 7*.

Driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offence at common law; and a constable, in such a case, is authorized to prevent the peace being broken. 1 Peters' Rep. 390, 392. And the act of congress of April 30th, 1810, (Ing. Dig. 684,) imposing a penalty on any person obstructing the passage of the mail, is not to be construed to protect the driver from arrest for a breach of the peace, such as driving rapidly through the crowded streets of a city. 1 Peters' Reports, 390.

It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. 5 Binn. 281. *Commonwealth v. Taylor*. Therefore, an indictment charging that defendant did unlawfully, maliciously, and secretly, in the night time, with force and arms, break and enter the dwelling-house of A. with intent to disturb the peace of the commonwealth; and being so in the said house, unlawfully, vehemently, and turbulently, did make a great noise, in disturbance of the peace of the commonwealth, and did greatly misbehave himself, and did greatly frighten and alarm the wife of the said A. by means of which said fright and alarm she being then and there pregnant, did miscarry, is good, as an indictment for malicious mischief. *Ibid*.

Any offence, which by its nature and example tends to the general corruption of morals

Felony de- The term *felony* appears to have been long used to signify the degree
fined. or class of crime committed, rather than the penal consequence of forfeiture occasioned by the crime, according to its original signification. The proper definition of it, however, as stated by an excellent writer, recurs to the subject of forfeiture, and describes the word as signifying—an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment may be superadded according to the degree of guilt. (a) Capital punish-

(a) 4 Bla. Com. 95, and see 1 Hawk. c. 25, s. 1. "The higher crimes, rape, robbery, murder, arson, &c., were called felony; and being interpreted want of fidelity to his lord, made the vassal lose his fief." 2 Hume, App. ii. p. 129. As to the derivation of the word *felony*, from *feah*, or *fee*, the fief or estate, and *lon*, the price or value, and ascribing to it the meaning of *pretium feudi*, see Spelm. Gloss. *Felony*, 4 Bla. Com. 95.

as the exhibition of an obscene picture, is indictable at common law. 2 Serg. & R. 91, Commonwealth v. Sharpless. And such offence may be punished, although it be not committed in public. *Ibid.* And in such case it is not necessary to aver in the indictment, that the exhibition was public; it is sufficient, if averred that the picture was exhibited to sundry persons for money. *Ibid.*

It is not necessary that an indictment for exhibiting an obscene painting, should describe minutely the attitude and posture of the figures. It is sufficient, if from the description the witnesses can identify it, so that the jury may judge whether it is an indecent picture. *Ibid.* Such indictment need not allege the defendant's house in which the picture was exhibited, to be a nuisance, nor the act of the defendant to be a common nuisance, the indictment being for an act of evil example. *Ibid.*

To send threatening letters, is an indictable offence under the laws of the United States, 2 Dall. 299, in note.

An indictment lies for unlawfully, forcibly, and contemptuously tearing down, and refusing to replace, an advertisement set up by the commissioners of a sale of land for county taxes. *Addis. 267, Pennsylvania v. Gillespie.*

Raising a liberty pole in the public streets, as a notorious expression of opposition to the government, was an indictable offence. *Addis. 274.*

Voluntary intoxication of one of the grand jury, during the sitting of the grand jury, and thereby disqualifying himself for the discharge of his office, is indictable. *Addis. 29.*

SOUTH CAROLINA.—Forging an order for the delivery of goods, is felony within the meaning of the statute, though no precise words are necessary to constitute the offence, if it is calculated to deceive and defraud. But if the indictment states the offence to be against a British act of Parliament, made of force here, when in fact no such act had ever been made of force, instead of concluding against the act of the legislature of the state, it is a good ground to arrest the judgment. 2 Bay's Rep. 262, *The State v. Wm. Kelly.*

MASSACHUSETTS.—It is the general principle, that where a statute gives a privilege, and one wilfully violates such privilege, such violation may be punished as a misdemeanor at common law. *Commonwealth v. Silsbee, 9 M. R. 417.* Thus, it is a misdemeanor punishable at common law, for a qualified voter, at a town meeting, knowingly to give more than one vote for any officer at the same balloting: because he thereby violates the rights of other voters. *Ibid.*

Uttering a fictitious bank note, although not purporting to be countersigned by the cashier of the bank by which the note was supposed to be issued, is an offence at common law, punishable by indictment. 2 R. M. p. 77, *Commonwealth v. Boynton.*

At common law, it is an indictable offence to cheat any man of his money, goods, or chattels, by false tokens, or by using false weights or measures. 6 Mass. Rep. 72, *Commonwealth v. Warren.*

But if a person cheat another out of his property by false affirmations merely, and without using any false weights, measures, or tokens, and by no conspiracy, it is not an indictable offence; although the party cheated may pursue a civil remedy for the injury. *Ibid.*

Nor is it an indictable offence for a person, under false pretences, to get possession of a deed lodged in the hands of a third person as an escrow, in violation of his agreement. 1 Mass. Rep. 137, *Commonwealth v. Hearsay.* Nor is an intention to cheat, indictable at common law. *Commonwealth v. Morse, 2 Mass. Rep. 139.* Since the decisions above quoted were made, a statute was passed by the legislature of this commonwealth, Feb. 1816, punishing cheats by false pretences; adopting generally the language of the statute of 30 Geo. 2d, c. 24, upon the same subject.

It is not an indictable offence to administer a potion to a pregnant woman, with an intent to procure an abortion, unless the woman be quick with child, and an abortion ensue. *Commonwealth v. Bangs, 9 Mass. Rep. 387.*

It is not an indictable offence to cut or tear a piece out of a bank bill, with an intent, with

ment does by no means enter into the true definition of felony : but the idea of felony, is so generally connected with that of capital punishment that it is hard to separate them; and to this usage the interpretations of the law have long conformed. Therefore, formerly, if a statute made any new offence felony, the law implied that it should be punished with death as well as with forfeiture, unless the offender prayed the benefit of clergy, which all felons were entitled once to have, unless the same was expressly taken away by statute. (b)

With regard to felonies created *by statute*, it seems clear that not only ^{What} those crimes which are made felonies in express words, but also all ^{words in a} those which are decreed to have or undergo judgment of life and mem- ^{statute} ber by any statute, becomes felonies thereby, whether the word "*felony*" ^{create a} be omitted or mentioned. (c) And where a statute declares that the offender shall, under the particular circumstances, be deemed to have ^{felony.} *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (d) But where a statute only says that an offence, previously a misdemeanor, "shall be deemed and construed to be a felony," instead of declaring it to be a felony in distinct and positive terms, the offence is not thereby made a felony. (dd) *An offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," or of being "at the king's will for body, land, and goods," it shall amount to no more than a high misdemeanor. (e) And though a statute made the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (f) And it should also be observed, that where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment, it shall be punished but as the first offence : for the gentler method shall first be tried, which perhaps may prove effectual. (g) Where a statute makes an offence felony which was before

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(b) 2 Bla. Com. 98; *Rex v. Johnson*, 3 M. & S. 549; *Post*, Book IV., Chap. xv., but now every person convicted of any felony, for which no punishment is specially provided, is punishable by transportation for seven years, or imprisonment, &c., under the 7 & 8 G. 4, c. 28, s. 8, *supra*, p. 38.

(c) 1 Hale, 703; 1 Hawk. P. C. c. 40, s. 2.

(d) By Bayley, J., in *Johnson's case*, 3 M. & S. 556.

(dd) *Rex v. Cale*, R. & M. C. C. R. 11, decided on 3 G. 4, c. 23, s. 23. But this decision seems to be overruled by *Rex v. Solomons*, R. & M. C. C. R. 292.

(e) 1 Hawk. P. C. c. 40, s. 3.

(f) 1 Hawk. P. C. c. 40, s. 5.

(g) 1 Hawk. P. C. c. 40, s. 4.

the bill so altered, and with the piece so cut out or torn out of the bill, together with other pieces of similar bank bills, altered and cut or torn out, to form other bank bills, more in number than the original bills, and with an intent to utter and pass the same. 10 Mass. Rep. 34, *Commonwealth v. Hayward*.

There is no law which prohibits any man from prescribing for a sick person, with his consent, if he honestly intended to cure him by his prescription, however ignorant he may be of medical science. *Commonwealth v. Thompson*, 6 Mass. Rep. 134.

But if a man administer a medicine, the injurious effects of which had been known and experienced by him, and death or bodily hurt ensue, the court will leave it to the consideration of the jury, whether the prisoner administered it from an honest intention to cure, or from an obstinate rashness and fool-hardy presumption, although he might not have intended any bodily harm to his patient. It is not lawful for a man to administer a medicine, of the dangerous effects of which he has had fatal experience. *Ibid*.

only a misdemeanor, an indictment will not lie for it as a misdemeanor. (h)†

Misdemeanors described.

The word *misdemeanor*, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine or imprisonment, or both. (i) A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. (k) Misdemeanors have been sometimes termed *misprisions*; indeed, the word *misprision*, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please. (l) But generally *misprision of felony* is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law, or by statute; (m) and silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision; a man being bound to discover the crime of another to a magistrate with all possible expedition. (n) If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. (o)

Misprisions.

Indictable offences.

It is clear that all *felonies*, and all kinds of *inferior crimes of a public nature*, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers,‡ and all other misdemeanors whatsoever of a *public evil* example against the common law, may be indicted. (p) And it seems to be an established principle, that whatever openly outrages decency, and is injurious *to public morals, is a misdemeanor at common law. (q) (1)§ Also it seems to be

(h) *Rex v. Cross*, 1 *Ld. Raym.* 711; 3 *Salk.* 193.

(i) 3 *Burn. Just. tit. Misdemeanor*, citing *Barlow's Justice, tit. Misdem.*

(k) 4 *Bla. Com.* 5, note 2; 3 *Burn. Just. tit. Misdemeanor.*

(l) 1 *Hawk. c.* 20, s. 2, and c. 50, s. 1, 2; *Burn. Just. tit. Felony.*

(m) 1 *Hawk. P. C. c.* 59, s. 5; *Post, Book II., Chap. xiii.*

(n) 3 *Inst.* 140; 1 *Hale*, 371-375.

(o) 1 *Hawk. P. C. c.* 59, s. 6. The concealment of *treasure trove* is misprision of felony; 4 *Bla. Com.* 121; 3 *Inst.* 133.

(p) 2 *Hawk. P. C. c.* 25, s. 4. As to misbehaviour by public officers, see *post, Book II., Chap. xiv.*

(q) 4 *Bla. Com.* 65, (n) 13th edit; 1 *Hawk. P. C. c.* 5, s. 4; 1 *East, P. C. c.* 1, s. 1, and see *Rex v. Sir Charles Sedley*, *Sid.* 168; 1 *Kebl.* 620, and *Rex v. Crunden*, 2 *Camp.* 89. Cases of men indecently exposing their naked persons.

† [The English doctrine that under an indictment for a felony, the prisoner cannot be convicted of a misdemeanor, proceeds upon peculiar reasons which have no foundation in the criminal law of New York. *The People v. Jackson*, 3 *Hill*, 92; *The People v. White*, 22 *Wend.* 175.]

‡ [Acts of official misconduct by justices of the peace, done with corrupt motives, are indictable offences. *Wickersham v. The People*, 1 *Scammon*, 128; *State v. Johnson*, 1 *Brevard*, 155; *The People v. Coon*, 15 *Wend.*]

When a public law imposes a public duty, the omission to perform the duty is indictable; but if it is not an absolute duty, but a conditional one, dependent upon the honest exercise of the judgment of the person or persons, to whom it is submitted, whether it is to be performed or not, the omission to perform it is not *per se*, an indictable offence. *State v. Williams*, 12 *Iredell*, 172.

(1) { Casting a dead body into a river, without the rites of Christian sepulture, is indictable as an offence against common decency. 1 *Greenleaf*, 226, *Kanavan's case.* }

§ [As open and notorious drunkenness. The indictment need not charge that the defend-

a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. (r) But no injuries of a private nature are indictable, unless they in some way concern the king. (s) (2) §

It is an indictable offence, in the nature of a misdemeanour, to refuse Neglect of or neglect to provide sufficient food or other necessaries for any infant children of

(r) 2 Hawk. P. C. c. 25, s. 4, and see 1 Hawk. P. C. c. 22, s. 25, where it is laid down that every contempt of a statute is indictable. But it is questionable, where the party offending has been fined, if he may afterwards be indicted: and where a statute extends only to private persons, or chiefly relates to disputes of a private nature, it is said that offences against it will hardly bear an indictment. 2 Hawk. P. C. c. 25, s. 4.

(s) 2 Hawk. P. C. c. 25, s. 4, *Rex v. Richards*, 8 T. R. 637. This distinction is stated also to have been taken in *Rex v. Bembridge & Powell*, (cited in *Rex v. Southerton*, 6 East, 136,) who were indicted for enabling persons to pass their accounts with the Pay-office in such a way as to enable them to defraud the government. It was objected that this was only a private matter of account, and not indictable: but the court held otherwise, as it related to the public revenue.

ant was a common drunkard and a nuisance to society. It is enough to aver that he was openly and notoriously drunk upon the day stated, and upon divers other days before that time. *Tipton v. The State*, 2 Yerger, (Tenn.) Rep. 542.

A single act of open public notorious drunkenness is not indictable. *Hutchinson v. The State*, 5 Humphreys, 142.

A single act of open drunkenness, though it be in the presence of a crowd, is not indictable if the persons assembled were not thereby annoyed or disturbed. *State v. Deboq*, 5 Iredell, N. C. 371.

(2) { Discharging a gun, with knowledge that the report will injuriously affect a sick person in the neighbourhood, is an indictable offence. 9 Pick. 1, *Commonwealth v. Wing*. }

§ [An indictment cannot be supported against an individual for being in the frequent practice of going to the house of another, and grossly abusing his family, thereby rendering their lives uncomfortable; it being a mere civil injury. *Commonwealth v. Edwards*, 1 Ashmead's (Penn.) Rep. 46.

Unlawfully throwing down the roof and chimney of a dwelling-house in the peaceable possession of another, with force and arms, is indictable at common law. *The State v. Wilson*, 3 Missouri, 91.

Where an individual was indicted for throwing into a well the carcase of an animal which tainted and corrupted the water used by a family, it was holden to be an indictable offence at common law. *State v. Buckman*, 8 N. Hamp. 203.

An indictment at common law may be sustained for an assault and false imprisonment—and for kidnapping. *State v. Rollins*, 8 N. Hamp. 550.

To support an indictment for keeping a quantity of gunpowder, there must be apparent danger, or mischief already done; and though gunpowder be a necessary thing, and for the defence of the country, yet if it be kept in such a place as is dangerous to the inhabitants or passengers, it will be a nuisance. *The People v. Sands*, 1 Johns, 78.

The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law. *State v. Huntley*, 3 Iredell, 418.

Simple incontinence is not punishable at common law. *Jones' case*, 2 Grattan, 555.

The keeping of a room or place for the sale of tickets in lotteries not authorized by law, is not indictable. *People v. Jackson*, 3 Denio, 101.

At common law the offence of kidnapping is treated as an aggravated species of false imprisonment, and all the ingredients in the definition of the latter are necessarily comprehended in the former. *Click v. The State*, 3 Texas, 282.

Keeping a disorderly house is indictable at common law as a nuisance, whether kept for gain or otherwise. *The State v. Bailey*, 1 Foster, 343.

An injury to personal property, though committed with actual force, is not indictable, unless accompanied by a breach of the peace. *Illies v. Knight*, 4 Texas, 312.

Going upon the porch of another man's house armed, and from thence shooting and killing a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house, is a misdemeanour, for which an indictment will lie. *Henderson's case*, 8 Grattan, 708.

The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable at common law. *Bell v. The State*, 1 Swan, 42.]

tender years. of tender years, unable to provide for and take care of itself (whether such infant be child, apprentice, or servant), whom the party is obliged by duty or contract to provide for; so as thereby to injure its health. (t) But it is not an indictable offence for a brother to neglect to maintain another brother, even if he be an idiot, helpless, and an inmate of his house. (u)

Attempts to commit crimes. So long as an act rests in *bare intention*, it is not punishable: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. (v) Thus, an attempt to commit a felony is, in many cases, a misdemeanor: (w) and an attempt to commit *even a misdemeanor has been decided in many cases to be itself a misdemeanor. (x) (1)

*17 An attempt to commit a felony is a soliciting another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. † Thus to solicit a servant to steal

(t) *Rex v. Friend* and his wife, February, 1802, MS. Bayley, J., and Russ. & Ry. 20. *Chambre, J.*, differed, thinking it not an indictable offence, but a matter founded wholly on contract, in this which was the case of an apprentice. The indictment should state that the infant was of tender years, and not able to provide for itself. And see *Rex v. Ridley*, 2 Campb. 650; *Rex v. Squire* and wife, *post*, Book III., Chap. i., of *Murder*. As to the neglect of paupers by overseers of the poor, see *post*, Book II., Chap. xiv. *Offences by persons in Office*.

(u) *Rex v. Smith*,^a 2 C. & P. 449, Burrough J.; see *Reg v. Marriott*,^b 8 C. & P. 425. *Patteson, J.*, *post*, *Murder*. A case of murder by confining an aged female, and not providing her with sufficient sustenance.

(v) Per Lord Mansfield, C. J., in *Schofield's case*, Cald. 397. The ancient writers, in treating of felonious homicide, considered the felonious intention in the same light in point of guilt as homicide itself. *Voluntas reputatur pro facto*, a rule which has long been laid aside as too rigorous in the case of common persons, though retained in the statute of Treasons, 25 Ed. 3, st. 5, c. 2. But when the rule prevailed, it was necessary that the intention should be manifested by plain facts, not by bare words of any kind. *Hæc voluntas non intellecta fuit de voluntate nudis verbis aut scriptis propalata sel mundo manifestata fuit per aerptum factum*. 3 Inst. 5; *Post*, 193.

(w) *Higgins's case*, 2 East, R. 21; *Rex v. Kinnersley & Moore*, 1 Str. 196. But in 1 Hawk. P. C. c. 25, s. 3, is the following passage:—"The bare intention to commit a felony is so very criminal, that at the common law it was punishable as felony where it missed its effect through some accident, no way lessening the guilt of the offender. But it seems agreed at this day, that felony shall not be imputed to a bare intention to commit it; yet it is certain that the party may be very severely fined for such an intention." Probably the latter part of this passage was intended to relate to an intention manifested by some act. And see 1 Hawk. P. C. c. 55.

(x) Per *Grose, J.*, in *Higgins's case*, 2 East, R. 8, and see *Rex v. Phillips*, 6 East, 464, where an *endeavour* to provoke another to commit the misdemeanor of sending a challenge to fight, was held to be an indictable misdemeanor. And by *Lawrence, J.*, in *Higgins's case*, "all such acts or attempts as tend to the prejudice of the community are indictable."

(1) {Letting a house to a woman, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law. 3 Pick. 26, *Commonwealth v. Harrington*.} *Smith v. The State*, 6 Gill, 425. [Every act done towards committing a misdemeanor is itself a misdemeanor. *Reg. v. Chapman*, 2 C. & K. 846; Eng. C. L. lxi. 845.]

† [The solicitation of another to commit adultery is a high crime and misdemeanor cognizable by the superior court. *The State v. Avery*, 7 Conn. Rep. 267. The persuading a witness not to attend a public prosecution on the part of the state, although not infamous, is an indictable offence, even when such witness had not been regularly served with a subpoena, but was known to be a material witness. *State v. Keyes*, 8 Verm. 57. An attempt to commit such an offence whether successful or not, or a solicitation of another to commit it, is indictable. *Ibid*.

Words insinuating a desire to fight with deadly weapons, as they tend to provoke such conduct, may amount to a misdemeanor at common law. *Comm. v. Tibbs*, 1 Dana, 524. A conspiracy to commit a misdemeanor is not merged in the commission of it. *State v. Murray*, 15 Maine, 100.]

^a Eng. Com. Law Repts. xii. 215.

^b Ib. xxxiv. 461.

his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. (y) It was held not to be necessary, in order to show that this was only a misdemeanor, to negative the commission of the felony; as none of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment: but it is left to the defendant to show, if he please, that the misdemeanor was merged in the greater offence. And it has been held, that the completion of an act, criminal in itself, is not necessary to constitute criminality. (z) An attempt to commit a statutable misdemeanor, is as much indictable as an attempt to commit a common law misdemeanor, (a) for when an offence is made a misdemeanor, by statute, it is made so for all purposes. (b) And the general rule is, that "an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law." (c)

Upon the same principles some earlier cases appear to have proceeded. Thus, it was held indictable to attempt to bribe a cabinet minister and a member of the privy counsel to give the defendant an office in the colonies. (d) And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor: (e) an information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (f) And it is laid down generally, that if a party offers to bribe a judge, meaning to corrupt him in the cause depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it. (g) And an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor. (h) †

In a case where the defendant was indicted for a misdemeanor *in having coining instruments in his custody, with intention to coin half guineas, shillings, and sixpences, and to utter them as and for the legal *48
An act done, and a

(y) Higgins's case, 2 East, R. 5, in which see many cases cited, where attempts to commit felonies and misdemeanors have been considered as misdemeanors.

(z) By Lord Mansfield, in *Rex v. Schofield*, Cald. 400.

(a) *Rex v. Butler*,^a 6 C. & P. 368, Patteson, J. *Rex v. Roderick*,^b 7 C. & P. 795, Parke, B., Le Blanc, J., in *Rex v. Cartwright*, East. T. 1806, Russ. & Ry. 107; but it seems the judges did not go into the point, as they decided that the paper by the production of which the defendant had attempted to obtain money at a banker's, and which was stated to be an order, was really no order. MS. Bayley, J.

(b) Parke, B., *Rex v. Roderick*, *supra*.

(c) *Per Parke, B., ibid.*

(d) Vaughan's case, 4 Burr, 2494, and see *Rex v. Pollman and others*, 2 Campb. 229, where a conspiracy to obtain money, by procuring from the Lords of the Treasury the appointment of a person to an office in the Customs, was held to be a misdemeanor at common law.

(e) Plympton's case, 2 Lord Raym. 1377.

(f) Young's case cited in Higgins's case, 2 East, R. 14 & 16.

(g) 3 Inst. 147; and see *Rex v. Cassano*, 5 Esp. 231, an information for attempting to bribe an officer of the Customs.

(h) Anon. before Adams, B., at Shrewsbury, cited in Schofield's case, Cald. 400, and in Higgins's case, 2 East, R. 14, 17, 22. This case is probably the same as *Rex v. Edwards*, MS. Sum. tit. *Perjury*.

† [To persuade a witness not to attend a public prosecution on the part of the state is an indictable offence. *State v. Keyes*, 8 Vermont, 57. The attempt, whether successful or not to obstruct the due administration of justice, by preventing the attendance of witnesses upon the trial of a case, is a substantive offence, punishable by the common law. *State v. Carpenter*, 20 Verm. 9.]

^a Eng. Com. Law Repts. xxv. 441.

^b Ib. xxxii. 740.

criminal intention joined to that act, are sufficient.

current coin, Lord Hardwicke doubted what the offence was; and the defendant being convicted, the indictment was removed into the King's Bench by *certiorari* for the opinion of that court. Upon argument, and several cases cited, the court held the offence to be a misdemeanor, and the conviction right; Lee, C. J., saying, that "all that was necessary in such a case, was an act charged, and a criminal intention joined to that act."⁽ⁱ⁾† But though this doctrine of the learned judge be admitted to be correct, it does not appear to have been applicable to the facts of the case as charged, which did not amount to a criminal *act* by the defendant. And it is understood that this case was considered and thought untenable in a late case, in which it was holden that having counterfeit silver in possession with intent to utter it as good is no offence, there being no criminal act done. The prisoner had been found guilty of unlawfully having in possession counterfeit silver coin with intent to utter it as good; but, on a case reserved, the judges were of opinion that there must be some *act* done to constitute a crime, and that the having in possession only was not an act.^(j) But the having a large quantity of counterfeit coin in possession, under suspicious circumstances and unaccounted for, appears to have been considered as evidence of having procured it with intent to utter it as good, which is clearly a criminal *act* punishable as a misdemeanor. Thus upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was that two parcels were found upon the prisoner containing about twenty shillings each, wrapped up in soft paper to prevent their rubbing, and there was nothing to induce a suspicion that the prisoner had coined them; and on a case reserved, the judges were of opinion unanimously, that procuring with intent to utter was an offence, and that the having in possession unaccounted for, and without any circumstance to induce a belief that the prisoner was the maker, was evidence of procuring.^(k) But the effect of such evidence would be removed by circumstances sufficient to induce a suspicion that the prisoner was the maker of the coin found in his possession: and, upon the argument in the last case, Thompson, C. B., mentioned a case where he had directed an acquittal, because, from certain powder found upon the prisoner, there was a presumption that he was the maker of the coin.^(l) Upon an indictment for procuring *counterfeit money with intent to utter it, the uttering the money, knowing it to be counterfeit, is evidence that it was procured with that intent.^(m)

Procuring base coin with intent to utter it.

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(i) Sutton's case, Rep. temp. Hardw. 370; 2 Str. 1074. In this case there were cited, in support of the prosecution, a case of conviction of three persons for having in their custody divers picklock keys *with intent* to break houses, and steal goods; *Rex v. Lee* and others, Old Bailey, 1689; and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money, Brandon's case, Old Bailey, 1698; and also a case where the party was indicted for buying counterfeit shillings with intent to utter them in payment, Cox's case, Old Bailey, 1690. See *post*, 2 W. 4, c. 34, ss. 10 & 11, as to the unlawful possession of coining instruments.

(j) *Rex v. Stuart*, Mich. T. 1814; Russ. & Ry. 288; S. P. *Rex v. Heath*, East. T. 1810. Russ. & Ry. 184; see 2 W. 4, c. 34, s. 8, as to this offence.

(k) *Rex v. Fuller and Robinson*, East. T. 1816; MS. Bayley, J., Russ. & Ry. 308. In the marginal note to Parker's case, 1 Leach, 41, it is stated, that having the possession of counterfeit money with intention to pay it away as and for good money, it is an indictable offence at common law. This may be criminal in some cases of such possession as we have seen above: but *qu.* if the point, as stated in the marginal note, was actually decided in Parker's case.

(l) Fuller and Robinson's case, *ante*, note (k).

(m) Brown's case, 1 Lew. 42, Holroyd, J. It is said the learned judge seemed to con-

With respect to persons having implements for housebreaking, &c., in their possession with a *felonious intent*, the legislature has made some provisions. The 5 Geo. 4, c. 83, s. 4, enacts, "That every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable or out-building, or being armed with any gun, pistol, hanger, cutlas, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act; and every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any enclosed yard, garden, or area for an unlawful purpose, and every suspected person or reputed thief frequenting places of public resort and other places specified in the act, with intent to commit felony, shall be deemed a rogue and vagabond within the intent and meaning of that statute." And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 7 & 8 Geo. 4, c. 29, s. 37, the severing with intent to steal the ore of any metal, or any coal, &c., from any mine, bed or vein thereof is made felony punishable as simple larceny. And by the 7 & 8 Geo. 4, c. 30, s. 3, the damaging certain articles in the course of manufacture, with intent to destroy them, and the entering certain places with the intent to commit such offence, is made felony punishable by transportation for life or imprisonment, &c.

Persons having implements of house-breaking with felonious intent. And reputed thieves, &c.

Other acts criminal from the intent.

Where an offence is not so at common law, but *made an offence* by act of parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given.^{(n)†} And it is stated as an established principle, that when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanor.^(o) And wherever a statute *forbids* the doing of a thing, the

Offences created by statute, when indictable.

sider a procurement elsewhere, with intent to utter, a continuing procurement in the county where the uttering took place.

⁽ⁿ⁾ *Rex v. Wright*, 1 Burr. 543; *Rex v. Gregory*,^a 5 B. & Ad. 555; 2 N. & M. 478; *Reg. v. Crossley*,^b 10 A. & E. 132.

^(o) By *Ashurst, J. Rex v. Harris*, 4 T. R. 205. And this principle has been held to apply, where the cause annexing the penalty was in the same section of the statute. Thus the repealed clause, 5th Eliz. c. 4, s. 31, enacted, "that it shall not be lawful to any person to set up, &c., any craft, mystery, &c., except he shall have been brought up therein seven years as an apprentice," &c., upon pain that every person willingly offending or doing the contrary, forfeit for every default forty shillings for every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c., where the offence was committed, to recover the penalty, or by indictment in those courts. See the cases collected in the note to *Rex v.*

† [*Moore v. The State*, 9 Yeager, 353; *The State v. Negro Jesse Evans*, 7 Gill & Johns. 290. Disobedience to an act of assembly is an indictable offence at common law. *Gearhart v. Dixon and al.* 1 Barr, 224.

When the statute forbids the doing an act and prescribes a penalty recoverable by action, this excludes punishment by indictment. *State v. Mase*, 6 Humphreys, 17.

Where the statute contains a general prohibitory clause, even if a specific remedy had been given by a subsequent clause, and no mention had been made of indictment, it may well be maintained that an indictment would lie for the misdemeanor contained in a violation of the prohibition. *State v. Thompson*, 2 Strobbart, 12.

A person indicted for an offence created by statute cannot be convicted after a repeal of the statute, unless the repealing statute contain a saving clause, &c. *Taylor v. The State*, 7 Blackford, 93.]

^a Eng. Com. Law Repts. xxvii. 125.

^b *Ib* xxxvii. 74.

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doing it wilfully, although without any corrupt motive, is indictable. (*p*) If a statute *enjoin* an act to be done, without pointing out any mode of punishment, an indictment *will lie for disobeying the injunction of the legislature. (*q*) And this mode of proceeding in such case is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience. (*r*) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment in case of neglect or refusal, it has been doubted whether an indictment will lie. (*s*) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. (*t*) Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor: but if it gives a new punishment or new mode of proceeding for what before was a misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is cumulative only, and the offender may be proceeded against as before for the common law misdemeanor. Therefore, notwithstanding the provisions of 9 & 10 Wm. 3, c. 32, against blasphemy, it was held that a blasphemous libel might be prosecuted as a common law offence. (*u*) It may be observed also that it is an offence at common law to obstruct the execution of powers granted by statute. (*v*) But where a public act regulates rights which are merely private, an indictment will not lie for the infringement of those rights: as if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them. (*w*)

Misdemeanor merges in a felony.

Under the 6 & 7 Wm. 4, c. 86, sec. 20, the father of a child, if required by the registrar within forty-two days after the birth, is bound to inform the registrar of the particulars required by the act, and if he refuse such information he is indictable for a misdemeanor. (*ww*)

When offences created by statute are not indictable.

Where the statute making a new offence only inflicts a forfeiture and specifies the remedy, an indictment will not lie. (*x*) The true rule is stated to be this: Where the offence was punishable by a common law proceeding, *before* the passing of a statute which prescribes a particular

Kilderby, 1 Saund. 312 *a*. But it should be observed that a subsequent section (39) gave authority to proceed by *indictment*, or by information, &c.

(*p*) *Rex v. Sainsbury*, 4 T. R. 457, where it was held to be a misdemeanor in magistrates to grant an ale licence where they had no jurisdiction. See *post*, Book II., Chap. xiv. See *Reg. v. Nott*, 2 vol., p. 678.

(*q*) *Rex v. Davis*, Say. 133.

(*r*) *Rex v. Boyal*, 2 Burr. 832; *Rex v. Balme*, Cowp. 648, cited in the notes to 2 Hawk, P. C. c. 25, s. 4. And generally speaking, the Court of King's Bench cannot be ousted of its jurisdiction but by express words, or by necessary implication. By Ashurst, J., in *Cates v. Knight*, 3 T. R. 445.

(*s*) *Rex v. Commings and another*, 5 Mod. 179; *Rex v. King*, 2 Str. 1268: Cases of indictments against overseers for neglecting to account, and for not paying over the balance within the time limited by the statute. But see the authorities; and, in 2 Nol. P. L. 453, it is stated that an indictment will lie in these cases, though the statute provides another remedy by commitment. See cases there cited.

(*t*) 2 Hawk. P. C. c. 25, s. 4; *Rex v. Wigg*, Lord Raym. 1163, 2 Salk. 460. And see the cases collected in *Rex v. Dickenson*, 1 Saund. 135, *a*, note (4).

(*u*) *Rex v. Carlisle*, 3 B. & A. 161, 164.

(*v*) *Rex v. Smith and others*, Dougl. 441. And an indictment for such offence need not, and ought not, to conclude *contra formam statuti*.

(*w*) *Rex v. Richards*, 8 T. R. 637.

(*ww*) *Reg. v. Price*, 11 A. & E. 727.

(*x*) *Rex v. Wright*, 1 Burr. 543; *Rex v. Douse*, 1 Lord Raym. 672.

^a Eng. Com. Law Reps. v. 249.

^b Ib. xxxiv. 214.

remedy by a summary proceeding, then either method may be pursued, as the particular remedy is *cumulative*, and does not exclude the common law punishment: but where the statute creates a new offence by prohibiting and making unlawful any thing which was lawful before, and appoints a particular remedy against such new offence by a particular sanction and particular method of proceeding, such method of proceeding must be pursued and no other. *(y)* The mention of other methods of proceeding impliedly excludes that of indictment; *(z)* unless such methods of proceeding *are given by a separate and substantive clause. *(a)* Thus it has been held, *(b)* and seems now to be settled, *(c)* that where a statute making a new offence, not prohibited by the common law, appoints in the same clause a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained. By 21 Hen. 8, c. 13, s. 1, no spiritual person shall take land to farm on pain to forfeit 10*l.* per month; and it was decided on this statute, that as the clause prohibiting the act specified the punishment, the defendant was not liable to be indicted. *(d)* And it was held not to be an indictable offence to keep an alehouse without a license, because a particular punishment, namely, that the party be committed by two justices, was provided by the statute. *(e)* And an indictment for assaulting and beating a custom house officer in the execution of his office was quashed, because the 13 & 14 Car. 2, c. 11, s. 6, appointed a particular mode of punishment for that offence. *(f)* So an indictment for killing a hare was quashed, on the ground that it was not indictable; the statute 5 Anne, c. 14, having appointed a summary mode of proceeding before justices. *(g)* In one case, where no appropriation of the penalty, nor mode of recovering it, was pointed out by the statute, the court held that it could not be recovered by indictment; but it was in the nature of a debt to the crown, and suable for in a court of revenue only. *(h)*

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Amongst other decisions as to cases which cannot be made the subject of indictment, it appears to have been ruled that an indictment will not lie for setting a person on the footway in a street to distribute handbills whereby the footway was impeded and obstructed; *(i)* nor for throwing down skins in a public way, by which a personal injury is accidentally occasioned; *(j)* nor for acting, not being qualified, as a justice of peace; *(k)* nor for selling short measure; *(l)* nor for excluding commoners by enclosing; *(m)* nor for an attempt to defraud,

Cases not indictable.

(y) *Rex v. Robinson*, 2 Burr. 805; *Rex v. Carlisle*,^a 3 B. & A. 163; *Rex v. Royal*, 2 Burr. 832. See also *Hartly v. Hooker*, Cowp. 524; *Rex v. Wright*, 1 Burr. 543; *Rex v. Balme*, Cowp. 650. And see *Faulkner's case*, 1 Saund. 250, note (3).

(z) *Hawk. c. 25, s. 4.*

(a) Ante, p. 49.

(b) Glass's case, 3 Salk. 350.

(c) 2 Hawk. c. 25, s. 4.

(d) Rex v. Wright, 1 Burr. 543.

(e) Anon. 3 Salk. 25; *S. P. Watson's case*, 1 Salk. 45, and *Rex v. Edwards*, 3 Salk. 27. And see *Faulkner's case*, 1 Saund. 248, and Mr. Serj. Williams's note (3) at page 250 *e.*

(f) Anon. 2 Lord Raym. 991; 3 Salk. 189. So an indictment for keeping an ale-house was quashed, because the 3 Car. 1, c. 3, had directed a particular remedy. *Rex v. James*, cited in *Rex v. Buck*, 1 Stra. 679. *(g) Rex v. Buck*, 1 Stra. 679.

(h) Rex v. Malland, 2 Stra. 828, a case upon the 12th Geo. 1, c. 25, which imposes a penalty of twenty shillings per thousand for burning place bricks and stock bricks together.

(i) Rex v. Sermon, 1 Burr. 516. But it was held by Lord Ellenborough that every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence in *Rex v. Cross*, 3 Camp. 227, where it was held to be an indictable offence for stage coaches to stand plying for passengers in the public streets.

(j) Rex v. Gill, 1 Stra. 190.

(k) Castle's case, Cro. Jac. 643.

(l) Rex v. Osborn, 3 Burr. 1697; but selling by *false measure* is indictable. *Ibid.*

(m) Willoughby's case, Cro. Eliz. 90.

^a Eng. Com. Law Reps. v. 249.

*52 if neither by false tokens or conspiracy; (n)† *nor for secreting another(o) nor for bringing a bastard child into a parish; (p) nor for entertaining idle and vagrant persons in the defendant's house; (q) nor for keeping a house to receive women with child, and deliver them. (r)‡ And cases of *non-feasance and particular wrong* done to another are not

(n) *Rex v. Channell*, 2 Stra. 793. Indictment against a miller for taking and detaining part of the corn sent to him; and *Rex v. Bryan*, 2 Stra. 866; *Anon.* 6 Mod. 105; *Rex v. Wheatly*, 2 Burr. 1125; *Rex v. Wilders*, cited 2 Burr. 1128, and *Rex v. Haynes*, 4 M. & S. 214. This last case was an indictment against a miller, for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. On the part of the prosecution, a note in 1 Hawk. P. C. c. 71, s. 1, referring to 1 Sess. Ca. 217, was cited, where it is laid down, "that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public:" but it was held that the indictment would not lie. Lord Ellenborough, in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and *ex vi termini* imported, that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. His Lordship then proceeds: "As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a "soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it now is, it seems to be no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing; such as is adverted to in *Rex v. Wheatley*, and the other cases, as not being indictable." And see also *Rex v. Bower*, Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. But in *Rex v. Dixon*, 3 M. & S. 11, it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in the manner which would have rendered it harmless. See *Post*, Book II., Chap. ix., s. 2.

(o) *Rex v. Chaundler*, 2 Lord Raym. 1368; an indictment for secreting A., who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid. But *qu.*

(p) *Rex v. Warne*, 1 Stra. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at common law, in lodging an inmate, who was delivered of a bastard child, which became chargeable to the liberty. 2 Chit. Crim. Law, 700. And see also *id.* 699, and 4 Wentw. 353; *Cro. Circ. Comp.* (7th ed.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no settlements, and in which they shortly died, whereby the parishioners were put to expense. In a late case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. *Rex v. Tanner and Another*, 1 Esp. 304. But if the facts of the case will warrant a charge of conspiracy, the offence would be substantiated, if, under the circumstances the parish might possibly be put to expense. See 1 Nol. P. L., *Settlement by Marriage*, Sect. I. in the notes. *Rex v. Seward*,^a 1 A. & E. 706; 3 N. & M. 557.

(q) *Rex v. Langley*, 1 Lord Raym. 790.

(r) *Rex v. Macdonald*, 2 Burr, 1646.

† [It is not an indictable fraud, to separate the condition from the penalty of a bond. To make a fraud indictable, the rule is, that it must be a deception that common prudence and care could not guard against, or that false tokens should have been used, or a conspiracy entered into to cheat; the offence must be such an one as affects the public, as the use of false weights, &c. *Wright v. The People*, 1 Breese (Illinois) Rep. 66. And see *Lewis v. The Commonwealth*, 2 Serg. & R. 552.

What fraud or cheat is indictable at common law. *The People v. Stone*, 9 Wend. 182; *Lambert v. The People*, 9 Cowen, 578; *People v. Miller*, 14 Johns. 371; *The People v. Babcock*, 7 Johns. 201.

‡ [Nor for carrying and wearing dangerous arms and weapons. *Simpson v. The State*, 5 Yerger, (Tenn.) Rep. 306. An indictment which charges that the defendant maliciously and unlawfully destroyed a pair of saddle-bags, does not charge the commission of an indictable offence. *Shell v. The State*, 6 Hamp. 283.]

^a Eng. Com. Law Reps. xxviii. 185.

in general the subject of indictment : but we have seen that circumstances may exist of mere *non-feasance* towards a child of tender years, (such as the neglect or refusal of a master to provide sufficient food and substance for such a child, being a servant and under his dominion and control), which may amount to an indictable offence.(s)

It has been held, that where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the master of the company, being served with the order, refused to obey it, such refusal was not the subject of indictment.(t) And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action on the case.(u) To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable.(v)

*With regard to *trespass*, it has been held that a mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable), committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable; and the court quashed such indictment on motion.(w)(1) And an indictment against one person for pulling off the thatch of a man's house, who was in the peaceable possession of it, was also quashed on motion.(x) So an indictment for taking away chattels, must import that such a degree of force was used as made the taking an offence against the public. An indictment averred that the defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away, of and from J. S., and against his will, a paper-writing purporting to be a warrant to apprehend the defendant for forgery; and, after a conviction, a motion was made in arrest of judgment on the ground that the charge did not amount to an indictable offence. *Perryn, B.*, took time to consider to the subsequent assizes, and had the case argued before him; and then held the objection valid, as the indictment charged nothing but a mere private trespass, and neither the king or the public appeared to have any interest therein.(y)

But where the indictment stated the entering a dwelling house, and *vi et armis and with strong hand* turning out the prosecutor, the court refused to quash it.(z) And an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace:(yy) and though such goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty.(zz)(2)

(s) *Ante*, p. 46.

(t) *Rex v. Atkinson*, 3 Salk, 188.

(u) *Rex v. Bradford*, 1 Lord Raym. 366; 3 Salk. 189. In an *Anon.* case, 2 Salk, 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But *Rex v. Jones*, 1 Salk. 379, is *contra*.

(v) *Rex v. George*, 3 Salk 188. Nor is it an indictable offence to exercise trade in a borough contrary to the bye-laws of that borough. *Rex v. Sharpless*, 4 T. R. 777.

(w) *Rex v. Storr*, 3 Burr. 1699.

(x) *Rex v. Atkins*, 3 Burr. 1706.

(y) *Rex v. Gardiner*, Salisbury, 1780, MS. Bailey, J.

(z) *Rex v. Storr*, 3 Burr. 1699.

(yy) *Anon.* 3 Salk, 187.

(zz) *Ibid.*

(1) { Cutting and girdling fruit trees is not an indictable offence at common law. 3 Greenleaf, 177, *Brown's case*. }

(2) { In the *People v. Smith*, 5 Cowen, 258, it is said by the court that acts injurious to private persons, which tend to excite violent resentment, and thus produce a disturbance of the peace, are indictable. Therefore an indictment was held to lie for maliciously, wickedly and wilfully killing a cow, the property of another. } [Contra, *The State v. Wheeler*, 3 Vermont Rep. 344.

The transmission of a sealed letter by mail containing libellous matter, is indictable. The indictment must charge that it was sent with the intention of provoking a breach of the peace. *Hodges v. The State*, 5 Humphreys, 112.]

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* BOOK THE SECOND.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT,
THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

CHAPTER THE FIRST.

OF COUNTERFEITING OR IMPAIRING COIN—OF IMPORTING INTO THE
KINGDOM COUNTERFEIT OR LIGHT MONEY—AND OF EXPORTING
COUNTERFEIT MONEY.

SECT. I.

Of Counterfeiting Coin.

THE legislature has made provision against the counterfeiting of the following description of coin, namely:—I. The king's current gold or silver coin.—II. Foreign gold, silver, or copper coin.—And III. The copper money of this realm.

Of counter-
feiting the
king's gold
and silver
coin.

I. The first of these, usually called the king's money, was protected by enactments, which placed the offence of counterfeiting it in the highest class of crimes, upon the ground that the royal majesty of the crown was affected by such offence in a great prerogative of government; the coining and legitimization of money, and the giving it its current value, being the unquestionable prerogatives of the crown.^(a) But these enactments are repealed by the 2 Wm. 4, c. 34, s. 1.

What is the
king's
money.

It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the king's authority: and therefore such money is supposed to be referred to by any statute naming "money" generally.^(b) The weight, alloy, impression, and denomination of money made in this kingdom are generally settled by indenture between the king and the master of the mint: but the statute, 56 Geo. 3, c. 68, provided, with respect to the new silver coinage, that the bullion shall be coined into silver coins of a standard and fineness of eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound troy, and in weight after the rate of sixty-six shillings to every pound troy, whether the same shall be coined in crowns, half-crowns, shillings, or sixpences, or pieces of a lower denomination. A proclamation has in some cases been *made as a more solemn manner of giving the coin currency: but the proclamation in general cases is certainly not necessary, and in prosecutions for coining need not be proved.^(c) And

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(a) 1 Hale, 188; 1 East, P. C. 148.

(b) 1 East, P. C. 147; and see 1 Hale, chap. 17, 18, 19, and 20.

(c) 1 East, P. C. 142, where see some cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current; and it is also stated that by the act of the 37th Geo. 3 c. 126, s. 1, relative to a copper coinage, the king's proclamation is made necessary; and seems, therefore to be required in proof of any indictment upon that statute.

it is not necessary in such prosecutions to produce the indentures; though it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamp used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the king's money or not, is a mere question of fact which may be found upon evidence of common usage or notoriety. (d) It should be observed, that any coin, once legally made and issued by the king's authority, continues to be the current coin of the kingdom until recalled, notwithstanding any charge in the authority by which it was constituted. (e)†

The 2 Wm. 4, c. 34, which by s. 2 took effect on the first day of May, 1832, after repealing many former acts, by s. 1, provides, "that if any person shall, after the commencement of this act, be convicted of any offence against any of the said acts committed before or upon the said last day of April," 1832; "and such offence shall have been punishable with death by virtue of any of the said acts, in every such case the person convicted of such offence shall not suffer the punishment of death, but shall in lieu thereof, be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years."

The punishment not to be capital of offences committed after 1st May, 1832.

Sec. 3 enacts, "that if any person shall falsely make or counterfeit any coin resembling, or apparently intending to resemble or pass for, any of the king's current gold or silver coin, (ee) every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; (f) and every such offence shall be deemed to be complete although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

Counterfeiting the gold or silver coin; transportation for life.

Offence when deemed complete.

Sec. 4 enacts, "that if any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, colour, or case over, any coin whatsoever resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, (g) or if any person shall gild or silver, or shall, with any

Coloring counterfeit coin or any pieces of metal with intent to make them

(d) 1 East, P. C. 149; but in the case of old coin which has gradually fallen into disuse, though still the legal coin of the king there can be no general notoriety of the fact.

(e) 1 East, P. C. 148, where it is said also, that this recall may be by proclamation; and long disuse may, it is conceived, be evidence of it. It has also been effected by act of parliament, as by 9 W. 3, c. 2, and 6 Geo. 2, c. 26.

(ee) See s. 21, *post*, p. 56.

(f) See s. 19, *post*, p. 61.

(g) See s. 21, *post*, p. 56.

† [The courts of Massachusetts have jurisdiction of the offence of having false money counterfeited in the similitude of any gold or silver coin current by law or usage within the State, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true. *Commonwealth v. Fuller*, 8 Metcalf, 313.]

The power vested in Congress by the Federal Constitution (Art. 157,) "to provide for the punishment of counterfeiting the current coin of the United States," may be exercised by the several States concurrently with Congress. *Harlan v. People*, 1 Dougl. 207. It seems that the States have no jurisdiction over the offence of counterfeiting money coined at the mint of the United States or any of its branches. But whether an indictment lies in the State courts under State statutes for counterfeiting foreign coin or passing coin so counterfeited. *Quare. Rouse v. The State*, 4 Georgia. 136.]

*56 “ wash or materials capable of producing the*colour of gold or of silver, “ wash, colour, or case over, any piece of silver or copper or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, “ being of a fit size and figure to be coined, and with intent that the same “ shall be coined into false and counterfeit coin resembling or apparently “ intended to resemble or pass for any of the king’s current gold or silver “ coin ;(h) or if any person shall gild, or shall, with any wash or mate-
 rials capable of producing the colour of gold, wash, colour, or case “ over, any of the king’s current silver coin, or file, or in any manner “ alter such coin with intent to make the same resemble or pass for any “ of the king’s current gold coin ; or if any person shall gild or silver, or “ shall, with any wash or materials capable of producing the colour of “ gold or of silver, wash, colour, or case over any of the king’s current “ copper coin, or file or in any manner alter such coin, with intent to “ make the same resemble or pass for any of the king’s current gold or “ silver coin ; every such offender shall, in England and Ireland be guilty “ of felony, and in Scotland of a high crime and offence, and being con- “ victed thereof, shall be liable, at the discretion of the court, to be trans- “ ported beyond the seas for life or for any term not less than seven “ years, or to be imprisoned for any term not exceeding four years.”(i)

Coloring or altering genuine coin, with intent to make it pass for a higher coin; transportation for life, &c.

Rules of interpretation as to current coin and counterfeit coin.

Sec. 21, declares and enacts, “ That where ‘ the king’s current gold or silver coin,’ or ‘ the king’s current copper coin, shall be mentioned “ in any part of this act, the same shall be deemed to include and denote “ any gold or silver coin, or any copper coin respectively coined in any “ of his majesty’s mints, and lawfully current in any part of his majesty’s “ dominions, whether within the united kingdom or otherwise ; and that “ any of the king’s current coin which shall have been gilt, silvered, “ washed, coloured, or cased over, or in any manner altered so as to “ resemble, or be apparently intended to resemble or pass for, any of the “ king’s current coin of a higher denomination, shall be deemed and taken “ to be counterfeit coin within the intent and meaning of those parts of “ this act wherein mention is made of ‘ false or counterfeit coin resem- “ bling, or apparently intended to resemble or pass for, any of the king’s “ current gold or silver coin.’ ”

II. The counterfeiting of *foreign coin*, either of gold, silver, or copper, is made highly penal by several statutes.

The 37 Geo. 3, c. 126, (j) recites the great increase of the practice of counterfeiting gold or silver coin *not current here* ; and enacts, “ that if “ any person or persons shall hereafter make, coin, or counterfeit any “ kind of coin not the proper coin of this realm, *nor permitted to be “ current within the same*, but resembling, or made with intent to “ resemble or look like any gold or silver coin of any foreign state, &c., “ or to pass as such foreign coin, such person or persons offending therein “ shall be deemed guilty of *felony*, and may be transported for any term “ of years not exceeding seven.”(k) By the words “not permitted to “ be current within*the realm,” must be understood not permitted to be current by proclamation under the great seal.(l)

Of counterfeiting foreign gold, silver, or copper coin.

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(h) See s. 21, *post*.

(i) See s. 19, *post*, p. 61, as to hard labor.

(j) Repealed as far as relates to copper money, by 2 W 4, c. 34.

(k) Although the act contains no express provision for the punishment of principals in the second degree, and accessories, yet they are punishable, the principals in the second degree, as principals in the first degree, according to the general rule, 4 Bla. Com. 39, and the accessories under the 7 & 8 Geo. 4, c. 28, s. 8, *ante*, p. 38, and s. 9 ; and 1 Vict. p. 90, s. 5, *post* 61.

(l) 1 East, P. C. c. 4, s. 10, p. 161, and c. 10, s. 3 & 6. The 6th sect. of the 37 Geo. 3,

The 43 Geo. 3, c. 139, s. 3, relates to the counterfeiting of foreign coin of copper, or of other metal of less value than silver *not current here*, and enacts, "That if any person shall within any part of the united kingdom make, coin, or counterfeit, any kind of coin not the proper coin of this realm, nor ordered by the royal proclamation of his majesty, his heirs or successors, to be deemed and taken as current money of this realm, or any part thereof, but resembling or made with intent to resemble any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country respectively, or to pass as such foreign coin, then every person so offending shall be deemed and taken to be guilty of a misdemeanor and breach of the peace; and being thereof convicted according to law, shall for the *first offence* be imprisoned for any time not exceeding one year; and for the *second offence* be transported to any of his majesty's colonies or plantations for the term of seven years." The act further provides that persons against whom any bill of indictment shall be found shall not be entitled to traverse the same to any subsequent assizes or sessions, but shall be tried upon the bill being found, unless there shall be good cause why the trial should be postponed.^(m) And a provision is also made for the *certificate* of a former conviction being sufficient evidence of that fact in cases where persons were tried for second offences.⁽ⁿ⁾

Counterfeiting foreign copper coin.

III. The 2 W. 4, c. 34, s. 12, enacts, "That if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin,^(o) every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years."^(p)

Of counterfeiting copper money.

With respect to the offence of counterfeiting the coin in general, it may be observed, that not only all such as counterfeit the king's coin without his authority, but even such as are employed by him in the mint, come within the statutes, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorized and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty; the act must be wilful, corrupt, and fraudulent.^(q)

The offence of counterfeiting the coin may be committed by officers in the mint.

*The moneys charged to be counterfeited must resemble the true and lawful coin:^(r) but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world.^(s) Thus a counterfeiting with some

*58

What will be a sufficient counterfeiting.

c. 126, makes persons having in their custody more than five pieces of such counterfeit foreign coin liable to a penalty not exceeding 5*l.* nor less than 4*0s.* upon conviction before a justice of peace, for every such piece of coin. And the proceedings before the justice are not to be quashed for want of form, or removed by *certiorari*. ^(m) Sect. 4.

⁽ⁿ⁾ Sect. 5. By the 6th section of the act persons having more than five pieces of such counterfeit foreign coin in their possession are liable to a penalty not exceeding 4*0s.* nor less than 1*0s.* upon conviction before a justice of the peace, and by sect. 8, no proceeding touching the conviction of any offender before any justice of the peace shall be quashed for want of form, or removal by *certiorari*.

^(o) See s. 21, *ante*, p. 56.

^(p) See s. 19, *post*, p. 61, as to hard labor.

^(q) 1 East, P. C. c. 4, s. 15, p. 166; 1 Hale, 213; 1 Hawk. P. C. c. 17, s. 55; 3 Inst. 16, 17; 4 Bla. Com. 84. ^(r) 1 Hawk. P. C. c. 17, s. 81. ^(s) 1 Hale, 178, 184, 211, 215.

small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin.(t)

Round
blanks like
shillings
worn
smooth by
circulation.

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the master of the mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. And the court were of opinion that a *blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passed in circulation.(u) In a subsequent case the point received the more solemn consideration of the twelve judges, the counsel for the prisoners having objected, upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm*. But the judges were of opinion, that it was a question of fact whether the counterfeit moneys were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists.(x) Before the 2 W. 4, c. 34, where the imitation of the real coin had not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated, the offence of counterfeiting was not complete. Thus where the prisoner had forged the impression of a half-guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was, upon reference to the judges, it was held that the crime of counterfeiting was incomplete.(y) And where the prisoners were convicted under the 25 Edw. 3 c. *2, and it appeared that no one piece of the base metal found upon them was in such a state as to make it passable, the conviction was held to be wrong.(z) But by the 2 W. 4, c. 34, s. 3, (zz) the offence of counterfeiting shall be deemed complete although the coin be not in a state fit to be uttered, or the counterfeiting not finished or perfected.

Where the
false coin
was not so
far perfect-
ed as to be
passable,
the offence
of counter-
feiting was
not com-
plete, but
now it is by
2 W. 4, c.
34, s. 3.

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Upon an indictment on the 8 & 9 W. 3, c. 26, s. 4, (now repealed), a

(t) 1 East, P. C. c. 4, s. 13, p. 164, citing 1 MS. Sum 50, and Ridgeley's case, Old Bailey, Dec. 1778.

(u) Wilson's case, Old Bailey, 1783; 1 Leach, 285.

(x) Rex v. Patrick and John Welsh, 1 Leach, 464; 1 East, P. C. c. 4, s. 13, p. 164.

(y) Varley's case, 1 Leach, 76; 1 East, P. C. c. 4, s. 13, p. 164; 2 Blac. Rep. 682.

(z) Rex v. Harris and Minion, 1 Leach, 135. The case was referred to the judges: but the grounds of their decision are not stated in the report. And *qu*. if the case was not disposed of upon a defect in the indictment. Besides the count on the 25th Edw. 3, c. 2, there was another count upon the 8th and 9th W. 3, c. 26, s. 4.

(zz) *Ante*, p. 55.

question arose as to what would amount to a colouring. It appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the colour and appearance of real silver. A doubt therefore arose, whether this process of extracting the latent silver by the power of the wash from the body to the surface of the blank was colouring with "a wash and materials" within the meaning of the statute; or whether the legislature did not intend such a colouring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a colouring within the words of the statute; (a) and they also thought that it might be charged as a colouring with silver; for the effect of the *aqua fortis* is to corrode the base metal, and leave the silver only on the superficies; and so the copper is coloured or cased with silver. (b)

So though it was necessary that the blanks should be *rubbed* after they were taken out of the wash, in order to give them the appearance of silver, the preparing and steeping them in the wash was held to be a colouring within the 8 & 9 W. 3, c. 26, s. 4. The prisoner was apprehended in the very act of steeping round blanks composed of brass and silver in *aqua fortis*: none of them were in a finished state; but many were taken out of the liquor and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and by *rubbing them* they might be made perfectly to resemble silver coin; but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the colour of silver had not been produced on any of the blanks. There was some difference of opinion amongst the judges upon a case reserved. One judge said, he understood the words "colour, &c.," to mean producing on the piece of metal the colour of silver, which was not done here; for, without rubbing, the money coined would not pass: and another observed, that the word in the statute was "*producing*" in the present tense, and not materials which would produce. But the other judges (c) thought the conviction right. They considered that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver: and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered, which would in the first instance produce a perfect bright shilling or sixpence. (d)

Upon an indictment on the 2 W. 4, c. 34, s. 4, which alleged that the prisoner three sixpences "feloniously did gild with materials capable of producing the colour of gold," it was proved that the prisoner was apprehended in the act of gilding sixpences with gold, three of which

(a) *Rex v. Lavey and Parker*, 1 Leach, 153.

(c) *Absent*, *Perryn, B.*, and *Buller, J.*

(d) *Rex v. Case*, 1 East, P. C. c. 4, s. 14, p. 165, 166; 1 Leach, 154, note (a). This case probably caused the use of the terms "materials capable of producing the colour of gold or silver," in the 2 W. 4, c. 34, s. 4, instead of the terms, "materials producing the colour of gold or silver," in the 8 & 9 W. 3, c. 26, s. 4, C. S. G.

so guilt were found in the room where he was taken : it was objected that the indictment was not proved, as the prisoner had used gold and not materials capable of producing the colour of gold. It was answered, that the latter words might be rejected ; to which it was replied, that they could not, as they qualified the word gold, and shewed it was not used in the strict sense of the word. A verdict having been directed for the crown, it was moved, in arrest of judgment, in case the objection should be one on the record. Upon a case reserved, the judges present were unanimous that the indictment was proved, and all, except two, (e) considered the indictment good. (f)

Counterfeiting complete without uttering.

It should be observed, that if there be a counterfeiting in fraud of the king, the offence is complete before any uttering, or attempt to utter. (g)

As to principals in the second degree, and accessories.

The 2 W. 4, c. 34, s. 18, enacts, "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and in so far as relates to Scotland, every person who shall become accessory after the fact to any of the offences to which the punishment of transportation is by this act attached, shall on conviction be liable to be imprisoned for any term not exceeding two years; the general law of Scotland as to accession, or art and part, being in all other respects to regulate the punishments to be awarded under this act."

Accomplices, or receivers, in those offences concerning the coin which amount to felony, follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools, or materials for coining. (gg)

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What shall be sufficient proof of coin being counterfeit.

Sect 17 declares and enacts, "that where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

What not sufficient evidence of counseling, &c.

Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that, on coming to the lodgings just after their apprehension, he endeavoured to escape, and was found to have had money about him; is not sufficient evidence to implicate him, as counseling, procuring, aiding and abetting the coining. Two women were indicted for colouring a shilling and sixpence,

(e) Littledale, J., and Parke, B.

(f) Reg v. Turner, 2 M. C. C. R. 42.

(g) 3 Inst. 61; 1 Hale, 215, 228; 1 Hawk. c. 17, s. 55; 1 East, P. C. c. 4, s. 13, p. 165.

(gg) 1 East, P. C. c. 4, s. 31, p. 186.

† [In an indictment for counterfeiting, the possession of coining instruments may be given in evidence against the prisoner to prove the scienter. *State v. Antonia*, 3 Brevard, 562.

On an indictment for counterfeiting a silver dollar, proof that the defendant had counterfeited other dollars, is not admissible. *State v. Odell*, 3 Brevard, 552.]

and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after their apprehension he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three shilling piece, five bad shillings, and five bad sixpences; but upon a case reserved the judges thought the evidence too slight to convict him. (h)

Sec. 15 enacts, "that where two or more persons, acting in concert in ^{Vendue.} different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried and punished, and their offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction: Provided always, that crimes and offences against this act committed in Scotland shall be proceeded against and tried in Scotland in such manner and form as crimes and offences generally have been heretofore tried in that country."

Sec. 20, enacts, "that where any offence punishable under this act ^{As to offences committed at sea.} shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

Sec. 19, enacts, "that where any person shall be convicted of any ^{The court may order hard labour or solitary confinement.} offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet."

And the 1 Vict. c. 90, s. 5, enacts, that after the first of October, 1837, no court shall direct any offender "to be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

In many instances of offences relating to the counterfeiting coin, the legislature have made special provisions for securing the base ^{*62} coin, and also the tools of the offenders; in order that they may be produced in evidence, and afterwards disposed of in a proper manner. ^{Coining tools and base money to be produced in evidence. Provision for the discovery and seizure of counterfeit coin and coining tools, for securing them as evidence, and for ultimately disposing of them.}

The 2 Wm. 4, c. 34, s. 14, enacts, "that if any person shall find or discover in any place whatever, or in the possession of any person having the same without lawful excuse, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold, silver, or copper coin, or any instrument, tool, or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for the person so finding or discovering, and he is hereby required to seize the same, and carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a creditable witness before any justice of the peace, that there is a reasonable cause to suspect that any person has been concerned in counterfeiting the king's current gold, silver, or copper coin, or has in his custody or possession any such counterfeit coin, or any instrument, tool, or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for

“ such justice, by warrant under his hand, to cause any place whatsoever
 “ belonging to or in the occupation or under the control of such suspected
 “ person to be searched, either in the day or in the night, and if any such
 “ counterfeit coin, or any such instrument, tool, or engine, shall be found
 “ in any place so searched, to cause the same to be seized and carried
 “ forthwith before the said justice, or some other justice of the peace;
 “ and wherever any such counterfeit coin, or any such instrument, tool,
 “ or engine as aforesaid, shall in any case whatever be seized and carried
 “ before a justice of the peace, he shall cause the same to be secured, for
 “ the purpose of being produced in evidence against any person who
 “ may be prosecuted for any offence against this act; and all counterfeit
 “ coin, and all instruments, tools, and engines adapted and intended for
 “ the counterfeiting of coin, after they shall have been produced in evi-
 “ dence, or where they shall have been seized, and shall not be required
 “ to be produced in evidence, shall forthwith be delivered up to the
 “ officers of his majesty’s mint, or to their solicitor, or to any person
 “ authorized by them or him to receive the same.”

Provisions of a similar kind are made by the 37 Geo. 3, c. 126, s. 7, with respect to searching for counterfeit gold or silver foreign coin, or for tools, implements, or materials for coining such coin, and securing the same, and producing them in evidence, and afterwards destroying or otherwise disposing of them. And the 43 Geo. 3, c. 139, s. 7, authorises searching for counterfeit foreign coin of copper or metal of less value than silver, and the tools or implements for coining the same. (i)

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*SECT. II.

Impairing Coin.

THE 2 Wm. 4, c. 34, s. 5, enacts, “that if any person shall impair, diminish, or lighten, any of the king’s current gold or silver coin, with

(i) The legislature has made other provisions for the suppression of base coin, or coin inferior in value, where there is no criminal charge imputed to the person who may happen to tender it. The 56 Geo. 3, c. 68, s. 7, enacts, that after the period to be mentioned in a proclamation, any persons are required to cut, &c., any piece or pieces of old silver coin of this realm, current at any time before the passing of that act, which shall be tendered to them in payment, and which shall be of less value than the denomination thereof shall import, and the person tendering the same shall bear the loss: but if any such pieces so cut, &c., shall appear to be of the full value which its denomination shall import, the person who shall cut, &c., is required to take the same at the rate it was coined for; and disputes about the value are to be determined by the mayor, &c., or other chief officer of any city, &c., where such tender shall be made; or if the tender be made out of any city, &c., then by some justice of the peace of the county inhabiting or being near the place where the tender shall be made. And the 2 W. 4, c. 34, s. 13, enacts, “that where any gold or silver coin shall be tendered to any person, who shall suspect any piece or pieces thereof to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, or deface such piece or pieces; and if any piece so cut, broken, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful coin, the person cutting, breaking, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise, whether the piece so cut, broken, or defaced be diminished in the manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of his majesty’s exchequer, and their deputies and clerks, and the receivers-general of every branch of his majesty’s revenue, are hereby required to cut, break, or deface, or cause to be cut,

intent to make the coin so impaired, diminished, or lightened, pass for the king's current gold or silver coin,^(j) every such offender shall in England and Ireland be guilty of a felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding two years."^(k)

With a view of more effectually preventing the clipping, diminishing, ^{Having} or impairing the current coin of the kingdom, the statute 6 & 7 Wm. 3, ^{clippings,} c. 17, ss. 7 and 8, makes provisions for breaking open houses and search- ^{&c., in pos-} ing for bullion: and the person in whose possession bullion is found not ^{session.} proving it to be lawful silver, and that the same was not before the melting thereof coin, nor clippings, shall be committed to prison; and in case, on an indictment against such offender for *melting* the current ^{Melting} silver coin of the realm, he shall not prove, by the oath of one witness ^{coin.} at the least, the bullion so found to be lawful silver, and that the same was not the current coin of the realm, nor clippings thereof, he shall be found guilty and imprisoned for six months.^(l) Provisions concerning *melting* down coin are ^{*61} made by other statutes. By the 17 Edw. 4, c. 1, no person shall melt down any money of gold or silver sufficient to run in payment, upon pain of forfeiture of the value: and by 13 and 14 Car. 2, c. 31, melting down any current silver money of the realm is to be punished with forfeiture of the same, and double the value; and if done by a freeman of a town, with disfranchisement; if by any other person, with six months' imprisonment. And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant *per statutum de monetâ*.^(m)

SECT. III.

Of importing into the Kingdom counterfeit or light money.

THE 2 Wm. 4, c. 34, s. 6, enact, "that if any person shall import ^{Importing} into the United Kingdom from beyond the seas any false or counterfeit ^{counterfeit} coin resembling, or apparently intended to resemble or pass for, any of ^{coin from} the king's current gold or silver coin,⁽ⁿ⁾ knowing the same to be false ^{beyond} or counterfeit; every such offender shall, in England and Ireland, be ^{seas; trans-} guilty of a felony, and in Scotland of a high crime and offence; and, being ^{portation} convicted thereof, shall be liable, at the discretion of the court, to be ^{for life, &c.}

broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of his majesty's revenue."

The last section (22) provides for the venue in actions against persons acting under the act, notice of action, tender of amends, &c.

(j) See the interpretation clause, s. 21, *ante*, p. 56.

(k) See *ante*, p. 60 & 61, ss. 18 & 19, as to accessories and hard labour.

(l) So much of this act as authorizes the wardens or assistants of the Company of Goldsmiths of London, or any two justices, to seize as unlawful bullion any molten silver, which before the melting thereof was the current coin of this realm, or as requires any offender, in whose possession unlawful bullion is found, to prove on oath that such bullion was not the current coin of this realm, is repealed by the 59 Geo. 3, c. 49, s. 12. And the 2 W. 4, c. 34, s. 1, repeals ss. 2, 4 & 12 of the same act. See also the 1 & 2 Geo. 4, c. 26, s. 4, which repeals some of the provisions of the 59 Geo. 3, c. 49, s. 13.

(m) 3 Inst. 18.

(n) See the interpretation clause, s. 21, *ante*, p. 56.

transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.”(o)

Under the 1 and 2 Ph. & M. c. 11, (now repealed) it was held that the words “false or counterfeit coin or money being current within this realm,” referred to gold and silver coin of foreign realms, current here by the sufferance and consent of the crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which was prohibited by the 25 Edw. 3, st. 5, c. 2, and 1 and 2 Ph. & M. c. 11, (now repealed) must be brought from some foreign place out of the king’s dominions into some place within the same,(oo) and not from Ireland or some other place subject to the crown of England, for though to some purposes they are distinct from England, yet as the counterfeiting is punishable there as much as in England, the bringing money from such places is not within those acts.(p) It may be observed also, that these acts were confined to the *importer* and did not extend to a *receiver* at second hand; and such importer must also have been averred and proved to have known that the money was counterfeit.(q)

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Importing
gold or sil-
ver foreign
coin not
current.

It seems to have been the better opinion, that it was not necessary that such false money should be actually paid away or merchandized with, for the words of the statute 25 Edw. 3, are to “merchandize or make payment, &c.,” which only import an *intention* to do so, and are fully satisfied whether the act intended be performed or not:(r) and *it is clear, that bringing over money counterfeited according to the similitude of foreign coin was treason within 1 and 2 Ph. & M. c. 11.(s)

The 37 Geo. 3, c. 126, recites, that the practice of bringing into the realm, and uttering within the same, *false and counterfeit foreign gold and silver coin*, and particularly pieces of gold coin commonly called louis d’or, and pieces of silver coin commonly called dollars, had of late greatly increased, and that it was expedient that provision should be made more effectually to prevent the same; and then enacts, that “if any person or persons shall bring into this realm any such false or counterfeit coin as aforesaid, (namely the coin described in s. 2, as ‘any kind of coin not the proper coin for this realm, nor permitted to be current within the same,’) resembling, or made with intent to resemble, or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, *to the intent to utter* the same within this realm, or within any dominions of the same; every such person shall be deemed guilty of felony, and may be transported for any term of years not exceeding seven.”(t) From the words of the statute, an importation *with intent*

(o) See as to hard labour, s. 19, *supra*, p. 61; as to accessories, s. 18, *supra*, p. 60.

(oo) 1 East, P. C. c. 4, s. 1, 4, 5, 6, 21, 22. (p) 1 Hawk. c. 17, s. 87.

(q) 1 Hale, 227, 228, 317; 1 Hawk. c. 17, s. 86, 88; 1 East, P. C. c. 4, s. 22, p. 175. The words of the 25 Ed. 3, were, “if any man *bring*;” of the 1 & 2 P. & M. “if any person shall *bring*.”

(r) 1 Hawk. c. 17, s. 89. But Lord Coke and Lord Hale seem to have thought differently. 3 Inst. 18; 1 Hale, 229. But see 1 East, P. C. c. 4, s. 22, p. 175, 176, where it is said that though the best trial and proof of an intent be by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge. At any rate such intent must be averred in the indictment.

(s) 1 Hawk. c. 17, s. 89. It is to be observed, that the new statute has neither the words “to merchandize or make payment,” which were in the 25 Ed. 3, nor the words “to the intent to utter or make payment with the same,” which were in the 1 & 2 P. & M. The crime, therefore, seems now to consist in importing counterfeit coin knowing it to be counterfeit. C. S. G.

(t) Principals in the second degree, and accessories, are not mentioned in this statute; there may, however, be such principals and accessories; and as no express punishment is

to utter is clearly sufficient, without any actual uttering. The intent must be collected from circumstances; and though an actual uttering may be the best evidence of such intent, it is said to be safest that the indictment should follow the words of the statute.^(u) It seems that this statute does not provide for the case of a person collecting the base money therein mentioned, from the vendors of it in this country, with intent to utter it within the realm, or the dominions of the realm.^(x)

Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the mint in weight, were formerly imported, to the public detriment at that time; in consequence of which the 14 Geo. 3, c. 42, prohibited the bringing into the kingdom any such coin, and provided that if any silver coin being or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, should be found by any officer of his majesty's customs on board any ship, &c., or in the custom of any person coming directly from the water-side; or upon the *information of one or more persons, in any house or other place on search there made in the manner directed by a statute of 14 Car. 2, the officer might seize the same; and if upon examination it should appear to be of the standard weight, it should be restored; but if it should be less in weight than the standard of the mint, that is to say, at and after the rate of sixty-two shillings to every pound troy, it should be forfeited. This act was revived and made perpetual by 39 Geo. 3, c. 75; but the recent act, 56 Geo. 3, c. 68, s. 2, enacts, that so much of the 14 Geo. 3, c. 42, as enacts that any silver coin of the realm less in weight than after the rate of sixty-two shillings for every pound troy shall be forfeited, and of any act or acts for reviving or continuing or making perpetual the provisions of the said act, in this respect, shall from the passing of that act be repealed.

Of importing light silver coin.

*66

SECT. IV.

Of Exporting Counterfeit Money.

THE statute 38 Geo. 3, c. 67, s. 1, enacts that "All copper coin whatsoever, not being the legal copper coin of this kingdom, and all counterfeit gold or silver coin, made to the similitude or resemblance, or intended to resemble any gold or silver coin, either of this kingdom or of any other country, which shall, under any pretence, name, or

Of sending counterfeit coin, &c., out of the kingdom for the purpose of its

pointed out for them, they are punishable, the principals as principals in the first degree according to the general rule (4 Bla. Com. 39), the accessories under the 7 & 8 G. 4, c. 28, *ante*, p. 38, and s. 9, which enacts, "that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet." By the 1 Vict. c. 90, s. 5, it is enacted, that, after the 1st of October, 1837, "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

(u) 1 East, P. C. c. 4, s. 23, p. 176.

(x) 1 East, P. C. c. 4, s. 23, p. 177.

being imported into the British colonies in America or the West Indies. description whatsoever, be exported or shipped, or laden or put on board any ship, vessel or boat, for the purpose of being exported from this kingdom to the island of Martinique in the West Indies, or any of his majesty's islands or colonies in the West Indies, or America, shall be forfeited," &c. And the second section enacts, that "every person who shall so export, or ship, lay, or put on board any ship, vessel or boat, in order to be so exported, or caused to be shipped, &c., or shall have in their custody, in order to be so exported, any such coin as aforesaid, shall forfeit 200*l.* and double the value of such coin, to be recovered by bill, suit, action or information, in any court of record at Westminster.

*67

*CHAPTER THE SECOND.

OF FRAUDS RELATING TO BULLION, AND OF COUNTERFEITING BULLION.

SECT. I.

Of Frauds relating to Bullion

Making gold and silver wares under the true alloy.

BULLION signifies properly either gold or silver in the mass ; but is sometimes used to denote those metals in any state other than that of authenticated coin ; comprising in this latter sense gold and silver wares and manufactures. Many statutes have been passed for the prevention of frauds with respect to such bullion by creating offences in making, working, putting to sale, exchanging, selling or exporting any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several acts. But it is not intended to make any particular mention of those statutes ; (a) the punishments inflicted by them being in general certain penalties and forfeitures, or, in default of payment, commitment to the house of correction. It should be observed, however, that the statute 28 Ed. 1, st. 3, c. 20, is still in force, which prohibits any goldsmith from making any vessel or other thing of gold or silver, except it be of good and true alloy, namely, gold not worse than the touch of Paris, and silver of sterling alloy or better ; and provides that all silver vessels shall be assayed by the wardens of the goldsmiths' company, and marked with the leopard's head. The punishment of a goldsmith so offending against this act is imprisonment and ransom at the king's pleasure ; and as the statute is a prohibitory law, the proper remedy under it is by indictment. (b) Though the description of the offence in this statute is not so large as in the subsequent statutes, it has been held that it is not repealed by any of the subsequent statutes against the same offence, but that they only add accumulative penalties. (c) But the knowingly exposing to sale and selling wrought gold under the sterling alloy for gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy. (d)

(a) See them collected in 1 East, P. C. c. 4, s. 32, p. 188 to 194.

(b) By Lord Mansfield, in *Rex v. Jackson*, Cowp. 297.

(c) *Rex v. Jackson*, Cowp. 297 ; 1 East, P. C. c. 4, s. 34, p. 194.

(d) *Rex v. Bower*, Cowp. 323.

It is conceived also that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat. **Joseph Fabian*, a working goldsmith, was indicted for falsifying plate by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, and sold it to the goldsmiths; and being convicted, he was fined 100*l.* and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman. This judgment must have been at common law. (e)

Fraudulently affixing marks indictable at common law.

*68

The offences of counterfeiting the assay marks on bullion or plate, or transposing such marks from one piece of manufacture to another, will be mentioned in a subsequent part of the work.

It was provided by the 15 Car. 2, c. 7, s. 12, that any person might export any foreign coin or bullion duty free, first making an entry thereof at the custom-house; but under colour of this regulation it was found that English money or wrought plate had been melted down into the form of foreign coin and bullion for the purpose of exportation. The 6 & 7 W. 3, c. 17, and the 7 & 8 W. 3, c. 19, s. 6, contain some enactments for the prevention of this evil. The 6 & 7 W. 3, c. 17, prohibits making ingots or bars of silver in imitation of Spanish bars or ingots, (f) and enacts, that no person shall export molten silver, unless stamped at Goldsmith's Hall, or without a certificate from one of the wardens of the goldsmiths' company that oath has been made as to the same being lawful silver, and that no part thereof was (before it was molten) the current coin of the realm, nor clippings thereof, nor plate wrought within this kingdom. (g) The 7 & 8 W. 3, c. 19, s. 6, provides that no person shall ship, &c., any molten silver, or bullion, unless a certificate be first obtained from the court of the lord mayor and aldermen of London, oath having been made before the court by the owners and two witnesses that the same was and is foreign bullion, and that no part thereof was the coin of the realm, or the clippings thereof, nor plate wrought within the kingdom, &c.; and that such oath shall be circumstantially certified by the said court to the commissioners of the customs, before any docket shall be granted for shipping the same. The regulations of these statutes are enforced in most instances by pecuniary penalties and forfeitures. Some alteration, however, has been made in them by a recent statute, 43 Geo. 3, c. 49, which reciting that the East India Company and others may be possessed of large quantities of foreign molten silver or bullion, brought from parts beyond the seas, and not be able to prove that no part of it was coin of the realm or clippings, nor plate wrought within Great Britain, so as to obtain the necessary certificates for the exportation of it, enacts, that the Treasury may grant licenses for the exportation of molten silver or bullion, and that persons so licensed may export bullion without the usual certificate. The 59 G. 3, c. 49, s. 12, repeals the 6 & 7 W. 3, c. 17, and 7 & 8 W. 3, c. 19, partially, and by s. 13, provides that certain oaths shall be made before the wardens of the company of goldsmiths before the exportation of any molten silver or bullion; but these provisions seem to be repealed by the 1 & 2 Geo. 4, c. 26, s. 4.

(e) Fabian's case, Old Bailey, Dec. Sess. 1664. 1 East, P. C. c. 4, s. 34, p. 194. Kel. 39.

(f) Sec. 3.

(g) Sec. 5. Other provisions as to the seizure of molten silver or bullion are contained in ss. 6, 13, and 14.

*CHAPTER THE THIRD.

OF THE MAKING, MENDING, OR HAVING IN POSSESSION ANY INSTRUMENTS FOR COINING.

Kel. 39.
Making,
mending,
or having
possession
of any
coining
tools,
felony.

THE 2 W. 4, c. 34, s. 10, enacts, "that if any person shall knowingly and without lawful authority (the proof of which authority shall lie on the party accused,) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party excused), have in his custody or possession(*h*) any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin,⁽ⁱ⁾ or any part or parts of both or either of such sides : or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession(*h*) any edger, edging tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin,⁽ⁱ⁾ such person knowing the same to be so adapted and intended as aforesaid ; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession(*h*) any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used for or in order to the counterfeiting of any of the king's current gold or silver coin ;⁽ⁱ⁾ every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."^(j)

*70
Conveying
tools or
moneys out
of the mint
without
authority,
felony,
transporta-
tion for life,
&c.

By sec. 11, "if any person shall, without lawful authority, the proof whereof shall lie upon the party accused, knowingly convey out of any of his majesty's mints any puncheon, counter-puncheon, *matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable at the discretion of the court, to

(*h*) See s. 21, *post*, 70.

(*i*) See s. 21, *ante*, p. 56.

(*i*) See s. 21, *ante*, p. 56.

(*j*) See s. 19, *ante*, p. 61, as to hard labour.

be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.”(k)

By sec. 12, “if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused,) have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the king’s current copper coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and misdemeanor, and, being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years.”(k)

Making or having in possession copper coining tools.

And by sec. 21, “where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act.”

Meaning of terms custody and possession.

Several points arose as to the tools or instruments which were within the words of the 8 and 9 W. 3. Where the prisoner was indicted for *having in his custody a press for coinage* without any lawful authority, a question was raised whether a press for coinage was one of the tools or instruments within that clause of the act on which the indictment was founded: and a majority of the judges held that it was.

Having possession of a press for coinage, or a mould, was within 8 & 9 W. 3, c. 26.

In another place the prisoner was indicted for *having in his custody and possession, without any lawful or sufficient excuse, one mould made of lead, on which was made and impressed the figure, stamp, resemblance, and similitude of one of the sides or flats of a shilling, viz., the head side of a shilling; and the prisoner being convicted, it was submitted to the judges whether the mould found in the prisoner’s custody was comprised under the general words “other tool or instrument before mentioned,”* so as to make the unlawful custody of it high treason; and also whether, if it were so comprised, it should not have been laid in the indictment to be *a tool or instrument* in the words of the act. And the judges were unanimously of opinion that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under these general words; and that as a mould is expressly mentioned by name in the first clause of the act which respects the *making or mending, it need not be averred to be a tool or instrument so mentioned.(n)

*71

(k) See s. 19, ante, p. 61, as to hard labour.

(m) Bell’s case, Fost. 430.

(n) Lennard’s case, 1 Leach, 90. 1 East, P. C. c. 4, s. 17, p. 170. Another point was afterwards raised in this case upon the form of the indictment. The doubt was, whether the mould which was found in the prisoner’s custody, it having only the resemblance of a shilling inverted, viz. the convex parts of the shilling being concave in the mould, and vice versa, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which would make and impress the resemblance, stamp, &c, rather than an instrument on which the same were made and impressed, as laid in this indictment, the statute seeming to distinguish between such as will make and impress the similitude, &c., as the matrix, die, and mould; and such on which the same is made and impressed, as a puncheon, or counter-puncheon, or pattern. But a great majority of the judges

What was considered a puncheon within the meaning of the repealed statutes.

The prisoner was indicted for having in his custody and possession a puncheon made of iron and steel, in and upon which was made and impressed the figure, resemblance, and similitude of the head side of a shilling, without any lawful authority, &c. It was fully proved that several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and that he had them knowingly for the purpose of coining. These puncheons were complete and hardened ready for use: but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. The manner of making these puncheons was as follows: a true shilling was cut away to the outline of the head; that outline was fixed on a piece of steel, which was filed or cut close to the outline, and this made the puncheon; the puncheon made the die, which is the counter-puncheon; a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the Mint; but after the die is struck the letters are engraved on it; a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument now produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted.

Eleven of the judges (*absentee* Lord C. J. De Grey) were unanimously of opinion that this was a *puncheon* within the meaning of the act; for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the figure, stamp, resemblance, or similitude of the current coin;" and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose upon the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters are worn out, are current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though *there were no letters. This was compared to the case mentioned by Sir Matthew Hale, (o) that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law would not alter the case. (p)

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The 8 & 9 W. 3, extended to newly invented instruments.

It has been held that the part of the 8 & 9 Wm. 3, c. 26, which relates to instruments to mark the edges of coins, was not confined to such instruments as were in use when the act passed, but extended to newly-invented instruments, which would produce the same effect; and also that it was not confined to such instruments as, used by hand, unconnected with any other power, would produce the effect. A collar, there-

were of opinion that this evidence sufficiently maintained the indictment; because the stamp of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that "he had in his custody a mould that would make and impress the similitude, &c," and in this opinion some, who otherwise doubted, acquiesced.

(o) 1 Hale, 184; 2 Hale, 212, 215; Robinson's case, 2 Roll. 2 Rep. 50; 1 East. P. C. c. 2, s. 25, p. 86.

(p) Ridgelay's case, 1 Leach, 189; 1 East, P. C. c. 4, s. 18, p. 171.

fore, marking the edge of coin, by having the coin forced through it by machinery, is an instrument within the 8 & 9 Wm. 3, c. 27, though this mode of marking the edges is of modern invention, and though the collar cannot be used by itself, but must be used in conjunction with other machinery. (q)

It was decided that having a tool or instrument (of such sort as is included in the 8 & 9 W. 3, c. 26) in possession *for the purpose of coining foreign gold coin not current here*, was not within that statute. A majority of the judges considered that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. But Lord C. J. Ryder and Mr. J. Foster dissented, considering that the act, though principally levelled against counterfeiters of the current coin of the kingdom, was not confined solely to that object. That the intention of the legislature was to keep out of private hands, as far as possible, all means of counterfeiting the coin; and therefore make it high treason to be knowingly possessed of such instruments, in fact, without lawful authority or sufficient excuse. That it was, therefore, incumbent on the defendant to show such lawful authority or sufficient excuse. But that, supposing his mere intention to be an ingredient in the case, the intention found of using the tool or instrument in question for the purpose stated, did not amount to a sufficient excuse; and upon the fullest consideration afterwards, Mr. Justice Foster was of opinion that the case did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred. (qq)

Having a tool or instrument in possession for the purpose of coining foreign gold coin, was not within 8 & 9 W. 3, c. 26. Sed. qu.

On an indictment for having in possession a die made of iron and steel, proof of a die made of either material will be sufficient; and it seems that if the indictment should state that the die was made of iron, steel, and other materials, proof that it was made of any material would be sufficient; and that it would not be necessary even to prove the exact material. In a case where the indictment was for having in possession a die made of iron and steel, a witness who saw the die said it was made of iron; another of the witnesses who had not seen it, said that dies were usually made of steel, and that iron dies would not stand: and upon the point being saved whether this evidence would support the indictment, the judges held that it would, for it was immaterial to the offence of what the die was *made, and proof of a die either of iron or steel, or both, would satisfy this charge. (r)

Proof of a die made either of iron or steel.

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It was agreed by all the judges, that in proceedings upon the 8 & 9 Wm. 3, c. 26, it was not necessary to prove that money was actually made with the instrument in question. (s)

It is not necessary to prove money made with the instrument. Having tools for coining in possession, with intent to use them is a misde-

The having tools for coining in possession, with intent to use them, has been held to be a misdemeanor at *common law*. An indictment, which was framed as for a misdemeanor at common law, charged that the defendant, without any lawful authority, had in his custody and possession two iron stamps, each of which would make and impress the figure, resemblance, and similitude of one of the sceptres impressed upon the current gold coin of this kingdom, called half-guineas, with

(q) *Rex v. Moore*,^a R. & M. C. C. R. 122; S. C. 2 C. & P. 235.

(qq) *Bell's case*, 1 East, P. C. c. 4, s. 17, p. 169, 170; *Fost.* 430, and Preface to the 3d edition of *Fost.* p. 8.

(r) *Rex v. Oxford*, East. T. 1819; *MS. Bayley, J.*, and *Russ. & Ry.* 382; *S. P. Rex v. Phillips, Russ. & Ry.* 369.

(s) *Riegelay's case*, 1 East, P. C. c. 4, s. 18, p. 172.

measur at
common
law. intent to make the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold, and fraudulently to utter them to his majesty's subjects as lawful half-guineas, against the peace, &c. Lord Hardwicke, at the assizes, doubted whether the bare possession was unlawful, unless made use of, or unless made criminal by statute; but upon the indictment being removed into the Court of King's Bench by *certiorari*,^(t) Page, Probyn, and Lee, justices, held, that the bare having such instruments in possession, with the intent charged, was a misdemeanor.^(u)

The tool or instrument need not bear an exact resemblance to the coin. If an indictment charge that the prisoner had possession of a mould having the resemblance of a shilling on it, it must be proved that the mould had the entire impression of a shilling on it. It seems that the degree of similitude to the real coin which the tools or instruments must be capable of impressing in order to bring the case within the statute, must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself.^(v) Whether the instrument in question be calculated to impress the figure, stamp, resemblance or similitude of the coin current is a question for the jury: and it is clear that the offence is not confined to an *exact imitation* of the original and proper effigies of the coin.^(w)

Upon an indictment which alleges that a prisoner feloniously had in his possession a mould having the resemblance of the obverse side of a shilling impressed upon it, it must be proved that the entire impression was upon the mould. The prisoner was charged in one count with having in his possession a mould, "upon which was impressed the figure and apparent resemblance of one of the sides (that is to say) the obverse side of the king's current coin called a shilling," and in another count the word "reverse" was substituted for "obverse;" the moulds when produced appeared not to have a complete impression of the obverse and reverse sides of a shilling, but only the outside rim, and a slight portion of the other parts of the impression. It was held, that if the jury

believed that no more than part of the impression was impressed upon the moulds while the prisoner was in possession of them, that he ought to be acquitted.^(x) But where an indictment charges that the prisoner made a mould, which was intended to impress the resemblance of a shilling, it is sufficient to prove that he made a mould which will make part of the impression. One count charged the prisoner with making a mould, "which said mould was intended to make and impress the figure and apparent resemblance" of the obverse side, and another the reverse side of a shilling, the evidence being the same as in the former case; it was held that the term "intended" did not mean in a state to make an entire impression, and therefore if the prisoner had only begun to make, the intention to make the whole might be inferred, though only part was actually made, and consequently that the evidence was sufficient.^(y)

(t) The defendant was brought up by habeas corpus, and committed to Newgate.

(u) *Rex v. Sutton*, Rep. temp. Hardw. 370. But see the remarks on this case, *ante*, p. 48.

(v) *Ante*, p. 58.

(w) 1 East, P. C. c. 4, s. 18, p. 171.

(x) *Rex v. Foster*, 7 C. & P. 494, Patteson, J.

(y) *Ib.* 495.

* Eng. Com. Law Reps. xxxii. 597.

*CHAPTER THE FOURTH.

*75

OF RECEIVING, UTTERING, OR TENDERING COUNTERFEIT COIN.

IN some cases formerly the putting off counterfeit coin might amount to treason: as if A. counterfeited the gold or silver coin current, and by agreement before that counterfeiting B. was to take off and vend the counterfeit money, B. was an aider and abettor to such counterfeiting, and consequently a principal traitor within the law. (a) And in the case of the copper coin, B. acting a similar part was an accessory before the fact to the felony, within the statute 11 Geo. 3, c. 40 (now repealed). (b) And if B., knowing that A. hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A. because he maintains him. (c)

If A. counterfeited money, and B., knowing the money to be counterfeit, vended the same for his own benefit, B. was neither guilty of treason, nor misprision of treason. But he might be proceeded against under the 15 Geo. 2, c. 28 (now repealed), before which statute he was only liable to be punished as for a cheat and misdemeanor. (d) Where the defendant was indicted for "unlawfully uttering and tendering in payment to T. H. ten counterfeit halfpence, knowing them to be counterfeit," and convicted on a count laying this generally upon reference to all the judges, they held that it was not an indictable offence. (e) And upon the principles which have been mentioned in a former part of this work, (f) the unlawful procuring of counterfeit coin with intent to circulate it, though no act of utterance be proved, is a misdemeanor; and the possession of counterfeited coin unaccounted for was held to be evidence of an unlawful procurement with intent to circulate. (g) †

(a) 1 Hale, 214.

(b) 1 East, P. C. c. 4, s. 26, p. 178.

(c) 1 Hale, 214.

(d) 1 East, P. C. c. 4, s. 26, p. 179; 1 Hale 214. See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half-guinea, Cro. Circ. Comp. 315 (7th ed.) Starkie, 466; 2 Chit. Crim. Law, 116. See also a precedent of an indictment for a misdemeanor at common law, against a man for uttering a counterfeit sixpence, and having another found in his custody, Cro. Circ. Comp. 315, (7th ed.) 2 Chit. Crim. Law, 117. The uttering of false money, knowing it to be false, is mentioned as a misdemeanor in the recital to the 15 Geo. 2, c. 28, s. 2. There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered, guineas filed and diminished as good guineas. Cro. Circ. Comp. 317, (7th ed.) and 2 Chit. Crim. Law, 116, and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders. Cro. Circ. Comp. 313, (7th ed.) 2 Chit. Crim. Law, 119, 120.

(e) Cirwan's case, Oxford Sum. Ass. 1794, MS. Jud. 1, East, P. C. c. 4, s. 28, p. 182; 2 Leach, 834, note (a.)

(f) *Ante*, Book I., Chap. iii., p. 48.

(g) *Rex v. Fuller & Robinson*, *ante*, 48. The possession in this case was under particularly suspicious circumstances; the coin being wrapped up in parcels with soft paper to prevent it from rubbing. The marginal note to Parker's case, 1 Leach, 41, states, that "having the possession of counterfeit money, with intention to pay it away as and for good money, is an indictable offence at common law." But *qu.* if the point stated in the marginal note was actually decided in Parker's case; and see *ante*, 48.

† [An indictment for fraudulently passing counterfeit money must charge an intent to defraud the person to whom it was passed; and to sustain such indictment it must appear that the money was delivered with a knowledge of its character and with intent to defraud the person to whom it was passed; and the indictment will not be sustained by proof of a sale of counterfeit money to a person who knew it to be counterfeit. *Harper v. The State*, 8 Humph. 93.

To support an indictment against the defendant for having in his possession a counterfeit

- *76 *But the receiving, uttering, or tendering in payment counterfeit money, have been made the subject of legislative provision by several statutes. I. By the 2 Wm. 4, c. 34, relating to the *coin of the realm*; and II. By the 37 Geo. 3, c. 126, relating to *foreign coin*.

SECT. 1.

Of receiving, paying, putting-off, &c., Counterfeit Coin of the Realm.

Uttering counterfeit gold or silver coin; imprisonment.

THE 2 Wm. 4, c. 34, s. 7, enacts, "that if any person, shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin,⁽ⁱ⁾ knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin,⁽ⁱ⁾ knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession,^(j) besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for, any of the king's current gold or silver coin,⁽ⁱ⁾ or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin,⁽ⁱ⁾ knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a high crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences, hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court to be transported

Uttering accompanied by possession of other counterfeit coin, or followed by a second uttering; imprisonment.

Every second offence of uttering, after a previous conviction, shall be felony.

(i) See s. 21, *ante*, p. 56.

(j) See s. 22, *ante*, p. 70.

bank bill, knowing it to be counterfeit, and with intention to pass the same as good, the government must prove the possession, knowledge, and intent to pass, and proof of possession is not sufficient to throw on the defendant the burden of explaining his possession and that he did not intend to pass the same. *Brown v. The People*, 4 Gilm. 439.

When the prosecutor in an information against A. for putting off a counterfeit bank bill, knowing it to be counterfeit, having given evidence to prove that A. and B. had entered into a conspiracy to put off counterfeit bills similar to the bill described in the information, attempted to show that A. knew the bill in question to be counterfeit, and for this purpose he offered evidence to prove that at two different places, a day or two previous to the alleged offence, and at another place soon after its commission, B. put off other counterfeit bills of the same bank, A. being in company with B. immediately before and after such putting off by B. but not actually present with him at those times, it was held that the whole of such evidence was proper to go to the jury; and if they were satisfied that such conspiracy existed between A. & B. and that B. in pursuance thereof, put off such counterfeit bills in the manner stated, these acts of B. were as strong evidence against A. to prove his knowledge of the bill in question being counterfeit as though he had personally done the same acts. *The State v. Spalding*, 19 Conn. 233.]

beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.”(k)

By s. 12, “if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king’s current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession (j) three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king’s current copper *coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year.”(kk)

Uttering counterfeit copper coin.

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Sec. 8, “that if any person shall have in his custody or possession (l) three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king’s current gold or silver coin, (m) knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; (n) and if any person so convicted shall afterwards commit the like misdemeanor, or crime and offence, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.”(n)

Having three or more pieces of counterfeit gold or silver coin in possession, &c., with intent, &c., imprisonment.

Second offence, felony and transportation.

Sec. 9, “That where any person (nn) shall have been convicted of any offence against this act shall afterwards be indicted for any offence against this act committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same; and for every such copy a fee of six shillings and eightpence, and no more, shall be demanded or taken; and if any such clerk, officer, or deputy shall certify or utter as true any false copy of an indictment or conviction for any offence against this act, knowing the same to be false, or if any person other than such clerk, officer, or deputy shall sign or certify any copy of any such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceed-

What shall be sufficient evidence of a conviction for a previous offence against this act.

(k) See s. 19, ante, p. 61, as to hard labour.

(j) See s. 21, ante, p. 70.

(kk) See s. 19, ante, p. 61.

(m) See s. 21, ante, p. 56.

(n) See s. 19, ante, p. 61.

(l) See s. 21, ante, p. 70.

(nn) “who,” seems omitted here.

ing seven years, or to be imprisoned for any term not exceeding two years.(o)

Indictments not to be traversed except for cause shown.
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Sec. 16. "That no person against whom any bill of indictment shall be found at any assizes or session of the peace, for any misdemeanor against this act, shall be entitled to traverse the same to any subsequent assizes or sessions, but the court before which the bill of indictment shall be returned as found shall forthwith proceed to try the person against whom the same is found, unless such person or the *prosecutor shall show good cause, to be allowed by the court, for the postponement of the trial."

What was considered a putting off counterfeit money within 8 & 9 W. 3, c. 26.

Under the 8 & 9 Wm. 3, c. 26, s. 6, which had only the words "take, receive, pay, or put off," there must have been *an actual passing or getting rid of the money*, and not merely an attempt to do so. The prisoner had carried a large quantity of counterfeit shillings to the house of a Mrs. Levey, which she agreed to receive from him, and which he agreed to put off to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table, and Mrs. Levey proceeded to count them out at the rate beforementioned: and had counted out three parcels containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas; but before she had paid him, and while the counterfeit money lay there exposed upon the table, the officer entered the room and apprehended them. Mrs. Levey was admitted as a witness for the crown; and swore that she had bought the three parcels of shillings, and was going to pay the prisoner three guineas for them at the moment they were detected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted.(p) But this case would clearly be within the new act, which has the word "tender" in it.

Names of persons to whom the coin is put off to be stated.
Passing counterfeit money by the trick of ringing the changes, was within the 15 G. 2, c. 28.

If the name of the person to whom the money was put off can be ascertained they ought to be mentioned, and laid severally in the indictment: but if they cannot be ascertained, the same rule will apply which prevails in the case of stealing the property of persons unknown.(pp)

The words of the 15 G. 2, c. 28, s. 2, "utter or tender in payment" being in the disjunctive, were held to apply to an uttering of counterfeit money, though not tendered in payment, but passed by the common trick called *ringing the changes*. The prosecutor having bargained with the prisoner, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness; and returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite; and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The court held that the words of the statute were sufficient to include this case; and that *uttering and tendering in payment* were two distinct and independent acts.(q)

(o) See s. 19, *ante*, p. 61.

(p) Woolbridge's case, 1 Leach, 307; 1 East, P. C. c. 4, s. 27, p. 179 I have left this case, as it might be useful if an indictment omitted the word "tender." C. S. G.

(pp) 1 East, P. C. c. 4, s. 27, p. 180, citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C. J., said that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

(q) Frank's case, 2 Leach, 64.

It has been held in one case that the uttering must either be with intent to defraud the party receiving the money, or with intent that that party should pass it as the agent of the utterer.

Upon an indictment on 2 Wm. 4, c. 34, s. 7, against husband and *wife for uttering a counterfeit half-crown, it appeared that a woman asked the female prisoner to give her something, as her children were without food, and the male prisoner gave her twopence, and told her that his wife would give her something more, on which she gave the woman the bad half-crown in question, telling her to get what she could for her children; it was held that, although in the statute there are no words with respect to defrauding, yet in the proof it is necessary to go beyond the mere words of the statute, and to show an intention to defraud some person. There might be cases of a party giving a person a piece of counterfeit money, and at the same time telling that person that it was bad, and yet he would still be liable to be convicted on an indictment like the present, if a case falling within the mere words of the statute were sufficient. (r)†

Some points arose as to the form of the indictment upon the 15 Geo. 2, c. 28. (rr) The indictment charged the prisoner in the first count with having on the 15th December, 39 Geo. 3, uttered to one G. S. a counterfeit half-crown, knowing it to be so, and in the second count with having on the said 15th of December, &c., uttered another counterfeit half-crown to the same person; and the prisoner was convicted on both counts. The question was, whether the uttering the counterfeit money twice on the same day *being stated in the two counts*, the court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second section; and, upon reference to the judges, they held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day, there being no distinct averment of that fact. (s) But where two utterings

are charged in one count of the indictment, on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. As where the indictment charged that the prisoner *on the 14th of February, &c.*, uttered base coin to W. C.; and that *on the said 14th of February, &c.*, he uttered to J. L. other base coin, it was held sufficient to warrant the higher punishment of the third section of the statute; the utterings, on the face of the indictment, appearing to be on the same day. And the judges held, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not

(r) *Rex v. Page*, 8 C. & P. 122, Lord Abinger, C. B. As every person is taken to intend the probable consequence of his act, and as the probable consequences of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person; *qu.* whether this case rests upon satisfactory grounds. In any case a party may not be defrauded by taking base coin, as he may pass it again, but still the probability is that he will be defrauded, and that is sufficient. C. S. G.

(rr) Now repealed.

(s) *Tandy's case*, 2 Leach, 833; 1 East, P. C. c. 4, s. 29, p. 182, 183. *Eyre, C. J.*, Buller, J., and Heath, J., were absent when this opinion was given, viz. Hil. T. 1799. The judges also thought it advisable to give judgment of imprisonment for six months singly, and not on each of the counts. And see *Smith's case*, 2 Leach, 856.

† [The staking counterfeit money at a gaming table, as good money, is an attempt to utter or pass the same; and losing it at play is a passing of the same against law. *Smith v. Beeler*, 1 Brevard, 482.]

indifferent, the precise time laid must be proved; and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day.^(t)

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On two counts charging distinct utterings on the same day, one judgment of two years' imprisonment under 2 W. 4, c. 34, s. 7, cannot be given.

Indictment upon s. 2, of 15 Geo. 2, for the felony must have set out the former convictions and judgments with a *prout patent per recordum*.

*On a conviction of two separate utterings, in two counts, one judgment of two years' imprisonment under s. 7, of the 2 Wm. 4, c. 24, is bad. The first count charged the prisoner with uttering on the 2d of December a counterfeit shilling; the second count charged him with uttering another counterfeit shilling on the same day and at the same place, and he was convicted of both utterings, and sentenced to two years' imprisonment; and, upon a case reserved the judges were of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one years' imprisonment each.^(u)

An indictment upon s. 2 of the 15 Geo. 2, for feloniously uttering counterfeit money after two convictions for misdemeanors on the same statute must have set out the former convictions, and judgments, with a *prout patent per recordum*; and judgment for a misdemeanor could not be given upon an indictment for felony, bad for want of such an averment. The prisoner was convicted before Holroyd, J., for feloniously uttering a counterfeit shilling, well knowing the same to be counterfeit, having been twice before convicted of similar utterings, as misdemeanors. It was objected in arrest of judgment, that the present indictment, in setting forth the trial, conviction, and judgment, upon the second indictment for the second offence, (and which were essential to constitute the crime a felony as charged in the present indictment,) was defective in not stating or alleging a *prout patent per recordum* in respect of those proceedings, as appeared to have been done in the second indictment, in stating the proceeding had under the first indictment. It was also objected that there ought to have been an allegation, that the former convictions and judgments remained in force unreversed, &c. And further, it was objected that the present indictment did not allege as facts the actual committing of the two former offences, or even the trials, convictions and judgments upon both of them, but only the trial, conviction, and judgment upon the second indictment, whereas the second indictment appear to have alleged a trial, conviction, and judgment, upon the first. Upon these objections judgment was respited by the learned judge, who submitted to the judges whether the judgment should be arrested, or whether, in case the indictment should be deemed defective, as an indictment for felony, it would warrant a judgment for the offence as for a misdemeanor. The judges held that the indictment was bad for want of a *prout patent per recordum* in the statement of the conviction and judgment for the second offence; and that no judgment could be given for the misdemeanor upon this record.^(v)

Evidence of a guilty knowledge. Other utterings of base coin.

For the purpose of proving the act charged in the indictment to have been done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice upon indictments for disposing of and putting away forged bank notes, knowing them to be forged;^(x) upon one of which, the

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(t) Martin's case, Derby Lent Ass. 1801, *coram* Graham, B., decided by the judges in June, in the same year. 2 Leach, 223; 1 East, P. C. *Addend.* xviii. MS. Bayley, J.

(u) Rex v. Robinson, R. & M. C. C. R. 413.

(v) Rex v. Turner, Mich. T., 1824, R. & M. C. C. R. 47. And see Rex v. Smith, Russ. & Ry. 5; 1 East, P. C. 183; 2 Leach, 858; Rex v. Booth, Russ & Ry. 7.

(x) Rex v. Whiley & Haines, 2 Leach, 983; 1 New R. 92. Tattershall's case, cited in

counsel for the prisoners, objected to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Mr. B. Thomson said, that he by no means agreed in the conclusion of the prisoner's counsel, that the prosecutor could not give evidence of another uttering on the same day to prove *the guilty knowledge*. "Such other uttering," he observed, "cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common utterer: (xx) but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." (y) So upon an indictment for uttering a counterfeit shilling, the fact of five other counterfeit shillings having been found in the prisoner's possession five days afterwards has been held admissible in order to show guilty knowledge. (z)

Possession
of other
base coin.

An associate, not present nor co-operating at an uttering of bad money, is not liable to be convicted with the actual utterer, merely on the ground that he is an utterer also, and has other bad money about him for the purpose of uttering. And it appears not to be a sufficient ground for convicting a person of the second offence, of having other bad money in possession at the time, that such person was associating with another, not present at the uttering, who had large quantities of bad money about him for circulation; or that such person on the day after the uttering had in possession a small number of pieces of bad money. The prisoners, *Job* and *Sarah Else*, were indicted for uttering a bad shilling, having other bad shillings in their possession at the time. Upon the evidence it appeared that the uttering was by the woman alone, on the 30th of January, in the absence of the man; that they both slept together on the 29th and 31st; and that on the 30th the man offered for sale a large quantity of bad shillings and sixpences; and also that they were both searched on the 31st; when upon the man was found a large quantity of bad shillings, and upon the woman were found six bad shillings. The prisoners were upon this evidence both convicted of the double offence, on the ground that both being engaged in the same illegal traffic, the act of one was the act of both: but, upon the case being reserved, the judges held the woman alone liable to be convicted, and that of the single offence only. (a)

Associate
not co-ope-
rating.

Whiley & Haines. And see *Ball's case*, 1 Campb. 325. where upon an indictment at Lewes, Sum. Assizes, 1807, against the prisoner for knowingly uttering a forged bank note, the note in question was proved to have been uttered by the prisoner on the 17th of June; and evidence was then given of his having uttered another forged note of the same manufacture on the 20th March preceding; and that there had been paid into the Bank of England various forged notes, dated between December, 1806, and March, 1807, all of the same manufacture, and having different endorsements upon them in the handwriting of the prisoner; but it did not appear at what times the Bank of England had received these notes. The endorsements, however, in the handwriting of the prisoner, were considered as evidence of such notes having been in his possession. Upon reference to the judges, they were all of opinion that the evidence as given in this case was properly admitted. And see *Forgery*, vol. 2.

(xx) That is, within the repealed act, 15 Geo. 2, c. 28.

(y) *Rex v. Whiley & Haines*, 2 Leach, 983.

(z) *Harrison's case*, 2 Lewin, 118, Tnunton, J., and Alderson, B.

(a) *Rex v. Else*, East T. 1808; MS. Bayley, J., and Russ & Ry. 142. And see *Rex v. Soares* and Others, (uttering a forged note,) Russ. & Ry. 25; and other cases *post*, Book IV., Chap. xxvii., s. 4.

*82 *So where *Page* and *Jones* were indicted under the 2 Wm. 4, c. 34, s. 27, for uttering counterfeit halfcrowns, twice on the same day; and it appeared that they were seen at different times in the morning together, and that *Page* went into an inn, leaving *Jones* about twelve yards off in the street, whilst *Page* passed one halfcrown in a room, which was out of the sight of *Jones*; *Page* then came out, joined *Jones*, and they went together to another inn, where *Jones* went in, and passed another halfcrown; leaving *Page* standing about twelve yards off in the street, and out of sight of where *Jones* passed the halfcrown; Mr. J. Coleridge said he thought the true principle was whether the one prisoner was so near to the other as to help the other to get rid of the money, which he did not think the evidence proved in this case. (b)

(b) *Reg. v. Page and Jones*, Hereford Sp. Ass. 1841, MS. C. S. G. The jury convicted both. I suggested in this case that *Rex v. Else*, ante, p. 81, had proceeded on a fallacy. It was considered in the same light as a felony, and the rule as to principal and accessory applied to it, which was erroneous, as it was a misdemeanor, and therefore all persons taking part in it were principals, though absent. The learned judge made no direct allusion to this suggestion, which seems to me to deserve consideration; the rule is, that in misdemeanors all persons concerned therein are principals, ante, p. 33; 4 Bla. Com. 36; 1 Hale, 613, 12 Co. 81; Dalt. c. 161; 2 Inst. 183; Co. Litt. 57; Fost. 73; *Baker v. Rogers*, Cro. Eliz. 788, and whatever would make a person accessory in a felony makes him a principal in crimes where there are no accessories. It has been so held in treason, 12 Co. 81, Stamford, P. C. 48. In all these cases of uttering the evidence would certainly have satisfied a jury, if the case had been a felony, that the party absent was an accessory, and therefore it should seem he was a principal in the misdemeanor. If that be so, the indictments charging with the actual uttering were right, because that is charging according to the legal effect of the offence. In 12 Co. 81, it was held that if one, before the act done, procure another to counterfeit the great seal, in the indictment he may be charged with the fact, viz., the counterfeiting. Unless, therefore, the misdemeanor of uttering base coin is to be distinguished from all other misdemeanors, these cases deserve re-consideration, and the more so, because if they are good law the utterer alone can be convicted, while the party in the distance, who generally is the more guilty, will altogether escape. He cannot be convicted as principal, because he is absent, nor as accessory, because in misdemeanors there are no accessories. In *Rex v. Roderick* 7 C. & P. 795, Mr. B. Parke expressly declared that when an offence was made a misdemeanor by statute, it was made so for all purposes; and surely there can be no good reason for introducing an exception, the effect of which is to give perfect impunity to guilty parties. The only cases referred to in *Rex v. Else*, were *Rex v. Soares*, R. & R. C. C. R. 25, and *Rex v. Davis*, *ibid.* 113; both cases of felony. C. S. G.

The above observations are very much strengthened by the following case:—The first count charged the prisoners with uttering a counterfeit sixpence to A., and on the same day uttering another to B; second count for uttering to C.; and third count for uttering to D. The prisoners were in a town together all the day in question, and in the evening quitted a public-house together, having first changed their clothes for the purpose of disguise. Each of them uttered three bad sixpences, made in the same mould, and of the same metal, to shopkeepers living within a short space of each other, and the prisoners were found together immediately afterwards with counterfeit money on their persons, but there was no proof that they were together at either of the utterings. There were other facts to prove a community of purpose. On these facts, Erskine, J., at first called on the counsel for the prosecution to elect as to which of the prisoners he intended to proceed; but it was contended that if the prisoners jointly provided themselves with the coin for uttering, and shared the proceeds afterwards, they were jointly guilty of each act of uttering; that in misdemeanor there being no accessories, the acts which would make them accessories before the fact in felony made them principals on this charge, and that at all events one of them could be convicted of the two utterings on the same day, and the other for the single uttering, of which he was guilty, on one of the other counts. Erskine, J., then directed the trial to proceed, and in summing up told the jury that if two persons, having jointly prepared counterfeit coin, planned the uttering, and went on a joint expedition, and uttered in concert, and by previous arrangement, the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. It might be different, if having possession of the counterfeit coin, they shared it between them, and each went his own way, and acted independently of the other. If they thought they were acting in concert in the utterings they should convict on the whole indictment. If they thought they were uttering independently of each other they might convict one of the two utterings on the first count, and the other on the other counts. *Reg. v. Hulse*, 2 M. & Rob. 360.

But where two prisoners were jointly indicted for uttering a counterfeit shilling, having other counterfeit shillings in their possession, and it appeared that both went to a shop, into which the one entered and uttered a bad shilling, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, it was held that both might be convicted, the uttering and possession being both joint.(c) So where two women were indicted for two utterings of forged sovereigns on the same day, and it was proved that they were together in the morning, at a public house, about nine o'clock, and together again about two o'clock: and several utterings by each were proved, and one of the prisoners uttered a sovereign to one person very near the place, in a market, where the other prisoner at the same time uttered a sovereign to another person; it was held that if they were acting concurrently, and were near enough to be assisting at the time of the uttering, that would be sufficient; but if there was only a general community of purpose in the morning, and each separated *to do their respective acts in the course of the day, so that one was not present or within a reasonable distance to assist the other, both could not be found guilty.(d)

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Where one of two persons in company utter base coin, and other base coin is found on the other, they are jointly guilty of the aggravated offence under sec. 8 of the 2 Wm. 4, c. 34, if they are acting in concert, and both know of the possession of the base coin.

The prisoner was tried under the 2 Wm. 4, c. 34, s. 8, for having in his possession three pieces of counterfeit coin, knowing the same to be counterfeit, with intent to utter them. The prisoner was taken in company with one *Large*; only two bad shillings were found on the prisoner, but upon *Large* were found sixteen bad shillings. The jury found that the prisoner knew that *Large* had the sixteen bad shillings in his possession; that he knew that all the shillings found both upon *Large* and on himself were counterfeit, and that the prisoner and *Large* had the common purpose of uttering them. Mr. B. Alderson thought, and so directed the jury, that under these circumstances the possession of *Large* was in law the possession of the prisoner, and if so, that the prisoner had three counterfeit pieces in his possession; but a difficulty arose out of the interpretation clause,(e) which rendered it doubtful whether he could be said to be in possession of what was with his knowledge in the personal possession of another man, even though he were in company, and acted in concert with such other man. Upon a case reserved, the judges were of opinion that the possession was joint, both being cognizant of it, and having the same intent of uttering it.(f)

Where two persons are in company acting in concert and one knows of the possession of counterfeit coin which is on the person of the other, they are both within s. 7 & 8 of 2 W. 4, c. 34, the possession of the one being in that case the possession of the other in point of law.

So where the prisoners were indicted for passing a counterfeit half-crown, under sec. 7 of the same act, they at the same time having in their possession other counterfeit coin; the female prisoner in the presence of, and in concert with the other prisoner, passed a bad half-crown, and shortly afterwards they were taken together, and searched, and on the female was found only good money, and on the male a bag containing nine other bad halfcrowns; and, upon the authority of the

(c) *Rex v. Skerrit*,^a 2 C. & P. 427, Garrow, B.(d) *Rex v. Manners*,^b 7 C. & P. 801, Ludlow, Serj., after consulting Bolland, B.(e) *Supra*. p. 70.(f) *Reg. v. Rogers*, 2 M. C. C. R. 85, S. C. 2 Lewin, 118, 297; See *Reg. v. Williams*, 1 C. & Mars. 259.^a Eng. Com. Law Reps. xii. 203.^b *Ib.* xxxii. 743.

preceding case, the facts were left to the jury to say how far the possession of the bad money was brought home to the knowledge of both. (g)

Form of indictment. The word "knowing" in indictments for uttering coin sufficiently applies to the time and place of uttering, and no addition of time or place is necessary. The word "knowing" refers to the prisoner, and not to the person, to whom the coin was uttered, although that person's name immediately precedes the word "knowing." It is sufficient, in an indictment for a felony, for uttering base coin after a previous conviction to state that the prisoner was in due form of law tried and convicted by a jury.

Variance. It is no objection that an indictment for felony, for uttering base coin after a previous conviction, states that the prisoner, together with another person, was tried and convicted; and the record of the former trial shows the conviction of the prisoner and the acquittal of the other person.

*84 Where a prisoner was indicted under the 3 Wm. 4, c. 34, s. 7, *for uttering counterfeit money after a previous conviction, and the indictment alleged that the prisoner "together with one T. P., was in due form of law tried and convicted," by a jury upon an indictment against them, for that they did unlawfully utter a shilling, to "A. W., knowing the same to be false," and thereupon it was considered that the prisoner should be imprisoned for two years; and that the prisoner afterwards feloniously did utter a halferown "to T. H., knowing the same to be false." The copy of the record of the former trial stated the conviction of the prisoner and the acquittal of T. P.: it was objected, 1st. That the indictment was bad for want of an addition of time and place to the allegation of knowledge, which was to be found neither in the recital of the former indictment, nor in the substantive charge on the face of the present indictment; but the learned judge thought that the former indictment was good, being in the words of the statute and after verdict; and that "knowing" in the present indictment, being a participle in the present tense, must import knowledge at the time of the uttering. 2dly. That the word "knowing" did not refer to the prisoner, but to A. W. and T. H.; but the learned judge thought that "knowing" did refer to the prisoner, as all that was alleged to be done was alleged to be done by him. 3rdly. That the indictment did not state any former conviction, because neither the plea nor the verdict of the jury were recited; but the learned judge thought the allegation, that he had been in due course of law tried and convicted, together with a statement of the judgment, was sufficient. 4thly. That the recital of the former record showed a conviction of the prisoner and T. P., whereas the record produced showed that the prisoner alone had been convicted and T. P. acquitted, and therefore there was a variance; the learned judge overruled this objection also, but entertaining some doubt upon the point, he reserved the case for the opinion of the judges, who held the conviction right. (gg)

(g) Reg v. Gerrish, 2 M. & Rob. 219; Mauld & Gurney, Bs.

(gg) Reg. v. Page, Hereford Spr. Ass. 1841. Coleridge, J., MSS. C. S. G., and Easter Term, 1841. The learned judge only reserved the last point, but he stated the others to the judges, that the prisoner might have the benefit of them, if he had been wrong in overruling them.

SECT. II.

Of Uttering, Tendering, &c., Foreign Counterfeit Coin.

THIS offence, particularly with respect to the gold coin called louis d'or, and silver dollars, is stated in the statute 37 Geo. 3, c 126, (h) to have greatly increased; and the third section of that statute makes the following provision against it: "That if any person or persons shall, from and after the passage of this act, utter, or tender in payment, or give in exchange, or pay or put off to any person or persons, any such false or counterfeit coin as aforesaid (namely, by the second section, coin not the proper coin of this realm, nor permitted to be current within the same) resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every person so offending shall suffer six months' imprisonment, and find sureties for his or her good behaviour for six months more, to be *computed from the end of the first six months; and if the same person shall afterwards be convicted a second time for the like offence of uttering or tendering in payment, or giving in exchange, or paying or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, such person shall, for such second offence, suffer two years' imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the first two years; and if the same person shall afterwards offend a third time, in uttering or tendering in payment, or giving in exchange, or paying, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, and shall be convicted of such third offence, he or she shall be adjudged to be guilty of felony without benefit of clergy."

37 G. 3. c. 126. Six months' imprisonment, and sureties for six months.

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For a second offence, two years' imprisonment, and sureties for two years.

For a third offence felony.

This clause is repealed by s. 1 of the 11 Geo. 4 and 1 Wm. 4, c. 66, as far as regards the capital punishment; and that section provides that "every person who shall, after the 21st day of July, 1830, be convicted of any such felony, or of aiding, abetting, counselling, or procuring the commission thereof, shall be liable at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years;" and by s. 25, every accessory after the fact to any felony punishable under this act, shall on conviction, be liable to be imprisoned for any term not exceeding two years." By s. 26, the court may "sentence the prisoner to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also direct that the offender shall be kept in solitary confinement for the whole, or any portion or portions of such imprisonment." By the 1 Vict. c. 90, s. 5, "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or more than three months in the space of one year."(i)

Transportation for life, &c.

(h) Repealed as far as relates to copper money, by the 2 W. 4, c. 34, s. 1.

(i) The Commissioners of Criminal Law and Mr. Lonsdale, p. 72, 3, treat these acts as regulating the punishment of offences within the 37 G. 3. c. 126, but *qu.* whether s. 1 of the 2 W. 4, c. 34, *ante*, p. 55, does not apply, by reason of the words, "such offence shall have been punishable with death by virtue of any of the said acts," one of which is the 37th Geo. 3, c. 126; C. S. G.

Evidence of former conviction by means of a certificate. A certificate of a former conviction is made sufficient evidence upon the trial of an offender for a further offence. Sec. 5 of 37 Geo. 3, c. 126, enacts, that if any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other (j) county, city, or place, the clerk of the assize, or clerk of the peace for the county, city, or place where such former conviction shall have been had, shall, at the request of the prosecutor, or any other on his majesty's behalf, certify the same by a transcript in few words, containing the effect and tenor of such convention; for which certificate two shillings and sixpence, and no more, shall be paid; and such certificate, being produced in court, shall be sufficient proof of such former conviction.

Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace, under the sixth section of the statute.

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*CHAPTER THE FIFTH.

OF BUYING, SELLING, RECEIVING, OR PAYING FOR COUNTERFEIT COIN AT A LOWER RATE THAN ITS DENOMINATION IMPORTS.

Buying or selling, &c. counterfeit gold or silver coin for lower value than its denomination. THE 2 Wm. 4, c. 34, s. 6, enacts, "That if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years." (a)

Buying and selling counterfeit copper for lower value than its denomination. By sec. 12. "If any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years." (a)

The money must be vendd at a lower value. The mere vending of the money was not considered to come within the 8 & 9 Wm. 3, c. 26, s. 6, unless it were done at a lower value than the coin imported; and it should be so stated in the indictment. (b)

Names of persons to whom coin is put off to be stated. If the names of the persons to whom the money was put off can be ascertained, they ought to be laid in the indictment; but if they cannot be ascertained, the same rule applies as in stealing the property of persons unknown. (c)

(j) If he be guilty again in the same county, &c., this section seems not to apply. C. S. G.

(a) See *ante*, p. 61, as to hard labour.

(b) 1 East, P. C. 4, s. 27, p. 180.

(c) 1 East, P. C. c. 4, s 27, p. 180.

The indictment must allege the precise sum of money for which the coin was agreed to be put off, and the proof must correspond with the indictment; for it is a contract, and must be proved as laid. Where, therefore, the indictment alleged that five counterfeit shillings were put off at two shillings, and it was proved that they were put off at half-a-crown; it was held that as this was a contract, it must be proved as laid, and an acquittal was directed. (d) But where an indictment alleged that the prisoner put off a counterfeit sovereign and three shillings for the sum of five shillings, and it was proved that the sovereign was sold at four shillings, and the three shillings at one shilling, and they were paid for with two good halfcrowns, it was held that this was sufficient, it was all one contract consisting of two items, and the whole of the bad money was put off at five shillings, and was paid for with two good halfcrowns. (e)

*CHAPTER THE SIXTH.

#87

OF SERVING, OR PROCURING OTHERS TO SERVE, FOREIGN STATES.

ENTERING into the service of any foreign state without the consent of the king, or contracting with it any other engagement which subjects the party to an influence or control inconsistent with the allegiance due to our own sovereign, is, at common law, a high misdemeanor, and punishable according. (f) Indeed it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the king. (g)

But with respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. The 3 Jac. 1, c. 4, s. 18, enacts, that "every subject of this realm that shall go or pass out of this realm to serve, any foreign prince, state, or potentate, or shall pass over the seas, and shall voluntarily serve any such foreign prince, state, or potentate, not having before his going taken the oath of obedience, (cc) shall be a felon." The nineteenth section of the statute enacts, that "if any gentleman or person of higher degree, or any person which hath borne, or shall bear any office, or place of captain, lieutenant, or any other place, charge, or office, in camp, army, or company of soldiers, or conductor of soldiers, shall after go or pass voluntarily out of this realm to serve any such foreign prince, state or potentate, or shall voluntarily serve any such prince, state, or potentate, before that he and they shall become bound by obligation, with two sureties, &c.," with a condition, to the effect that he will not be reconciled to the see of Rome, nor enter into any conspiracy against the king (as particularly set forth in the act) "he shall be a felon."

Upon the construction of this statute it has been considered, that if a party go out of the realm with intent to serve a foreign state, although

(d) *Rex v. Joyce*, Carr. Supp. 184, Thompson, C. B., and Heath, J.

(e) *Rex v. Hedges*, 3 C. & P. 410, Vaughan, B.

(f) 1 East, P. C. c. 2, s. 23, p. 84; 4 Bla. Com. 122.

(g) 1 Hawk. P. C. c. 22, s. 3; 4 Bla. Com. 121; 3 Inst. 144.

(cc) The oath is set forth in the act, but it has been since taken away by 1 W. & M. Sess. 1, c. 8, s. 2, and new oaths of allegiance and supremacy enjoined in its room.

* Eng. Com. Law Reps. xiv. 374.

there be no service in fact; or if a party do actually so serve, though he did not go over for that purpose, but upon some other occasion, it will be within the statute. *(d)*

Trial. The trial of an offence against this statute is to be where the offence is committed, which is at the place where the party passed out of the kingdom. *(e)*

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59 Geo. 3, c. 69. Any subjects of his majesty enlisting or engaging to enlist or serve in foreign service, or engaging to go into a foreign country with intent to enlist, &c., without license, &c.; and any person procuring or attempting to procure others to enlist, &c., shall be deemed guilty of a misdemeanor, and punishable by fine and imprisonment.

The statute 59 Geo. 3, c. 69, reciting that the enlistment or engagement of his majesty's subjects to serve in war in foreign service, *without his majesty's license; and the fitting out, and equipping, and arming of vessels by his majesty's subjects, without his majesty's license, for warlike operations in or against the dominions or territories of any foreign prince, state, &c., or against the ships, goods, or merchandise, of any foreign prince, state, &c., might be prejudicial to, and tend to endanger the peace and welfare of this kingdom, repeals the statutes, 9 Geo. 2, c. 30, and 29 Geo. 2, c. 17, and also the two Irish statutes, 11 Geo. 2, and 19 Geo. 2; and then enacts, that "if any natural born subject of his majesty, his heirs and successors, without the leave or license of his majesty, &c., for that purpose had and obtained under the sign manual of his majesty, his heirs or successors, or signified by order in council, or by proclamation of his majesty, his heirs or successors, shall take or accept, or shall agree to take or accept, any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed or shall serve in any warlike or military operation, in the service of, or for, or under, or in aid of, any foreign prince, state, potentate, colony, province, or part of any province, or people, or of any person or persons, exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people, either as an officer or soldier, or in any other military capacity; or if any natural born subject of his majesty shall, without such leave or license as aforesaid, accept, or agree to take or accept, any commission, warrant, or appointment, as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself to serve as a sailor or marine, or to be employed or engaged, or shall serve in and on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose, in the service of, or for, or under, or in aid of, any foreign power, prince, state, potentate, colony, province, or part of any province, or people, or of any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people; or if any natural born subject of his majesty shall, without such leave and license as aforesaid, engage, contract, or agree to, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent or in order to enlist, or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea, in the service of, or for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province, or people, or in the service of, or for, or under, or in aid of, any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people, either as an officer or a soldier, or in any

(d) 3 Inst. 80.; 1 East, P. C. c. 2, s. 23, p. 82.

(e) 3 Inst. 80; 3 Jac 1, c. 4, s. 36.

other military capacity, or as an officer or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money, or pay, or reward, shall have been, or shall be, in any or either of the cases aforesaid, actually paid to or received by him, or by any person to or for his use or benefit; or if any person whatever, within the United Kingdom of Great Britain and Ireland, or in any part of his majesty's dominions elsewhere, or any country, colony, settlement, *island, or place, belonging to or subject to his majesty, shall hire, retain, engage, or procure, or shall attempt to endeavour to hire, retain, engage, or procure, any person or persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, for, or under, or in aid of, any foreign prince, state, potentate, colony, province, or any part of any province, or people, or for, or under, or in aid of, any person or persons exercising, or assuming to exercise, any powers of government as aforesaid; or to go or to agree to go, or embark, from any part of his majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed, as aforesaid, whether any enlisting money, pay, or reward, shall have been, or shall be, actually given or received or not; in any or either of such cases, every person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the court before which such offender shall be convicted."(f)

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Sec. 7 enacts, that "if any person within any part of his majesty's dominions beyond the seas, shall, without the leave and license of his majesty for that purpose, first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt to endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province, or people, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province, or people, as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising, or assuming to exercise, the powers of government in any colony, or part of any province, or country, or against the inhabitants of any foreign colony, province, or part of any province, or country, with whom his majesty shall not then be at war: or shall, within the United Kingdom, or any of his majesty's dominions, or in any settlement, colony, territory, island, or place, belonging or subject to his majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid; every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted."(g)

Any person without license equipping, &c., or procuring to be equipped, &c., any vessel with intent that it shall be employed in the service of any foreign prince, &c., or to cruise &c., against any prince, &c., with whom his majesty shall not be at war, guilty of a misdemeanor.

(f) Sec. 3 contains a proviso, excepting persons from the operations of the act who shall have enlisted, &c., or procured others to enlist, &c., before the time therein specified.

(g) And the ship, with the tackle, &c., is to be forfeited, and may be seized by the officers of excise, &c., s. 7.

Any person without license increasing, or procuring to be increased, the warlike force of any ship, &c., in the service of any foreign prince, &c., guilty of a misdemeanor.

Sec. 8 enacts, "that if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of his majesty's dominions beyond the seas, without the leave and license of his majesty for that purpose, first had and obtained as aforesaid, *shall, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship, or vessel of war, or cruiser, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or any of his majesty's dominions, was a ship of war, cruiser, or armed vessel, in the service of any foreign prince, state, or potentate, or of any person or persons exercising, or assuming to exercise any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such prince, state, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any person or persons so exercising, or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon being convicted thereof, upon any information or indictment be punished by fine and imprisonment, or either of them, at the discretion of the court before which such offender shall be convicted."

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Apprehension of offenders.

Any justice of the peace residing at or near any port or place within the United Kingdom, where any offence made punishable by this act as a misdemeanor shall be committed, may issue his warrant for the apprehension of the offender, to bring him before the same or any other justice, who may commit unless bail is given. (*h*)

Any trial for offences committed within the United Kingdom.

It is further enacted, that all such offences as shall be committed within that part of the United Kingdom called England, shall be tried in the Court of King's Bench at Westminster, and the venue laid at Westminster, or at the assizes, or session of oyer and terminer and jail delivery, or at any quarter or general sessions of the peace for the county or place where the offence was committed; that when committed in Ireland they shall be prosecuted in the Court of King's Bench at Dublin, and the venue there laid, or at any assizes, &c., for the county or place where the offence was committed; and when committed in Scotland that they shall be prosecuted in the Court of Justiciary, or any other court competent to try criminal offences committed within the county, &c., within which the offence was committed. (*i*)

Apprehension and trial of offenders where the offences have been committed out of the United Kingdom.

The statute also provides for the apprehension of offenders, when the offence shall have been committed out of the United Kingdom, and for their trial in any superior court of his majesty's dominions competent to try, and having jurisdiction to try criminal offences, at the place where the offence shall have been committed. (*j*) And with respect to offences committed out of the United Kingdom, the ninth section enacts, that they may be prosecuted in the Court of King's Bench at Westminster, the venue being laid at Westminster, in the county of Middlesex. (*k*)

(*h*) Sect. 4.(*i*) Ibid.(*j*) Ibid.

(*k*) By s. 5, vessels with persons on board engaged in foreign service may be detained in any part of his majesty's dominions, information being laid upon oath. By s. 6, a penalty is imposed on masters of vessels, &c., knowingly taking on board persons enlisted contrary to the act. But by s. 12, the penalties of the act are not to extend to any person entering into the service of any prince, &c., in Asia, with leave from the Governor-General in council, &c., at Bengal.

The *Mutiny Act*, 3 Vict. c. 6, s. 25, enacts "that any person who *91
 *shall in any part of her majesty's dominions, directly or indirectly per- 3 Vict. c. 6,
 suade any soldier to desert, shall suffer such punishment by fine or im- s. 25. Per-
 prisonment, or both, as the court before which the conviction may take sons per-
 place shall adjudge; and every person who shall assist any deserter, suading
 knowing him to be such, in deserting or concealing himself, shall forfeit soldiers to
 for every such offence the sum of twenty pounds." desert, to
 be punish-
 ed by fine
 or impris-
 onment,
 or both.

It may be observed, though not strictly applicable to the subject of
 this chapter, that disobedience to the king's letter to a subject com- Disobedi-
 manding him to return from beyond the seas, or to the king's writ of ne ence to the
execat regno, commanding a subject to stay at home, is a high misprison king's com-
 and contempt.^(l) And it is also a high offence to refuse to assist the mands to
 king for the good of the public, either in councils, by advice, if called return, or
 upon, or in his wars, by personal service for the defence of the realm to stay at
 against a rebellion or invasion:^(m) under which class may be ranked home, or
 the neglecting to join the *posse comitatus*, or power of the county, being refuse to
 thereunto required by sheriff or justices, according to the statute 2 assist the
 king in
 council or
 war.
 Henry 5, c. 8, which is a duty incumbent upon all that are fifteen years
 of age, under the degree of nobility, and able to travel.⁽ⁿ⁾

*CHAPTER THE SEVENTH.

OF SEDUCING SOLDIERS AND SAILORS TO DESERT OR MUTINY.

In consequence of the attempts of evil disposed persons by the publi- 37 G. 3, c.
 cation of written or printed papers, and by malicious and advised speak- 70, seduc-
 ing, to seduce soldiers and sailors from their duty and allegiance to his ing soldiers
 majesty, the 37 Geo. 3, c. 70, was passed, enacting, "that any person or sailors,
 who shall maliciously and advisedly endeavour to seduce any person felony.
 or persons serving in his majesty's forces by sea or land, from his or their
 duty and allegiance to his majesty, or to incite or stir up any such per-
 son or persons to commit any act of mutiny, or to make or endeavour to
 make, any mutinous assembly, or to commit any traitorous or mutinous
 practice whatsoever, shall, on being legally convicted of such offence, be
 adjudged guilty of felony, and shall suffer death, as in cases of felony,
 without benefit of clergy."^(o) The third section of the act provides, that
 any person tried, acquitted, or convicted, of any offence against this act,
 shall not be liable to be prosecuted again for the same offence or fact,
 as high treason, or misprision of high treason; and that nothing in the
 act contained shall prevent the trial of any person who has not been
 tried for an offence against this act from being tried for the same as high Trial.
 treason, or misprision of high treason. And it is provided by the second
 section, that any offence against this act, whether committed on the
 high seas or in England, may be prosecuted and tried before any court
 of oyer and terminer, or gaol delivery, for any county in England, as if
 the said offence had been therein committed.

(l) 4 Bla. Com. 122. And if the subject neglects to return from beyond the seas, when
 commanded, his lands shall be seized till he does return. 1 Hawk. P. C. c. 22, s. 4.

(m) 1 Hawk. P. C. c. 22, s. 2.

(n) 4 Bla. Com. 122; Lamb. Eir. 315.

(o) The act contains no provision for the punishment of principals in the second degree
 and accessories: they are, therefore, punishable, the former in the same manner as prin-
 cipals in the first degree, the latter under the 7 & 8 G. 4, c. 28, s. 8 & 9, and 1 Vict. c. 90,
 s. 5, see note (t), ante, p. 65.

Puni-
ment,
transportation
for
life, &c.

The 1 Vict. c. 91, s. 1, after reciting this act, provides, "that if any person shall," after the 1st of October, 1837, "be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas, for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Offences
punishable
by im-
prisonment.

Sec. 2 enacts, "that in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

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It was decided that a sailor in a sick hospital, where he had been for thirty days, and who therefore was not entitled to pay, nor liable *for what he then did to answer before a court-martial, was nevertheless a person serving in his majesty's forces by sea within this statute, so as to make the seducing him an offence within its provisions.(p)

Indict-
ment.

An indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and it need not aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavoured to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment.(q)

The 37 Geo. 3, c. 70, was only temporary: but, after having been continued from time to time by different statutes, was made perpetual (together with an act upon the same subject, passed at the same time in the parliament of Ireland,) by the 57 Geo. 3, c. 7.

By the 1 Geo. 1, c. 47, persons persuading or procuring soldiers to desert are subject to a penalty, and under certain circumstances to imprisonment; and the Mutiny Act, 3 Vict. c. 6, s. 25, subjects persons so offending to punishment by fine or imprisonment, or both.(r)

1 Geo. 1, c.
47, persons
persuading
&c., sol-
diers to de-
sert, liable
to penalty
and im-
prison-
ment.

The 1 Geo. 1, c. 47, enacts, that if any person (other than enlisted soldiers, against whom it is stated sufficient remedy was already provided by law,) shall, in Great Britain, Ireland, Jersey, or Guernsey, persuade or procure any soldier to desert, he shall forfeit 40*l.*, to be recovered by any informer; and if he has not property to that amount, or from the heinous circumstances of the crime, it shall be thought proper, the court before whom he is convicted shall imprison him, not exceeding six months.(s)

Consequen-
ces of de-
sertion to
the party
deserting.

With respect to the consequences to the party deserting, it may be observed, that desertion in time of war was made a capital crime by 18 Hen. 6, c. 19, enforced by 2 & 3 Edw. 6, c. 2, s. 6, repealed as to the felony by 1 M. sess. 1, c. 1, revived by 4 & 5 Ph. and M., c. 3, s. 9, and extended to mariners and gunners by 5 Eliz. c. 5, s. 27. But these

(p) *Rex v. Tierney*, Mich. T. 1804, Russ. & Ry. 74.

(q) Fuller's case, 2 Leach, 790; 1 East, P. C. c. 2, s. 33, p. 92; 1 Bos. & Pul. 180.

(r) See the section, *ante*, p. 90, 91.

(s) The punishment of pillory was also added, but that is abolished by the 56 G. 3, c. 138, and the 7 W. 4, and 1 Vict. c. 23.

statutes are now fallen into disuse, as well on account of the manner of retaining soldiers therein referred to being no longer adapted, as because, since the annual acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained. (t) The mutiny Act, 3 Vict. c. 6, s. 1, reciting "that no man can be fore-judged of life or limb, or subjected *in time of peace* to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm; yet that nevertheless, it being requisite for retaining the forces in their duty that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or desert, be brought to more exemplary and speedy punishment than the usual form of the law will allow," enacts, that if any officer or soldier shall, during the continuance of the act, commit any of the offences therein enumerated, amongst which is *desertion*, the offender shall suffer death, or such other punishment as shall be awarded by court martial.

*CHAPTER THE EIGHTH.

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OF PIRACY.

IN treating shortly of this offence, we may consider, I. Of piracy at common law, and by statutes. II. Of the places in which the offence may be committed. III. Of the court by which it may be tried.

SECT. I.

Of Piracy at Common Law, and by Statutes.(A)

THE offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed

Piracy at
common
law.

(t) 1 East, P. C. c. 2, s. 344, p. 93.

(A) UNITED STATES.—By article 1st, section 8, of the Constitution of the United States, Congress have power "to define and punish piracies and felonies committed on the high seas," and offences against the law of nations.

"If any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; and if any captain or mariner of any other ship or vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars: or yield up such ship or vessel voluntarily to a pirate; or if any seamen shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust; or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and a felon; and being thereof convicted, shall suffer death. And the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." Ing. Digest, p. 155. See the "act for the punishment of certain crimes against the United States," sect. 8.

"If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under colour of any commission from any foreign prince or state, or on pretence of any authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon and robber; and on being thereof convicted, shall suffer death." Ibid. sect. 9.

"Every person who shall, either upon the land or the seas, knowingly and willingly aid,

upon land, would have amounted to felony there. (a) But it is no felony at common law, and it was only punishable by the civil law before the

(a) 1 Hawk. P. C. c. 37, s. 4; 4 Bla. Com. 72; 2 East, P. C. c. 17, s. 3, p. 796.

and assist, procure, command, counsel or advise, any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons, shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be accessory to such piracies before the fact; and every such person being thereof convicted shall suffer death." Ibid. and section 10, of the last mentioned act.

"After any murder, felony, robbery, or any other piracy whatsoever, as aforesaid, is or shall be committed by any pirate or robber, every person, who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall on the land, or at sea, receive, entertain, or conceal, any such pirate or robber, or receive, or take into his custody, any ship, vessel, goods or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged to be accessory to such piracy or robbery after the fact. And on conviction thereof shall be imprisoned, not exceeding three years, and fined not exceeding five hundred dollars." Ibid. p. 156, and sect. 11, of the last mentioned act.

"If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavor to corrupt any commander, master, officer, or mariner, to yield up, or run away with any ship or vessel, or with any goods, wares, or merchandise; or to turn pirate, or go over to, or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly, and with a design to trade with or supply, or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or vessel, or endeavor to make a revolt in such ship, such person or persons so offending, and being thereof convicted, shall be imprisoned, not exceeding three years, and fined not exceeding one thousand dollars." Ibid. See also 2 Story, 1738, for certain temporary provisions by "an act to protect the commerce of the United States, and punish the crime of piracy." (See 11 Wheat. 39.)

A robbery committed on the high seas, is piracy under the act of 1790, c. 36, s. 8, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, and the courts of the United States have jurisdiction of such robbery and piracy. *The United States v. Palmer*, 3 Wheat. 310, 326.

The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board a vessel belonging exclusively to foreigners, is not piracy under the act of 1790, c. 36; and is not punishable under that act in the courts of the United States. Ibid.

The act of 1790, c. 36, s. 8, extends to all persons on board all vessels, who throw off their allegiance by cruising piratically, and committing piracy on other vessels. *The United States v. Klintock*, 5 Wheat. 144, 149; *United States v. Furlong*, Ib., 52, 184, 192; *The United States v. Holmes*, Ib. 412, 416.

In such case, where by the evidence found on board, the vessel does not appear to be sailing under the authority of any particular nation, the burden of proof of the national character of the vessel is thrown on the prisoner. Ibid.

Under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board a piratical vessel, the offence is equally cognizable by the courts of the United States; and it makes no difference whether the offence was committed on board of a vessel, or in the sea; as by throwing the deceased overboard and drowning him; or by shooting him when in the sea, though he was not thrown overboard. *The United States v. Holmes*, 5 Wheat. 412, 416.

A vessel lying in the open roadstead of a foreign country, is upon "the high seas" within the act of 1790, c. 36, s. 8. *The United States v. Furlong*, 5 Wheat. 200.

The act of the 3d of March, 1819, c. 76, s. 35, which provides, "that if any person or persons whatsoever, shall upon the high seas, commit the crime of piracy, as defined by the law of nations, &c., every such offender or offenders, shall, upon conviction thereof, &c., be punished with death," is a constitutional definition of the crime of piracy; that crime being defined by the writers on the law of nations with reasonable certainty. *The United States v. Smith*, 5 Wheat. 153, 160.

[Under the act of Congress of March 3, 1819, to protect the commerce of the United States, and to punish piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical

statute 28 Hen. 8, c. 15; and this statute, though it makes the offence capital, and provides for the trial of it according to the course of the common law, by the king's special commission, does not make it a

aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court. *United States v. Brig Mulek Adel*, 2 How. C. C. 210.

It is no matter whether the vessel be armed for offence or defence, provided she commits the unlawful acts specified.

To bring a vessel within the act it is not necessary that there should be either actual plunder or an intent to plunder; if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.

The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing.

A piratical aggression, search, restraint, or seizure, is as much within the act as a piratical depredation.

The innocence or ignorance on the part of the owner of these prohibited acts will not exempt the vessel from condemnation.

The condemnation of the cargo is not authorized by the act of 1819.

Neither does the law of nations require the condemnation of the cargo for petty offences, unless the owner thereof co-operates in, and authorizes the unlawful act. *Ibid.*]

Robbery or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations, and by the act of Congress. *The United States v. Furlong and al.*, 5 Wheat. 164, 184.

The 8th section of the act of 1790, c. 36, is not repealed by the act of the 3d of March, 1819, c. 76, to protect the commerce of the United States, and punish the crime of piracy. *The United States v. Furlong and al.*, 5 Wheat. 184, 192.

In an indictment for a piratical murder (under the act of 1790, c. 36,) it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to a citizen of the United States, but it is sufficient to charge it, as committed on board such a vessel, by a mariner sailing on board such a vessel. *Ib.* 194.

The words "out of the jurisdiction of any particular state," in the act of 1790, c. 36, s. 8, are construed to mean out of any particular state of this Union. *Ib.* 200.

A commission issued by a person claiming to be the officer of a republic, whose existence *de facto* or *de jure*, is unacknowledged by the United States, will not authorize captures at sea. *Quere.* Whether a person acting with good faith under such a commission is guilty of piracy. *The United States v. Klintock*, 5 Wheat. 144, 149. But however this may be, in general, under the peculiar circumstances of the case, showing that the seizure was made, not *jure belli* but *animo furandi*, the commission will not exempt the offender from the charge of piracy. *Ibid.*

Each count in an indictment for piracy, is a distinct substantive charge; and if the indictment conform to any one of the counts, which in itself will support the verdict, it is sufficient.

Thus, where in an indictment for piracy there were two counts, the one charging the offence as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty may be sustained. *The United States v. Furlong et al.*, 5 Wheat. 184, 201.

The clause of the act of Congress of April 30, 1790, c. 36, s. 8, which provides that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or in which he may be first brought," applies only to offences committed on the high seas, or in some river, haven, basin or bay, not within the jurisdiction of any particular state; and does not apply to the territories of the United States, where regular courts for the trial of offences are provided by Congress. *Ex parte Bollman and Swartwout*, 4 Cranch, 75, 135

The courts of the United States have no jurisdiction under the act of April 30, 1790, c. 36, of the crime of manslaughter committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the river Tigris in the empire of China, thirty-five miles above its mouth, and a hundred miles from the shore, and below low water mark. *The United States v. Wittberger*, 5 Wheat. 76, 93.

To constitute the offence of piracy within the act of 1790, by piratically and feloniously running away with a vessel, personal force and violence is not necessary. *The United States v. Tully and al.*, 1 Gallison's Reports, 247, Mass. District.

The "piratically and feloniously running away with a vessel," within the act, is the running away with a vessel with the intent of converting the same to the taker's own use, against the will of the owner. The intent must be *animo furandi*. *Ibid.*

The Circuit Court of the United States has cognizance, under the act of 1790, s. 8, of piracy on board of an American ship, although committed in an open roadstead, adjacent to

felony; therefore a pardon of all felonies generally does not extend to it. (a)

Piracy by statute 11 & 12 Wm. 3, c. 7, s. 8, as to acts done under the commission of a foreign state. And 18 Geo. 2, c. 30, as to piracy committed

The offence of piracy is also provided against by the enactments of several statutes. The 11 & 12 Wm. 3, c. 7, s. 8, enacts, "that if any of his majesty's natural born subjects, or denizens of this kingdom, shall commit any piracy or robbery, or any act of hostility against others his majesty's subjects, upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders shall be deemed, adjudged, and taken to be pirates, felons and robbers;" and being duly convicted thereof, according to that act, or the statute 28 Hen. 8, c. 15, shall suffer such pains of death, (b) and loss of lands, goods and chattels, as pirates,

(a) 1 Hawk P. C. c. 37, s. 13; 3 Inst. 112; Co. Litt. 391; Moorl 746; 2 East, P. C. c. 17, s. 3, p. 796, where it is said that the offence does not extend to corruption of blood, at least where the conviction is before the admiralty jurisdiction; though the contrary is holden by considerable authority upon attainder before commissioners, under the statute of Hen. 8.

(b) Repealed by 1 Vict. c. 88, s. 1. See s. 2, &c., *post*, p. 96.

a foreign territory, and within half a mile of the shore. *The United States v. Ross*, 1 Gallison's Reports, 524.

PENNSYLVANIA DISTRICT — [The 8th and 9th articles of the rules for the government of the navy, adopted by the act of April 23, 1800. (Ing. Dig. 623,) relate to spoiliations from prizes, not acts of piracy. *U. States v. Jones*, 3 Wash. C. C. Rep. 209.

Robbery committed on the high seas is an offence punishable as piracy by the 8th section of the act of Congress of 30th April, 1790. *Ibid*.

Robbery on the high seas by a *commissioned privateer*, is piracy under the act of 1790, and the law of nations. *Ibid*.

A subordinate officer or private, committing piracy, cannot plead the orders of his superior officer as an excuse or justification. *Ibid*.

A confederacy by American citizens on land, or on board of an American vessel, with sea-robbers or pirates by the laws of nations, or the yielding up of a vessel by a citizen to such pirates, is an offence within the meaning of the 8th section of the act of 1790. *The United States v. Howard*, 3 Wash. C. C. Rep. 340.

Any intercourse with pirates, however inefficient or remote, which had a reference to the offence, or which had a tendency, or was intended in any manner to promote their views, is an offence within the 12th section of the act of 1700. *Ibid*.

American seamen put on board a vessel of the United States at a foreign port by an American consul, are within the meaning of the act of April 30, 1790, (1 Story, 84,) which declares it to be piracy to make a revolt, and a misdemeanor to confine the master, &c. They are bound to all the obligations and duties which exist in the case of article seamen. *The United States v. Sharp and al.*, 1 Peters' C. C. Rep. 118, 121.

To convict of this offence, it is not necessary that the defendants should be proved individually to have used any force or threats to compel the captain to confine himself to his cabin, or to resign his command. It is sufficient, if they joined in the general confederacy, and by their presence countenanced the act. *Ibid*. 118, 126.

It seems that to make a revolt under the act, is to throw off all obedience to the master; to take possession of the vessel by the crew; to navigate her themselves, or to transfer the command to some other person on board; and such offence may be committed on board merchant vessels as well in time of peace as in time of war. *Ibid*. 121, 122.

It seems that to bring a case of revolt within the act of Congress, an attack upon the master should be accompanied by some evidence indicating on the part of the assailants, an intention to take possession of the vessel. *The United States v. Smith and al.*, 3 Wash. C. C. Rep. 78.

Confining the captain while the vessel is in a bay or river of a foreign country, is an offence within the 12th section of this act; and an indictment charging the offence to have been committed on the high seas is good. *Ibid*.

Any confinement of the master of a vessel, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or by intimidation preventing him from the free use of every part of the vessel, amounts to a confinement within the 12th section of this act. *Ibid*. *The United States v. Sharp and al.*, 1 Peters' C. C. Rep. 122.

If the captain was restrained from performing his duties by such mutinous conduct of the crew, as might easily intimidate a firm man, this will amount to a constructive confinement within the meaning of the act; and it makes no difference in this respect, that the master did in fact go unmolesed to every part of his vessel, whenever he pleased, if he was compelled by a regard to his own safety to go armed, and if, from all the circumstances of the case, it was necessary or prudent for him to do so. *United States v. Bladen*, 1 Peters' C. C. Rep. 213, 214.

&c., upon the seas ought to suffer. And the 18 Geo. 2, c. 30, enacts, under an enemy's commission, "that all persons being natural born subjects or denizens of his majesty, who during any war shall commit any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against his majesty's subjects, by virtue or under colour of any commission from any of his majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his majesty's enemies upon the sea, or in any haven, river, creek, or place, where *the admiral or admirals have power, authority, or jurisdiction, may be tried as pirates, felons and robbers in the said court of admiralty, on ship-board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery, are by the said act(c) directed to be tried, and such persons being upon such trial convicted thereof, shall suffer pains of death,(d) loss of lands, &c., as any other pirates, felons and robbers ought, by virtue of the statute 11 & 12 Wm. 3, c. 7, or any other act, to suffer."(e)

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(c) 11 & 12 W. 3 c. 7.

(d) Repealed by 1 Vict. c. 88, s. 1; see s. 2, &c., *post*, 96.

(e) Sec. 2 contains a proviso that any person tried and acquitted, or convicted according to the act, shall not be liable to be indicted, &c., again in Great Britain or elsewhere, for the same crime or fact as high treason. But by s. 3, the act is not to prevent any offender, who shall not be tried according thereto, from being tried for high treason within this realm, according to the stat. 8 c. 15.

Seizing the person of the master, although the restraint continue but a minute or two, amounts to an actual confinement within the law. *Ibid.*—*United States v. Smith*, 3 Wash. C. C. Rep. 525.

A master of a vessel may so conduct himself as to justify his officers and men placing a restraint upon him, to prevent his committing acts which may endanger their lives; but an excuse of this kind must be listened to with great caution, and such measures should not be continued beyond the existence of the danger which occasioned it. *United States v. Sharp, and al.*, 1 Peter's C. C. Rep. 127.

A battery by the master in pushing defendant from him with a chair, did not justify a confinement. *United States v. Bladen*, 1 Peter's C. C. Rep. 213, 214.

An indictment under this act, which charged, in the same count, the offence of making a revolt and confining the captain was quashed. *Ibid.* 131.

{See 12 Wheat. 1, the Palmyra.}

[If the crew combine together to refuse to do duty, and actually refuse until the master complies with some improper request on their part, it is an endeavor to make a revolt within the crimes' act of 1790, ch. 36, s. 12. *United States v. Gardiner*, 5 Mason, 402.

To constitute the offence, it is necessary that there should be some effort or act to stir up others of the crew to disobedience to the master. *Ibid.*

Mere insolent conduct, disobedience of orders, or even violence committed on the person of the master, unattended by other circumstances, will not amount to an endeavor to revolt. Those acts must be coupled with an intent to subvert the authority of the master and to displace him from his command. A mere conspiracy of the crew to make a revolt will not amount to an endeavor to make it, unless it be followed up by some overt act tending to that end; nor is concert an essential ingredient in constituting the offence. *United States v. Kelly and al.*, 4 Wash. C. C. Rep. 528.

Judge Washington has declined giving judicially a definition of a revolt. *United States v. Haskell and al.*, 4 Wash. C. C. Rep. 402; *United States v. Kelly*, *Ibid.* 529.

It seems the making a revolt under the act is where the crew throws off all obedience to the commander, and forcibly take possession of the vessel by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command. *United States v. Haskell et supra*. See *United States v. Haines*, 5 Mason, 272; *United States v. Gardiner*, *Ibid.* 402; *United States v. Savage*, *Ibid.* 469. The offence may be committed in any kind of a vessel. *United States v. Kelly, supra*.

See *United States v. Peterson*, 1 Woodbury and Minot, 305; *United States v. Staley*, *Ibid.* 338.

As to what will constitute a confinement of the master within the purview of the act. See *United States v. Stevens*, 4 Wash. C. C. Rep. 547; *United States v. Savage*, 5 Mason, 460.

Seemle, that the mate is a seaman within the crimes' act of 1790, ch. 36, s. 12; *United States v. Savage*, Mason, 460; but see *Ely v. Peck*, 7 Conn. Rep. 239.

As to the offence of running away with a vessel. See *United States v. Haskell*, 4 Wash. C. C. Rep. 402.]

Commanders, seamen &c., running away with ship or cargo, &c., or yielding voluntarily to pirates, or confederating with them; attempting to corrupt the crew, &c., and persons putting force upon the commander.

The 11 & 12 Wm. 3, c. 8, s. 9, enacts, "that if any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust and turn pirate, enemy or rebel; and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods or merchandise; or yield them up voluntarily to any pirate; or shall bring any seducing message from any pirate, enemy or rebel; or consult, combine, or confederate with, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or run away with any ship, goods or merchandise, or turn pirates, or go over to pirates; or if any person shall lay violent hands upon his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust,(f) or shall confine his master, or make or endeavor to make a revolt in the ship, he shall be adjudged, deemed and taken to be a pirate, felon and robber, and being convicted thereof according to the direction of this act, shall suffer death(g) and loss of lands, goods and chattels, as pirates, felons, and robbers upon the seas, ought to suffer."

Forcibly entering merchant ships and destroying goods, 8 G. 1, c. 24, s. 1, made perpetual by 2 G. 2, c. 28, s. 7.

By the 8 Geo. 1, c. 24, s. 1, "in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven or creek whatsoever, shall forcibly board or enter into such ships or vessel; and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandise belonging to such ship or vessel; the person or persons guilty thereof shall in all respects be deemed and punished as pirates as aforesaid."

Trading with pirates, furnishing them with ammunition, &c., combining or corresponding with them, &c., 8 G. 1, c. 24, s. 1.

The 8 Geo. 1, c. 24, s. 1, enacts also, "that if any commander or master of any ship or vessel, or any other person or persons, shall any wise trade with any pirate by truck, barter, exchange, or in any other manner or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any way consult, combine, confederate or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of any such piracy, felony, or robbery, every such offender and offenders shall be deemed and *adjudged guilty of piracy, felony, and robbery." The act further provides, that every offender convicted of any piracy, felony or robbery, by virtue of the act, shall not be admitted to have the benefit of clergy.(g)

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Dealing in slaves on

By a late statute 5 Geo. 4, c. 113, *dealing in slaves* upon the high seas, or in any haven, &c., where the admiral has jurisdiction, except as

(f) This last provision is similar to one in the 22 & 23 Car. 2, c. 11, s. 9, which is repealed by 9 G. 4, c. 31, s. 1, as relates to any mariner laying violent hands on his commander. This statute of Car. 2, contains also some provisions as to yielding without fighting, and as to mariners declining or refusing to fight and defend the ship when commanded by the master. (g) Repealed by 1 Vict. c. 88, s. 1. See s. 2, &c., *post*, 96.

(g) Sec. 4, (but see now 1 Vict. c. 88, *post*, as to the punishment,) and by sec. 2, every vessel fitted out to trade, &c., with pirates, and also the goods, shall be forfeited, half to the crown and half to the informer. Offenders against this act are to be tried according to the 28 Hen. 8, c. 15, and 11 & 12 W. 3, c. 7. In the last edition, the 32 G. 3, c. 25, s. 12, was here inserted, but as that act was only to continue in force during the then war with France, it seems to have expired. See 2 East, P. C. c. 17, s. 7, p. 801, n. (a), and Crabb's Index to the statutes. C. S. G. The 22 Geo. 3, c. 25, prohibits ransoming any ship belonging to any subject of his majesty, or goods on board the same, which shall be captured by the subjects of any state at war with his majesty, or by any persons committing hostilities against his majesty's subjects.

by that act is permitted, is made piracy, felony and robbery, and the offenders made punishable as pirates, felons and robbers upon the seas (h) the high seas, 5 G. 4, c. 113.

By the 1 Vict. c. 88, (which came into operation on the 1st October, 1837,) (i) so much of the 28 H. 8 c. 15, 11 & 12 Wm. 3, c. 7, 4 Geo. 1, c. 11, s. 7, 8 Geo. 1, c. 24, and 18 Geo. 2, c. 30, "as relates to the punishment of the crime of piracy, or of any offence by any of the said acts declared to be piracy, or of accessories thereto respectfully," is repealed.

Sect. 2 enacts, "That from and after the commencement of this act, whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." Punishment of piracy when murder is attempted.

Sect. 3. "That from and after the commencement of this act, whosoever shall be convicted of any offence which by any of the acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." Persons guilty of piracy to be transported.

Sect. 4. "That in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years." (j) Punishment of accessories.

Sect. 5. "That where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall *be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet." (k) Offences punishable by imprisonment. *97

(h) See *post*, Chap. xviii. *Of dealing in slaves.*

(i) By sec. 7.

(j) Sec. 6, provides that this act shall not alter the provisions of the 5 & 6 W. 4, c. 98, and 4 G. 4, c. 64.

(k) This statute having repealed the punishment of piracy at common law, which was before punished by the 23 Hen. 8, c. 15, s. 3, with death without benefit of clergy, a difficulty arises as to what is now the punishment for that offence. The 39 G. 3, c. 37, s. 1, provides, "That all and every offence and offences, which, after the passing of this act, shall be committed upon the high seas out of the body of any county of this realm, shall be, and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treason, murders, and conspiracies are directed to be by the same act." (28 Hen. 8, c. 15. *post*, p. 100.) It should seem, therefore, that this act, by making all offences committed on sea of the same nature as if they had been committed on shore, has made piracy at common law a felony, which it is not at common law, or by the 28 Hen. 8, c. 15, (see *ante*, p. 94.) By the 1 G. 4, c. 90, any person found guilty of any capital crime or offence committed upon the sea, which if committed upon the land would be clergyable, is entitled to the benefit of clergy, in like manner as if he had committed such offence upon land. By the 7 & 8 Geo.

Cases of piracy.

Prior to these statutes (except the statute of Hen. 8,) several mariners on board a ship lying near the Groyne seized the captain, he not agreeing with them; and, having put him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy; and they were executed.^(l) But in a subsequent case where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England, the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the judges of the common law, who assisted the judges of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because, being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined.^(m)

Case upon 11 & 12 Wm. 3, c. 7, s. 9. Making a revolt in a ship.

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It has been decided to be an offence within the 11 & 12 Wm. 3, c. 7, s. 9, to make a revolt in a ship, or to endeavor to make one, though the object was not to run away with the ship, or to commit any act of piracy, but to force the captain to redress supposed grievances. The prisoners were charged by the first count of the *indictment with betraying their trust and turning pirates, and with confederating piratically and feloniously to steal and run away with the ship; by the second, with piratically and feloniously attempting to corrupt other persons of the crew so to steal and run away with the ship; by the third, with piratically and feloniously inciting a revolt in the ship, the master being on board; and, by the fourth, with endeavoring to make such revolt. It appeared clearly that there was a revolt in the ship, and that the prisoners participated, refusing to obey orders, and being guilty of many acts of insubordination and violence. The counsel for the prisoners endeavored to show, that the prisoners and their adherents had in view a redress of supposed grievances, and not the intention of assuming the command for the purpose of carrying off the ship: and though there was some evidence that the prisoners had an ulterior object than that of redressing ill usage, of which it appeared they had complained, yet their acquittal upon the two first counts led to the conclusion that the jury did not impute to them any other real intention than that of redressing their supposed grievances. The point submitted to the judges was, that in

4 c. 28, s. 6, clergy was abolished; and by sec. 7, no person convicted of *felony* was to suffer death unless for some felony excluded from clergy, on or before the first day of that session of Parliament; and by sec. 12, "all offences prosecuted in the High Court of Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed on land." See also the 9 Geo. 4, c. 31, s. 32, *post*, p. 104. By the 4 & 5 W. 4, c. 46, (*post*, p. 104,) piracy *may* now be tried at the Central Criminal Court. By some writers, piracy at common law is defined to be the committing those acts of robbery and depredation on sea, which, if committed on land, would have amounted to felony, 1 Hawk. c. 37, s. 4; 4 Bla. Com. 72; 2 East, P. C. c. 15, s. 3, p. 796; Mason's case, *post*, note (*m*). By others it seems to be considered the same offence as *robbery* on land, Archb. Vict. Acts, 72; 2 Hale, 359; 1 Hale, 354; 3 Inst. 113, where Lord Coke calls a pirate "a robber upon the sea." On the whole it seems that each act of piracy at common law is now a felony of the same kind, and liable to the same punishment, as if the same act had been done upon land, and the offender is triable either under a commission founded on the 28 Hen. 8, c. 15, or the Central Criminal Court. C. S. G.

(l) *Rex v. May, Bishop, and others*, Nov. 1696, MS. Tracy, 77; 2 East, P. C. c. 17, s. 3, p. 796.

(m) Mason's case, Old Bailey, 9 Geo. 1, on a special commission, 8 Mod. 74; 2 East, P. C. c. 17, s. 3, p. 796, S. C.

order to satisfy the intent of the statute, and the words of the indictment, "piratically and feloniously revolted," the object of the revolt must have been to take possession of or to run away with the ship, or to enable the prisoners to commit some act of piracy, and not merely to resist the captain's authority in order to force him to redress alleged grievances. But the judges present were unanimously of opinion, that making or endeavoring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without and intent to run away with the ship, or to commit any act of piracy, was an offence within 11 & 12 Wm. 3, c. 7, s. 9, and that the conviction was therefore right.(n)

Upon an indictment on the 18 Geo. 2, c. 30, a question was made whether *adhering to the king's enemies* in hostilely cruising in their ships could be tried *as piracy* under the usual commission granted by virtue of the 28 Hen. 8, c. 15. The 18 Geo. 2, recites that doubts had arisen whether subjects entering into the service of the king's enemies, on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the 11 & 12 Wm. 3, c. 7, and be triable by the Court of Admiralty appointed by virtue of the said act; and then enacts that persons who shall commit hostilities upon the sea, &c., against his majesty's subject, by virtue or under colour of any commission from any of his majesty's enemies, or shall be *any otherwise adherent* to his majesty's enemies upon the sea, &c., may be tried *as pirates*, felons, or robbers, in the said Court of Admiralty in the same manner as persons guilty of piracy, felony, and robbery, are by the said act directed to be tried; but it does not say that they shall be deemed *pirates*, &c., as in the 11 & 12 Wm. 3, c. 7. The prisoner having been convicted, the question was reserved for consideration of the judges; and it was agreed by eight who were present,(o) that the *prisoner had been well tried under the commission. For taking the 11 & 12 Wm. and 18 Geo. 2 together, and the doubt raised in the latter, and also its enactment that in the instances therein mentioned, and also in case of any other adhering to the king's enemies, the parties might be tried as pirates by the Court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates*; and that it was a just construction in their favor to allow them to be tried *as such* by a jury.(p)

Under the 18 Geo. 2, c. 30, adhering to the king's enemies was triable as piracy.

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The 48 Geo. 3, c. 130, s. 7, 10; 49 Geo. 3, c. 122, s. 1, and s. 13, 16, and 1 & 2 Geo. 4, c. 75,(q) relate to the unlawfully keeping possession of anchors and other materials belonging to ships, and the receiving of such stolen articles, &c.

Receiving, &c., stolen anchors, &c.

Accessories to piracy were triable only by the civil law if their offence was committed on the sea, and were not triable at all if their offence was committed on land, until the statute 11 & 12 Wm. 3, c. 7, s. 10, which enacts "that every person and persons whatsoever, who shall either on the land, or upon the seas, knowingly or wittingly set forth

Of accessories 11 & 12 Wm. 3, c. 7.

(n) *Rex. v Hastings and Meharg*, East. T. 1825. Ry. & Mood. 82.

(o) Lord Loughborough, Lord C. B. Skynner, Gould, J., Willes, J., Ashurst, J., Eyre, B., Peryn, B., and Heath, J., who met Nov. 11, 1782.

(p) *Evan's case*, MS. Gould, J., 1 East, P. C. c. 17, s. 5, p. 798, 799. The third section of 18 Geo. 2, c. 30, provides that the act shall not prevent any offender who shall not be tried according thereto from being tried for high treason within this realm according to the stat. 28 Hen. 8, c. 15.

(q) *Post*, Book IV., Chap. xxiii.

any pirate; or aid and assist, or maintain, procure, command, counsel, or advise, any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person and persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever, so as aforesaid setting forth any pirate, or aiding, assisting, maintaining, procuring, commanding, counselling, or advising, the same either on the land or upon the sea, shall be and are hereby declared, and shall be deemed and adjudged, to be *accessory* to such piracy and robbery, done and committed; and further, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person and persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall on the land or upon the sea, receive, entertain, or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby likewise declared, deemed, and adjudged to be accessory to such piracy and robbery." And then the statute directs, "that all such accessories to such piracies and robberies shall be inquired of, tried, heard, determined, and adjudged, after the common course of the laws of this land, according to the statute 28 Hen. 8, as the principals of such piracies and robberies may and ought to be, and no otherwise: and being thereupon attainted, shall suffer such pains of death^(r) losses of lands, goods, and chattels, and in like manner, as such principals ought to suffer, according to the statute 28 Hen. 8, which is thereby declared to continue in full force."

But accessories are declared to be principals, and are to be tried accordingly by 8 Geo. 1, c. 24.

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The 8 Geo. 1, c. 24, however, makes an alteration with respect to the accessories described in 11 & 12 Wm. 3, and declares them to be principals, and that they shall be tried accordingly. The third section, reciting that "whereas there are some defects in the laws for *bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy or robbery is not or cannot be apprehended and brought to justice," enacts, "that all persons whatsoever, who by the stat. 11 & 12 Wm. 3, are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may, according to that statute; and being thereupon attainted and convicted, shall suffer death^(x) and loss of lands, &c., in like manner as pirates and robbers ought by the said act to suffer."

It has been fully settled that one who knowingly receives and abets a pirate within the body of a county is not triable by the common law, the original offence being cognizable alone by another jurisdiction."^(s)

^(r) See 1 Vict. c. 88, s. 4, as to the punishment of accessories, *ante*, p. 96.

^(x) See note ^(r), p. 99.

^(s) Admiralty case, 13 Co. 53. And a little before this^a case the law appears to have been so considered in the case of one Scadding, who was committed by the Court of Admiralty for aiding a pirate to escape out of prison; and, on a return to a *habeas corpus*, the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The Court of King's Bench holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognizance, and was, as it were, an accessorial offence to the first piracy which was determinable by the admiral, it was sufficient ground for remanding him. *Yelv.* 134. 2 East, P. C. c. 17, s. 14, p. 810.

SECT. II.

Of the place in which the Offence may be committed.

THE statute 28 Hen. 8, c. 15, s. 1, enacts, that all treasons, felonies, 23 II. 8, c. 15. Offences to be tried in the places limited by commission. robberies, murders, and confederacies, committed in or upon the sea, or in any haven, river, creek or place, where the admiral has, or pretends to have, power, authority, or jurisdiction, shall be inquired, tried, &c. in such shires and places as shall be limited by the king's commission, as if any such offences has been committed upon the land.

In a case at the Admiralty session, of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commission granted under this statute 28 Hen. 8, c. 15, do by law extend. Upon reference to the judges, they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point, the construction of this statute by Lord Hale^(t) was much preferred to the doctrine of Lord Coke;^(u) and that most, if not all of the judges, seemed to think that the common law has a concurrent jurisdiction with the Admiralty in this haven, and in all other havens, creeks, and rivers, in this realm.^(v) It appeared to them that the 28 Hen. 8, *applied to all great waters frequented by ships; that in such waters the admiral, in the time of Hen. 8, pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships.^(w)

If a robbery, be committed in creeks, harbours, ports, &c. in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is, consequently, piracy.^(x)

It is clear that upon the open sea shore the common law and the Admiralty have alternate jurisdiction between high and low water-mark:^(y) but it is sometimes a matter of difficulty to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence: but some general rules upon the point are collected by Mr. East. He says, that "in general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale, in his treatise *De jure maris*, says, that the arm or

(t) 2 Hale, 16, 17.

(u) 3 Inst. 111. 4 Inst. 134.

(v) Bruce's case, 2 Leach, 1093. Russ. & Ry. 243. This was a case of *murder*. The st. 15 Rich. 2, c. 3, gives the admiral jurisdiction to inquire of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, beneath the bridges of the same rivers nigh to the sea, and none other places of the same rivers; which jurisdiction is only concurrent with, and not in exclusion of, the common law. 1 East, P. C. 368.

(w) MS. Bayley, J.

(x) Rex v. Jemot, Old Bailey, 28th Feb. 1812. MS. Jerv. Arch, 263. Ed. 8.

(y) 3 Inst. 113. 2 Hale, 17; and see 2 Hawk. c. 9, s. 14, as to the jurisdiction of the coroner in offences on the sea shore. Anonymous, 1 Lewin, 242.

branch of the sea which lies within the *facuces terræ*, where a man may *reasonably discern* between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man, standing on one side of the land, *may see what is done on the other*; and the reason assigned by Lord Coke in the Admiralty case^(z) in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred."^(a)

The question, whether the fact were committed on the sea or within the body of a county, is of main importance. For if it turn out that the goods were taken anywhere within the body of the county, the commissioners under the statute of Henry 8, can have no jurisdiction to inquire of it; and if it should appear that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried, because the original felony was not a taking of which the common law takes cognizance.^(b) And the statute 39 Geo, 3, c. 37,^(c) relates only to offences committed on the high seas, and out of the body of any county.

Where a man was indicted for stealing three chests of tea out of the Aurora, of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing, or otherwise, at the place where the vessel lay, it was held, from the circumstance, that the tea was stolen on *board the vessel, which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas.^(d)

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Shooting from the land and killing on the sea.

It was decided that where A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter, which had struck upon a sandbank in the sea, about one hundred yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy; for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded.^(e) And if a man be struck upon the high sea, and die upon the shore after the reflux of the water, the admiral, by virtue of his commission, has no cognizance of the offence.^(f) And as it was doubtful whether it could be tried at common law, it was provided by statute that the offender may be tried in the county where the death stroke, poisoning, or hurt happened.^(g)

Wound on the sea, death on the shore.

The second section of the 28 Hen. 8, c. 15, introduces "manslaughters;" and uses the words "havens, &c." without the qualification in the first section, where the admiral has a jurisdiction. One of the mischiefs recited in the first section is, that the witnesses being commonly mariners

(z) 13 Co. 52.

(a) 2 East, P. C. c. 17, s. 10, p. 803, 804.

(b) 2 East, P. C. c. 17, s. 12, p. 705. 3 Inst. 113. Rex v. Prowes, 1 M. C. C. R. 349. Reg. v. Madge, 9 C. & P. 29.

(c) Ante, p. 97, note (k).

(d) Rex v. Allen, R. & M., C. C. R. 494. S. C. 7 C. & P. 664.

(e) 1 Hawk. P. C. c. 37, s. 17. Coombes's case, 1 Leach, 388. 1 East, P. C. c. 5, s. 131, p. 367.

(f) 2 Hale, 17, 20. 1 East, P. C. c. 5, s. 131, p. 365, 366.

(g) 9 Geo. 4, c. 31, s. 8, post, Murder.

• Eng. Com. Law Repts. xxxviii. 23.

• Ib. xxxii. 678.

and shipmen, depart without long tarrying or protraction of time. This statute is almost in terms with 27 Hen. 8, c. 4, except that it adds "treasons" to the offences.

It seems that the stat. 27 Hen. 8, does not authorize the trial of felonies created by subsequent statutes, for which provision was therefore made by the 39 Geo. 3, c. 37(*h*) The prisoner was indicted for maliciously shooting, and the offence was within a few weeks after the passing of the 39 Geo. 3, and before notice of it could have reached the place where the offence was committed: and, upon a case reserved, none of the judges supposed that the party could have been tried if the 39 Geo. 3, had not passed; and as he could not have known of that act, they thought it right that he should have a pardon.(*i*) And it was decided that a party was not triable under both or either of these statutes for maliciously shooting, within 43 Geo. 3, c. 58: (now repealed:) but this decision proceeded upon the terms of the 43 Geo. 3, which confined its operation to *England* and *Ireland*.(*j*)

SECT. III.

Of the Court by which the Offence of Piracy may be tried.

THE offence of piracy was formerly cognizable only by the Admiralty Courts, which proceeded without a jury, in a method much conformed to the civil law. But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. 8, c. 15, established a new jurisdiction. By that statute it was enacted, that this offence should be tried by *commissioners nominated by the lord chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law; and that the course of proceedings should be according to the law of the land. Amongst the commissioners there are always some of the common law judges;(k) and by the Admiralty Court thus constituted, the offence of piracy, and other marine offences, may now be tried. But the statute 28 Hen. 8, merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundations as it did before that act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that court a jurisdiction that our common law has not.(l)

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The 32 Geo. 2, c. 25, s. 20, for the more speedy bringing of offenders to justice, &c., enacts, that a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas, within the jurisdiction of the Admiralty of England, shall be holden twice at least in every year; viz., in March and October, at the Old Bailey; (except when the sessions of oyer and terminer and gaol delivery for London and Middlesex shall be there holden;) or in such other places in Eng-

Times for holding the court. 32 Geo. 2, c. 25, s. 20.

(h) *Ante*, 97, note (k). *Rex v. Snape*, East, P. C. 807.

(i) *Rex v. Bailey*, Hil. T. 1800. M.S. Bayley, J., and Russ. & Ry. 1.

(j) *Rex v. Amarro*, Mich. T. 1814. Russ. & Ry. 287. The act was extended by 1 Geo. 4, c. 90, s. 1, but is now repealed, and new provisions substituted by 9 G. 4, c. 31. See *post*, Book III., Chap. x.

(k) Generally two. 4 Bla. Com. 269.

(l) By Mansfield, C. J., *Rex v. Depardo*, 1 Taunt, 29.

land as the lord high admiral, &c., shall, in writing under his hand, directed to the judge of the Court of Admiralty, appoint. And the late act 7 Geo. 4, c. 38, was passed, to enable the commissioners for trying the offences committed upon the sea, and justices of the peace, to take examination touching such offences, and to commit to safe custody persons charged therewith.

Offences committed at sea, &c., may be tried in any of his majesty's islands, &c., by virtue of his commission under the great seal directed, &c.

The 11 & 12 Wm. 3, c. 7, s. 1, made provision for the trial of piracies, felonies, &c., committed upon the sea, or in any haven, &c., and the 16 Geo. 3, c. 54, enacts, that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek or place, where the admiral or admirals have power, authority or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor of Great Britain, lord keeper, or commissioner for the custody of the great seal of Great Britain for the time being, shall from time to time think fit to appoint; and that the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, &c., within any such island, &c., as any commissioners appointed according to the directions of the statute 28 Hen. 8, by any law or laws then in force would have for the trial of the said offences within this realm. And it further enacts, that all persons convicted of any of the said offences so to be tried, &c., shall be liable to the same pains, &c., as by any laws then in force, persons convicted of the same would be liable to, in case the same were tried, &c., within this realm, by virtue of any commission according to the directions of the 28 Hen. 8.

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Punishments 7 & 8 Geo. 4, c. 28, s. 12.
9 Geo. 4, c. 31. Provisions for offences against this act committed at sea.

*By 7 & 8 Geo. 4, c. 28, s. 12, "all offences prosecuted in the high Court of Admiralty of England shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land."

Not to affect the laws relating to the forces.

The 9 Geo. 4, c. 31, s. 32, enacts, "that all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the Admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England, and may be dealt with, inquired of, tried and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of England. Provided always, that nothing herein contained shall alter or affect any of the laws relating to the government of his majesty's land or naval forces."

Offences committed within the jurisdiction of the Admiralty may be tried at the Central Criminal Court.

The Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 22, enacts, that "it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of this act, or any two or more of them, to inquire of, hear and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to, or detained therein for any offence or offences alleged to have been done

and committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England; and all indictments found, and trials, and other proceedings had or taken by or before the said justices and judges of oyer and terminer and gaol delivery, shall be valid and effectual to all intents and purposes whatsoever."

An accessory before the fact to a felony committed on the high seas, within the jurisdiction of the Admiralty, may be indicted and tried at the Central Criminal Court, by virtue of the 7 Geo. 4, c. 64, s. 9, and the 4 & 5 Wm. 4, c. 36, s. 22, although the person charged as the principal offender has not been "committed to or detained in" the gaol of Newgate for his offence.(m)

*CHAPTER THE NINTH.

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OF NEGLECTING QUARANTINE, OR SPREADING CONTAGIOUS DISORDERS,
AND OF INJURY TO THE PUBLIC HEALTH.

SECT. I

Of Neglecting Quarantine.

THE performance of *quarantine*. or forty days probation, when ships arrive from countries infected with contagious disorders, having been considered as of the highest importance, with reference to the public health of the nation, has been enforced from time to time by various legislative enactments. These were formerly of considerable severity; but the 6 Geo. 4, c. 78, repeals all former acts upon this subject, and enforces the performance of quarantine principally by pecuniary penalties. Some offences, however, subject the offender to imprisonment, and some are of the degree of felony. It may be here observed, that in a case which arose upon 26 Geo. 2, c. 6, which enacted that all persons going on board ships coming from infected places, should obey such orders as the king in council should make, but did not award any particular punishment, nor contain a clause as to the jurisdiction of the justices of the peace, it was holden that disobedience of such an order of council was an indictable offence, and punishable as a misdemeanor at common law.(a)

The 6 Geo. 4, c. 78, s. 17, enacts that, "if any commander, master, or other person, having charge of any vessel liable to perform quarantine, and on board of which the plague, or other infectious disease or distemper shall not then have appeared, shall himself quit, or shall knowingly permit or suffer any seaman or passenger coming in such vessel, to quit such vessel, by going on shore, or by going on board any other vessel or boat, before such quarantine shall be fully performed, unless by such license as shall be granted by virtue of any order in council, to be made concerning quarantine as aforesaid, or in case any commander or other person having charge of such vessel, shall not, within a convenient time after due notice given for that purpose, cause such vessel, and the lading thereof, to be conveyed into the place or places appointed for such vessel and lading to perform quarantine; then and in

6 Geo. 4, c. 78, s. 17. Penalty on masters, &c., quitting vessels, or permitting persons to quit them, or not conveying them to the appointed places, 4007.

(m) Reg. v. Wallace, 1 C. & Mars. 200. All the judges on a case reserved.

(a) Rex v. Harris, 4 T. R. 202. 2 Leach. 549.

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Persons coming in such vessels, or going on board, and quitting them before discharged from quarantine, to suffer imprisonment for six months, and forfeit 300*l*.

Penalty on persons embezzling goods performing quarantine, neglecting or deserting their duty, or permitting persons, vessels, &c. to depart without authority, or giving false certificates, or damaging goods; and officers, &c. deserting their duty or giving false certificate of performance of quarantine, to be guilty of felony.

every such case such commander, master, or other person as aforesaid, for every such offence shall forfeit and pay the sum of four hundred pounds; and if any such person coming in any such vessel liable to quarantine (or any pilot or other person going on board the same, either *before or after the arrival of such vessel at any port or place in the United Kingdom, or the islands aforesaid,) shall, either before or after such arrival, quit such vessel, unless by such license as aforesaid, by going on shore in any port or place in the United Kingdom, or the islands aforesaid, or by going on board any other vessel or boat, with intent to go on shore as aforesaid, before such vessel so liable to quarantine as aforesaid shall be regularly discharged from the performance thereof, it shall and may be lawful for any person whatsoever, by any kind of necessary force, to compel such pilot or other person so quitting such vessel, so liable to quarantine, to return on board the same; and every such pilot or other person so quitting such vessel so liable to quarantine, shall for every such offence, suffer imprisonment for the space of six months, and shall forfeit and pay the sum of three hundred pounds."

The 21st section enacts, "that if any officer of his majesty's customs, or any other officer or person whatsoever, to whom it doth or shall appertain to execute any order or orders made or to be made concerning quarantine, or the prevention of infection, as notified as aforesaid, or to see the same put in execution, shall knowingly and wilfully embezzle any goods or articles performing quarantine, or be guilty of any other breach or neglect of his duty in respect of the vessels, persons, goods, or articles performing quarantine, every such officer or person so offending shall forfeit such office or employment as he may be possessed of, and shall become from thence incapable to hold or enjoy the same, or to take a new grant thereof; and every such officer and person shall forfeit and pay the sum of two hundred pounds; and if any such officer or person shall desert from his duty when employed as aforesaid, or shall knowingly and willingly permit any person, vessel, goods or merchandise to depart or to be conveyed out of the said lazaret vessel or other place as aforesaid, unless by permission under an order of his majesty, by and with the advice of his council, or under an order of two or more of the lords or others of his privy council; or if any person hereby authorized and directed to give a certificate of a vessel having duly performed quarantine or airing, shall knowingly give a false certificate thereof, every such person so offending shall be guilty of felony; (b) and if any such officer or person shall knowingly or willingly damage any goods performing quarantine under his direction, he shall be liable to pay one hundred pounds damages, and full cost of suit, to the owner of the same."

Publication in *London* of any order by two or more of the lords or others of the privy council,

(b) This act specifies no punishment for the principals in the first degree; they are, therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8 (*ante*, p. 38), and s. 9, and 1 Vict. c. 90, s. 5, *ante*, p. 65, with transportation for seven years, or imprisonment for not exceeding two years, with or without hard labour, in the common jail or house of correction, and the offender may also be kept in solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, and if a male, may be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment. The act makes no provision for principals in the second degree, or accessories, but there may be such, (*ante*, p. 34,) and the principals are punishable as the principals in the first degree, and the accessories in the same manner as the principals in this case. See note (i), *ante*, p. 65. C. S. G.

made in pursuance of the act, or his majesty's royal proclamation, made in pursuance of the same, is to be deemed and *taken to be sufficient notice to all persons concerned, of all matters therein respectively contained.

Gazette
to be
sufficient
notice.

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The statute also enacts, that in any prosecution, suit, or other proceedings against any person, for any offence against this act, or any which may hereafter be passed concerning quarantine, or for any breach or disobedience of any order made by his majesty by the advice of his privy council, concerning quarantine, and the prevention of infection, notified or published as aforesaid, or of any order or orders made by two or more of the privy council, the answers of the commander, master or other person, having charge of any vessel, to any question or interrogatories put to him by virtue and in pursuance of the act, or of any act which may hereafter be passed concerning quarantine, or of any such order or orders as aforesaid, shall be received as evidence so far as the same relate to the place from which such vessel came, or to the place or places at which she touched in the course of her voyage; and also that where any vessel shall have been directed to perform quarantine by the superintendent of quarantine, or his assistant, or, where there is no superintendent or assistant, by the principal officer of the customs at any port or place, or other officer of the customs authorized to act in that behalf; the having been so directed to perform quarantine shall be given and received as evidence that such vessel was liable to quarantine, unless satisfactory proof be produced by the defendant to show that the vessel did not come from, or touch at any such place or places as is or are stated in the said answers, or that such vessel, although directed to perform quarantine, was not liable to the performance thereof. And it further enacts, that where any vessel shall in fact have been put under quarantine by the superintendent, &c., and shall actually be performing the same, such vessel shall, in any prosecution, &c., for any offence against this act, or any other act hereafter passed concerning quarantine, or against any orders of council as aforesaid, be deemed liable to quarantine, without proving in what manner or from what circumstances such vessel became liable to the performance thereof.

Sec. 36.
Answers
of the com-
mander,
&c., are to
be evidence
of the place
from which
the vessel
came or
touched at;
and the
having
been
directed to
perform
quarantine
is to be
received as
prima facie
evidence
that the
vessels
were liable
thereto,
and the
being in
perform-
ance of
quarantine
to be
proof of
liability to
quarantine.

SECT. II.

Of Spreading Contagious Disorders, and of Injury to the Public Health.

WITH the same regard to the public health, upon which the statutes relating to quarantine have proceeded, the legislature appears to have acted in former times, in making persons guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by the magistrates to stay at home.^(c) The statute which contained this enactment, after being continued for some time, is now expired; but Lord Hale puts the question whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not

Persons
infected
with the
plague,
going
abroad and
infecting
others.

(c) 2 (vulgo 1,) Jac. 1, c. 31, s. 7; 1 Hale, 432, 695; 3 Inst. 90.

*108 be murder by the common law.^(d) And he seems to consider it as clear, that though where *no such intent appears it cannot be murder, yet, if by the conversation of such a person another should be infected, it would be a great misdemeanor.^(e)

It is an indictable offence unlawfully and injuriously to carry a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects.

In a case relating to the small-pox infection, it was held that the exposing in a public highway, with a full knowledge of the fact, a person infected with a contagious disorder, is a common nuisance, and as such the subject of an indictment. The defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the king's subjects; and having suffered judgment to go by default, it was moved, in arrest of judgment, that it was consistent with the indictment that the child might have caught the disease, and that it was not shown that the act was unlawful, as the mother might have carried it through the street in order to procure medical advice; and that the indictment ought to have alleged that there was some sore upon the child at the time when it was so carried. It was also urged, that the only offences against the public health of which Hawkins speaks, are spreading the plague and neglecting the quarantine;^(f) and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated with the small-pox was not a public nuisance, and mentioned that upon an indictment of that kind there had been an acquittal.^(g) But Lord Ellenborough, C. J., said, that if there had been any such necessity as supposed for the conduct of the defendant, it might have been given in evidence as matter of defence: but there was no such evidence: and as the indictment alleged that the act was done *unlawfully* and *injuriously* it precluded the presumption that there was any such necessity. Le Blanc, J., in passing sentence, observed, that although the court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. That the court did not pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. But no person, having a disorder of this description upon him, ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects.^(h)

Unlawfully to expose a person infected with a contagious disorder in a public highway is indictable.

And it is also an indictable offence in an apothecary, after having inoculated children, unlawfully

In a subsequent case, where the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and while they were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street, it was moved in arrest of judgment, that this was not an offence; that the case differed materially from that of *Rex v. Vantandillo*, as it appeared that the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate with it. That as to its being alleged that the defendant caused the children to be carried along the street, it

(d) 1 Hale, 432.

(f) 1 Hawk. P. C. c. 52, 53.

(g) Anon. 3 Atk. 750. In 2 Chit. Crim. Law, 656, there is an indictment against an apothecary for keeping a common inoculating house near the church in a town: and the Cro. Circ. A. 365, is referred to.

(h) *Rex v. Vantandillo*, 4 M. & S. 73.

(e) 1 Hale, 433.

was no more than this, that he *directed the patients to attend him for *109
 advice instead of visiting them, or that he prescribed what he might and injuri-
 deem essential for their recovery, air, and exercise. And it was observed ously to
 that in *Rex v. Sutton*, (i) which was an indictment for keeping an inocu- cause
 lating house, and therefore much more likely to spread infection than them to be
 what had been done here, the court said that the defendant might demur. exposed
 But Lord Ellenborough, C. J., said, that the indictment laid the act to in the
 be done *unlawfully* and *injuriously*; and that in order to support this public
 statement, it must be shown that what was done was, in the manner of street to the
 doing it, incautious, and likely to affect the health of others. That the danger of
 words *unlawfully* and *injuriously* precluded all legal cause of excuse. It is indi-
 And Le Blanc, J., in passing sentence, observed, that in all times it was ctable to
 unlawful and an indictable offence to expose persons infected with con- expose
 tagious disorders, and therefore liable to communicate them to the public, persons
 in a place of public resort. (k) infected in
 places of
 public
 resort.

By the 3 & 4 Vict. c. 29, which was passed to extend the practice of Persons
 vaccination, s. 8, it is enacted, "that any person who shall from and inocula-
 after the passing of this act (23 July, 1840) produce or attempt to pro- ting or
 duce in any person, by inoculation with variolous matter, or by wilful otherwise
 exposure to variolous matter, or to any matter, article, or thing, impreg- producing
 nated with variolous matter, or wilfully by any other means whatsoever the small-
 produce the disease of small-pox in any person in England, Wales, or pox, to be
 Ireland, shall be liable to be proceeded against and convicted summarily subject to
 before any two or more justices of the peace in petty sessions assembled, one
 and for every such offence shall, upon conviction, be imprisoned in the months'
 common gaol or house of correction for any term not exceeding one imprisonment.
 month."

The public health may be injured by selling unwholesome food; and Selling un-
 it is an indictable offence to mix unwholesome ingredients in any thing wholesome
 made and supplied for the food of man. And if a master knows that his food an
 servant puts into bread what the law has prohibited, and the servant indictable
 from the quantity he puts in, makes the bread unwholesome, the master offence.
 is answerable criminally, for he should have taken care that more than Master
 is wholesome was not inserted. The indictment was against the contract liable for
 baker for a military asylum, for delivering for the use of the children the acts of
 belonging to the asylum divers loaves containing noxious materials, which his ser-
 he knew. The evidence was that they contained crude lumps of alum, vants done
 and that alum was an unwholesome ingredient, and that the defendant's in the
 foreman made the loaves: but the jury found that the defendant knew course of
 he used alum. Upon a motion for a new trial the court thought, that if their em-
 the master suffered the use of a prohibited article, it was his duty to ployment.
 take care that it was not used to a noxious extent, and that he was an-
 swerable if it was. A rule for arresting the judgment was then moved
 for, on the ground that the indictment did not specify what the noxious
 ingredients were, or state that the loaves were delivered to be eaten by the
 children; but the court held the former not necessary, because the ingre-
 dients were in the defendant's knowledge; and the allegation that the
 loaves were delivered for the use and supply of the children, must mean
 that they were delivered for their eating: and the rule was refused." (l)

(i) 4 Burr. 2116.

(k) *Rex v. Burnett*, 4 M. & S. 272.

(l) *Rex v. Dixon*, 3 M. & S. 11. And see 1 & 2 Geo. 4, c. 50, as to penalties upon bakers for using alum, &c., in making bread. See Att. Gen. v. Siddon, 1 Tyrw. 41, as to the liability of a master for the acts of his servant. Att. Gen. v. Riddle, 2 Tyrw. 523, as to the liability of a husband for the acts of his wife. *Lyons v. Martin*, 8 A. & E. 512.

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It is an indictable offence to corrupt the waters of a public river, and render them unfit for the use of man by conveying the refuse of gas into the river.

*It is also an indictable offence to convey the refuse of gas into a great public river, and thereby to render the waters corrupt, insalubrious, and unfit for the use of man, and the directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such a plan be a departure from the original and understood method which the directors had no reason to suppose was discontinued: for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants.(*m*)

*CHAPTER THE TENTH.

*111

OF OFFENCES AGAINST THE REVENUE LAWS RELATING TO THE CUSTOMS OR EXCISE.

AMONGST the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society.(*a*) In order to prevent the commission of offences of this kind, many statutes were passed from time to time, which in addition to the proceedings at common law for assaulting and obstructing revenue officers when acting in the execution of their duties,(*b*) gave to those officers extraordinary powers and protections, and punished persons endeavoring to resist or evade the laws relating to the customs and excise. The 3 & 4 Wm. 4, c. 50, after reciting that it is inexpedient to amend the laws relating to the customs, proceeds to repeal all the statutes relating to smuggling. The 3 & 4 Wm. 4, c. 53, which came into operation on the 1st of September, 1833, makes various enactments relating to the forfeiture of vessels engaged in illegal traffic, and of uncustomed goods, which do not come within the scope and object of this treatise. But some of the enactments relating to the right to proceed to extremities, when necessary, for the purpose of seizing vessels liable to seizure, and the right to search for and seize goods liable to forfeiture, may properly be here mentioned. And the offence of making signals to smuggling vessels at sea, and the several offences declared to be felonies by this statute, require to be particularly noticed.(*c*)

Vessels to bring-to on being chased by vessels or

The 3 & 4 Wm. 4, c. 53, s. 8, enacts, "that in case any vessel or boat liable to seizure or examination under any act or law for the prevention of smuggling shall not bring-to on being required to do so, on being chased by any vessel or boat in his majesty's navy having the proper pendant

(*m*) *Rex v. Medley*,^a 6 C. & P. 292. Lord Denman, C. J.

(*a*) 1 Hawk, P. C. c. 48, s 1; 4 Bla. Com. 155; Bac. Abr. *Smuggling*.

(*b*) See many precedents for midemeanors at common law, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices; 4 Went. 385, *et seq.* 2 Chit. Crim. Law, 127, *et seq.* And see Brady's case, 1 Bos. & Pul. 188, where it was admitted that the offence charged in the indictment was an offence indictable at common law.

(*c*) The 4 & 5 W. 4, c. 13, alters some of the provisions of this act as to commitments by justices, and hoisting pendants, by his majesty's subjects, &c.

^a Eng. Com. Law Repts. xxv. 403.

and ensign of his majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in his majesty's navy or employed as *aforesaid, (first causing a gun to be fired as a signal,) to fire at or into such vessel or boat; and such captain, master, or other person acting in his aid or assistance, or by his direction, shall be and he is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing." boats of the navy or in preventive service; not bringing-to may be fired into. *112

By sec. 32, "all vessels and boats, and all goods whatsoever, liable to forfeiture under this or any other act relating to the revenue of customs, shall and may be seized in any place, either upon land or water, by any officer or officers of his majesty's army, navy, or marines, duly employed for the prevention of smuggling, and on full pay, or by any officer or officers of custom or excise, or by any person having authority to seize from the commissioners of his majesty's customs or excise; and all vessels, boats, and goods so seized shall, so soon as conveniently may be, be delivered into the care of the proper officer appointed to receive the same." Vessels, boats, and goods may be seized by officers and persons herein mentioned.

In a case under the 6 Geo. 4, c. 108, s. 34, which was similar in terms to sec. 32, of the 3 & 4 Wm. 4, c. 53, a count alleged that certain spirituous liquors were about to be imported, in respect of which certain duties would be payable, and that R. H. was a person employed in the service of the customs of our lord the king, and that it was the duty of R. H., as such person so employed in the service of the customs as aforesaid, to arrest and detain all such goods and merchandises as should within his knowledge be imported, which, upon such importation thereof, would become forfeited: and that the defendant unlawfully solicited R. H. to forbear to arrest and detain the said goods; it was objected, in arrest of judgment, that as the law did not cast upon all persons in the service of the customs the duty of making seizures, and the count did not show that H. was a person coming within any of the three classes described in sec. 34 of 6 Geo. 4, c. 108, the count was bad; and the court held that the allegation that it was H.'s duty to seize goods, which upon importation were forfeited, was an allegation of matter of law. That being so, the fact from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly was not the duty of every such person, and therefore the indictment was bad.(d) It is not sufficient in an indictment to state that it was the duty of an officer to seize goods; the fact from which such duty arises, must be stated.

By sec. 34, "it shall and may be lawful to and for any officer or officers of the army, navy, or marines, duly employed for the prevention of smuggling, and on full pay, or for any officer or officers of customs, producing his or their warrant or deputation (if required,) to go on board any vessel which shall be within the limits of any of the ports of this kingdom, and to rummage and to search the cabin and all other parts of such vessel for prohibited and uncustomed goods, and to remain on board such vessel during the whole time that the same shall continue within the limits of such port, and also to search any person or persons either on board or who shall have landed from any vessel, provided such officer or officers shall have good reason to suppose that such person or Vessels may be searched within the limits of the ports, and persons landing from them, if officers suspect goods are concealed about their person.

(d) *Rex v. Everett*, 8 B. & C. 114; 2 M. & R. 35. See s. 117, *post*.

* Eng. Com. Law Repts. xv. 158.

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persons hath or have any uncustomed or prohibited goods secreted about his, her or their person or persons; and if any person shall obstruct any such officer *or officers in going or remaining on board, or in entering or searching such vessel or person, every such person shall forfeit and lose the sum of one hundred pounds."

Officers authorized by writ of assistance, and having a peace officer, may search houses for prohibited goods.

By sec. 38, "it shall and may be lawful for any officer or officers of customs, or person acting under the direction of the commissioners of his majesty's customs, having a writ of assistance under the seal of his majesty's Court of Exchequer, to take a constable, headborough, or other public officer inhabiting near the place, and in the day time, to enter into and search any house, shop, cellar, warehouse, room, or other place, and in case of resistance to break open doors, chests, trunks, or other packages, there to seize and from thence to bring any uncustomed or prohibited goods, and to put and secure the same in the custom house warehouse in the port next to the place from whence such goods shall be so taken as aforesaid; Provided always, that for the purposes of this act any such constable, headborough, or other public officer, duly sworn as such, may act as well without the limits of any parish, vill, or other place for which he shall be so sworn as within such limits."

Officers of customs or excise may on probable cause, stop carts, &c., and search for goods.

By sec. 40, "it shall be lawful for any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, upon reasonable suspicion, to stop and examine any cart, wagon, or other means of conveyance, for the purpose of ascertaining whether any smuggled goods are contained therein; and if no such goods shall be found, then and in such case the officer or other person so stopping and examining such cart, wagon, or other conveyance, having had probable cause to suspect that such cart, wagon, or other conveyance had smuggled goods contained therein, shall not, on account of such stoppage and search, be liable to any prosecution or action at law on account thereof; and all persons driving or conducting such cart, wagon, or other conveyance, refusing to stop when required so to do in the king's name, shall forfeit the sum of one hundred pounds."

Any person liable to be arrested, making his escape, may afterwards be detained by any officer of the customs.

By sec. 52, "if any person or persons liable to be detained under the provisions of this or any other act relating to the customs shall not be detained at the time of so committing the offence for which he or they is or are so liable, or after detention shall make his or their escape, it shall and may be lawful for any officer or officers of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or for any officer of customs or excise, or any other person acting in his or their aid and assistance, or duly employed for the prevention of smuggling, to detain such person so liable to detention as aforesaid, at any time afterwards, and to carry him before any justice of the peace, to be dealt with as if detained at the time of committing the said offence."

Persons making signals to smuggling vessels at sea may be

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By sec. 52, "no person shall, after sunset and before sunrise between the 21st day of September and the 1st day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time in the year, make, aid, or assist in making(e) any signal in or on board or from any vessel or boat, or *on or from any part of the coast

(e) Here followed in the 6 G. 4, c. 108, s. 52, or be present for the purpose of aiding or assisting in the making of any light, fire, flash, or blaze, or any signal by smoke, or by any rocket, fire-works, flags, firing of any gun or other fire-arms, or any other contrivance or device, or any other signal.

or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice(*f*) to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to(*g*) notice any such signal; and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or aid or assist in making any such signal, such person so offending shall be guilty of a misdemeanor; and it shall be lawful for any person to stop, arrest, and detain the person or persons who shall so offend, and to carry and convey such person or persons so offending before any one or more of his majesty's justices of the peace residing near the place where such offence shall be committed, who, if he sees cause, shall commit the offender to the next county goal, there to remain until the next court of oyer and terminer, great session, or gaol delivery, (*h*) or until such person or persons shall be delivered by due course of law; and it shall not be necessary to prove on any indictment or information that any vessel or boat was actually on the coast; and the offender or offenders being duly convicted thereof shall, by order of the court before whom such offender or offenders shall be convicted, either forfeit and pay the penalty or forfeiture of one hundred pounds, or, at the discretion of such court, be sentenced or committed to the common gaol, or house of correction, there to be kept to hard labour for for any term not exceeding one year."

Where an indictment upon the 6th Geo. 4, c. 108, s. 52, which was very similar to s. 53, of the 3 & 4 Wm. 4, c. 53, stated that the defendants between sunset on the 8th, and sunrise on the 9th of March, that is to say, on the morning of the said 9th of March, about three o'clock, did make certain lights, &c.; it was proved that the lights were made on the morning of the 9th, and it was objected that the indictment did not state the offence to have been committed between the 21st of September and the 1st of April, and that the allegation that the offence was committed on the 9th of March was not sufficient, because the prosecutor was not bound to the day laid, but might prove the offence to have taken place on any other day; that the time was of the essence of the offence, and therefore it ought to have formed a distinct and substantive averment in the words of the act; but it was held that the day having been proved as laid, the objection could only properly be made in arrest of judgment, and even then it was no valid objection; for judicial notice must be taken that the day averred in the indictment, is, in fact, within the period mentioned in the statute, and therefore the indictment was good. (*i*)

By sec. 54, "in case any person be charged with or indicted for having made or caused to be made, or been aiding or assisting in making any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such *intent and for such purpose, shall be upon the defendant against whom such charge is made or such indictment is found."

(*f*) In the 6 G. 4, c. 108, s. 52, "making or giving any signal."

(*g*) In 6 G. 4, c. 108, s. 52, "See or hear any such light, fire, flash, blaze or signal."

(*h*) Notwithstanding these words, these sessions have jurisdiction to try this offence. *Rex v. Cock*, 4 M. & S. 71.

(*i*) *Rex v. Brown*,^a Moo. & M. 162, Littledale, J., after consulting Gaselee, J., see Martin's case, *ante*, p. 79.

Any person may prevent signals.

By sec. 55, "it shall be lawful for any person whatsoever to prevent any signal being made as aforesaid, and to enter and go into and upon any lands for that purpose, without being liable or subject to any indictment, suit or action for the same."

Persons resisting officers, or rescuing or destroying goods to prevent seizure to forfeit 100*l*.

By sec. 56, "if any person whatsoever shall obstruct any officer or officers of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer or officers of customs or excise, or any person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the execution of his or their duty, or in the due seizing of any goods liable to forfeiture by this or any other act relating to the customs, or shall rescue are cause to be rescued any goods which have been seized, or shall attempt or endeavor to do so, or shall, before or at or after any seizure, stave, break, or otherwise destroy any goods, to prevent the seizure thereof, or the securing the same, then and in such case the party or parties offending shall forfeit for every such offence the sum of one hundred pounds."

Three or more armed persons assembled to assist in the illegal landing of any goods, or in the rescuing of goods seized to be deemed guilty of felony.

By sec. 58, "if any persons to the number of three or more, armed with fire arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled, in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods, liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence, or in case any persons to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon."*(j)*

Persons shooting at any boat belonging to the navy, or in the service of the revenue, &c., deemed guilty of felony.

By sec. 59, "if any person shall maliciously shoot at any vessel or boat belonging to his majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully *convicted, be adjudged guilty of felony, and suffer death as a felon."*(k)*

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Any person

By sec. 60, "if any person being in company with more than four

(j) Repealed as to the punishment, by 1 Vict. c. 91, ss. 1 & 2, *ante*, p. 92, by which it is transportation for life, or for any term not less than fifteen years, or imprisonment, with or without hard labour, in the common jail or house of correction for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

(k) See note *(j)*, and see *Rex v. Reynolds*, *post*, p. 118.

other persons be found with any goods liable to forfeiture under this or any other act relating to the revenue of customs or excise, or in company with one other person, within five miles of the sea-coast or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years.”(2)

in company with four others having prohibited goods or with one other armed or disguised, guilty of felony.

By sec. 61, “if any person shall by force or violence assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, such person, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted as aforesaid.”

Persons assaulting officers by force or violence may be transported.

By sec. 77, “in case any offence shall be committed upon the high seas against this or any other act relating to the customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place on land in the United Kingdom or the Isle of Man into which the person committing such offence or incurring such penalty or forfeiture shall be taken, brought, or carried, or in which such person shall be found; and in case such place on land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, borough, liberty, division, franchise, or town corporate, as any justice of the peace of the county within which such city, borough, liberty, division, franchise, or town corporate is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding: provided always, that where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this act, be deemed and taken to be an offence committed on the high seas.”

Offences on the high seas deemed to have been committed at the place into which the offender is brought, or in which he is found.

*By sec. 112, “no indictment shall be preferred or suit commenced for the recovery of any penalty or forfeiture under this or any other act relating to the customs or excise, (except in the cases of persons detained and carried before one or more justices in pursuance of this act,) unless such suit shall be commenced in the name of his majesty’s attorney-general, or in the name of the lord advocate of Scotland, or unless such indictment shall be preferred under the direction of the commissioners

*117 Indictments (except before justices) to be preferred by order of the commis-

(2) The 3 & 4 Wm. 4, c. 35, contains no provisions as to accessories; there may, however, be accessories to any felony mentioned in it (*ante*, p. 34), and they are punishable by the 7 & 8 Geo. 4, c. 28, s. 8, (*ante*, p. 38,) and sec. 9, and 1 Vict. c. 90, s. 5 (*ante*, p. 65), with transportation for seven years, or imprisonment for not exceeding two years, with or without hard labour, in the common jail or house of correction, and the offender may also be ordered to be kept in solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, and if a male, may be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment.

sioners, and suits to be brought in the name of attorney-general. Proof of payment of duties, or of lawful importation of goods to be on owner.

of his majesty's customs or excise, or unless such suit shall be commenced in the name of some officer of customs or excise, under the direction of the said commissioners respectively."

By sec. 114, "if any goods shall be seized for nonpayment of duties, or any other cause of forfeiture, and any dispute shall arise whether the customs, excise, or inland duties have been paid for the same, or the same have been lawfully imported, or concerning the place from whence such goods were brought, then and in such case the proof thereof shall be on the owner or claimer of such goods, and not on the officer who shall seize and stop the same."

Averment of certain matters to be sufficient unless contrary is proved.

By sec. 116, "in case of any information or proceedings had under this or any other act relating to the customs, the averment that the commissioners of his majesty's customs or excise have directed or elected such information or proceedings to be instituted, or that any vessel is foreign, or belonging wholly or in part to his majesty's subjects, or that any person detained or found on board any vessel or boat liable to seizure is or is not a subject of his majesty, or that any person detained is or is not a seafaring man, or fit and able to serve his majesty in his naval service, or that any person is an officer of the customs, and where the offence is committed in any port in the United Kingdom, the naming of such port in any information or proceedings shall be sufficient, without proof as to such fact or facts, unless the defendant in such case shall prove to the contrary."

Persons employed for the prevention of smuggling to be deemed duly employed.

By sec. 117, "all persons employed for the prevention of smuggling under the direction of the commissioners of his majesty's customs, or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment, in any information or suit, that such party was so duly employed, shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary."

Viva voce evidence may be given that a party is an officer, and he is a competent witness, although entitled to the whole or a share of the seizure, &c.

By sec. 118, "if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information."

Within what time suits, indictments, &c., are to be exhibited.

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By sec. 120, "all suits, indictments or informations exhibited for any offence against this or any other act relating to the customs, *in any of his majesty's courts of record at Westminster, or in Dublin, or in Edinburgh, or in the royal courts of Guernsey, Jersey, Alderney, Sark, or Man, shall and may be had, brought, sued, or exhibited within three years next after the date of the offence committed, and shall and may be exhibited before any one or more justices of the peace within six months next after the date of the offence committed."

Indictments, &c. may be tried in any

By sec. 122, "any indictment or information for any offence against this or any other act relating to the customs, shall and may be inquired of, examined, tried and determined in any county of England where the

offence is committed in England, and in any county in Scotland where the offence is committed in Scotland, and in any county in Ireland where the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried." county in England, Scotland, or Ireland.

Upon a clause in the 52 Geo. 3, c. 143, s. 11, (now repealed,) which was nearly similar to s. 59 of the present act, it was determined that where a custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required by 56 Geo. 3, c. 104, s. 8, the returning such fire was not malicious. The indictment was for shooting at a vessel in the service of the customs on the high seas, within one hundred leagues of the coast of Great Britain; and also for maliciously shooting at an officer of the customs, &c. It appeared that the vessel chased a smuggler within the limits; the smuggler did not bring to upon being chased and a signal-gun fired; whereupon the custom-house vessel fired at the smuggler, and the smuggler returned the fire, and they had a regular engagement, in which one of the custom-house officers was severely wounded. In order to prove the right of firing at the smuggler, the 56 Geo. 3, c. 104, s. 8, was referred to, which, in the case of ships employed to prevent smuggling by the Treasury, Admiralty, Customs or Excise, gave the power, if the vessel had a pendant and ensign hoisted of such description as his majesty by any order in council, or by royal proclamation under the great seal, should direct; but there had been no proclamation, nor was any order in council proved; though after the trial an order in council was discovered, which required certain particulars in the pendant and ensign which this ship's pendant and ensign had not. Upon a case reserved, eleven judges (Best, J., being absent) were clear that as the custom-house vessel had not complied with what was required to make her shooting legal, the smuggler's firing was not in law malicious." As to malicious shooting at a vessel, &c. or officer, &c. (l)

Upon a clause in the 19 Geo. 2, c. 34, (now repealed,) similar to the section which relates to offences committed by persons, to the number of three or more, armed with fire-arms, or other offensive weapons, and assembled in order to be aiding and assisting in the illegal landing of goods, &c., it was decided that in order to bring the offenders within its penalties, it was necessary that they should be armed with weapons which might properly be called *offensive*. (m) It seems, that a person catching up a *hatchet* accidentally, during *the hurry and heat of an affray, was not armed with any offensive weapon within the meaning of that act; (n) and in one case it was held, that *large sticks* about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were not offensive weapons; and that from the preamble of the statute, the weapons must be such as the law calls dangerous (o) But in a subsequent case the court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers and instruments of war should be so considered; and that bludgeons, properly so called, clubs and any thing What shall be deemed an offensive weapon. *119

(l) *Rex v. Reynolds*, Mich. T. 1821. MS. Bayley, J., Russ. & Ry. 465.

(m) *Hutchinson's case*, 1784, 1 Leach, 342.

(n) *Rose's case*, Old Bailey, May, 1784, before Willes, J., and Perryn, B. 1 Leach, 342 note (a).

(o) *Ince's case*, Old Bailey, Feb. 1785. By Gould, J., Perryn, B., and Mr. Recorder. 1 Leach, 342, note (a).

that was not in common use for any other purpose but a weapon, were clearly offensive weapons within the meaning of the legislature. (*p*) In a case upon a former statute, 9 Geo. 2, c. 32, s. 10, where the same words "armed with fire-arms, or other offensive arms or weapons," occurred, it was held that a person armed only with a *common whip* was not an offender within the meaning of the act, though he aided and assisted other persons who were armed with fire-arms and weapons which were clearly offensive. (*q*) But with respect to the latter part of this judgment, a different doctrine appears to have been held by Lord Mansfield, upon the 19 Geo. 2, c. 34, who is reported to have said, that where a person was assembled, together with others who were armed, and was active, it was not necessary that such individual should be armed. (*r*)

Where a number of persons were assembled for the purpose of landing smuggled goods, and they were, as is usual on such occasions, divided into two different parties, one called the company, who had bats in their hands for the purpose of carrying the tubs of spirits, (which bats were hop-poles about seven feet in length,) and the other called the protecting party, who were armed with muskets; and the prisoner was one of the company, and carried a bat, but he did not strike any one with it, but some of the men with bats struck some of the preventive men; as the bats might be used for offensive purposes, it was left to the jury to say whether the bats were offensive weapons or not. (*s*)

Upon the 7 Geo. 2, c. 21, (now repealed,) by which any person who should, with an offensive weapon or instrument, unlawfully and maliciously assault with intent to rob was made guilty of felony, it was decided that the words "offensive weapon or instrument," would apply to a stick, though not of extraordinary size, and though it might in general have been used as a walking stick. An indictment was for assaulting with an offensive weapon, *viz.*, a stick, with intent to rob; and it appeared that the stick was like a common walking stick, about a yard long, and not very thick, but that the prisoner, when he came up to the prosecutor, struck him violently *on the head with it, so as to cut his head and make it bleed; and two of the prisoner's comrades afterwards came up and beat the prosecutor on the head with similar sticks. Holroyd, J., told the jury, that as the prisoner had used the stick as a weapon of offence, he thought it ought to be considered as an offensive weapon; and the jury having convicted the prisoner, the judges agreed with Holroyd, J., and held the conviction right. (*t*) And in a similar case on the 9 Geo. 4, c. 69, s. 9, (the Night Poaching Act,) it was held to be a question for the jury whether the prisoner had taken out a stick large enough to be called a bludgeon, which he, being lame, was in the habit of using as a crutch, with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied

(*p*) *Cosan's case*, Old Bailey, May, 1785. In this case it was contended, upon the authority of *Ince's case*, that very large club sticks, such as people ride with, to defend themselves, are not offensive weapons; and on its being left to the jury, the prisoner was acquitted. 1 Leach., 342, 343, note (*a*).

(*q*) *Fletcher's case*, 1 Leach, 23.

(*r*) *Franklin's case*, 1 Leach, 255. S. C. Cald. 244. And this appears to be the correct doctrine, see *Rex v. Smith*, Mich. T. 1818. Russ. & Ry. 368, *post*. Book II., Chap. xxxix.

(*s*) *Rex v. Noakes*,^a 5 C. & P. 326, Littledale J., Alderson, J., Bolland, B.

(*t*) *Rex v. Johnson*, Mich. T. 1822. Russ & Ry. 492.

^a Eng. Com. Law Reps. xxiv. 342.

it.(u) From a case upon the same repealed statute, (7 Geo. 2, c. 21,) where the indictment was for assaulting with a certain offensive weapon called a wooden staff, and the evidence proved a violent blow with a great stone, as it was holden that the conviction of the prisoner was proper, it appears to follow that both a wooden staff and a great stone were considered as offensive weapons within the meaning of that statute.(v)

As to the *assembling*, it may be mentioned that upon the repealed statute (19 Geo. 2, c. 34) it was determined that it must be *deliberate*, and for the purpose of committing the offence described in the statute. So that where a set of drunken men came from an ale-house, and hastily set themselves to carry away some Geneva which had been seized by the excise officers, it was thought very questionable whether the object which the legislature had in view could be extended to such a case; and the court said, that the words of the statute manifestly alluded to the circumstance of great multitudes of persons coming down upon the beach of the sea for the purpose of escorting uncustomed goods to the places designed for their reception.(w)

As to the assembling.

Upon a clause of the repealed statute 9 Geo. 2, c. 35, s. 26, by which it was enacted that an assault committed upon any of the officers of the customs and excise should be tried in any county in England, in such manner and form as if the offence had been therein committed, it was decided that the provision extended only to revenue officers, *qua* officers: and a defendant having been found guilty, on an indictment, of a *common assault* on the prosecutor, who was an excise officer, the Court of King's Bench arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in Surrey, and the venue in Middlesex.(x)

Indictment in any county in England.

*CHAPTER THE ELEVENTH.

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OF HINDERING THE EXPORTATION OF CORN, OR PREVENTING ITS CIRCULATION WITHIN THE KINGDOM.

THE 11 Geo. 2, c. 22, s. 1, reciting that persons had assembled in great numbers, committed great violence, and done many injuries, with intent to hinder the exportation of corn, whereby many of his majesty's subjects had been deterred from buying corn and grain, and following their lawful business therein, to their great loss and damage, as well as to the great damage and prejudice of the farmers and landholders of

Of hindering the exportation of corn by violence.

(u) *Rex v. Palmer*, M. & Rob. 70. Taunton, J. See *post*, Book II., Chap. 39.

(v) *Sherwin's case*, Oakham, 1785. 1 East, P. C. c. 8, s. 13, p. 421. The ground upon which the judges held in this case, that the evidence was sufficient to maintain the charge in the indictment, was that the weapon laid in the indictment, and the weapon proved, produce the same sort of mischief, *viz.*, by blows and bruises; and that the description would have been sufficient in an indictment for murder.

(w) *Hutchinson's case*, 1 Leach, 343. The Court offered the Attorney-General a special verdict upon this case; but he declined to take it, and the prisoners were acquitted. This construction of the statute as to the assembling being *deliberate*, and for the purpose of committing the offence, is stated to have been adopted by Willes, J., and Hotham, B., in *Spice's case*, Old Bailey, December, 1785, and by Heath, J., in *Gray's case*, Old Bailey, July in the same year. 1 Leach, 343, note (a).

(x) *Rex v. Cartwright*, 4 T. R. 490.

this kingdom, and of the nation in general, enacts, "that if any person or persons [shall wilfully and maliciously beat, wound, or use any other violence to or upon any person or persons, with intent to deter or hinder him or them from buying of corn or grain in any market, or other place within this kingdom: (a) or] shall unlawfully stop or seize upon any wagon, cart, or other carriage, or horse loaded with wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market town, or sea-port, of this kingdom; and wilfully and maliciously break, cut, separate or destroy the same, or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take off, drive away, kill or wound any of such horses; [or unlawfully beat or wound the driver or drivers of such wagon, cart, or other carriage, or horse, so loaded, in order to stop the same;] (a) or shall, by cutting of the sacks, or otherwise scatter or throw abroad such wheat, flour, meal, malt, or other grain; or shall take or carry away, spoil or damage the same, or any part thereof;" such offenders being convicted before two justices of the peace of the county, &c., in which the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol or to the house of correction, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and shall by the same justices be also ordered to be once publicly whipped by the master or keeper of the gaol or house of correction in such city, market town, or sea-port, in or near to which such offence shall be committed, at the market-cross or market place there, between the hours of eleven and two o'clock.

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Persons committing these offences a second time, or destroying granaries or the corn therein, or entering any vessel, &c., and spoiling grain intended for exportation, guilty of felony.

By sec. 2, ["if any person or persons so convicted, shall commit any of the offences aforesaid a second time;] (a) or if any person or persons shall wilfully and maliciously pull, throw down, or otherwise destroy any storehouse or granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any *such storehouse, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom; or shall throw abroad, or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and shall wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage, any meal, flour, wheat, or grain, therein intended for exportation;"] every such offender being convicted, shall be adjudged guilty of felony, and transported for seven years, and if such offender shall return before the expiration of seven years, he or she shall suffer death as a felon without benefit of clergy. (b)

Persons using violence to deter others from buying corn within the kingdom,

The 36 Geo. 3, c. 9, s. 1, reciting that persons had assembled themselves in great numbers, and committed great violences, with intent to hinder the passage of corn and grain from place to place, whereby the necessary circulation of corn and grain within the kingdom might be prevented; enacts, that if any person or persons shall [wilfully and maliciously beat, wound, or use any other violence to or upon any

(a) Repealed, see note (b), *post*, p. 122.

(b) Section 3 provides that attainder shall not work corruption of blood, loss of dower, or disinheritor; and by sec. 4, no person, who shall be punished for any offence by virtue of this act, shall be punished for the same offence by any other law or statute. Sections 5, 6, 7, and 8, relating to actions by persons against the hundred for damages done to their properties are repealed by 7 & 8 Geo. 4, c. 27; and so much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, is repealed by the 9 Geo. 4, c. 31.

person or persons with intent to deter or hinder him or them from buying of corn or grain in any market, or other place within this kingdom;] (c) or shall unlawfully stop or seize any wheat, flour, malt, or other grain, in or on the way to or from any city, market-town, or place, in this kingdom; or shall wilfully and maliciously break, cut, or destroy any wagon, cart, or other carriage, wherein any such wheat, flour, meal, malt, or other grain, shall be loaded, or the harness of any horse or horses drawing or carrying the same; or shall unlawfully take off from any such carriage, or drive away, kill, or wound any such horse or horses; [or unlawfully beat or wound the driver or drivers of any such wagon, cart, or such other carriage or horse so loaded, with intent to stop such wheat, flour, meal, malt, or other grain;] (c) or shall, by cutting of the sacks or otherwise, scatter or throw abroad any such wheat, flour, meal, malt, or other grain; or shall take or carry away, destroy, spoil, or damage, the same or any part thereof; such offenders being convicted before two justices of the peace of the county, &c., wherein the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol, or house of correction, to be kept to hard labor for any time not exceeding three months, nor less than one month.

By sec. 2, [“if any such person or persons so convicted, shall commit any of the offences aforesaid, a second time;] (a) or if any person or persons, with intent to prevent or hinder any corn, meal, flour, malt, or grain, from being lawfully carried or removed from any place whatsoever, shall wilfully and maliciously pull, throw down, or otherwise destroy, any storehouse or granary, or other place, in which corn, meal, flour, malt, or grain, shall be then kept; or shall unlawfully enter any such storehouse, granary, or other place, and *take and carry away any corn, flour, meal, malt, or grain, therefrom; or shall throw abroad or spoil the same or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, east or throw out therefrom, or otherwise spoil or damage, any corn, flour, meal, malt, or grain therein;” every person so offending, and being convicted, shall be adjudged guilty of felony, and be transported for seven years; and if such offender shall return into this kingdom before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. (b) The section further provides that attainder shall not work corruption of blood, loss of dower, or disinheritance of heirs. And by the sixth section it is provided that nothing contained in the act shall abridge or take away any provision already made by the law of the realm, for the suppression or punishment of any

or stopping any corn, breaking wagons, &c., carrying corn or scattering or taking off the horses, or beating the drivers, or scattering or taking corn, to be imprisoned.

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Persons committing these offences a second time, or with intent to prevent corn, &c., from being removed, destroying granaries, &c., or taking therefrom corn, &c., or spoiling the same, or entering any ship, barge, &c., and taking therefrom or spoiling corn, &c., guilty of felony, and

(c) Repealed, see next page.

(a) Ibid.

(b) This act contains no express provision for the punishment of principals in the second degree and accessories. They are therefore punishable, the principals in the second degree as principals in the first degree, according to the general rule, 4 Bla. Com. 38, and the accessories under the 7 & 8 Geo. 4, c. 28, s. 8, (ante, p. 38,) and s. 9 and 1 Vict. c. 90, s. 5, (ante, p. 65,) that is with transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and the offender may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet; and if a male, may be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment. *Quere*, whether the punishment from the transportation under this act is altered by the 4 & 5 Wm. 4, c. 67.

to be transported.

offence whatsoever, mentioned or described in this act; and it is provided also, that no person who shall be punished by virtue of this act, shall be punished for the same offence by virtue of any other law or statute whatsoever. (c)

So much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, is repealed by the 9 Geo. 4, c. 31, but other provisions are made for the punishment of offences of this description.

9 Geo. 4, c. 31. Assaults with intent to obstruct the buying or selling of grain, or the free passage thereof, punishable summarily before two magistrates.

The 26th section enacts, "that if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market, or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt, whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months; provided always that no person, who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

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*CHAPTER THE TWELFTH.

OF ADMINISTERING OR TAKING UNLAWFUL OATHS.

THE 37 Geo. 3, c. 123, s. 1, recites, that wicked and evil disposed persons had attempted to seduce his majesty's forces and subjects from their duty and allegiance, and to incite them to acts of mutiny and sedition; and had endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they had attempted to seduce the pretended obligation of oaths unlawfully administered. From this preamble it appears as if the statute were mainly directed against combinations for purposes of mutiny and sedition; but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. It enacts, "that any person or persons who shall in any manner or form whatsoever administer or cause to be administered, or be aiding or assisting at, or present at, and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purposes; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be undone; or not to reveal or discover any illegal oath or en-

37 Geo. 3, c. 123, s. 1, administering unlawful oaths felony, punishable by transportation.

(c) Sections 3, 4 and 5, relating to proceedings against the hundred for damages done to the properties of persons, by offenders against this act, are repealed by the 7 & 8 Geo. 4, c. 27.

gagement which may have been administered or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement;" shall on conviction be adjudged guilty of felony, and be transported for any term not exceeding seven years; "and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction, be adjudged guilty of felony, and may be transported for any term not exceeding seven years."

In one case a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them,^(a) was within this statute; the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended, that the words of *the statute, however large in themselves must be confined to the objects stated in the preamble: and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone: and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute.^(b)

So where sixteen persons, with their faces blackened, met at a house at night, having guns with them, and intending to go out for the purpose of night poaching, and were all sworn not to betray their companions, and it was objected that this oath was not within the statute, as it was not for a mutinous or seditious object, and that the statute only prohibited those oaths of secrecy which related to some illegal act, and that the words, "illegal" imported a criminal act and not a mere civil trespass, whereas it was a mere civil trespass which was contemplated at the time when the oath was administered; but it was held that the oath was within the statute; and as to the assembly itself, and its object, it was impossible that a meeting to go out with faces thus disguised at night, and under such circumstances, could be other than an unlawful assembly: in which case, the oath to keep it secret was an oath prohibited by the statute.^(c) So where an oath was administered to the members of a trades' union, binding them not to make buttons for less than the lodge prices, and not to divulge the secrets of the lodge; it was held that this was an oath within the statute, for to administer an oath or engagement not to reveal the secrets of any association, is within the 37 Geo. 3, c. 127, as explained by subsequent statutes, not because it has reference to any matter respecting wages, but on the ground that every association of that kind, bound together by an oath, not to disclose the proceeding of that society, is for that reason an unlawful combination within the statutes.^(e)

(a) The oath was, "You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets; so help you God."

(b) *Rex v. Marks*, 3 East, 157. Lawrence, J., said, "It is true that the preamble and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in acts of parliament, for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law."

(c) *Rex v. Brodrigg*, 6 C. & P. 571, Holroyd, J.

(e) *Rex v. Ball*, 6 G. & P. 563, Williams, J.

^a Eng. Com. Law Repts. xxv. 549.

^b Ib. xxv. 545.

So where an oath not to reveal what they saw or heard was administered by members of an association, which was formed for the purpose of raising wages by a general strike on the part of its members, and for other purposes in furtherance of that design, it was held that it was within the 30 Geo. 3, c. 123. (*f*)

52 Geo. 3, c. 104, s. 1. Administering unlawful oaths in certain cases felony. *126

Taking such oaths felony and transportation for life.

Persons taking oaths by compulsion must disclose the same within a limited time.

The 52 Geo. 3, c. 104, s. 1, which was passed, to render the foregoing act more effectual in respect to oaths of a particular nature, enacts, "that every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, *shall, on conviction, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy; (g) and every person who shall take any such oath or engagement, not being compelled thereto," shall, on conviction, be adjudged guilty of felony, and be transported for life, or for such term of years as the court shall adjudge.

But persons taking the oaths mentioned in either of these acts by compulsion must make a full disclosure of the fact, and the circumstances attending it, within a limited time, in order to be justified or excused. The 37 Geo. 3, c. 103, s. 2, enacts, "that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within *four days* after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produce by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom, and in whose presence, and when and where, such oath or engagement was administered or taken, by information on oath before one of his majesty's justices of the peace, or one of his majesty's principal secretaries of state, or his majesty's privy council; or in case the person taking such oath or engagement shall be in actual service in his majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer." The 52 Geo. 3, c. 104, s. 2, contains a similar enactment as to the oaths or engagements within that act, except that the words "*fourteen days*" are substituted for "*four days*."

What shall be deemed an oath.

By the 37 Geo. 3, c. 123, s. 5, any engagement or obligation whatsoever in the nature of an oath, and by the 52 Geo. 3, c. 104, s. 6, any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those acts, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

(*f*) *Rex v. Loveless*,^a 1 M. & Rob. 349; S. C., 6 C. & P. 596, Williams, J. See *Rex v. Dixon*,^b 6 C. & P. 601, Bosanquet, J.

(*g*) But this punishment was abolished by 1 Vict. c. 91, s. 1, by which, and sect. 2, the punishment now is transportation for life, or for any term not less than fifteen years, or for imprisonment, with or without hard labour, in the common gaol or house of correction for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the course of one year. See the sections, *ante*, p. 92.

^a Eng. Com. Law Reps. xxv. 557.

^b *Ib.* xxv. 557.

If the oath administered was intended to make the party believe himself under an engagement, it is equally within the act, whether the book made use of be a testament or not. *(h)* So the precise form of the oath is immaterial; it is an oath within the meaning of the acts, if it was understood by the party tendering and by the party taking it, as having the force and obligation of an oath *(i)*

With respect to persons aiding and assisting at the administering or taking these unlawful oaths, the 37 Geo. 3, s. 3, enacts, that persons aiding and assisting at, or present and consenting to, the administering or taking of any oath or engagement before mentioned *in that act; and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; although the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. A similar enactment is contained in the 52 Geo. 3, s. 4, with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in that act; and persons causing any such oath or engagement to be administered, though not present at the administering thereof: such persons are to be deemed principal offenders, and on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy, *(j)* although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

Both the statutes provide that it shall not be necessary to set forth in the indictment the words of the oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof. *(k)* Upon an indictment on the 37 Geo. 3, the fourth count charged, that the defendants administered to J. H. an oath "intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace for any act or expression of his or theirs, done or made collectively or individually, in or out of that or other similar societies, in pursuance of the spirit of that obligation;" and the eighth count stated the oath to be "intended to bind the said J. H. not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes;" and the other counts stated the objects of the oath administered, and the objects of the society, differently and more generally adapted to several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord Alvanley was of opinion that the act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the act, was well described: but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the clause of the act. The point was submitted to the judges, who, without giving any opinion

(h) *Rex v. Brodribb*, 6 C. & P. 571, Holroyd, J., where an account-book called *The Young Man's Best Companion*, was used.

(i) *Rex v. Loveless*, M. & Rob 349, Williams, J.

(j) Abolished by 1 Vict. c. 91, s. 1, see note *(c)* ante, for the present punishment.

(k) 37 Geo. 3, c. 123, s. 4; 52 Geo. 3, c. 104, s. 5.

* Eng. Com. Law Reps. xxv. 549.

against the other counts, all agreed that at any rate the fourth and eighth counts were good. (*l*)

If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together to do "a certain illegal act," it is sufficient, without going on to state what the illegal act was. For the offence is not the illegal act, but the administration of the oath, which preceded it, and all that the rules of pleading require is that the offence—that is the oath itself—should be sufficiently set *out. (*m*) Where an indictment charged that the prisoner administered "a certain oath" to J. Penny, and fifteen others, naming them, and it was proved that the sixteen were all sworn in the same manner, on the same book, two or three at a time, at the same meeting, it was held that this was sufficient, for it was the same act of administering. Or it might be taken to be a complete transaction with respect to each person sworn; and the charge would be substantiated by evidence of the prisoner having sworn any one of the party, in the same way a man may be convicted of larceny on proof of stealing one out of several articles named in an indictment. (*n*)

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Evidence: Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was supposed that he read the words; it was held, that parol evidence of what he in fact said was sufficient, without giving him notice to produce such paper. (*o*) And where the oath on the face of it did not purport to be for seditious purpose, though it was objected that no parol evidence could be given to show that the "brotherhood" mentioned in it was of a seditious nature, it was held that declarations made at the time by the party administering such oath were admissible to prove the real object of it. (*p*)

It is not necessary to produce a paper from which it is supposed that the oath was read. And parol evidence may be given to explain the nature of the oath. Placo of trial.

Both the 37 Geo. 3, and 52 Geo. 3, provide that offences committed on the high seas, or out of realm, or in England, shall be tried before and court of oyer and terminer or gaol delivery for any county in England, in such manner and form as if such offences had been therein committed; and that offences committed in Scotland shall be tried either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom. (*q*)

Persons tried not liable to be tried for the same fact as high treason.

It is also provided by both these statutes, that any person who shall be tried and acquitted or convicted of any offence against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of treason. And further, that nothing in the act contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same, as an offence against the acts, from being tried for the same, as high treason, or misprision of high treason, in such manner as if those acts had not been made. (*r*)

Societies taking unlawful

By the 57 Geo. 3, c. 19, s. 25, it is enacted, that all societies or clubs, the members whereof shall be required or admitted to take any oath or

(*l*) *Rex v. Moors and Others*, 6 East, 419, note. (*l*) The defendants were tried at Lancaster Summer Assizes, 1801; and the opinion of the judges was given in Michaelmas Term, 1801.

(*m*) *Rex v. Brodribb*,* 6 C. & P. 571, Holroyd, J.

(*n*) *Ibid.*

(*o*) *Rex v. Moors and Others*, 6 East, 421.

(*p*) *Ibid.*

(*q*) 37 Geo. 3, c. 123, s. 6; 52 Geo. 3, c. 104, s. 7.

(*r*) 37 Geo. 3, c. 123, s. 7; 52 Geo. 3, c. 104, s. 8.

* Eng. Com. Law Reps. xxv. 549.

engagement, which shall be an unlawful engagement within the 37th Geo. 3, c. 123, or the 52d Geo. 3, c. 104, or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be *performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies* within the meaning of the 39th Geo. 3, c. 97,(s) and may be prosecuted, proceeded against and punished, according to the provisions of the said act.(t)

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Administering unlawful oaths in Ireland felony and transportation for life.

With respect to the administering or taking unlawful oaths in Ireland, the 50 Geo. 3, c. 102, enacts, "that any person or persons who shall administer, or cause to be administered, tender, or caused to be tendered, or be present aiding and assisting at the administering or tendering, or who shall, by threats, promises, persuasions, or other undue means cause, procure, or induce to be taken by any person or persons in Ireland, upon a book or otherwise, any oath or engagement importing to bind the person or persons taking the same to be of any association, brotherhood, committee, society or confederacy whatsoever, in reality formed, or to be formed, for seditious purposes, or to disturb the public peace, or to injure the persons or property of any person or persons whatsoever, or to compel any person or persons whatsoever, to do, or omit, or refuse to do any act or acts whatsoever, under whatever name description or pretence such association, brotherhood, committee, society or confederacy shall assume, or pretend to be formed or constituted, or any oath or engagement importing to bind the person taking the same to obey the orders, or rules, or commands of any committee or other body of men not lawfully constituted, or of any captain, leader or commander, (not appointed by or under the authority of his majesty, his heirs and successors,) or to assemble at the desire and command of any such captain, leader, commander or committee, or of any person or persons not having lawful authority, or not to inform or give evidence against any brother associate, confederate or other person, or not to reveal or discover his or her having taken any illegal oath, or not to reveal or discover any illegal act done or to be done, or not to discover any illegal oath or engagement which may be administered or tendered to him or her, or the import thereof, whether such oath shall be afterwards so administered or tendered, or not, or whether he or she shall take such oath, or enter into such engagement or not, being by due course of law convicted thereof, shall be adjudged guilty of felony, and be transported for life; and every person who shall *take*, in Ireland, any such oath or engagement, importing so to bind him or her as aforesaid, and being by due course of law thereof convicted, shall be adjudged guilty of felony, and be transported for seven years."

And taking such oaths in Ireland, transportation for seven years.

(s) See this act, *post*, Book II., Chap. xxvi.

(t) This statute is not to extend to Freemason's lodges, nor to any declaration approved by two justices, nor to *Quakers'* meetings, nor to meetings or societies for charitable purposes, s. 26. By sec. 39, the act is not to extend to Ireland.

Persons compelled by necessity are excused if they disclose what they know in a limited time.

*130 Aiders to be deemed principal offenders.

Purport of the oath sufficient in the indictment.

This statute further enacts, that a person compelled by inevitable necessity to commit any of these offences, shall be excused and justified upon proof of such necessity, if within ten days (not being prevented by actual force or sickness, and then within seven days after such actual force or sickness shall cease to disable him,) he disclose to a justice of peace, by information on oath, the whole of what *he knows touching his compulsion. (u) Persons aiding at the administering or tendering the oath or engagement, and persons causing the oath or engagement to be administered or tendered, though not present, are to be deemed principal offenders and to be tried as such, though the person who actually administered such oath or engagement shall not have been tried or convicted. (v) And the statute also provides, that it shall be sufficient to set forth in the indictment the purport or object of such oath or engagement. (w)

By the 4 Geo. 4, c. 87, s. 1, every society, &c., in Ireland, the members whereof shall, according to the rules, &c., be required or admitted, or permitted to take any oath or engagement, which shall be an unlawful oath or engagement, within the statute 50 Geo. 3, c. 102, or to take any oath not required or authorized by law, are declared to be unlawful combinations and confederacies.

The 4 Geo. 4, c. 87, is extended for five years, from the 1st of September, 1839, by the 2 & 3 Vict. c. 74, which also extends the provisions of the 4th of Geo. 4, to certain other societies therein described.

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*CHAPTER THE THIRTEENTH.

OF MISPRISION OF FELONY AND OF COMPOUNDING OFFENCES. (A)

Of misprision or concealment of felony.

By misprision of felony, is generally understood the *concealment of felony*, or a *procuring* such concealment, whether it be felony by the common law, or by statute. (a) Thus, silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision; (b) for a man is bound to discover the crime of another to a magistrate with all possible expedition. (c) But there must be knowledge merely without any assent; for if a man assent to a felony, he will be either principal or accessory. (d) The punishment of this offence in an officer is imposed by the statute of Westminster, 3 Edw. 1, c. 9, which enacts, that "if the sheriff, coroner or any other bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any

(u) Sec. 2. And the section provides also, that no person shall be excluded from the defence of inevitable necessity, who shall be tried for an offence within ten days from the commission of it, or of seven days from the time when the force or sickness shall cease.

(v) Sec. 3.

(w) Sec. 4.

(a) 1 Hawk. P. C. c. 59, s. 2; 3 Inst. 139.

(b) 1 Hale, 374, 375; 1 Hawk. P. C. c. 59, s. 2, note (1.)

(c) 3 Inst. 140.

(d) 4 Bla. Com. 121.

(A) See the case of *Commonwealth v. Pease*, 16 Mass. Rep. p. 91, where it is settled, that accepting a note signed by the party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute a compounding of a felony. {See also 1 Campb. 45, *Wallace v. Hardacre*; 1 Campb. 55, *Pool v. Bousefield*; 2 M. & S. 201; *The King v. Duane*; 16 East, 293, *Brett v. Close*; Kyd on Awards, 63-69.}

manner of affinity, conceal, consent, or procure to conceal the felonies done in their liberties; or otherwise will not attach nor arrest such felons there (as they may) or otherwise will not do their office, for favour borne to such misdoers, and be attainted thereof, they shall have one year's imprisonment, and after make a grievous fine at the king's pleasure, if they have wherewith; and if they have not whereof, they shall have imprisonment of three years." The punishment, in the case of a common person, is imprisonment for a less discretionary time; and in both cases fine and ransom at the king's pleasure.(e) By the 3 Hen. 7, c. 1, the justices of every shire may take inquest to inquire of the concealments of other inquests, of such matters and offences as are to be inquired and presented before justices of the peace, whereof complaint shall be made by bill; and if such concealment be found of any inquest within a year after the concealment, every person of the inquest is to be amerced for the concealment by the discretion of the justices.

Of a similar nature to this offence of misprision of felony, is the offence of *compounding of felony*, mentioned in the books by the more ancient appellation of *theft-bote*, which is, where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.(f) It is said to have been anciently punishable as felony; but is now punished only with fine and imprisonment, unless it be accompanied with some *degree of maintenance given to the felon, which, makes the party an accessory after the fact.(g) But the barely taking again one's own goods which have been stoleu, is no offence at all, unless some favour be shown to the thief.(h)

Of com-
pounding
felony or of
theft-bote.

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Where an indictment for compounding felony alleged that the defendant desisted from prosecuting, and it appeared that he did prosecute to conviction, the defendant was held entitled to be acquitted.(hh)

It may be observed, that to take any reward for helping a person to stolen goods, is made felony by 7 & 8 Geo. 4, c. 29, s. 58, and to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds by the fifty-ninth section of the same act.

An agreement to put an end to a prosecution for a *misdemeanor* has been considered to be illegal, as impeding the course of public justice;(i) but it is sometimes done after conviction, with the sanction of the court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted to *speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied.(k)† And where, in a case of an indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the court would abate the

Compound-
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meanors.

(e) 4 Bla. Com. 121, where it is said, "which pleasure of the king must be observed, once for all, not to signify any extra-judicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; *voluntas Regis in curia, non in camera.*"

(f) 1 Hawk. P. C. c. 59, s. 5; 4 Bla. Com. 133.

(g) 1 Hawk. P. C. c. 59, s. 6; 2 Hale, 400.

(h) 1 Hawk. P. C. c. 59, s. 7.

(hh) *Rex v. Stone*, 4 C. & P. 379, Bosanquet, J. *Qu.* whether, if the indictment had omitted this averment it would have been good. The offence seems to be the letting the thief go without prosecution.

(i) *Collins v. Blantern*, 2 Wils. 341-9; *Edgecombe v. Rodd and Others*, 5 East, 294.

(k) 4 Bla. Com. 363, 364.

† [See *The People v. Bishop*, 5 Wend. 111.]

* Eng. Com. Law Repts. xix. 429.

period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him.^(l)

So where a defendant was prosecuted by parish officers, and convicted for disobeying an order of maintenance, and sentence was deferred by the court with a view to an arrangement, and in the meantime he was committed to prison, and the officers demanded a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs; the defendant paid part, and gave a note for the remainder, and was then brought into court, fined 1s. and discharged; it did not appear whether the particulars of the arrangement were made known to the court, but the defendant made no complaint when brought up; and it was held that the compromise was legal.^(m)

Of com-
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informa-
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penal
statutes.

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The compounding of *information on penal statutes* is a misdemeanor against public justice, by contributing to make the laws odious to the people.⁽ⁿ⁾ Therefore, in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by the 18 Eliz. c. 5, s. 4, that if any person, "by colour or pretence of process, or without process *upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or consent of some court, he shall stand two hours in the pillory,^(o) be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This severe statute extends even to penal actions, where the whole penalty is given to the prosecutor.^(p) But it does not apply to penalties which are only recoverable by information before justices; and an indictment for making a composition, in such a case was holden bad, in arrest of judgment.^(q)

In a case where it was held that threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties for selling *Fryer's Balsam* without a stamp,^(r) for the purpose of obtaining money to stay the prosecution, (not being such a threat as a firm and prudent man might not be expected to resist,) was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an offence would be indictable under the foregoing section of this statute of Elizabeth.^(s) But no indictment for any *attempt* to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against, the statute. Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and

^(l) *Beely v. Wingfield*, 11 East, 46, and see also *Baker v. Townshend*,^a 7 Taunt. 422. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the court, is invalid. 1 Chit. Crim. Law, 4.

^(m) *Kirk v. Strickwood*,^b 4 B. & Ad 421.

⁽ⁿ⁾ 4 Bla. Com. 136.

^(o) This part of the punishment cannot now, by 56 Geo. 3, c. 128, be inflicted. But section 2 of that statute empowers the court to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the court shall seem proper; and see the 7 Wm. 4, and 1 Vict. c. 23. The 18 Eliz. was made perpetual by the 27 Eliz. c. 10.

^(p) 4 Bla. Com. 136, note (3).

^(q) *Rex v. Crisp and Others*, 1 B. & Ald. 282.

^(r) By the 4 Geo. 3, c. 56, it was prohibited to be vended without a stamped label.

^(s) *Rex v. Southerton*, 6 East, 126. But *qu.* and see *Rex v. Crisp and Others*, 1 B. & Ald. 286, 287.

^a Eng. Com. Law Repts. 162.

^b *Ib.* xxiv. 91.

creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for the sake of example,) might also, upon general principles, have been deemed a sufficient ground on which to have sustained the indictment of common law.(*t*)

A party is liable to the punishment prescribed by this statute of 18 Eliz. c. 5, for taking the penalty imposed by a penal statute, though there is no action or proceeding for the penalty. The prisoner applied to one Round, and demanded five pounds, as a penalty, which Round had incurred under the general turnpike act, by suffering his wagon to be drawn on a turnpike road by more than four horses. Round had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings: no process had been sued out, and no information had been laid before a magistrate. The prisoner having been convicted, judgment was respited by Le Blanc, J., upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of any court in Westminster Hall for a composition could have *been obtained. But the judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred without leave of a court at Westminster, or without judgment or conviction.(*u*)

A party comes within the 18 Eliz. c. 5, although there be no action or proceeding for the penalty.

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A person may be convicted under the 18 Eliz. c. 5, s. 4, for taking money upon colour or pretence of a party having committed an offence, though in fact no offence liable to a penalty has been committed by the person from whom the money is taken. One *Peverill* who kept a retail beer-shop, but had no license to sell spirits, having given a woman a glass of gin, as a new year's gift, the prisoner threatened to prosecute him for selling gin without a license, and afterwards obtained money from *Peverill*, as a reward for forbearing to prosecute him for the supposed offence of selling gin without a license. No information was actually preferred, nor any process sued out. It was objected that, as no offence had been actually committed by *Peverill*, and as no process had been issued, or information laid against him, the case was not within the statute. The jury having found the prisoner guilty, upon a case reserved, the judges thought that the words "upon colour or pretence of any matter of offence" extended to a case where no penalty had been incurred, and that the conviction was right.(*v*)

A person may be convicted under 18 Eliz. c. 5, of taking money, though no offence liable to a penalty has been committed by the person from whom the money is taken.

(*t*) *Rex v. Southerton*, 6 East, 126. But *qu.* and see *Rex v. Crisp and Others*, 1 B. & Ald. 286, 287.

(*u*) *Rex v. Gotley*, East, T. 1805; Russ. & Ry. 84.

(*v*) *Reg. v. Best*, 2 Moo. C. C. R. 124; S. C. 9, C. & P. 368.

* Eng. Com. Law Reps. xxxviii. 159.

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*CHAPTER THE FOURTEENTH.

OF OFFENCES BY PERSONS IN OFFICE.

Officers indictable for misconduct.

WHERE an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by an act of parliament: (a) and a person holding a public office under the king's letters-patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it. (b) And it is laid down generally, that any public officer is indictable for misbehaviour in his office. (c) There is also the further punishment of the forfeiture of the office for the misdemeanor of doing any thing directly contrary to its design. (d) And in the case of a coroner, the 25 Geo. 2, c. 29, s. 6, makes particular provision, and enacts, and when convicted of extortion, or wilful neglect of duty, or misdemeanor in office, he may be removed from office by the judgment of the court in which he is convicted, unless such office be annual, or annexed to some other office. Where a duty is thrown upon a body of several persons, and they neglect it, each is individually liable to prosecution for the neglect. (e) †

It is proposed to treat shortly, in the present chapter, of oppression, negligence, fraud, and extortion, by persons in office; and of the refusal of persons to execute the duties of their office when properly appointed; leaving the subjects of buying and selling offices, and of bribery for subsequent chapters.

Oppression by public officer.

The *oppression* and tyrannical partiality of judges, justices, and other magistrates in the administration, and under colour of their offices, may be punished by impeachment in parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence. (f) Thus if a justice of the peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information. But the Court of King's Bench have expressly declared, that though a justice of peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge or any bad view of ill intention whatsoever, the court will never punish him by the extraordinary course of an information, but will leave the party complaining to the ordinary method of prosecution *by action or indictment. (g)

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(a) Reg. v. Wyat, 1 Salk. 380; Anon. 6 Mod. 96.

(b) Rex v. Bembridge, M. 24 Geo. 3; 1 Salk. 380, note (a).

(c) Anon. 6 Mod. 96.

(d) 1 Hawk. P. C. c. 66, s. 1.

(e) Rex v. Holland, 5 T. R. 607.

(f) 4 Bla. Com. 141. A judge is not indictable for an error in judgment; but this rule extends only to judges in courts of record, and not to ministerial officers. Rex v. Loggen and another, 1 Str. 74.

(g) Rex v. Palmer and Others, 2 Burr, 1162; 1 Bla. Com. 354, note (17), where it is said that in no case will the court grant an information unless an application for it be made within the second term after the offence committed, and notice of the application be previously given to the justice, unless the party injured will undertake to bring no action.

† [To render a neglect of duty by a public officer *wilful* within the statute making such neglect a misdemeanor, it is only necessary that it should appear to be *intentional*, and it is no defence that the officer believed he was not bound to do the act and was not guilty of bad faith in refusing. *The People v. Brooks*, 1 Denio, 471. That a corporation aggregate may be indicted for breach of duty. *Reg. v. Birmingham Railroad Co.*, 9 Car. & P. 469; Eng. C. L. xxxviii. 278; S. C. 3 Q. B. 223; Eng. C. L. xliii. 708.]

And whenever justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment.^(g) But where two sets of magistrates having a concurrent jurisdiction, one set of them appointed a meeting to grant ale licenses, and, after such appointment, the other set of magistrates appointed a meeting for the same purpose on a subsequent day, and having met, granted a license which had been refused by the first set; it was held that the proceedings of the magistrates appointing the second meeting were illegal, and the subject of an indictment. Lord Kenyon, C. J., said that it was proper the question should be settled whether it were *legal* for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashhurst, J., said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives.^(h)

The conduct of justices of the peace in granting or refusing licenses to sell ale has been frequently the subject of investigation; and it seems to be clear that though upon this matter the justices have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the control of the Court of King's Bench.⁽ⁱ⁾ That court will, therefore, grant an information against justices who refuse from corrupt and improper motives to grant such licenses;^(k) and an information will be granted against them as well for granting a license improperly as for refusing one in the same manner.^(l)

To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted by the 14 Edw. 3, c. 10, that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* or an *appeller* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful *to induce or incite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody.^(m) And a gaoler may be discharged and fined for

Of justices granting or refusing ale licenses improperly.

Of gaolers | forcing persons to give evidence.

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^(g) Per Lord Tenterden, C. J., *Rex v. Borron*, 3 B. & Ald. 434. *Ex parte Fentiman*,^b 2 Ad. & E. 127; 1 Bla. Com. 354, note (17).

^(h) *Rex v. Sainsbury* and another, 4 T. R. 451.

⁽ⁱ⁾ *Rex v. Young and Pitts*, 1 Burr. 556, 560, *et seq.*

^(k) *Rex v. Williams and Davis*, 3 Burr. 1317. The licenses in this case had been refused, because the persons applying for them would not give their votes for members of parliament as the justices would have had them. And see *Rex v. Hann and Price*, *id.* 1716, 1786.

^(l) *Rex v. Holland and Foster*, 4 T. R. 692. And see 1 Burn's Just. tit. *Alchouses*.

^(m) 4 Bla. Com. 128; 3 Inst. 91.

^a Eng. Com. Law Repts. v. 335.

^b *Ib.* xxix. 47.

voluntarily suffering his prisoners to escape, or for barbarously misusing them.(n) So a gaoler is indictable for refusing to receive a prisoner under the commitment of a magistrate (o)

Overseers of the poor punishable for misfeasance in their office. An overseer of the poor is also indictable for misfeasance in the execution of his office: as if he relieve the poor where there is no necessity for it:(p) or if he misuse the poor, as by keeping and lodging several poor persons in a filthy unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather;(q) or by exacting labour from them when they are unable to work.(r) And if overseers conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted.(s) And for most breaches of their duty overseers may be punished by indictment or information;(t) but with respect to the proceedings by information, as it is an extraordinary remedy, the Court of King's Bench will not suffer it to be applied to the punishment of ordinary offences, and has long come to a resolution not to grant informations against overseers for procuring a pauper's marriage with a view to burthen another parish (u)

An indictment against overseers on the 5 & 6 Wm. 4, c. 76, s. 47, for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad, unless it appear that there was some rule, order or regulation of the poor-law commissioners that the overseers should account upon such request, and where no such order, &c., is alleged, the indictment cannot be sustained after verdict, merely because it appears by inference, or by the inducement, that the defendants have not in fact accounted for one whole quarter.(v) Upon such an indictment it is sufficient, at least after verdict, to allege the order to have been made by "the poor-law commissioners for England and Wales," without naming each commissioner, and to state that a copy of the order, under seal, &c., was "duly sent" to the overseers, without alleging actual service on them.(w)

*138 *It has been already stated, that an officer *neglecting* the duties of

(n) 1 Hawk. P. & C. c. 66, s. 2.

(o) *Rex v. Cope*,^a 6 A. & E. 226; 1 N. & P. 515; 7 C. & P. 720.^b See the form of indictment there; which was for a refusal to receive in Newgate, and it was held that under the 4 Geo. 4, c. 64, the Court of Aldermen had not power to exclude from the gaol prisoners committed by the Middlesex magistrates, and who might have been committed to that gaol before that act passed.

(p) *Tawney's case*, 16 Vin. Abr. 415; 1 Bott. 358, pl. 371.

(q) *Rex v. Wetherill and another*, Cald. 432. (r) *Rex v. Winship and another*, Cald. 76.

(s) *Rex v. Compton*, Cald. 246; *Rex v. Tarrant*, 4 Burr. 2106, and *Rex v. Herbert*, 1 East, P. C. c. 11, s. 11, p. 461.

(t) *Rex v. Commings*, 1 Bott. 357, pl. 370; *Rex v. Robinson*, 2 Burr. 709; *Rex v. Jones*, 1 Bott. 360, pl. 377; 2 Nol. 474. From these authorities it appears that such proceeding may be had in some cases where a particular punishment is created by statute, and a specific method of recovering the penalty is pointed out. But as to this see *ante*, Book I., Chap. iii., p. 49, 50.

(u) *Rex v. Slaughter*, Cald. 346, note (a). And perhaps this offence would not be punishable at all, if the woman settled in the defendant's parish previous to the marriage is with child by the man to whom the defendants procure her to be married. 2 Nolan, 477.

(v) *Reg. v. Crossley*,^c 10 A. & E. 132; 2 P. & D. 319.

(w) Per Lord Denman, C. J., and Patteson, J. Whether disobedience of an order of the commissioners within sec. 98, be indictable till the third offence, was not discussed in this case, but it should seem it is not. C. S. G.

^a Eng. Com. Law Reps. xxxiii. 65.

^b *Ib.* xxxii. 707.

^c *Ib.* xxxvii. 74.

his office, is guilty of an indictable offence.(x) In some cases also the offence will amount to a forfeiture of his office, if it be a beneficial one;(y) for, by the implied condition that the grantee of an office shall execute it diligently and faithfully, it appears to be clear that he will be liable to a forfeiture of it, not only for doing a thing directly contrary to its design, but also for neglecting to attend to his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those by or for whom he was made an officer.(z) A coroner neglecting the duties of his office is indictable:(a) and by statute 3 Edw. 1, c. 9, the sheriff, coroner, or any other bailiff concealing felonies, or not arresting felons, or otherwise not doing their duty, are to be imprisoned for a year, and fined at the king's pleasure.(b) A sheriff is indictable for refusing or neglecting to execute a criminal according to his sentence; but he is not bound to execute a criminal if he be not in his custody, and in such case if it is intended by the court, which passed the sentence, that the sheriff should do execution, there should be a special mandate to the party having the prisoner in custody, to deliver him to the sheriff, and another to the sheriff to receive the prisoner and execute him.(c) And an indictment lies at common law against all subordinate officers, for neglect, as well as misconduct, in the discharge of their official duties. A constable, is therefore indictable for neglecting the duties required of him by common law or by statute;(d) and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for the neglect.(e) And an overseer of the poor is indictable for the wilful neglect of his duty. Thus overseers have been held to be indictable for not providing for the poor:(f) for refusing to account within four days after the appointment of new overseer, under 43 Eliz. c. 2;(g) for not making a rate to reimburse constables, under 14 Car. 2, c. 14,(h) and for not receiving a pauper sent to them by order of two justices;(i) or disobeying any other order of justices, where the justices have competent jurisdiction.(j)

*It was the opinion of a majority of the learned judges present at the discussion, that an indictment would not lie against an overseer for not

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(x) *Ante*, p. 135.

(y) 4 Bla. Com. 140.

(z) 1 Hawk. P. C. c. 66, s. 1. And see further as to the forfeiture of offices, Com. Dig. *Officer*, (K. 2) (K. 3), and the Earl of Shrewsbury's case, 9 Co. 50.

(a) See precedents of indictments against coroners for refusing to take inquisitions or for not returning inquisitions according to evidence, 2 Chit. Crim. Law, 255; Cro. Circ. Comp. (10th ed.) 173.

(b) *Ante*, p. 131. And by 3 Hen. 7, c. 1, if any coroner be remiss, and make not inquisition upon the view of the body dead, and certify not, as ordained in the statute, he shall, for every default, forfeit to the king a hundred shillings.(c) *Rex v. Antrobus*, 6 C. & P. 784; 2 A. & E. 788; 4 N. & M. 565.(d) *Reg. v. Wyat*, 1 Salk. 380. *Crowther's case*, Cro. Eliz. 654; indictment against a constable for refusing to make hue and cry after notice of a burglary.(e) *Reg. v. Wyat*, 1 Salk. 381.(f) 2 Nolan, 475; *Tawney's case*, 1 Bott. 378, pl. 381; *Rex v. Winship and another*, Cald. 72.(g) *Rex v. Commings*, 5 Mod. 179; 2 Nol. 453, 476, where it is observed in the note (3) that this case occurred prior to 17 Geo. 2, c. 38.(h) *Rex v. Barlow*, 2 Salk. 609; 1 Bott. 357, pl. 369. The objection was, that the word used in the act is "may," which does not require it as a duty. But the court held the word "may" to be imperative, and the same as "shall." By 18 Geo. 3, c. 19, constables are now to be paid for parish business out of the poor's rate.(i) *Rex v. Davis*, 1 Bott. 361, pl. 378; *Say*, 163, S. C.(j) 2 Nol. 476; *Rex v. Boys*, *Say*, 143. But otherwise where the justices have no jurisdiction. *Rex v. Smith*, 1 Bott. 415, pl. 461.

* Eng. Com. Law Repts. xxv. 651.

b *Ib.* xxix. 213.

Overseers of the poor punishable for neglecting to relieve paupers. relieving a pauper, unless there were an order for his relief, except in a case of immediate emergency, where there was not time to get an order. (*k*) But there may be cases in which the neglect to provide a pauper with necessaries will render an overseer liable to be indicted. Thus were an indictment stated that the defendant, an overseer, had under his care a poor person belonging to his township, but neglected and refused to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want of such reasonable and necessary meat, &c., died, the defendant was convicted, and sentenced to a year's imprisonment. (*l*) And where an overseer was indicted for neglecting to supply medical assistance when required, to a pauper labouring under dangerous illness, the learned judges before whom the indictment was tried, held that an offence was sufficiently charged and proved, though such pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. (*m*)

Churchwardens and others refusing to call vestries, guilty of a misdemeanor. By the 1 & 2 Wm. 4, c. 60, an act for the better regulation of vestries, s. 11, "if any churchwarden, rate-collector, overseer, or other parish officer, shall refuse to call meetings according to the provisions of this act, or shall refuse or neglect to make and give the declarations and notices directed to be made and given by this act, or to receive the vote of any rate-payer as aforesaid, or shall in any manner whatsoever alter, falsify, conceal or suppress any vote or votes as aforesaid, such churchwarden, rate-collector, or overseer, or other parish officer, shall be deemed and taken to be guilty of a misdemeanor."

Indictment for neglect of duty. Upon an indictment against an officer for neglect of duty, it is sufficient to state that he was such officer, and it is not necessary to state his appointment. (*n*) And in the case of a delinquent in India, prosecuted under 24 Geo. 3, c. 25, for neglect of duty, it was held not to be necessary to state that the neglect was corrupt; the statute making it a misdemeanor if it was wilful. (*o*) And the indictment for neglect of duty need not aver that the defendant had notice of all the facts it states, if it was his duty to have known them. (*p*) Where some of the charges against the defendant were *for disobeying orders, and it was stated that those orders were made and communicated to him, but their continuance in force was not averred, such an averment was insisted upon as essential: but the court said that the orders must be taken to continue in force until they were revoked; and the objection was overruled. (*q*)

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(*k*) *Rex v. Meredith & Turner*, Russ. & Ry. 46. This case occasioned much doubt and discussion. It came under consideration in Mich. Term, 1802, and was adjourned until the following Hilary Term, when it was further adjourned, as there was a difference of opinion among the judges. Lord Ellenborough, C. J., Lord Alvanley, C. J., Heath, J., Rooke, J., and Graham, B., seemed to be of the opinion that the indictment was good, and the conviction proper, the overseer having taken the pauper under his care; but M'Donald, C. B., Grose, J., Thomson, B., Lawrence, J., Le Blanc, J., and Chambre, J., thought otherwise, and were of opinion that except in a case of immediate and urgent necessity, the overseer was only bound to act under an order of justices, in a case where such an order could be had. It was agreed that the defendant should enter into his own recognizance to appear and receive judgment when called upon.

(*l*) *Rex v. Booth*, Russ. & Ry. 47, note (*a*).

(*m*) *Rex v. Warren*, *cor. Holroyd, J.*, Worcester Lent Assizes, 1820. In a case where the parents of a bastard child had neglected to provide necessaries for its subsistence, it was decided that the officers of the parish in which the child was born were obliged to provide such necessaries without an order of justices, *Hayes v. Bryant*, 1 H. Blac. 253.

(*n*) *Rex v. Holland*, 5 T. R. 607.

(*o*) *Id. ibid.*

(*p*) *Id. ibid.*

(*q*) *Id. ibid.*

Other charges in the same case against the defendant were for not acting upon particular events within the settlement, as those events made it his duty to act: but it was not averred that he had notice of those events. The court, however, held that an allegation of notice was not necessary: for as the events happened within a foreign settlement, whilst the defendant was one of the council in such settlement, he was bound to take notice of them.^(r)

By the 33 Geo. 3, c. 55, two justices at a petty or special sessions of Justices at the peace, upon complaint on oath of any neglect of duty or disobedience of any warrant or order, of any justice of the peace, by any constable, overseer of the poor, or other peace or parish officer, such constable, overseer, or other officer, having been duly summoned, may impose, upon conviction, any reasonable fine or fines not exceeding the sum of forty shillings, as a punishment for such neglect of duty or disobedience. petty sessions may fine constables, &c., for neglect of duty.

The absence or misconduct of the chief officers of corporations at the time of elections, whereby the completion of the election of other chief officers may be prevented, is punishable by the provisions of 11 Geo. 1, c. 4, which enacts, "that if any mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, shall voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer in the same city, borough, or town corporate, upon the day, or within the time appointed by charter or ancient usage for such election;" such offender being convicted shall, for every offence, be imprisoned for six months and be for ever disabled from exercising any office belonging to the same city, borough, or corporation. This voluntary absence from the election of a chief officer must be such an absence whereby the mischief complained of in the preamble of the statute, namely, the preventing the completion of the election of a chief officer, may possibly be occasioned. It has been decided therefore, that a chief officer voluntarily absenting himself upon the charter day of election of his successor is not indictable, unless his presence as such chief officer be necessary by the constitution of the corporation to constitute a legal corporate assembly for such purpose.^(s) Chief officers of corporations absenting themselves from, or hindering the election of other officers, may be imprisoned.

By the 3 & 4 Wm. 4, c. 94, s. 41, "if any master in ordinary of the High Court of Chancery, or any person holding any office, situation, or employment in any office of the said court, or under any of the judges or officers thereof, shall, for any thing done or pretended to be done relating to his office, situation, or employment, or under colour of doing any thing relating to his office, situation, or employment, wilfully take, demand, receive, or accept, or appoint, or allow any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him, or for any other person by him named, any fee, gift, gratuity, or emolument, *or any thing of value, other than what is allowed or directed to be taken by him as aforesaid, the person so offending, when duly convicted, shall forfeit and pay the sum of 500*l.*, and shall be removed from any office, situation or employment he may hold in the said court, and shall be rendered, and is hereby rendered, incapable for ever thereafter of holding any office, situation, or employment in the said court, or otherwise serving his majesty, his heirs or successors." Officers and clerks in Chancery liable to penalties, for taking gratuities.

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(r) *Rex v. Holland*, 5 T. R. 607.

(s) *Rex v. Corry*, 5 East, 372

How offenders may be prosecuted. By s. 42, "any such offender may be prosecuted either by information at the suit of his majesty's attorney-general, or by criminal information before his majesty's Court of King's Bench, or by indictment."

Frauds by public officers. Public officers may also be indicted for frauds committed in their official capacities.† Thus were two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the government, though it was objected that it was only a private matter of account and not indictable, the court held otherwise, as it related to the public revenue.(t) And if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish.(u) It was objected in this case, that the defendant was not bound to bring this sum to account, the contract being illegal;(v) that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damaged by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother, yet having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

By officers &c., of the general penitentiary at Millbank.

By the 56 Geo. 3, c. 63, which was passed to regulate the general penitentiary for convicts at Millbank, provision is made for the punishment of the governor and the other officers and servants of that establishment, in case of any fraudulent or improper charges in their accounts. The twelfth section enacts, (after stating the mode of examination to be adopted,) that in case there shall appear in any such accounts any false entry knowingly or wilfully made, or any fraudulent omission, or any other fraud whatsoever, or any collusion between the officers and servants, or between the officers and servants and any other persons in any matter relative thereto, the committee may dismiss such officers and servants, and, if they see fit, cause indictments to be preferred against the officers, servants, or other persons so offending at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or for any adjoining county; and in case the persons indicted are found guilty, they are to be punished by fine and *imprisonment, or either of them at the discretion of the court. The 59 Geo. 3, c. 136, which was passed for the better regulation of this penitentiary, contains further provisions for the punishment of officers and servants guilty of misconduct.

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(t) *Rex v. Bembridge* and another cited, 6 East, 136.

(u) *Rex v. Martin*, 2 Campb. 268. (v) See *Townson v. Wilson*, 1 Campb. 396.

† [Gross negligence in the discharge of a fiduciary duty is evidence of fraud and misbehaviour in office. An habitual neglect to account for small sums by a public officer authorizes and requires the presumption that the sums retained and not accounted for, were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts instead of rebutting such presumption strengthens and supports it. *Commonwealth v. Rodee*, 6 B. Mon. 171.]

It may be observed, that where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his office, it is not necessary to state that he had notice of those acts, for he is presumed from his situation to know them, (w)†

Extortion in a large sense signifies any oppression under color of right: but in a more strict sense signifies the unlawful taking by any officer, by color of his office, of any money or any thing of value that is not due to him, or more than his due, or before it is due. (x) By the statute of Westm. 1, (3 Edw. 1.) c. 26, which is only in affirmance of the common law, it is declared and enacted to be extortion for any sheriff other minister of the king, whose office any way concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the king. This statute extends to escheators, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of the act. (y) Justices of the peace, whose office was instituted after the act, are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute. And generally no public officer may take any other fees or rewards for doing any thing relating to his office than some statute in force gives him, or such as have been anciently and accustomedly taken; and if he do otherwise, he is guilty of extortion. (z) And it should be observed, that all prescriptions which have been contrary to the statute and to the common law, in affirmance of which it was made, have been always holden to be void; as where the clerk of the market claimed certain fees as due time out of mind for the examination of weights and measures: this was adjudged to be void. (a)‡

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of Westm. 1, c. 26, and therefore such fees may be legally demanded and insisted upon without any danger of extortion. (b) And it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigor and success. (c) But it has been always holden, that a promise to pay an officer money for the *doing of a thing which the law will not suffer

Extortion
by public
officers.

The stated
fees of
courts of
justice may
be insisted
upon.

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(w) *Rex v. Holland*, 5 T. R. 607. (x) 4 Bla. Com. 141; 1 Hawk. P. C. c. 68 s. 1.

(y) Inst. 209. Burn's Just. tit. *Extortion*.

(z) Dalt. c. 41. Burn's Just. tit. *Extortion*.

(a) 1 Hawk. P. C. c. 68, s. 2. Bac. Abr. tit. *Extortion*.

(b) 1 Hawk. P. C. c. 68, s. 3; 2 Inst. 210; Co. Lit. 368. Bac. Abr. tit. *Extortion*.

(c) Bac. Abr. tit. *Extortion*. 2 Inst. 210; 3 Inst. 149; Co. Lit. 368.

† [See *Kane v. The People*, 8 Wend. 203. *Graffins v. The Commonwealth*, 3 Penna. Rep 502.]

‡ [The *People v. Whaley*, 8 Cowen 661. *The People v. Rust*, 1 Caines's Rep. 130. It is an indictable offence in public officers to exact and receive any thing more for the performance of their duty than the fees allowed by law. *Gilmore v. Lewis*, 12 Ohio, 281.]

Cases of
extortion.

him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. (*d*)

It has been held to be extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the defendants knew that it had been proved before in the prerogative court. (*e*) And it is extortion in a *churchwarden* to obtain a silver cup, or other valuable thing, by color of his office. (*f*) And a *coroner* is guilty of this offence who refuses to take the view of a dead body until his fees are paid. (*g*) So if an *under-sheriff* obtain his fees by refusing to execute process till they are paid, (*h*) or take a bond for his fee before execution is sued out, (*i*) it will be extortion. † And it will be the same offence in a *sheriff's officer* to bargain for money to be paid him by A. to accept A. and B. as bail for C. whom he has arrested; (*j*) or to arrest a man in order to obtain a release from him; (*k*) and also in a goaler to obtain money from his prisoner by colour of his office. (*l*) In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion; (*m*) and the same if a ferryman takes more than is due by custom for the use of his ferry. (*n*) And it was held that if the farmer of a market erects so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such a case is extortion. (*o*) Where a collector of post-horse duty demanded a sum of money of a person, charging him with having let out post-horses without paying the duty, and threatened him with an exchequer process, and he thereon gave him a promissory note for five pounds, which was afterwards paid and the proceeds handed over to the farmer of the post-horse duties, it was held to be an extortion. (*p*)

The question of exemption from toll cannot be tried on an indictment against a turnpike keeper for extortion in taking the toll; the general right to demand toll not having been denied, nor the ground of exemption notified, at the time the toll was taken. (*q*)

33 Geo. 3,
c. 52, East
Indies.

The 33 Geo. 3, 62, enacts, that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his majesty, or the company in the East Indies, shall be deemed to be extortion and a misdemeanor at law,

*144 and punished as such. The offender is also to forfeit to the king the

(*d*) Bac. Abr. tit. *Extortion*.

(*e*) *Rex v. Loggen* and another, 1 Str. 73.

(*f*) *Roy v. Eyres*, 1 Sid. 307.

(*g*) 3 Inst. 149.

(*h*) *Hescott's case*, 1 Salk. 330. The court said that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.

(*i*) *Empson v. Bathurst, Hutt*. 52, where it is said that an obligation made by extortion is against common law, for it is as robbery; and that the sheriff's fee is not due until execution.

(*j*) *Stotesbury v. Smith*, 2 Burr. 924

(*k*) *Williams v. Lyons*, 8 Mod. 189.

(*l*) *Rex v. Broughton, Trem*. P. C. 111. Stark. 588.

(*m*) *Rex v. Burdett*, 1 Lord Raym. 149.

(*n*) *Rex v. Roberts*, 4 Mod. 101.

(*o*) *Rex v. Burdett*, 1 Lord Raym. 149.

(*p*) *Rex v. Higgins*, 4 C. & P. 247, Vaughan, B.

(*q*) *Rex v. Hamlyn*, 4 Campb. 379.

† [See *Cross v. The State*, 1 Yerger, 261.]

* Eng. Com. Law. Repts. xix. 368.

present so received, or its full value; but the court may order such present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

Two persons may be indicted jointly for extortion where no fee was due; and there are no accessories in this offence. Upon an indictment against the chancellor and the registrar of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker, C. J., this would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion: but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the act of others.^(r) And an indictment against three averring that they, *colore officiorum suorum*, took so much, is good, for they might take so much in gross, and afterwards divide it amongst them, of which the party grieved could have no notice.^(s)

It is said that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5, s. 4;^(ss) but this position has been questioned.^(t) It may be tried and determined by justices of the peace at their sessions by virtue of the term "extortions" in their commission.^(u) The indictment must state a sum which the defendant received: but it is not material to prove the exact sum as laid in the indictment; so that if a man be indicted for taking extorsively twenty shillings, and there be proof but of one shilling, it will be sufficient.^(v) An indictment for extortion, where nothing was due, ought to state that nothing was due;^(w) and if it be for taking more than was due, it ought to show how much was due.^(x) And the extorsive agreement is not the offence, but the taking; for a pardon after the agreement, before the taking does not pardon the extortion.^(y) A

^(r) *Rex v. Loggen* and another, 1 Str. 75. *Qu.* Whether this was not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule that several persons may be jointly indicted for extortion, see *Rex v. Atkinson* and another, Lord Raym. 1284. 1 Salk. 382.

^(s) Lake's case, 3 Leon. 268. Com. Dig. tit. *Extortion*.

^(ss) 1 Hawk. P. C. c. 68, s. 6, note (3); Burn's Just. tit. *Extortion*, Stark. Crim. Plead. 585, note (k).

^(t) 2 Hawk. P. C. c. 26, s. 50, 2 Chit. Crim. Law, 294, in the note.

^(u) *Rex v. Loggen* and another, 1 Stra. 73.

^(v) *Rex v. Burdett*, 1 Lord Raym. 149; and see *Rex v. Gillham*, 6 T. R. 267.

^(w) Lake's case, 3 Leon. 268. Com. Dig. tit. *Extortion*.

^(y) By Holt, C. J., in *Rex v. Burdett*, 1 Lord Raym. 149.

(x) *Ibid.*

(A) MASSACHUSETTS.—If fees be demanded by an officer of one not liable to pay them, although improperly and unjustly taken and accepted by the officer, yet it is not extortion, for which he is liable to the penalty imposed by the statute of 1795, c. 25, s. 6. As the fees, if excessive, are not obtained by the colour of his office.—10 M. & R. 210, *Dunlap v. Curtis*.

Hence, if an officer charge more than legal fees for the service of an original writ, which are taxed in the bill of costs, and paid by the defendant on an execution issuing on a judgment in the action, the officer does not thereby incur the penalty provided by the statute, as the fees were not extorted from the debtor, by any power which the officer had to demand them, under colour of his office. *Ibid.*

If a sheriff take a negotiable promissory note for greater fees than are allowed by the fee bill he is not thereby liable to the penalty therein provided for taking illegal fees. *Commonwealth v. Coney*, 2 M. R. 253.

A deputy sheriff is not liable to be indicted on the statute for taking greater fees for the service of an execution than are allowed by the fee bill, unless it be done wilfully and corruptly. *Commonwealth v. Shed*, 1 M. R. 227.

Punish-
ment.

The offence of extortion is punishable at common law by fine and imprisonment; and also by a removal from the office in the execution of which it was committed; (z) and there is a further additional punishment by the statute of West. 1, c. 26, by which it is enacted "that no sheriff nor other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure." (a) And an action lies to recover this double value. (b)

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Refusal to
execute
offices.

*It is an offence at common law to refuse to serve an office when duly elected. (bb) And the refusal of person to execute ministerial offices to which they are duly appointed, and from the execution to which they have no proper ground of exemption, seems in general to be punishable by indictment.

Constables.

Thus it has been held to be indictable for a constable, after he has been duly chosen, to refuse to execute the office, (c) or to refuse to take the oath for that purpose. (d) But a person is not liable to serve the office of constable unless he be resident in a parish. Where, therefore, a person occupied a house and paid all parish rates in respect of it, and carried on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, it was held that he was not liable to serve the office of constable in the parish where the house was situated. (e) But where a person occupied a warehouse in M., and usually slept at a lodging-house in M. from Monday till Saturday, when he returned to his mother's in H., where he also had premises, and he did suit and service to the court-leet of H., the court thought that he was liable to be appointed a constable of M. (f)

It is sufficient, in an indictment for refusing to execute the office of constable, to state that defendant unlawfully, &c., "did neglect and refuse to take upon himself the execution of the said office; and it is

(z) 1 Hawk. P. C. c. 68, c. 5. Bac. Abr. tit. *Extortion*.

(a) By the "king's pleasure" is meant by the king's justices before whom the case depends, and at their discretion, 2 Inst. 210.

(b) Com. Dig. 323, tit. *Extortion* (C).

(bb) *Rex v. Bower*, 1 B. & C. 587.

(c) *Rex v. Lowe*, 2 Stra. 92. *Rex v. Chappel*, 3 Campb. 91. *Rex v. Genge*, Cowp. 13. *Rex v. Clerke*, 1 Keb. 393.

(d) *Rex v. Harpur*, 5 Mod. 96. *Fletcher v. Ingram*, 5 Mod. 127

(e) *Rex v. Adard*, 4 B. & C. 772; 7 D. & R. 340.

(f) *Rex v. Mosley*, 3 A. & E., 488, 5 N. & M. 261. See this case as to what is an excessive fine for refusing to serve the office.

On an indictment against a deputy sheriff for taking greater fees for the service of an execution than are allowed by the fee bill, the fact of his having done so is not, in itself, proof of a corrupt intention. *Ibid*.

To subject an officer to the penalty prescribed by the statute, it must be proved that the sum alleged to have been extorted was demanded as a fee for some official duty. He must have wilfully and corruptly demanded and received other or greater fees than the law allows. *Runnels v. Fletcher*, 15 M. R. 525. {See 17 Mass. R. 410, *Lincoln v. Shaw*. 1 Pick. 171, *Shattuck v. Woods*. 7 Pick. 279, *Commonwealth v. Bayley*.}

NEW YORK.—An indictment against an attorney for extorting more than his legal fees, must specify how much he received on his own account, and how much for the officers and members of the court. *The People v. Rust*, 1 Caine's Reports, 132.

VIRGINIA.—The sheriff's fee for taking the forth-coming bond, may be included in it, without extortion. 2 Munford's Reports, 266. *Bronaugh's v. Freeman's Executor*.

{See 1 Serg. & Rawle, 505, *Irw. v. Commissioners*. 4 ib. 291, *Levy v. Commissioners*. 7 ib. 447, *Bussier v. Pray*.}

• Eng. Com. Law Reps. viii. 153.

• Ib. x. 458.

• Ib. xxx. 134.

not necessary to state he refused to be sworn.(g) Upon such an indictment, proof that he refused to be sworn is sufficient *prima facie* evidence of a refusal to take the office; but if it were proved that, although not sworn, he had acted as constable, the refusal to take the oath would not prove that he refused to take the office.(g)

Where there is a special custom of swearing in constables, as in the city of London, it is unnecessary to set such custom out in the indictment.(g)

The 1 & 2 Wm. 4, c. 41, which authorizes justices in cases of tumult, riot, &c., to appoint special constables, enacts, by ss. 7 & 8, that any person appointed and neglecting to take the oath, and act, shall be liable to certain penalties.(h) So a person is indictable for refusing to take upon himself the office of overseer of the poor.(i) For though the 43^{Overseers} Eliz. c. 2, says only that certain persons therein described shall be over-^{of the poor.}seers, and gives no express indictment for a refusal of the office; yet upon the principles of common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable.(j) But there should be previous *notice of the appointment; and the indictment should show that the defendant was bound to undertake the office by setting forth how he was elected.(k) And if an indictment for refusing to serve the office of constable on being thereto chosen by the corporation do not set forth the prescription of the corporation so to choose, it is bad; for a corporation has no power of common right to choose a constable.(l) (A)

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An indictment for refusing to execute an office must aver that the party had notice of the appointment.(m)

(g) *Rex v. Brain*, 3 B. & Ad. 614.

(h) See also 5 & 6 Wm. 4, c. 43. Special constables appointed under the 1 & 2 Wm. 4, c. 21, continue to retain their authority till they have notice under s. 9 of the determination of their services, although such notice may not be given for many years. *Reg. v. Thomas* and others, Gloucester, Spr. Ass. 1841. *Coleridge, J.*

(i) *Rex v. Jones*, 2 Stra. 1145, S. C. 7 Mod. 410; 1 Bott. 360, pl. 377; *Rex v. Poynder*,^b 1 B. & C. 178; S. C. 2 D. & R. 258; *Rex v. Hall*,^c 1 B. & C. 123. S. C. 2 D. & R. 241.

(j) *Rex v. Jones*, 1 Bott. *supra*.

(k) *Rex v. Harpur*, 5 Mod. 96. In *Rex v. Burder*, 4 T. R. 778, it was held that an appointment of an overseer of the poor for the year next ensuing must be understood to be for the overseer's year: and an indictment, stating that the defendant was appointed "overseer of the poor of the parish of A.," and that he afterwards refused "to take the said office of overseer of the parish to which he was so appointed," was held good on demurrer.

(l) *Rex v. Bernard*, 2 Salk. 52; 1 Lord Raym. 94.

(m) *Rex v. Fearnly*, 1 T. R. 316; *Rex v. White*, Cald. 183; *Rex v. Winship*, Cald. 72; *Rex v. Kingston*, 8 East, 41.

(A) The penalties, and mode of recovering them, for refusing to execute ministerial offices, are specially provided for in the statutes of the several states, regulating the choice and duties of town and municipal officers. To these statute provisions the reader is referred. In many of the states, the penalty is to be recovered by action of debt, &c. But in others, by warrant of distress and sale of the offender's goods and chattels. The latter mode is very summary and inconsistent with the principles of the common law, which requires that the process shall be by indictment, which shall set forth that the defendant is bound to accept the office, and the manner in which he was elected. *Quare*, is any mode of recovering these penalties which deprives the party of a trial by jury, constitutional? Such for instance as the statute of Massachusetts provides; which is, that a certificate under the hand of the town clerk, or two of the select men, certifying that the person (constable) was legally chosen, shall be admitted as evidence of the fact; and if the person shall make default, or appearing shall not show sufficient cause for his refusal, the court shall order a warrant, &c., to levy the fine by distress and sale of the offender's goods and chattels; and for want thereof to commit the delinquent to prison. St. 1785, c. 75, § 3.

^a Eng. Com. Law Repts. xxiii. 151.

^b Ib. viii. 51.

^c Ib. 39.

*CHAPTER THE FIFTEENTH.

OF BUYING AND SELLING OFFICES.

CONCERNING the sale of offices of a public nature, it has been well observed, that nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both the king and people depends, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them: nor can any thing be a greater discouragement to industry and virtue than to see those places of trust and honour, which ought to be the rewards of persons who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of having been at a great expense in gaining of their places, and the necessity of sometimes straining a point to make their bargain answer their expectation. (a) (1)

Offence at
common
law.

The buying and selling such offices has therefore been considered an offence *malum in se*, and indictable at common law. (b) In a case of an indictment for a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, it was proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast-waiter. But Lord Ellenborough, C J., said that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error: but that, after reading the case of *Rex v. Vaughan*, (c) it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J., afterward, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law. (d)

Attempt to
bribe a
minister to
give an
office.

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The case of *Rex v. Vaughan*, was an attempt only to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies. (e) And where the defendant, who was clerk to the agent for the French prisoners of war at Portchester Castle, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been made the subject of an indictment. (f)

Statutes.

But it has been endeavoured to prevent the mischiefs of buying and selling offices, by the enactment of several statutes.

12 Rich. 2
c. 2, Chan-

The 12 Rich. 2, c. 2, enacted, "that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain,

(a) 1 Hawk. P. C. c. 67, s. 3. Bac. Abr. tit. *Offices and Officers*.

(b) *Stockwell v. North*, Noy. 102. Moor, 781, S. C.

(c) 4 Burr. 2494.

(d) *Rex v. Pollman* and others, 2 Campb. 229.

(e) 4 Burr. 2494. A criminal information was granted against the defendant for offering the Duke of Grafton, then first lord of the treasury, the sum of 5000*l.* as a bribe to procure the reversion of the office of clerk of the supreme court of the island of Jamaica.

(f) *Rex v. Beale*, cited in *Rex v. Gibbs*, 1 East, R. 183.

(1) {See 5 N. Hamp. Rep. *Charleston v. Whitaker* p. 196.}

clerk of the rolls, the justices of the one bench and of the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn that they shall not ordain, name, or make, any of the above-mentioned officers for any gift or brokage, favour or affection; nor that none which pursueth by himself, or by other, privily or openly, to be in any manner of office, shall be put in the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient to their estimation and knowledge.”(g)

The 4 Hen. 4, c. 5, ordained, “that no sheriff shall let his bailwick to farm to any man for the time that he occupieth such office.”

But a principal statute relating to this subject is the 5 & 6 Ed. 6, c. 16,(h) which, for the avoiding corruption which might thereafter happen in the officers, in places wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced should thereafter be preferred, enacts, that if any person bargain or sell any office, or deputation of office, or take any money or profit directly or indirectly, or any promises, &c., bond, or any assurance to receive any money, &c., for any office or deputation of office, or to the intent that any person should have, exercise, or enjoy any office, or the deputation of any office, which office, or any part or parcel thereof, shall in any wise concern the administration or execution of justice, or the receipt, controlment, or payment of the king’s treasure, rent, revenue, &c., or any of the king’s customs, or the keeping the king’s towns, castles, &c., used for defence, or which shall concern any clerkship in any court of record where justice is ministered; the offender shall not only forfeit all his right to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy such office or deputation. The statute further enacts, that such bargains, sales, bonds, agreements, &c., shall be void;(i) and provides that the act shall not extend to any office whereof any person shall be seized of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase, or forest.”(ii) It provides also that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law. And further, that the act shall not extend to be prejudicial or hurtful to any of the chief justices of the *King’s Bench or Common Pleas, or to any of the justices of assize; but that they may do concerning any offices to be granted by them as they might have done before the making of this act.(k)

It has been held that the offices of chancellor, registrar, and commis-

(g) For the exposition of this statute see the Earl of Macclesfield’s trial, 6 Sta. Tri. 477; 16 Howell’s Sta. Tri. 767.

(h) Repealed, “so far as regards the revenue of customs, or offices in the service of the customs,” by 6 Geo. 4, c. 105, s. 10.

(i) Sect. 3.

(ii) Sect. 4.

(k) Sect. 5. The statute 6 Geo. 4, c. 89, authorized the purchase of the office of receiver and comptroller of the seal of the Courts of King’s Bench and Common Pleas, and of the *custos brevium* of the Court of Common Pleas by the commissioners of the treasury, for certain annuities; and after the confirmation of the agreement by parliament, the rights and interests of all persons claiming or entitled to claim under the letters-patent mentioned in the act are to cease and determine.

chancellor, &c., to be sworn that they will not make officers for any gift, &c.

4 Hen. 4, c. 5.

5 & 6 Ed. 6, c. 16, Persons selling offices, relating to the administration of justice, &c. shall forfeit the office, and be disabled to have such office.

Cases decided upon this statute. sary in ecclesiastical courts, are within the meaning of this statute; (l) also the place of cofferer, (m) and that of surveyor of the customs; (n) and the place of customer of a port; (o) and the offices of collector and supervisor of the excise; (p) and in a writ of error on a judgment in Ireland, it was held clearly that the offices of clerk of the crown and clerk of the peace were within the statute. (g) But offices in fee have been held to be out of the statute; (r) and the sale of a bailwick of a hundred is not within it, for such an office does not concern the administration of justice, nor is it an office of trust. (s) It has also been adjudged that a seat in the six clerk's office is not within the statute, being a ministerial office only; (t) and it was held that it did not extend to military officers, (u) nor to the purser of a ship, (w) but this last decision was doubted (x) and in a later case it was said by Lord Mansfield, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corruptor and corrupted. (y) It was decided also, that this statute did not extend to the plantations. (z) But with respect to military and naval commissions, and the different places in the public departments of government, the colonies or plantations, or in the appointment of the East India Company, alterations have been made by a recent statute, which will be presently mentioned.

An offender against this act can never hold the office. One who makes a contract for an office contrary to the purport of this statute is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it, by any grant or dispensation whatever. (a)

What deputation of an office is within the statute. *150 With regard to the *deputation* of an office, it was held that where an office is within the statute, and the salary is certain, if the principal make a deputation reserving a less sum out of the salary, it is *good; so, if the profits be uncertain, arising from fees, if the principal make a deputation reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continuing to be the principals; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a

(l) 12 Co. 78. 3 Inst. 148. Cro. Jac. 269. 1 Hawk, P. C. c. 67, s. 4.

(m) Sir Arthur Ingram's case, 3 Bulst. 91, S. C. Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*: and Cro. Jac. 385, S. C. is cited.

(n) 2 And. 55, 107.

(o) 1 H. Black. 327.

(p) Law v. Law, Cas. temp. Talb. 140. 3 P. Wms. 391, S. C.

(q) Macarty v. Wickford, Trin. 9 Geo. 2, B. R. Bac. Abr. *Offices and Officers* (F). It was also held in this case, that the statute did not extend to Ireland. But see *post*, 49 Geo. 3, c. 126, next page.

(r) Ellis v. Ruddle, 2 Lev. 151.

(s) Godboldt's case, 4 Leon. 33; 4 Mod. 223, S. C. cited.

(t) Sparrow v. Reynold, Pasch. 26 Car. 2, C. D. Bac. Abr. *Offices and Officers* (F).

(u) 1 Vern. 98.

(w) 2 Vern. 308. Ca. Temp. Talb. 40.

(x) See 1 H. Blac. 326, where it is said by Lord Loughborough, C. J., that the case in 2 Vern. is contrary to an evident principle of law.

(y) Purdy v. Stacy, 5 Burr. 2698.

(z) Blankard v. Galdy, 4 Mod. 222; 2 Salk. 411; 2 Lord Raym. 1245, S. C. cited 2 Mod. 45. S. P. undetermined; and see Bac. Abr. *Offices and Officers* (F). But if the office, though in the plantations, had been granted under the great seal of England, the sale of it would have been held criminal at common law. See the judgment of Lord Mansfield, in *Rex v Vaughan*, 4 Burr. 2500.

(a) Hob. 75; Co. Lit. 234; Cro. Car. 361; Cro. Jac. 386; Ca. temp. Talb. 107.

certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute.^(b)

But this statute has been much extended by the 49 Geo. 3, c. 126,^{49 Geo. 3, c. 126, extends the 5 & 6 Edw. 6, c. 16, to Scotland & Ireland, to public offices in this country and in the colonies, and offices under the East India Company.} which, after reciting it, enacts, "that all the provisions therein contained shall extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown; and all commissions, civil, naval, or military, and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer, or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master general and principal officers of his majesty's ordnance, the commander in chief, the secretary at war, the paymaster-general of his majesty's forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualing, the commissioners of transports, the commissary general, the storekeeper general, and also the principal officers of any other public department or office of his majesty's government in any part of the United Kingdom, or in any of his majesty's dominions, colonies or plantations, which now belong or may hereafter belong to his majesty; and also to all offices, commissions, places and employments belonging to or under the appointment or control of the East India Company,^(c) in as full and ample a manner as if the provisions of the said act were repeated, and made part of this act; and the said act and this act shall be construed as one act, as if the same had been herein repeated and re-enacted."

The third section enacts, "that if any person or persons shall sell, or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance; or shall by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly; and also if any person or persons shall purchase, or bargain for the purchase of or give or pay any money, fee, gratuity, loan of money, reward or profit, or make or enter into any promise, agreement, covenant, contract, bond or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit; *or shall by any ways, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place or employment, specified or described in the said recited act (5 & 6 Edw. 6, c. 16) or this act, or within the true intent or meaning of the said act, or this act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons, to any such appointment, nomination or resignation; then and in every such case, every such person, and also every person who shall wilfully and knowingly aid,
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(b) Bac. Abr. *Offices and Officers* (F). 1 Hawk. P. C. c. 67, s. 5; Salk. 468; 6 Mod. 234; *Godolphin v. Tudor*, Comb. 356, S. P.

(c) By the 33 Geo. 3, c. 52, s. 66, it was enacted, that the making or entering into, or being a party to any corrupt bargain or contract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the crown, or the East India Company, by any British subject there resident, should be deemed a misdemeanor.

abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor."

49 Geo. 3, c. 126, s. 4. Persons receiving or paying money for soliciting or obtaining offices, and any negotiations or pretended negotiations relating thereto guilty of a misdemeanor.

The fourth section enacts, "that if any person or persons shall receive, have, or take any money, fee, reward, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making, or causing or procuring to be made, any *interest, solicitation, petition, request, recommendation or negotiation*, in or about or in any wise touching, concerning, or relating to, any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment, as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation, in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents, or voice or voices of any person or persons as aforesaid to such nomination, appointment, deputation, or resignation; and also if any person or persons shall give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward or profit, or make, or cause, or procure to be made, any promise, agreement, covenant, contract, bond or assurance, or by any way, means, or device, contract or agree, or give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in any wise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or consents, or voice or voices, of any person or persons as aforesaid, to any such nomination, appointment, deputation, or resignation; and also if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, recommend, or negotiate, in any manner, for any person or persons, in any matter that shall in any wise touch, concern, or relate to, any such nomination, appointment, deputation, or resignation aforesaid, or for the obtaining, directly or indirectly, the consent or consents, or voice or voices, of any person or persons to any such nomination, appointment, or deputation, or resignation aforesaid, then and in every such case every such person, and also every person who shall wilfully and *knowingly aid, abet, or assist, such person therein, shall be deemed and adjudged guilty of a misdemeanor."

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49 Geo. 3, c. 126, s. 5. Keeping any place for business relating to such traffic in offences, a misdemeanor. 50l. penalty on advertising, &c.

By the 5th section, if any person shall open or keep any house or place for the soliciting or negotiating any business relating to vacancies in offices, &c., in or under any public department, or to the sale or purchase of such offices, or appointment to them, or resignation, transfer or exchange of them, such offender, and every person aiding or assisting therein, is guilty of a misdemeanor. And by the sixth section any person advertising any office, place, &c., or the name of any person as broker, &c., or printing any advertisement or proposal for such purposes, is liable to a penalty of 50l.

There are, however, several exceptions from the provisions of this

statute. It does not extend to commissions or appointments in the band of gentlemen pensioners, or in his majesty's yeoman guard, or in the Marshalsea, or the Court of the King's Palace at Westminster; or to purchases and exchanges of commissions in his majesty's forces, at the regulated prices; or to any thing done in relation thereto by authorized regimental agents not advertising and not receiving money, &c., in that behalf (d) But officers receiving or paying, or agreeing to pay more than the regulated prices, or paying agents for negotiating, on conviction by a court martial, are to forfeit their commissions, and be cashiered.(e)

Exceptions from this statute of certain offices, and also of commissions in his majesty's forces at the prices regulated.

And it is provided also, that every person who shall sell his commission in his majesty's forces and not continue to hold any commission, and shall upon or in relation to or of such sale receive, directly or indirectly, any money, &c., beyond the regulated price of the commission sold, and every person who shall aid or assist such persons therein, shall be guilty of a misdemeanor.

But persons selling commissions for more than regulated prices, are guilty of misdemeanor.

This act contains further exceptions: and provides, that it shall not extend to any office excepted from the 5 & 6 Edw. 6, c. 16, or to any office which was legally saleable before the passing of this act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life; or to render invalid, or in any manner to affect, any promise, covenant, trust, &c., entered into or declared before the passing of this act, and which then was valid in law or equity.(f)

Further exceptions as to offices excepted.

With respect to *deputations* to offices, it is enacted, that the act shall not extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c., lawfully made in respect of any allowance or payment to such principal or deputy respectively, out of the fees or profits of such office.(g)

Deputations, 49 Geo. 3, c. 126.

Annual reservations, charges, or payments, out of fees or profits of any office to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c., for securing such reservations, charges, or payments, are also excepted; provided that the amount of the reservations, &c., and the circumstances and reasons under which they shall *have been permitted, shall be stated in the commission or instrument of appointment of the successor.(h)

Annual payments out of the fees of any persons formerly holding the office. *153

The statute contains an enactment, that when the right, estate, or interest of any person shall be forfeited under any of its provisions, or the provisions of the 5 & 6 Edw. 6, c. 16, the right of such appointment shall vest in and belong to the king.(i)

Right of appointment when forfeited vests in the king.

Offences against this act, or the 5 & 6 Edw. 6, c. 16, by any governor, lieutenant-governor, or person having the chief command, civil or military, in his majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the Court of King's Bench at Westminster, in the same manner as any crime, &c., committed by any person holding a public employment abroad may be prosecuted under the provisions of the 42 Geo. 3, c. 85.(k)

Trial of offences committed abroad.

(d) 49 Geo. 3, c. 126, s. 7; and the 53 Geo. 3, c. 54, except purchases, &c., of any commissions or appointments in the battleaxe guards in Ireland.

(e) 49 Geo. 3, c. 126, s. 8. And the commission is to be sold; and half the produce, not exceeding 500*l.*, to be paid to the informer, and the remainder to go to the king.

(f) 49 Geo. 3, c. 126, s. 9.

(g) *lb.* s. 10. And see *ante*, 149.

(h) *lb.* s. 11. The twelfth section contains an exception as to the masters, six clerks, and examiners of the chancery in Ireland, till after the death, &c., of the present possessors.

(i) *lb.* s. 2.

(k) *lb.* s. 14.

Punishment of misdemeanors in Scotland. It is enacted also, that any person who shall commit in Scotland any misdemeanor against this act shall be liable to be punished by fine and imprisonment, or by the one or the other of such punishments, as the judge or judges, before whom the offender shall be committed, may direct. (l)

49 Geo. 3, c. 113, s. 3. Giving any officer, &c., for election purposes. By the 49 Geo. 3, c. 218, s. 3, if any person give or promise any office, place, or employment, upon *any express contract or agreement* to procure, or endeavour to procure, the return of any person to serve in parliament, the person returned shall vacate his seat, and be incapacitated to serve during that parliament for the same place; and the person receiving the office, &c., shall forfeit it, be incapacitated for holding it, and shall forfeit 500*l.*: and any person holding any office under his majesty, who shall give such office, appointment, or place upon any such *express contract or agreement*, shall forfeit the sum of 1000*l.*(m)

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*CHAPTER THE SIXTEENTH.

OF BRIBERY.

Case of bribery.

BRIBERY is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (a) And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises; as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. (b) And bribery sometimes signifies the taking or giving of a reward for offices of a public nature. (c) Corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in parliament, are also denominated bribery, and punishable by common law, and by statute. (d) So giving refreshments to voters before they vote, in order to induce them to vote for a particular candidate, is bribery at common law. (e) And the attempt to influence persons serving as jurymen corruptly to one side, by gifts or promises, (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*,) (f) may be mentioned as a species of bribery.

Attempts to bribe.

The law abhors the least tendency to corruption; and upon the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor, (g) *attempts to bribe*, though unsuccessful, have in several cases been held to be criminal. Thus it

(l) 49 Geo. 3, c. 126, s. 13.

(m) See this act more at length in the subsequent Chapter on *Bribery*, p. 158.

(a) 3 Inst. 149; 1 Hawk. P. C. c. 67, s. 2; 4 Bla. Com. 139.

(b) *Rex v. Beale*, E. T. 38 Geo. 3, cited in *Rex v. Gibbs*, 1 East, R. 183, and see *Rex v. Vaughan*, 4 Burr. 2494, *ante*, 147.

(c) 1 Hawk. P. C. c. 67, s. 3. As to this species of bribery, see the preceding Chapter.

(d) *Rex v. Pitt* and another, 3 Burr. 1338; 2 Geo. 2, c. 24; 49 Geo. 3, c. 118.(e) *Hughes v. Marshall*, 2 Tyrw. 134, S. C.; 2 C. & J 118; 5 C. & P. 151.(f) *Post*, Chap. xxi.(g) *Ante*, Book I., Chap. iii., p. 46,

is laid down generally, that if a party offers a bribe to a judge, meaning to corrupt him in a case depending before him, and the judge takes it not; yet this is an offence punishable by law in the party that offers it. (*h*) And it has been held to be a misdemeanour to attempt to bribe a cabinet minister, and a member of the privy council, to give the defendant an office in the colonies. (*i*) And an information was granted against a man for promising money to a member of a corporation, to induce him to vote *for the election of a mayor. (*j*) An information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*k*)

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Where a police officer was offered 1000*l.* to assist a party in obtaining possession of a ward of the Court of Chancery, who had a fortune of 5000*l.*, and who afterwards married such party, Lord Eldon, C., said "the endeavour to bribe a man to commit an offence is itself a very serious offence, and the person who made that offer may not be aware of his danger." (*kk*)

The statutes relating to the customs and excise impose penalties, as well upon officers taking bribes as upon those who offer them. The 3 & 4 Wm. 4, c. 53, enacts, that "if any officer or officers of the customs or excise, or any officer or officers of the army, navy, or marines duly employed for the prevention of smuggling, and on full pay, or any other person or persons whatsoever duly employed for the prevention of smuggling, shall make any collusive seizure, or deliver up, or make any agreement to deliver up or not to seize any vessel or boat, or any goods liable to forfeiture, or shall take any bribe, gratuity, recompense, or reward for the neglect or non-performance of his duty, every such officer, or other person shall forfeit for every such offence the sum of five hundred pounds, and be rendered incapable of serving his majesty in any office whatever, either civil or military; and every person who shall give or offer, or promise to give or procure to be given, any bribe, recompense, or reward to, or shall make any collusive agreement with, any such officer or person as aforesaid, to induce him in any way to neglect his duty, or to do, conceal, or connive at any act whereby any of the provisions of any act of parliament relating to the revenue of customs may be evaded, shall forfeit the sum of two hundred pounds."

Penalty on officers and persons making collusive seizures or taking bribes, and on persons offering them.

Bribery at elections for members of parliament was always a crime at common law, and consequently punishable by indictment or information: (*l*) but in order to enforce the common law, and because it had not been found sufficient to prevent the evil, considerable penalties have been imposed upon this offence by different statutes.

Bribery at elections for members of parliament.

The 7 & 8 Wm. 3, c. 7, s. 4, enacts, that all contracts, promises, bonds, and securities to procure any return of any member to serve in parliament, or any thing relating thereunto, shall be void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit three hundred pounds. (*m*)

7 & 8 Wm. 3, c. 7, s. 4. contracts &c., void, persons to forfeit 300*l.*

(*h*) 3 Inst. 147; *Rex v. Vaughan*, 4 Burr. 2500 *Ante*, 147.

(*i*) *Vaughan's case*, 4 Burr. 2494, *ante*, 147; see *Rex v. Pollman and others*, 2 Campb. 229.

(*j*) *Plympton's case*, 2 Ld. Raym. 1377.

(*k*) *Young's case*, cited in *Rex v. Higgins*, 2 East, R. 14 and 16.

(*kk*) *Wade v. Broughton*, 3 Ves. & B. 172.

(*l*) *Rex v. Pitt and another*, 3 Burr. 1335, by Lord Mansfield, C. J.

(*m*) One-third to the king, one-third to the poor of the place concerned, and one-third to the informer, with his costs, to be recovered by action or information. But if it appears to be a void election, an action for this penalty is not maintainable. 1 Hawk. P. C. c. 67, s. 8, in the margin.

2 Geo. 2, c. 24, s. 7. The 2 Geo. 2, c. 24, s. 7, enacts, "that if any person who shall have or claim to have, any right to vote in any election of any member to serve in parliament, shall ask, receive, or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself or any person employed by him, shall by any gift or reward, or by any promise, agreement or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election, (n) such person so offending in any of the cases aforesaid, shall, for every such *offence, forfeit five hundred pounds." And further, that such offender, after judgment against him in any action or information, or summary action, or prosecution, or being otherwise lawfully convicted, thereof, shall for ever be disabled to vote in any election of any member to parliament, and to hold any office or franchise, as if such person was naturally dead.

2 Geo. 2, c. 24, s. 8. Offenders discovering person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act." The eleventh section provides that no person shall be liable to any incapacity, disability, forfeiture, or penalty, unless a prosecution be commenced within *two years* after the incapacity, &c., shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay.

It has been holden that, notwithstanding this statute, bribery in elections of members to serve in parliament still remains a crime at common law; that the legislature never meant to take away the common law crime, but to add a penal action; and that this appears by the words in the statute,—“or being otherwise lawfully convicted thereof.” (o) And a conviction upon an information granted by the Court of King’s Bench is just the same as if the party had been convicted upon an indictment (p) But as the offender will be equally liable to the penalties of the statute, (q) that court will not interpose by information until the two years are expired, in ordinary cases; though there may possibly be particular cases, founded on particular reasons, where it may be right to grant informations before the expiration of the time limited for commencing the prosecution on the statute. (r) And in one case, where the defendant had been convicted of bribery, and the time for bringing the penal action was not expired, the court permitted him to enter a recognizance to appear at the expiration of that time. (s)

(n) An action will lie though the party bribed does not vote according to the bribe. *Tulston v. Norton*, 1 Blac. R. 317, and *Orme*, 296, note.

(o) *Rex v. Pitt* and another, 3 Burr. 1335; S. C. 1 Blac. R. 380.

(p) *Rex v. Pitt* and another, 3 Burr. 1339.

(q) *Coombe v. Pitt*, 1 Blac. R. 524.

(r) *Rex v. Pitt* and another, 3 Burr. 1340.

(s) *Rex v. Heydon*, 3 Burr. 1359. But where that time had expired, the court held that the circumstance of the witness, by whose evidence the defendant was convicted of bribery, being under prosecution for perjury, was no ground for postponing the judgment. *Rex v. Heydon*, 3 Burr. 1387. S. C. 1 Blac. R. 404. And the court refused to stay judgment upon the *postea* where they were moved to do so on the ground that the defendant had made a dis-

Persons taking money, &c., for voting or forbearing to vote, and persons procuring others to vote or forbear to vote, by any gift, &c., forfeit 500*l.*, &c.
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Prosecutions must be within two years.

This statute does not take always the common law crime. But the court of King’s Bench will rarely proceed by information.

There is a great difference between the two parts of the seventh section of the statute. The first part which is applicable to the voter, contains the word "ask," which is not repeated in the second. From this it may be taken that, in an action against the party tendering the bribe, proof should be required of more than a mere solicitation. Then, in the first part, the words go on thus, "or agree or contract for any money," the agreement, therefore, would subject the party to the penalty.^(t) In the second part the words are "corrupt or procure." *157 As to procuring, it is necessary that the vote should be actually given, but the corruption is complete by effecting an agreement amounting to corruption, although the vote be not given. If, therefore, A. give money to B. to induce B. to vote for a candidate, and B. agree to do so, in consideration of the gift, A. is liable to the penalty for corrupting, although B. never gives the vote,^(u) and two very learned judges thought that A. would be equally liable, if B. never intended to vote according to the agreement at all, as A. had done all that lay with him;^(w) and this opinion of the two learned judges has been since held to be correct by the Court of Exchequer.^(x)

Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter note to deliver up the first note when the elector had voted, it was held to be an absolute gift and bribery within the act, although the elector voted for the opposite party.^(y) And laying a wager with the voter that he does not vote for a particular candidate is also bribery within the act.^(z) In any action upon this statute it has been held, that, before the time of election, any one is a candidate for whom a vote is asked; and that it is not competent to the defendant to dispute a man's right of voting when he has asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such right.^(a) It seems that a declaration upon this statute must state what the bribe was, and specify that the defendant took money or some other particular species of reward; and where it stated generally "that the defendant did receive a gift or reward," in the disjunctive, it was held bad, and that the defect might be taken advantage of in arrest of judgment, the charge being of a criminal nature.^(b)

The words of section 7 are all prospective, and they have been construed as if they had been "in order to give," and "in order to forbear to give," and consequently they do not include a case where money is given to a voter after an election, for having voted for a candidate, there having been no agreement made before the election for giving such money.^(c)

covery of another person offending against the statute, who had been convicted on his (the defendant's) evidence. *Pugh v. Curgenven*, 3 Wils. 35. And see the cases collected in 1 Hawk. P. C. c. 67, s. 13, note (4), where see also as to the Court of King's Bench granting a new trial.

(t) Per Patteson, J. *Henslow v. Faucett*, 3 A. & E. 51; 4 N. & M. 593, S. C.

(u) *Henslow v. Faucett*. See the form of declaration there.

(w) *Patteson & Coleridge, Js.*, *ibid*.

(x) *Harding v. Stokes*, 2 M. & W. 233; S. C. T. & G. 593, *post*, p. 160.

(y) *Sulston v. Norton*, 3 Burr. 1235; 1 Blac. Rep. 317.

(z) 1 Hawk. P. C. c. 67, s. 10, note (4), citing *Loft*, 552, and referring also to *Allen v. Hearne*, 1 T. R. 56, where a wager between two voters, with respect to the event of an election, laid before the poll began, was held to be illegal.

(a) *Coombe v. Pitt*, 1 Blac. R. 522.

(b) *Davy v. Baker*, 5 Burr. 2471.

(c) *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

* Eng. Com. Law Repts. viii. 83.

Who shall be deemed a discoverer within 2 Geo. 2. c. 24, s. 8, so as to be indemnified. As to the person who shall be considered as a *discoverer* within the eighth section of the statute, so as to be indemnified from its penalties, it has been decided that the circumstance of a party having been, within the limited time, a plaintiff in an action on the statute, and having prosecuted it to judgment, does not prove him to have been the first discoverer. Lord Mansfield, C. J., observed, that the court had not said, nor would say, that a plaintiff *cannot* be the discoverer; but that the act does not *make* him so, or *consider* him as the discoverer; and that as the plaintiff could not be the witness himself in the action, some other person must have been the witness; it was not therefore to be presumed, without any evidence *of it, that the plaintiff in the action was the first discoverer. (d) And where one person procured another to make an affidavit of facts amounting to bribery, and then prosecuted a third person upon those facts to conviction and judgment, it was held that the person making the affidavit was the discoverer. (e) With respect to what shall be deemed a *conviction* within this section, it has been held that a verdict will not be sufficient, but that there must be a judgment; but that when the judgment is obtained it will relate, for the purpose of the indemnity, to the time when the discovery was first made. (f)

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49 Geo. 3, c. 118, s 1, imposes penalties on persons giving or receiving money, &c. to procure the election of a member of parliament, though such money, &c., be not given to voters. The 49 Geo. 3, c. 118, relating that the giving money, &c., in order to procure the return of a member to parliament, if not given to or for the use of some person having a right, or claiming to have a right to act as returning officer, or to vote at the election, is not bribery within the former statute, (2 Geo. 2, c. 24.) enacts, that if any person shall give, or cause to be given, directly or indirectly, or promise, or agree to give, any money, gift, or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to parliament for any place, he shall, if not returned himself to parliament for such place, for every such gift or promise forfeit one thousand pounds; and if returned, and having given, or promised to give, or knowing of and consenting to such gifts, or promises, shall be disabled and incapacitated to serve in that parliament for such place, and shall be as if he had never been returned or elected a member of parliament. And it enacts also, that any person who shall receive or accept of by himself, or by any other, to his use or on his behalf, any such money, gift, or reward, or any promise upon any such engagement, contract, or agreement, shall forfeit the value or amount of such money, gift, or reward, over and above the sum of five hundred pounds. (g)

49 Geo. 3, c. 118, s, 3, imposes penalties upon persons giving or receiving offices, &c., by way of bribes to procure the return of By sec. 3, "if any person shall by himself, or by any other, give or procure to be given, or promise to give or procure to be given, any office, place, or employment, upon any *express* contract or agreement that the person to whom, or to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to parliament for any place, such person so returned, and so having given or procured to be given, or so having promised to give or procure to be given, or knowing of or consenting to such gift or promise upon

(d) *Curgenvén v. Cuming*, 4 Burr. 2504.(e) *Sibly v. Cuming*, 4 Burr. 2464.(f) *Sutton v. Bishop*, 1 Blac. R. 665.(g) Sec. 1. The second section provides that the act shall not extend to any money paid, or agreed to be paid, to or by any person, for any legal expense, *bona fide* incurred at or concerning any election.

any such *express* contract or agreement, shall be disabled and incapable of being elected to serve in that parliament for such place, and be deemed no member of parliament, and as if he had never been returned; and any person who shall receive or accept of by himself or by any other, to his use or on his behalf, any such office, place, or employment, upon such *express* contract or agreement, shall forfeit such office, &c., and be incapacitated for *holding the same, and shall forfeit five hundred pounds. And it further enacts, that any person holding any office under his majesty, who shall give such office, appointment, or place, upon any such *express* contract or agreement that the person to whom, or for whose use, such office, &c., shall have been given, shall so procure, or endeavour to procure, the return of any person to parliament, shall forfeit one thousand pounds.

members of parliament.

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By sec. 4, no person shall be liable to any forfeiture or penalty imposed by the act, unless some prosecution, action, or suit for the offence committed, shall be actually and legally commenced against such person within two years next after the offence committed, and unless such person shall be arrested, summoned, or otherwise served with the writ or process within the same space of time, so as such arrest, summons, or service, shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court; and in case of any prosecution, suit, or process, the same shall be proceeded in and carried on without any wilful delay.

49 Geo. 3, e. 118, s. 4, limits prosecutions, &c., to two years after the offence.

Where voters for a member of parliament have only been paid their actual travelling expenses, a difference of opinion has existed as to the legality of such payments; some committees of the House of Commons having held that such payments are legal, others (and probably their's is the more correct opinion) that such payments are not legal, for it is obvious that such a mode of proceeding, if allowed, would lead to great abuses. (g) And it seems, at all events, that where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so though all the candidates agree in the payment of the same amount. But where an action is brought by an agent of a candidate, to recover from him the amount so paid, it is for the jury to say whether the sums were paid for travelling expenses, and travelling expenses only, or to induce the voters to give their votes. (h) But payment of the expense of taking up the freedom of voters is clearly illegal. (i)

Payment of the travelling expenses of voters.

It has been held that a declaration under the 2 Geo. 2, c. 24, s. 7, for corrupting a voter by corruptly giving the voter the sum of 10*l.*, as a reward to him to give his vote, is supported by evidence that the defendant gave the voter a card in one room, which the voter presented to a person in another room, who thereupon gave him the money. (j) And it was held in the same case that the plaintiff might prove that the defendant on the same day, and at the same place, gave cards to other persons, who also obtained money by presenting them to the person in the other room. (k)

What is giving a bribe within the 2 Geo. 2, c. 24, s. 7.

The 5 & 6 Wm. 4, c. 76, s. 54, enacts, "that if any person who shall

5 & 6 Wm.

(g) Per Alderson, B. *Bayntun v. Cattle*, 1 M. & Rob. 565, March, 1833.

(h) *Bremridge v. Campbell*, 5 C. & P. 186.

(i) *Bayntun v. Cattle*, 1 M. & Rob. 265, Alderson, B.

(j) *Webb v. Smith*, 4 Bing. N. C. 373.

(k) *Ibid.*

* Eng. Com. Law Repts. xxiv. 270.

† Id. xxiii. 382.

4, c. 76. Persons convicted of bribery disqualified from voting at any election in any borough.

have or claim to have any right to vote in any election of mayor, or of a councillor, auditor or assessor of any borough, shall, after the passing of this act, ask or take any money or other reward by way of gift, loan or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give or forbear to give his vote in any such election, or if any person, by *himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure, or offer to corrupt or procure any person so offending in any of the cases aforesaid, shall for every such offence forfeit the sum of fifty pounds of lawful money of Great Britain, to be recovered, with full costs of suit, by any one who shall sue for the same, by action of debt, bill, plaint or information in any of his majesty's courts of record at Westminster; and any person offending in any of the cases aforesaid, being lawfully convicted thereof shall for ever be disabled to vote in any election in such borough, or in any municipal or parliamentary election whatever in any part of the United Kingdom, and also shall for ever be disabled to hold, exercise or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person was naturally dead."

Persons offending and discovering others so offending discharged from all penalties.

By sec. 55, "if any person offending in any of the cases aforesaid, shall, within the space of twelve months next after such election as aforesaid, discover any other person offending in any of the cases aforesaid, so that such other person be thereon convicted, such person so discovering, and not having been before that time convicted of any such offence, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any such offence."

No person liable to incapacity, &c., unless prosecuted within two years.

By sec. 56, "no person shall be made liable to any incapacity, disability, forfeiture or penalty by this act imposed, in any of the cases aforesaid, unless prosecution be commenced within two years after such incapacity, disability, forfeiture or penalty shall be incurred, any thing herein contained to the contrary notwithstanding."

Construction of the act.

The 54th section contemplates three descriptions of offences; first, that of procuring the party to give his vote for a particular candidate, that is, when he acts in pursuance of the corrupt agreement; secondly, that of corrupting the voter, where the bribe is offered and accepted, an actual agreement is made, and the party promises to act upon it; the third offence is a new one, not found in the old bribery act, where the whole that appears is the mere offer of a bribe, refused on the other side, or not assented to at the time. (l)

An Employment is a reward within sec. 54. What is a corrupting, and what an offer to corrupt a voter.

An *employment* is a *reward* within the meaning of this section. The offence of *corrupting* a voter is complete where the two parties have agreed, the one to offer, the other to accept, a bribe as the condition of voting for a particular person, whether the person who has agreed to vote votes or not for such person, or whether he intended so to vote or not. But where a bribe is offered, but not accepted, the offence is that of offering to corrupt. A declaration in debt for the penalty of 50*l.*, under the 5 & 6 Wm. 4, c. 76, s. 54, alleged that the defendant did corrupt one J. W., who had a right to vote at an election of councillors for a borough, by corruptly promising to give the said J. W., if he should vote at the said election for certain candidates, employment in hauling

(l) Per Parke, B., *Harding v. Stokes*, 2 M. & W. 233.

stones at and for certain hire and reward to be paid for the same; and it was held upon demurrer that the declaration was sufficient. The question was, whether any difference was made between the asker and the offerer of a gift or reward, as to the nature *of the thing asked or offered. To ascertain what is the "gift or reward" contemplated in the latter branch of the clause, the court must look at the former part of the section, and there are found in conjunction the words "any money, gift, office, employment or other reward whatsoever." An employment, therefore, is there considered as a reward; and by the common sense of mankind it is so, where the party to whom it is offered wants employment. It falls, therefore, equally within the more general words of the latter part of the clause. But whether this employment was in the particular case given as a reward within the object of the act, was a question for the jury; if only the ordinary wages were given they might probably find that the employment was not given for a corrupt reward.^(m) The demurrer having been withdrawn by leave of the court, the defendant pleaded not guilty, and on the trial it appeared that J. W. having promised his vote in favour of certain candidates, the defendant told him that if he would vote for certain other candidates, he would give him employment in hauling stones at certain weekly wages; J. W. answered that it was a good offer, but that the difficulty was how he should get off his promise, that he would consider of it, and would see the defendant again the next Friday. No further communication, however, took place, and J. W. eventually voted for the candidates to whom he had originally promised his vote. It was objected for the defendant that the evidence did not prove a corrupting of the voter, as charged in the declaration, but a mere offering to corrupt; and the plaintiff was nonsuited; but the court, upon a rule to show cause why there should not be a new trial, held that if it were proved that there was an agreement to vote in pursuance of the offer, no matter whether the party intended to perform it or not, the offence of corrupting was complete. The evidence given in this case *might* be construed to prove that the offer was accepted; if the jury should be of that opinion, the offence of corrupting was complete; but on the other hand they might well come to the conclusion that the voter had not made up his mind, but took time to consider further whether he would accept the offer; in that case the offence of corrupting was not complete, but it was a mere offer to corrupt within the third clause of the statute.⁽ⁿ⁾

The 5 & 6 Vict. c. 102, s. 20, reciting that "a practice has prevailed in certain boroughs and places of making payments by or on behalf of candidates to the voters, in such manner that doubts have been entertained whether such payments are to be deemed bribery," declares and enacts, "that the payment or gift of any sum of money, or other valuable consideration whatsoever, to any voter, before, during, or after any election, or to any person on his behalf, or to any person related to him by kindred or affinity, and which shall be so paid or given on account of such voter having voted, or having refrained from voting, or being about to vote, or refrain from voting, at the said election, whether the same shall have been paid or given under the name of head money, or any other name whatsoever, and whether such payment shall have been in compliance of any usage or practice or not, shall be deemed bribery."

5 & 6 Vict.
c. 102, s. 20.
Payment of
head money
declared
bribery.

(m) *Harding v. Stokes*, 1 M. & W. 354; S. C. T. & Gr. 599.

(n) *Harding v. Stokes*, 2 M. & W. 233. See *Henslow v. Faucett*, *ante*, p. 157.

*1606
5 & 6 Vict.
c. 102, s.
22. For pro-
venting
treating.

*Sec. 22, reciting that the provisions of the 7 & 8 Wm. 3, c. 25, "have been found insufficient to prevent corrupt treating at elections, and it is expedient to extend such provisions," enacts, "that every candidate or person elected to serve in parliament for any county, riding, or division of a county, or for any city, borough, or district of boroughs, who shall, from and after the passing of this act, by himself, or by or with any person, or in any manner, directly, or indirectly, give or provide, or cause or knowingly allow to be given or provided, wholly or partly at his expense, or pay wholly or in part any expenses incurred for any meat, drink, entertainment, or provision to or for any person, at any time, either before, during, or after any such election, for the purpose of corruptly influencing such person, or any other person, to give, or to refrain from giving, his vote at any such election, or for the purpose of corruptly rewarding such person, or any other person, or for having given or refrained from giving his vote at any such election, shall be incapable of being elected or sitting in parliament for that county, riding, or division of a county, or for that city, borough, or district of boroughs, during the parliament for which such election shall be holden."

4 & 5 Vict.
c. 57.
Evidence
of bribery
may be
given with-
out first
proving
agency.

The 4 & 5 Vict. c. 57, enacts, that "whenever any charge of bribery shall be brought before any select committee of the House of Commons appointed to try and determine the merits of any return or election of a member or members to serve in parliament, the committee shall receive evidence upon the whole matter whereon it is alleged that bribery has been committed; neither shall it be necessary to prove agency in the first instance, before giving evidence of those facts whereby the charge of bribery is to be sustained; and the committee, in their report to the House of Commons, shall separately and distinctly report upon the fact or facts of bribery, which shall have been proved before them, and also whether or not it shall have been proved that such bribery was committed with the knowledge and consent of any sitting member or candidate at the election."

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*CHAPTER THE SEVENTEENTH.

OF NEGLECTING OR DELAYING TO DELIVER ELECTION WRITS.

53 Geo. 3,
c. 89, s. 1,
directs the
course in
which elec-
tion writs
shall be for-
warded by
the messen-
ger of the
great seal,
and
through the
post office.

THE 53 Geo. 3, c. 89, was passed for the purpose of effecting the more expeditious and regular conveyance of writs for the election of members to serve in parliament. It enacts, that the messenger, or pur-suivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of London or Middlesex, to the respective offices of such sheriffs, and the other writs to the general post office in London, and there deliver them to the postmaster general for the time being, or to such other person as the postmaster shall depute to receive the same, (which deputation the postmaster is thereby required to make), who, on receipt thereof, shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment, signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall dispatch all such writs free of postage by the first post or mail, after the receipt thereof,

under covers directed to the proper officers, to whom the said writ shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers, to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the hour the same was delivered by such postmaster or deputy, and which memorandum shall also be signed by such postmaster or deputy, who are required to transmit the same by the first or second post afterwards to the postmaster general or his deputy at the general post office in London, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections.(a)

The statute, after directing that all persons to whom the writs for the election of members to parliament ought to be and are usually directed, shall, within a month, send to the postmaster general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed; and of the post town nearest to such offices; or in case any such office shall be in London, Westminster, or Southwark, or within five miles thereof, shall send such account to the messenger of the great seal; (b) proceeds to enact, that after the death of the then messenger of the great seal, the allowances of *mileage* shall cease, except an allowance of two guineas on each writ for the election of a member on any vacancy, and of fifty pounds on the calling of a new parliament.(c) And it further enacts, that whereas the messenger of the great seal and his deputy have from time to time received certain other fees for the conveyance and upon the delivery of these writs, such fees shall cease from the passing of the act; and that neither the messenger nor his deputy, nor any other person, shall receive or take any fee, reward, or gratuity, whatsoever, for the conveyance or delivery of any such writ.(d)

53 Geo. 3 c. 89, s. 2 and 3. Persons to whom such writs are usually directed must give places of their offices. *162 S. 4 & 5. Mileage & other fees abolished, except in certain cases.

The sixth section enacts, "that every person concerned in the transmitting or delivery of any such writ as aforesaid, who shall wilfully neglect or delay to deliver or transmit any such writ, or accept any fee, or do any other matter or thing in violation of this act, shall be guilty of a misdemeanor, and may, upon any conviction upon any indictment or information in his majesty's Court of King's Bench, be fined and imprisoned at the discretion of the court for such misdemeanor."

53 Geo. 3, c. 89 s. 6. Persons acting in violation of the act guilty of a misdemeanor.

Offences committed in Scotland may be punished by a fine or imprisonment, as the judge, before whom the offender shall be tried and convicted may direct.(e)

(a) 53 Geo. 3, c. 89, s. 1.

(b) *Ib.* ss. 2 and 3.

(c) *Ib.* s. 4.

(d) 53 Geo. 3, c. 89, s. 5. And the section further proceeds to give to the then messenger an annual allowance for his life of 520*l.* in compensation for these fees.

(e) *Id.* s. 7.

*CHAPTER THE EIGHTEENTH.

OF DEALING IN SLAVES.[1]

5 Geo. 4, c. 113. THE 5 Geo. 4, c. 113, repeals all the acts and enactments relating to the slave trade, and the abolition thereof, and the exportation or importation of slaves, except so far as they have repealed any prior acts or enactments, or may have been acted upon, or may be expressly confirmed

[1] {The slave trade, though contrary to the law of nature, is not prohibited by the positive law of nations. It is not piracy, unless made so by the treaties and statutes of the nation to which the party engaged in it belongs.

Most civilized nations have of late prohibited the slave trade, but the subjects of those nations which have not, either by treaties or by municipal acts, yet prohibited it, may still lawfully carry it on. And a vessel engaged in such trade, even though prohibited by the laws of the country to which it belongs, cannot for that cause alone, be legally seized on the high seas, and brought in for adjudication, in time of peace, in the courts of another country.

See on these and other points, 10 Wheaton, 66; The Antelope, 2 Mason, 409; La Jeune Eugenie, 1 Acton, 240; The Amedie, 1 Dodson, 81; The Fortuna, Ib. 91; The Donna Marrianna, Ib. 95; The Diana, 2 Dodson, 238; The Louis, 3 Barn. & Ald. 353; [Eng. Com. L. Rep. v. 313,] *Mudrazo v. Willes*, 6 Mass. Rep. 358; *Greenwood v. Curtis*. [*United States v. Zibbey*, 1 Woodbury & Minot, 221.]

By the Constitution of the United States, Art. I. s. 9, it is provided that "the migration or importation of such persons as any of the States now existing [in 1789] shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight." This provision will account for the apparent deficiency in the enactments first made by Congress, on the subject of the slave trade.

The act of Congress, 1794, c. 11, (1 U. S. Laws, 319, Story's ed.) § 1, forbid all persons, whether citizens or foreigners, for themselves or any other person whatsoever, or in any capacity whatsoever, to build, fit, equip, load, or otherwise prepare any ship or vessel within any port or place of the United States, or to cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country, or for the purpose of procuring from any foreign place the inhabitants of such place to be transported to any foreign country, port or place whatever, to be sold or disposed of as slaves. And every ship or vessel so fitted out for such purpose, or caused to sail so as aforesaid, her tackle, furniture, &c., is to be forfeited to the United States, and liable to be seized or condemned in any of the Circuit Courts or District Courts for the district where it may be found.

§ 2. Every person so building, &c., any ship or vessel, knowing or intending that it shall be employed contrary to the true intent of the act, or aiding or abetting therein, severally forfeits two thousand dollars—one moiety to the United States, the other to the prosecutor.

§ 3. Owners, masters, or factors of foreign ships clearing out for any of the coasts or kingdoms of Africa, or suspected to be intended for the slave trade, are required to give bond to the treasurer of the United States, that none of the natives of Africa or any other foreign country or place shall, within nine months, be taken on board, to be transported or sold as slaves in any other foreign port or place.

§ 4. Any citizen of the United States, who shall, contrary to this act, receive or transport any such persons as above described, for the purpose of selling them as slaves, as aforesaid forfeits for every person so received, transported or sold, two hundred dollars.

On this statute it has been decided—that prosecutions under it must be commenced within two years after the offence committed—by virtue of the act of 1790, c. 36, § 31. 2 Cranch, 336, *Adams v. Woods*—that the question of forfeiture of a vessel under this act is of admiralty and maritime jurisdiction. 3 Dall. 297, *United States La Vengeance*; 2 Cranch, 406, *United States v. Schooner Sally*—and that the forfeiture attaches where the original voyage is commenced in the United States, whether the vessel belongs to citizens or foreigners, and whether the act is done *suo jure*, or by an agent for the benefit of another person who is not a citizen or resident of the United States—and that it is not necessary in order to incur the forfeiture (under any of the slave trade acts) that the equipment for the voyage should be completed: It is sufficient if any preparations are made for the unlawful purpose. 10 Wheat. 133, *The Plattsburg*. See also 12 Wheat. 460, *United States v. Gooding*; 9 Wheat. 381, *The Emily & Caroline*.

Neither this act nor that of 1800, c. 51, *post*, was intended to apply to a case where slaves are carried from one foreign port to another, as passengers and not for sale. 1 Wash. C. C. Rep. 522, *Brig Tryphenia v. Harrison*. The object of the law is to prevent transpor-

by the present act. It then enacts, that it shall not be lawful (except in such special cases as are thereafter mentioned) to deal in slaves, or to remove, import, ship, tranship, &c., any persons as slaves, or to fit out

tation of slaves from one foreign country to another for the purpose of traffic. 4 Wash. C. C. Rep. 91, *United States v. Kennedy*.

The act of 1800, c. 51, (1 United States Laws, 780, Story's ed.) § 1, prohibits all persons residing in the United States from holding directly or indirectly any right or property in any vessel employed or used in the transportation or carrying slaves from one foreign country to another; and any such right or property shall be forfeited, and the person so transgressing shall forfeit and pay a sum double the value of such right and property, and also a sum double the value of the interest he may have had in the slaves at any time transported or carried in such vessel, after the passing of this act and against the form thereof.

§ 2. Every person residing in the United States, who shall voluntarily serve on board any vessel of the United States employed or used in transporting or carrying slaves from one foreign country to another, is made liable to indictment, and to pay a fine not exceeding two thousand dollars, and to be imprisoned not exceeding two years.

§ 3. Every citizen of the United States who shall voluntarily serve on board of any foreign vessel employed in the slave trade, is made liable to the same forfeitures and penalties as he would have incurred if such vessel had been owned, in whole or in part, by a person or by persons residing in the United States.

§ 4. The commissioned vessels in the United States are authorized to seize any vessel employed contrary to the meaning of this act, and of the act 1794, c. 11,—and such vessel, her tackle, guns, &c., and the goods and effects on board, (except slaves,) shall be forfeited and disposed of as prize by the District or Circuit Courts. All persons interested in the vessel, or in the voyage in which she is employed at the time of capture, are precluded from all right or claim to the slaves found on board, and from all damages or retribution on account thereof: And the commanders of such commissioned vessels are to apprehend every person found on board such vessel, being of the officers or crew, and convey them to the civil authority of the United States.

The first section of this act prohibits not merely the transportation of slaves, but the being employed in the business of the slave trade, and therefore a vessel caught in such trade, though before she has taken slaves on board, is subject to forfeiture. 3 Mason, 175, *Brig Alexander*.

Under the fourth section the owner of slaves transported contrary to the act, cannot claim them in a court of the United States, though they may be held to service according to the laws of his own country. But if, at the time of capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who made a seizure for the same offence, the owner of the slaves may claim; the fourth section only applying to persons interested in the enterprise or voyage in which the ship was employed, at the time of such capture. 9 Wheat. 391, *The Merino* and al.

The act of 1803, c. 63, (2 United States Laws, 886, Story's ed.) forbids the importation after April 1st, 1803, of any negro, mulatto, or other person of colour, (Indians excepted,) not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the cape of Good Hope, into any port or place in the United States, situated in any State which has prohibited or shall prohibit the admission or importation of such persons of colour—under a penalty on the master of a vessel, or other person importing or bringing such persons of colour, of one thousand dollars for every such person so imported. Vessels arriving in any of said ports or places, having on board such persons of colour, shall not be admitted to entry—and if any such persons of colour shall be landed from on board any vessel, in any of the ports or places aforesaid, or on the coast of any State prohibiting the importation as aforesaid; said vessel, her tackle, &c., shall be forfeited to the United States.

This act was held not to be in force in the territory of Orleans, because the legislature of that territory had not prohibited the importation of slaves or other coloured people. 6 Cranch, 330, *Amiable Lucy v. The United States*.

By the act of 1807, c. 77, (2 U. S. Laws, 1050, Story's ed.) Congress prohibited the importation into the United States, or the territories thereof, (after the 1st day of January, 1808,) from any foreign kingdom, place, or country, of any negro, &c., as a slave, or to be held to service or labour.

The first six sections of that act are repealed by the act of 1818, c. 86, which has substituted other provisions against the importation of slaves into the United States.

§ 7. Any ship found, after January 1st, 1808, in any river, port, bay or harbor, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, having on board any negro, &c., for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States—shall be forfeited, with her tackle, &c., and the goods and effects on board, to the United States. And the president is authorized to cause the armed vessels of the United States to

employ, &c., any vessels in order to accomplish such unlawful objects, or to lend money &c., or to become guarantee, &c., for agents in relation to such objects, or in any other manner to engage, directly or indirectly,

cruise on any part of the coast of the United States or the territories thereof, and to seize and bring in all ships wheresoever found on the high seas, contravening this act—and the master of every such ship shall be fined, on conviction, not exceeding ten thousand dollars. The negroes, &c., found on board such ship, are to be delivered to such persons as shall be appointed by the respective States to receive them; and if no person shall be so appointed to receive them they are to be delivered to the overseers of the poor of the place where such ship may be brought or found, and an account to be transmitted to the chief magistrate of the State, by the officers of the ship seizing and bringing them in.

§ 8. No master of a vessel of less burden than forty tons shall take on board or transport any negro, &c., to any port or place whatsoever, for the purpose of selling or disposing of the same as a slave, on penalty of forfeiting for every such negro, &c., the sum of eight hundred dollars.

§ 9. The master of any ship of the burden of forty tons and upwards, sailing coastwise from any port of the United States, in any port or place within the jurisdiction of the same, having on board any negro, &c., for the purpose of transporting them to be sold or disposed of as slaves, &c., shall, before the departure of such ship, make out and subscribe duplicate manifests of every such negro, &c., (describing them) with the name and residence of the shipper, and deliver such manifest to the collector of the port, if there be one, and if not, to the surveyor; and the master, and the owner, or shipper, shall make oath, that to the best of their knowledge or belief, the persons therein specified were not imported or brought into the United States from and after the first day of January, 1808, and that, under the laws of the State they are held to service or labour. If any ship laden and destined as aforesaid, shall depart from port, without the master having first made out and subscribed such duplicate manifests of every negro, &c., or shall take on board before arriving at the port of destination, any negro, &c., not specified in the manifests as aforesaid,—every such ship, her tackle, &c., shall be forfeited to the United States, and the master shall forfeit one thousand dollars for every negro, &c., taken on board contrary to the provisions of this act.

§ 10. The master of every vessel of forty tons burden or more, sailing coastwise, and having on board any negro, &c., to sell as slaves, and arriving in one port of the United States, from another, shall deliver certified manifests to the collector or surveyor of the port of arrival, and make oath to the truth of it—and the collector, &c., if satisfied, shall grant a permit for unloading such negro, &c. And if the master refuse to deliver the manifest, or shall land any negro, &c., before he has delivered his manifest, he shall forfeit ten thousand dollars.

Under the 9th section of this act, a libel alleging that the vessel sailed from the ports of New York and Perth Amboy without the captain's having delivered the manifests required by law to the collector or surveyor of New York and Perth Amboy, is defective—the act requiring the manifest to be delivered to the collector or surveyor of a single port. The libel must also charge the vessel to be of forty tons burden or more. 8 Wheat. 380, *The Mary Ann*.

The offence described in the 7th section, is not that of importing or bringing into the United States persons of colour with intent to hold or sell such persons as slaves—but that of hovering on the coast of the United States with such intent; and though it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the coloured persons found on board, any further than to impose a duty on the officers of armed vessels, who make the capture, to keep them safely, to be delivered to the overseers of the poor, or the Governor of the State, or the persons appointed by the respective states to receive the same. 3 Peters, 57, *United States v. Preston*. Hence a sale of persons of colour (thus brought into the ports of the United States,) under the authority of the owners of the vessel or cargo, or of the state authorities, is wholly unauthorized by the statute. *Ib.* See 5 Wheat. 338, and 10 Wheat. 312, *The Josefa Segunda*.

The act of 1818, c. 86, (3 United States Laws, 1698, Story's ed.) § 1, forbids the importation of any negro, &c., into the United States, or the territories thereof, from any foreign place, with intent to hold, sell or dispose of them as slaves—and forfeits the ship employed in such importation.

§ 2. Forbids any person to build, fit, equip, load, or otherwise prepare any ship within the jurisdiction of the United States—or to cause any vessel to sail from within the same jurisdiction, for the purpose of procuring any negro, &c., to be transported to any place whatsoever, to be held as slaves—and forfeits the ship, her tackle, lading, &c.

§ 3. Every person building, fitting, or sending away any ship, or aiding or abetting therein, with intent to employ her contrary to the intent of this act, forfeits not less than one thousand nor more than five thousand dollars, and shall be imprisoned not less than three, nor more than seven years.

therein, as a partner, agent, or otherwise; or to ship, &c., any money, goods, or effects, to be employed in accomplishing any of these unlawful objects; or to command, or embark on board, or contract for command-

§ 4. Imposes a forfeiture of not less than one thousand nor more than five thousand dollars, and imprisonment not less than three nor more than seven years, upon any person resident within the jurisdiction of the United States who shall take on board, receive or transport from Africa, or any other foreign place, or aid or abet in taking on board, &c., any negro, &c., not an inhabitant nor held to service by the laws of either of the states or territories of the United States for the purpose of holding, selling, &c., such persons as a slave. The ship, her tackle, cargo, &c., are also to be forfeited.

§ 5. The persons imported as slaves, contrary to this act, not to belong to the importer, but to be subject to the regulations of the legislatures of the states or territories of the United States.

§ 6. Imposes a penalty of not less than one thousand nor more than ten thousand dollars, and imprisonment not less than three, nor more than seven years, on any person who shall bring within the jurisdiction of the United States, from any foreign place, any negro, &c., or shall hold, sell, or dispose of any negro, &c., as a slave, or shall aid or abet therein.

§ 7. Imposes a penalty of one thousand dollars for every negro, &c., that any person shall hold, or sell for a slave, or aid or abet in holding, &c., as a slave, who shall have been imported from any foreign place. See 3 Peters, 57, *United States v. Preston*.

The prohibitions of this act and of the act of 1800, c. 51, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying them from one port to another of the same foreign country, as well as from one foreign country to another. 9 Wheat, 391. *The Merino* and *al.*

Seamen are not entitled to wages out of the proceeds of the forfeited vessel, if they had knowledge or participated in the voyage made illegal by the foregoing act. But the wages of seamen, and the claims of material-men, innocent of all such knowledge or participation, are preferred to the claim of forfeiture on the part of the United States. 9 Wheat, 409, *The St. Jago de Cuba*.

The offence of sailing from a port with intent to engage in the slave trade, is not committed, unless the vessel sails out of the port. 2 Mason, 129, *United States v. La Coste*. It is not necessary, in an indictment on the 2d and 3d sections of this act, to allege that the defendant knowingly committed the offence, 2 Mason, 143, *United States v. Smith*. It is not essential to constitute a fitting out, under the slave trade acts, that every equipment necessary for a slave voyage, or any equipment peculiarly adapted to such a voyage, should be taken on board: It is sufficient if the vessel is actually fitted out with intent to be employed in the illegal voyage. 12 Wheat, 460, *United States v. Gooding*. The terms aiding and abetting in the statute do not refer to the relations of principal and accessory—both the actor, and he who aids and abets the act, are principals. *Ibid.*

The act of 1819, c. 224, (3 United States laws, 1752, Story's ed.) § 1, authorizes the president of the United States to cause armed vessels of the United States to cruise on the coasts of the United States and of Africa and elsewhere, and to direct the commanders of such armed vessels to seize and bring in all ships of the United States having on board, or intended for the purpose of taking on board or transporting, or which may have transported any negro, &c., contrary to the provisions of any act prohibiting traffic in slaves. The proceeds of all such ships, their tackle, &c., and the effects on board, which shall be so seized, prosecuted and condemned, are to be divided equally between the United States and the officers and crew who shall seize and bring them in, and shall be distributed like prizes taken from an enemy. Provided, the officers and crew shall keep safe every negro, &c., found on board such ship, and shall deliver them to the marshal of the district into which they are brought, if into a port of the United States, or if elsewhere, to such persons as shall be lawfully appointed by the president of the United States. And provided also, that the commanders of such commissioned vessels shall apprehend all the officers and crew of the ship so seized, and convey them to the civil authority of the United States.

§ 2. Authorizes the president to make such regulations and arrangements as he may deem expedient for the safe keeping, support, and removal beyond the limits of the United States, of all such negroes, &c., as may be delivered and brought in under the provisions of the preceding section—and to appoint an agent or agents on the coasts of Africa to receive such negroes, &c.

§ 3. Gives a bounty of twenty-five dollars to the officers and crew of armed vessels, for every negro, &c., brought in as aforesaid, and delivered to the marshal, or agent duly appointed to receive them.

§ 4. Directs district attorneys to prosecute persons holding negroes, &c., imported contrary to the statutes of the United States—and on the finding by a jury that such negroes, &c., have been imported against the laws of the United States, directs the court to order the marshal to take them into his custody for safe keeping, &c.

§ 5. Directs commanders of armed vessels to bring ships captured under this act into a

ing, or embarking on board, any vessel, &c., in any capacity, knowing that such vessel, &c., is employed, or intended to be employed, in such unlawful objects; or to insure or contract for insuring, any slaves, or other property, employed or intended to be employed, in accomplishing any of these unlawful objects. (a) Pecuniary penalties and forfeitures are then imposed upon persons offending, by engaging in such unlawful objects. (b) And the statute then proceeds to subject certain offenders to punishments of a more serious nature.

Sec. 9.
Dealing in
slaves on
the high
seas, &c.,
to be deem-
ed piracy,
felony, and
robbery,
and punish-
ed with
death.

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By sec. 9, "if any subject or subjects of his majesty, or any person or persons residing, or being within any of the dominions, forts, settlements, factories or territories, now or hereafter belonging to his majesty, or being in his majesty's occupation or possession, or under the government of the united company of merchants of England trading to the East Indies, shall, except in such cases as are in and by this act permitted, (c) after the first day of January, one thousand eight hundred and twenty five, upon the high seas, or in any haven, river, creek, or place, where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid or assist in carrying away, conveying, or removing, any person or persons as a slave or slaves, or for the purpose of his, her or their being imported, or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used or dealt with, as a *slave or slaves; or shall, after the said first day of January, one thousand eight hundred and twenty-five, except in such cases as are in and by this act permitted, (d) upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain, or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, any person or persons, for the purpose of his, her, or their being carried away, conveyed or removed, as a slave

(a) Sec. 2.

(b) Sec. 3, 4, 5, 7, 8.

(c) These excepted cases are repealed by the 3 & 4 Wm. 4, c. 73, s. 12, which abolishes slavery in the British colonies, plantations, and possessions abroad.

(d) See note (c) p. 163.

port of the state or territory to which such ships belong, if he can ascertain the same; otherwise into any convenient port of the United States.

Finally, by act of 1820, c. 113, (3 United States Laws, 1798, Story's Ed.) § 4, "if any citizen of the United States being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in whole or in part, or navigated for or in behalf of any citizen or citizens of the United States, shall land, from any such ship or vessel, and, on any foreign shores, seize any negro or mulatto, not held to service or labour by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizens or person shall be adjudged a PIRATE; and on conviction thereof, before the Circuit Court of the United States for the district wherein he may be brought or found, shall suffer DEATH."

§ 5. Enacts, that if any citizen of the United States, or any other person (as described in § 4,) "shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel [as is mentioned in § 4,] any negro or mulatto not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall on the high seas or any where on tide water transfer or deliver over to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land or deliver on shore, on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold such negro or mulatto, as a slave, such citizen or person shall be adjudged a PIRATE; and on conviction thereof before the Circuit Court of the United States for the district wherein he shall be brought or found, shall suffer DEATH."

or slaves, or for the purpose of his, her, or their being imported or brought, as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with, as a slave or slaves, then and in every such case, the person or persons so offending shall be deemed and adjudged guilty of piracy, felony and robbery, and being convicted thereof shall suffer death, without benefit of clergy, and loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas, ought to suffer."

The 1 Vict. c. 91, s. 1, recites the preceding section, and provides that, after the first of October, 1837, no person convicted of any such offence shall suffer death, but instead thereof shall be liable to transportation for life, or for any term not less than fifteen years, or imprisonment with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet. (*dd*)

By sec. 10, " (except in such special cases as are in and by this act 5 Geo. 4, c. 113, s. 10. (e) if any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing, or trading in, purchase, sale, barter, or transfer, of slaves, or persons intended to be dealt with as slaves, or shall, otherwise than as aforesaid, carry away or remove, or contract for the carrying away or removing of slaves, or other persons, as or in order to their being dealt with as slaves, or shall import or bring, or contract for the importing or bringing, into any place whatsoever, slaves or other persons as or in order to their being dealt with as slaves; or shall, otherwise than is aforesaid, ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves, or shall ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining or confining on board of any ship, vessel, or boat, slaves, or other persons, for the purpose of their being imported, or brought into any place whatsoever, as or in order to their being dealt with as slaves; or shall fit out, man, navigate, equip, despatch, use, employ, let, or take to freight, or on hire, or contract, for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight, or on hire, any ship, vessel, *or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully lend or advance, or become security for the loan or advance, or contract for the lending or advancing, or becoming security for the loan or advance of money, goods, or effects, employed, or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully become guarantee or security, or contract for the becoming guarantee or security for agents employed, or to be employed, in accomplishing any of the objects, or the contracts

But now with transportation for life, &c.
 Dealing in slaves, or exporting or importing them, or shipping them for such purposes, or embarking capital in the slave trade, or guaranteeing slave adventures or shipping goods, &c., to be so employed, or serving on board slave ships, or insuring slave adventures, or forging instruments relating to the slave laws, made felony punishable by transportation, &c.
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(*dd*) See ss. 1 & 2 of the 1 Vict. c. 91, *ante*, p. 92.

(*e*) See note (*c*) p. 163.

in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, or in any other manner to engage, or to contract to engage, directly or indirectly therein, as a partner, agent, or otherwise, or shall knowingly and wilfully, ship, tranship, lade, receive, or put on board, or contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods or effects, to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall take the charge or command, or navigate, or enter and embark on board, or contract for the taking the charge or command, or for the navigating, or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, surgeon; or supercargo, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect to which they shall so take the charge or command, or navigate, or enter and embark, or contract to do so as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful: or shall knowingly and wilfully insure, or contract for the insuring of any slaves, or any property, or other subject-matter engaged or employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall wilfully and fraudulently forge or counterfeit any certificate, certificate of valuation, sentence, or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipts being required by this act,) or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence, or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate; then and in every such case, the person or persons so offending, and their procurers, counsellors, aiders, and abettors, shall be, and are hereby declared to be felons, and shall be transported beyond seas, for a term not exceeding fourteen years, or shall be confined and kept to hard labor for a term not exceeding five years, nor less than three years, at the discretion of the court, before whom such offender or offenders shall be tried and convicted."

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Sec. 11.
Seamen,
&c., serv-
ing on
board such
ships guilty
of a misde-
meanor.

*By sec. 11, "that (except in such special cases, or for such special purposes as are in and by this act expressly permitted,)(e) if any persons shall enter and embark on board, or contract for the entering and embarking on board of any ship, vessel or boat, as petty officer, seaman, marine or servant, or in any other capacity not hereinbefore specially mentioned, knowing that such ship, vessel or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so enter and embark on board, or contract to do so as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; then and in every such case the persons so offending, and their procurers, counsellors, aiders and abettors shall be, and they are hereby declared to be, guilty of a misde-

(c) See note (c) *ante*, p. 163.

meanor only, and shall be punished by imprisonment for a term not exceeding two years."

By sec. 12, "nothing in this act contained, making piracies, felonies, robberies and misdemeanors, of the several offences aforesaid, shall be construed to repeal, annul or alter the provisions and enactments in this act also contained, imposing forfeitures and penalties, or either of them, upon the same offences, or repeal, annul or alter the remedies given for the recovery thereof: but that the said provisions and enactments, imposing forfeitures and penalties, shall in all respects be deemed and taken to be in full force; it being the true intent and meaning of this act, that the right and privilege heretofore exercised of suing in vice-admiralty courts for the forfeitures or penalties, shall remain in full force and effect as before the passing of this act; and the jurisdiction of the said vice admiralty courts in all cases of forfeitures and penalties imposed by this act is hereby established, given, ratified and confirmed."

By sec. 40, "if any person offending, as a petty officer, seaman, marine or servant, against any of the provisions of the act, shall, within two years after the offence committed, give information on oath before any competent magistrate, against any owner or part owner, or any captain, master, mate, surgeon or supercargo of any ship or vessel, who shall have committed any offence against this act, and shall give evidence on oath against such owner, &c., before any magistrate or court before whom such offender may be tried; or if such person so offending shall give information to any of his majesty's ambassadors, ministers, &c., or other agents, so that any person owning such ship or vessel, or navigating or taking charge of the same, as captain, master, mate, surgeon or supercargo, may be apprehended, such person so giving information and evidence, shall not be liable to any of the pains or penalties under the act, incurred in respect of his offence; and his majesty's ambassadors, ministers, &c., are required to receive any such information, and to transmit the particulars thereof without delay to one of his majesty's principal secretaries of state, and to transmit copies of the same to the commanders of his majesty's ships or vessels, then being in such port or place."

*By sec. 48, "all offences against this act which shall be committed in any country, territory or place, other than the United Kingdom, or on the high seas, or in any port, sea, creek or place where the admiral has jurisdiction, and which shall be prosecuted as piracies, felonies, robberies or misdemeanors, shall and may be inquired of, either according to the ordinary course of law, and the provisions of the 28 H. 8, c. 15, or according to the provisions of the 33 H. 8, c. 23, (repealed by 9 Geo. 4, c. 31,) or according to the provisions of the 11 & 12 Wm. 3, c. 7, or according to the provisions of the 46 Geo. 3, c. 54; (f) and that all persons convicted of any of the said offences, to be inquired of, tried and determined, under and by virtue of any commission to be made and issued, according to the directions of the said act of the 46 Geo. 3, shall be subject and liable to, and shall suffer all such and the same pains, penalties and forfeitures, as by this act, or any law or laws now in force, persons convicted of the same respectively would be subject and liable to, in case the same were respectively inquired of, tried and determined, and adjudged, within this realm, by virtue of any commission made according to the directions of the statute of 28 H. 8, c. 15."

S. 12 provides for an option to sue for penalties in the Vice-Admiralty Courts.

S. 40. Petty officers, seamen, marines, or servants, having offended, and within two years informing against any owner, captain, master's mate, surgeon, or supercargo, not to be liable to the pains and penalties of the act.

*167 S. 48. Trial of offences against this act.

S. 49. Trial of offences committed out of the admiral's jurisdiction. By sec. 49, "all offences against this act, which shall be committed in any place where the admiralty has not jurisdiction, and not being within the local jurisdiction of any ordinary court of a British colony, &c., competent to try such offence, may be inquired of, tried, &c., under and by virtue of any commission to be issued, according to the directions of the 46 Geo. 3, c. 54."

Offences tried as if committed in Middlesex. By sec. 50, "all offences committed against this act may be inquired of, tried, determined and dealt with as if the same had been respectively committed within the body of the county of Middlesex."

OF FORESTALLING, REGRATING, AND INGROSSING, AND OF MONOPOLIES.

Nature of these offences.

EVERY practice or device by act, conspiracy, words or news, to enhance the price of victuals or other merchandise, has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general. (a) Practices of this kind come under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offences of the like nature. (b) Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind. (c) Also if a person within the realm buy any merchandise in gross, and sell the same again in gross, it has been considered to be an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavour to make his profit of it. (d) So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at the common law; for if such practices were allowed, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit. (e) And so jealous is the common law of all practices of this kind, that it has been held contrary to law to sell corn in the sheaf; upon the supposition that by such means the market might be in effect forestalled. (f)

The statute on this subject now repealed.

The offence of forestalling, regrating and ingrossing were for a considerable period prohibited by statutes; and chiefly by the 3 & 4 Edw. 6, c. 21, and 5 & 6 Edw. 6, c. 14: (g) but the beneficial tendency of such statutes were doubted; and at length by the 12 Geo. 3, c. 71, they were repealed, (h) as being detrimental to the supply of the labouring and manufacturing poor of the kingdom.

(a) 3 Inst. 196. Bac. Abr. tit. *Forestalling*. (A)

(b) 3 Inst. 196. Bac. Abr. tit. *Forestalling*. (A)

(c) 1 Hawk. P. C. c. 80, s. 1.

(d) 3 Inst. 196. Bac. Abr. tit. *Forestalling*. (A) 1 Hawk. P. C. c. 80, s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandise into the realm, may sell it in gross. 3 Inst. 196.

(e) 1 Hawk. P. C. c. 80, s. 3. 3 Inst. 196.

(f) 3 Inst. 197. Bac. Abr. tit. *Forestalling*. (A)

(g) Altered by 5 Eliz. c. 5, s. 13. 5 Eliz. c. 12, and 13 Eliz. c. 25, s. 13.

(h) The acts repealed are 3 & 4 Edw. 6, c. 21. 5 & 6 Edw. 6, c. 14. 3 Phil. & Mary, c. 3. 5 Eliz. c. 5. 15 Car. 2. c. 8, and so much of Ann. c. 34, as relates to butchers selling cattle alive or dead in London or Westminster, or within ten miles thereof; and all the acts made for the better enforcement of the same.

It has been sometimes contended that forestalling, regrating and ingrossing, were punishable only by the provisions of these *statutes: (i) but that doctrine has not been admitted, and they still continue offences at common law; (k) though their precise extent and definition at the present day may perhaps admit of some doubt. There is not much to be found in the books concerning the common law upon this subject; and from the time of the 5 & 6 Edw. 6, c. 14, prosecutions for offences of this nature were probably found to be framed with more facility and certainty upon the statute than upon the common law. That statute, it has been observed, is now repealed; but as it particularly describes the offences of forestalling, regrating and ingrossing, it may be of use to refer to it as containing a parliamentary exposition of the respective terms denoting the several particular offences. (l)

The first section enacted, that whosoever should buy or cause to be bought any merchandize, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city port, haven, creek or road, or from any parts beyond the sea, to be sold; or make any bargain, contract or promise, for the having or buying the same or any part thereof, so coming as aforesaid, before the said merchandize, victuals or other things, should be in the market, fair, city, port, haven, creek or road, ready to be sold; or should make any motion by word, letter message, or otherwise, to any person, for the enhancing of the price, or dearer selling of any thing above mentioned; or else dissuade, move or stir any person coming to the market or fair, or abstain or forebear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek or road, to be sold as aforesaid—should be taken to be a *forestaller*. (m)

The second section enacted, that whosoever should by any means regrate, obtain or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that should be brought to any fair or market to be sold, and should sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof—should be taken to be a *regrator*. (n)

The third section enacted, that whosoever should ingross or get into his hands by buying, contracting, or promise taking, other than by demise, grant or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, should be taken to be an *ingrosser*. (o)

It has been suggested, that at the present day it would probably be

(i) *Rex v. Maynard*, Cro. Car. 231; *Rex v. Waddington*, 1 East, R. 153.

(k) 1 Hawk. P. C. c. 80, s. 15.

(l) 1 Hawk, c. 80, s. 15. Burn's Just. tit. *Forestalling*, &c. 4 Bla. Com. 158.

(m) *Forestalling* (*Forestallan*, or *forestallan*) in the English Saxon signifieth properly to market before the public, or to prevent the public market, and metaphorically, to intercept in general; and seemeth derived from *fore*, which is the same as *before*, and *stalle*, a standing place, or department, from whence sprang the ancient word *stallage*, which signifieth money paid for erecting a stall or stand for the selling of goods in a fair or market. Burn's Just. tit. *Forestalling*, &c.

(n) *Regrator* is said to be derived from the French word *regratement*, for huckstery. 3 Inst. 195.

(o) The vendee cannot sell again in gross, for then he is an *ingrosser*, according to the nature of the word, for that he buys in gross and sells in gross; 3 Inst. 195.

Common
law offence.
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holden that no offence is committed, unless the conduct of the *party manifests an *intent to raise the price of provisions*: as the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing of a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community. (*p*) And that many cases may occur in which a most laudable motive may exist for buying up large quantity of the same commodity. (*q*) It is stated also, that in one case the court were equally divided on the question, whether regrating is an indictable offence at common law; (*r*) and that it seems, therefore, at all times to be safer to charge in the indictment that the acts complained of were done with an evil design to raise the price of the article in question. (*s*)

Waddington's case.—Enhancing the price of hops.

In a case, in the year 1800, in which the defendant was charged by an information, with divers acts committed with the intent of enhancing the price of hops, the law relating to forestalling, regrating and ingrossing, was much considered. The defendant, a merchant of credit and affluence in Kent, having a stock of hops in hand, went to Worcester for the purpose of speculating how he could enhance the price of that commodity. And for that purpose he declared to the sellers that hops were too cheap, and to the hop planters that they had not a fair price for their hops: and in order that his speculation of raising the price of a falling market might not be defeated, he contracted for one-fifth of the produce of Worcestershire and Herefordshire when he had a stock in hand, and admitted that he did not want to purchase. For this conduct the information was filed against him, containing many counts, (*t*) upon which he was convicted generally; and upon his being brought up to receive judgment it was contended, that the facts charged against him never constituted any offence, even previous to the statute 12 Geo. 3, c. 61; but that if they did, the offences stated in each count, and all others *ejusdem generis*, were done away by that statute, which went to repeal, not merely the particular acts of parliament therein enumerated, but the whole system of laws respecting forestalling, regrating and ingrossing. And the resolutions of the committee of the House of Commons, to whom it was referred to make a report *upon these laws, were relied upon as showing that it was the intention of the legislature

Arguments urged for the defendant.

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(*p*) 2 Chit. Crim. Law, 528, in the notes; referring to Smith's Wealth of Nations, 2 Vol. 309, and the Index, tit. *Labour*.

(*q*) 2 Chit. Crim. Law, *ibid*, referring to the arguments, &c., in 14 East, 406; 15 East, 511.

(*r*) Rex v. Rushby, Hil. T., 40 Geo. 3, 2 Chit. Crim. Law, 436, note (*r*), and 528 in the notes.

(*s*) 2 Chit. Crim. Law, 528, in the notes.

(*t*) There were nine counts; the first charging the defendant with spreading rumors, with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price; 2d, with spreading such rumors generally, with intent to enhance the price of hops; 3d, with endeavouring to enhance the price, by persuading divers dealers, &c., not to take their hops to market, and to abstain from selling for a long time; 4th, with ingrossing large quantities of hops, by buying from many particular persons, by name, certain quantities, with intent to resell the same for an unreasonable profit, and thereby to enhance the price; 5th, *Ad idem*, stating the particular contracts; 6th, with getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, and thereby greatly to enhance the price; 7th, with buying like quantities, with like intent; 8th, with buying like quantities with intent to resell at an exorbitant profit, and thereby greatly to enhance the price; 9th, with unlawfully ingrossing by buying large quantities with like intent. The defendant was convicted generally upon this information.

to do them away altogether. That an ingrossing must be of some commodity which constitutes *victuals*, and that *hops* were no victuals: and objections were taken to the particular form of the counts of the information: and amongst others, that there was no quantity specified on the face of the information out of which the defendant purchased the hops, whereas this should have appeared; ingrossing being a relative term, and meaning the getting either the whole of any commodity, or at least so much of it as to prevent others from supplying their wants in the common course of trade; and that the quantity ingrossed ought to have been so much as would have affected the consumption of the whole kingdom.

Lord Kenyon, in delivering his opinion, said, that it could not be denied, but that our law books declare practices of the sort with which the defendant was charged to be offences at common law; that he was perfectly satisfied that the common law remained in force with respect to offences of this nature; and that in considering whether that was intended to be done away by the act of the 12 Geo 3, he could not regard the resolutions entered on the journals of the commons house of parliament, but must look to the statute-book; and that there he found nothing which trespassed upon what he had said, but only a repeal of certain statutes, upon none of which that prosecution was founded, but upon the common law. With respect to the objection that hops were no victuals, he observed, that if they were become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the ingrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law.^(u) And as to the objection that the quantity purchased could not constitute the offence of ingrossing unless it bore such a proportion to the consumption of the whole kingdom as would affect the general price, his lordship said, that the objection was new to him: but that if the opinion of Lord Mansfield, Mr. Justice Dennison, and Mr. Justice Foster, were deserving of attention, there was as little in that objection as in the rest. That he well remembered an information moved for before them against certain persons, for conspiring to monopolize or raise the price of all the salt at Droitwich: and that they had no doubt of its constituting an offence, although it was not pretended that these persons had endeavoured to ingross all or any considerable part of the salt of the kingdom.

After referring to the conflict of political opinion upon the subject of these laws, Lord Kenyon proceeded thus:—"But without attending to disputed points, let us state fairly what this case really *is, and then see if it be possible to doubt whether the defendant has been guilty of any offence. Here is a person going into the market, who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing, with a view of afterwards dispersing the commodity which he collected, in proportion to the wants and conveni-

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(u) It appears that hops and malt were held not to be within the meaning of the statute 5 & 6 Edw. 6, c. 14, any more than apples, cherries, &c. (1 Hawk. P. C. c. 80, s. 20), but the statute 9 Ann. c. 12, s. 24, must have altered the law with respect to hops, as it prohibited common brewers, under a penalty, from using any other bitter than hops in brewing beer; and the ground on which salt was held to be a victual within the meaning of that statute was not only because it is necessary of itself for the food and health of man, but also because it seasons and makes wholesome beef, pork, &c. 3 Inst. 195. The monopolizing of salt is clearly an offence at common law. *Vide* Lord Kenyon's judgment in *Rex v. Waddington*, 1 East, R. 157.

ence of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price, who can deny that this is an offence of the greatest magnitude.”(w)

Second case against Waddington.—In-grossing hops.

The same defendant had been also tried upon an indictment which, in substance, charged him chiefly with *ingrossing* a large quantity of hops in Kent, by buying them from various persons by forehand bargains and otherwise, at a certain price, with intent to resell them at an unreasonable profit, or an exorbitant price.(x) The principal part of the evidence related to the forehand bargains made by the defendant with different planters for their growing crop of hops; a practice, however, which appeared to have prevailed for a considerable period of time in Kent, and without which some of the witnesses stated, that, in their judgment, the cultivation of this plant, the expense of which was exceedingly heavy, could not be generally carried on. There was also evidence of the defendant's having bought up very large quantities of the commodity to an unusual amount, and by making unusual advances of money; and that he had held out language of inducement to other persons dealing in the same article, to withhold their stock from the market, with a view to rise in the price.(y) On the part of the defendant, the long existence of the practice of making forehand bargains for hops was insisted upon as affording some argument for their legality; and that at any rate it could not be considered as *ingrossing* to have made forehand bargains for 258 acres out of 30,000 acres in cultivation of the same article in the county of Kent alone. But Grose, J., in passing sentence upon the defendant, adverted to what had been said in the former prosecution, and stated that the particular *offence of *ingrossing* still remained an offence at common law, and was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist.(z)

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Indictment.

An indictment for *ingrossing a great quantity of fish, geese, and ducks*, without specifying the quantity of each, has been held to be bad.(a) And an indictment for *ingrossing magnam quantitatem*

(w) *Rex v. Waddington*, Hil. T., 41 Geo. 3; 1 East, R. 143.

(x) The indictment, consisted of ten counts; 1st. for engrossing hops of divers persons by name, with intent to resell at an unreasonable profit, and thereby enhance the price; 2d, for ingrossing hops then growing, by forehand bargains, with like intent; 3d, for buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to resell them at an unreasonable profit, and thereby enhance the price; 4th, for buying all the growth of hops in several parishes by forehand bargains, with the like intent; 5th, for buying hops of divers persons named, with the same intent as in the first count; 6th, for buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to resell at an unreasonable price, and thereby to enhance the price; 7th, for endeavouring to enhance the price of hops by persuading hop-owners not to sell, &c.; 8th, for engrossing, by buying large quantities, of persons unknown, with intent to resell at an exorbitant profit; 9th, buying large quantities with the like intent; 10th, for buying hops then growing, with intent to resell at an exorbitant price and lucre. The defendant was tried before Lord Kenyon, who thought the evidence sufficient to go to the jury upon all the counts: and the jury found a general verdict against the defendant.

(y) The last-mentioned evidence applied to the 7th count; the only one the proof of which was afterwards contested, but without effect, at the bar.

(z) *Rex v. Waddington*, Hil. T., 41 Geo. 3; 1 East, R. 167.

(a) *Rex v. Gilbert*, 1 East, R. 583.

straminis et feni was quashed for not mentioning how many loads of ^{Punish-}each.^{ment.}(b)

It is said, that by an ancient statute the offender was to be grievously amerced for the first offence; for the second to be condemned to the pillory; for the third to be imprisoned; and, for the fourth, to be compelled to abjure the bill. And there seems to be no doubt but that, at this day, all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law.(c)

Monopolies are much the same offence in other branches of trade, ^{Of monopo-}that ingrossing is in provisions: being a license or privilege allowed by ^{lies.}the king for the sole buying and selling, making, working or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.(d) They are said to differ only in this,—that monopoly is by patent from the king, ingrossing by the act of the subject, between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law.(e) By the common law, therefore, those who are guilty of this offence are subject to fine and imprisonment, the offence being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom, and it is said that there are precedents of prosecutions of this kind, in former days,(f) and all points of this kind relating to any known trade, are void by the common-law.(g)

But, notwithstanding their illegality, monopolies have been carried to an enormous height during the reign of Queen Elizabeth; the evil was, however, in a great measure remedied by the 21 Jac. 1, c. 3, which declares them to be contrary to law, and void; (except as to patents not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot;) and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb.(h)

It is worthy of observation, that, as our laws on the one hand care- ^{The undue}fully protect the people from the arts of those who would unduly raise ^{abatement}the price of the comforts and necessaries of life, so on the other, they ^{of the price}protect the fair trader from impositions which may have the effect of ^{of our}unduly lowering the price of the article in which he deals. Thus, the ^{native com-}abatement by undue means of the price of our ^{modities is}*native commodities is ^{punishable.}punishable by fine and ransom:(i) and a case is mentioned where certain persons came to Coteswold, and said, in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wool was abated; and presentment thereof being made, the defendants having appeared, were, upon their confession, put to fine and ransom.(k)

(b) Anon. Cro. Car. 381. And see 2 Hawk. P. C. c. 25, s. 74. Rex v. Gibbs, 1 Str. 497. Rex v. Foster, 1 Lord Raym. 475.

(c) 1 Hawk. P. C. c. 80, s. 5.

(d) 4 Bla. Com. 158; 3 Inst. 181.

(e) Skin. 169.

(f) 3 Inst. 181; 2 Inst. 47, 61. Bac. Ab. tit. *Monopoly* (A), note (b).

(g) 1 Hawk. P. C. c. 79, s. 1.

(h) Sec. 4. And see further upon the subject of monopolies, 1 Hawk. P. C. c. 79. Bac. Ab. tit. *Monopoly*.

(i) 3 Inst. 196, referring to 23 Ed. 3, c. 6; 13 Rich. 2, c. 8, *Inter leges Ethelstani*, c. 12.

(k) 3 Inst. 196.

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*CHAPTER THE TWENTIETH.

OF MAINTENANCE AND CHAMPERTY, AND OF BUYING AND SELLING
PRETENDED TITLES.Mainte-
nance.

1. MAINTENANCE seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is no way concerned,^(a) or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him by assisting either party with money, or otherwise, in the prosecution or defence of such suit.^(b) Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulate to have part of the thing in suit, his offence is called *champerty*.^(c) (A)

Instances
of mainte-
nance

As to *maintenance*, it is laid down, that whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit, may properly be said to be guilty of an act of maintenance.^(d) † It has been said that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it should seem that this, if not strictly maintenance, must be equally criminal at common law.^(e) And a person may *be as much guilty of maintenance for supporting another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attain.^(f)

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(a) Co. Lit. 368 b. 2 Inst. 208, 212, 213; 1 Hawk. P. C. c. 83, s. 1, 2. Bac. Ab. tit. *Maintenance*. This kind of maintenance is called in the books *ruralis*, in distinction to another sort carried on in courts of justice, and therefore called *curialis*. It is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(b) 1 Hawk. P. C. c. 83, s. 3. Bac. Ab. tit. *Maintenance*. 4 Bla. Com. 134. This kind of maintenance is called *curialis*. See *ante*, note (a).

(c) Co. Lit. 368; 1 Hawk. P. C. c. 83, s. 3. The abuse of legal proceedings by oppressive combinations to carry them into effect is observed by Mr. Hume to have speedily appeared upon the establishment of the laws in the time of Edward I. He says, "Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in lawsuits; and it was found requisite to check this iniquity by act of parliament." 2 Hume, 320, referring to the statute of conspirators.—Edw. 1.

(d) 1 Hawk. P. C. c. 83, s. 4, and the numerous authorities cited in the margin.

(e) Bac. Ab. tit. *Maintenance* (A). 1 Hawk. P. C. c. 83, s. 12, where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the notion of maintenance.

(f) 1 Hawk. P. C. c. 83, s. 13. Bac. Ab. tit. *Maintenance* (A).

(A) An action of maintenance will not lie against a person, for carrying on a suit in the name of another, or assisting in the prosecution of it, if he has any legal or equitable interest in the land or subject in controversy. *Wickham v. Conklin*, 8 Johns. Rep. 220. [See also 1 Greenleaf, 292, *Gowen v. Nowell*. 3 Cowen, 623, *Thalhimer v. Brinkerhoff*.]

† ["A man is not the less a maintainer, champertor, or conspirator, because the cause was just, if the motive were selfish or oppressive." Judge Johnson, in *The State v. Chitty*, 1 Bailey (S. Car.) Rep. 379.]

It has also been said that he who, by *his friendship or interest*, saves a person that expense in his cause which he might otherwise be put to, or gives, or but endeavours to give, any other kind of assistance to a party in the management of his suit, is guilty of maintenance. (g) And it has been said also that he who gives any *public countenance* to another in relation to such suit, will come under the like notion; as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labour the jury whether in truth he spend any thing or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says any thing or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty. (h) But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made. (i) And it seems clear, that a man is in no danger of being guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the counsellor or attorney likely to do his business more effectually. (k)

But there are many acts, in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justifiable: 1, in respect of an interest in the thing in variance; 2, in respect of kindred or affinity; 3, in respect of other relations, as that of lord and tenant, master and servant; 4, in respect of charity; 5, in respect of the profession of the law.

It seems clear that not only those who have an actual interest in the thing at variance, as those who have a reversion expectant on an estate-tail, or a lease for life or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who by the act of God have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands: and if a plaintiff in an action of trespass alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, because the title is now become his own. (l) Also he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in

When justifiable.

In respect of interest in the thing at variance.

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(g) Bro. tit. *Maintenance*, 7, 14, 17, &c. 1 Hawk. P. C. c. 83, s. 5, 6. But *qu.* how far this would be acted upon at the present day; and see the judgment of Buller, J., in *Master v. Miller*, 4 T. R. 340, where he says, "It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense that he would otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppressed the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be laid aside, must be expected.

(h) 1 Hawk. P. C. c. 83, s. 5. Bac. Ab. tit. *Maintenance*, (A).

(i) 1 Hawk. P. C. c. 83, s. 8.

(k) *Ibid.* s. 9. Bac. Ab. tit. *Maintenance*, (A).

(l) Bac. Abr. tit. *Maintenance*, (B). 1 Hawk. P. C. c. 83, s. 14, 15, &c.

which he has such an equity. (m) And whenever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit concerning such thing. And a man's bail may take care to have his appearance recorded : but, as some say, they cannot safely intermeddle further. (n)

Where a count stated that Yeoman had deposited certain money in the hands of the plaintiff, which the plaintiff had delivered to the defendant at his request, and that Yeoman threatened to bring an action against the plaintiff to recover the money, and thereupon, in consideration that the plaintiff, at the request of the defendant, would defend any action Yeoman should commence, the defendant undertook to save the plaintiff harmless ; that Yeoman brought an action to recover the money, and that the plaintiff defended it with the privity and consent of the defendant ; it was held that this was not maintenance. (o)

Where, on the trial of an action brought to recover the amount of an attorney's bill, in which there was a plea of maintenance, it appeared that Jesus College, Oxford, had given notice to set out tithes in kind to all the owners of old inclosures in the parish of Tredington, who had, as far as living memory went, paid certain sums of money in lieu of tithes for the old inclosures, and that at a meeting of the owners of such old inclosures, it was agreed by them that they should defend any suit or suits, which should be instituted by Jesus College, to enforce the payment of tithes, and that the expenses of such defence should be paid by the owners in proportion to their interests, as ascertained by the poor rate ; the owners considering that if Jesus College should succeed in one suit as to any part of the old inclosures, that would invalidate the payments as to all ; and Jesus College afterwards filed seven bills in the Exchequer, and commissions were issued for the examination of witnesses in each suit, and depositions taken in all the suits ; but in one suit a greater number of depositions than in any other, and which related to there having been no payment or any tithe for the old inclosures, and there being a distinction in this respect, as far as living memory went, between the old and the new inclosures ; and these depositions by consent had been used in all the suits : and nine issues having been directed to be tried, and the jury having retired to consider their verdict in the first, it was agreed that the verdicts in the other issues should be entered according to the finding of the jury in the first ; but such jury was discharged without finding any verdict, and decrees were afterwards made, establishing some of the moduses and quashing others ; it was held that the agreement to defend the suits was not maintenance ; for, although the payments were not the same per acre, and although the interest in each payment was separate, yet all the owners of the old inclosures had an interest in supporting the moduses over all the old inclosures, and, consequently, the agreement was not *officiously* entered into in order to defend the suits. (oo) And the Court of Exchequer, in Trinity Term, 1843, held, upon a rule to show cause why a nonsuit should not be entered, that this ruling was correct.

(m) *Id. ibid.*, and see the judgment of Buller, J., in *Master v. Miller*, 4 T. R. 340, *et seq.*

(n) 1 Hawk. P. C. c. 83, s. 24, 25. Bac. Abr. tit. *Maintenance*, (B).

(o) *Williamson v. Henley*, 6 Bing. 299.

(oo) *Findon v. Parker*, Worcester Spring Assizes, 1843, Wightman, J.

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent to the party, or husband of such an heiress. *(p)*

In respect of kindred or affinity.

Much of the law relating to the maintenance which a lord may give to his tenant would hardly be applicable at the present time. It seems to have been the better opinion that the lord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the lord, but that he could not maintain the tenant in respect of lands not holden in himself. *(q)*

In respect of the relation of lord and tenant, master and servant.

With respect to the maintenance which a master may give to his servant, it has been held that he may go along with him, or his domestic chaplain, to retain counsel; also he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but he cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse. *(r)* And a servant cannot lawfully lay out any of his own money to assist the master in his suit. *(s)*

Any one may lawfully give money to a poor man to enable him to carry on his suit: † and any one may safely go with a foreigner, *who cannot speak English, to a counsellor and inform him of his case. *(t)*

In respect of charity. *178

A counsellor having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An attorney also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit; but an attorney who maintains another is not justified by a general retainer to prosecute for him in all causes. Nor can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect repayment; and it is said to be questionable whether solicitors, who are no attorneys, can, in any case, lawfully lay out their own money in another's cause. *(u)*

In respect of the profession of the law.

But no counsellor or attorney can justify using any deceitful practice in maintenance of a client's cause; and they will be liable to be punished for misdemeanors in this respect by the common law, and also by the statute Westm. 1, c. 29. *(v)* In the construction of this statute it hath been holden that all fraud and falsehood, tending to impose upon or abuse the justice of the king's courts, are within the purview of it; as if

(p) Bac. Abr. tit. *Maintenance*, (B). 1 Hawk. P. C. c. 83, s. 26.

(q) 1 Hawk. P. C. c. 83, s. 29.

(r) Bro. tit. *Maintenance*, 41, 52. 1 Hawk. P. C. c. 83, s. 31, 32, 33.

(s) 1 Hawk. id. s. 34.

(t) Bro. tit. *Maintenance*, 14. Bac. Abr. tit. *Maintenance*, (B) 4. 1 Hawk. P. C. c. 83, s. 36, 37.

(u) 2 Inst. 564. Bac. Abr. tit. *Maintenance*, (B) 5. 1 Hawk. P. C. c. 83, s. 28, 29, 30.

(v) 2 Inst. 215. Bac. Abr. and Hawk. id. *ibid.* The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader.

† [“ If any one lay out money in the prosecution of a suit to recover a close of which his poor neighbour has been deprived, and without which he must lose it, he is no champertor (*qu. Maintainer*), because right, humanity, and justice, would approve it. Johnson, J., in *The State v. Chitty*, 1 Bailey (S. Car.), 401.

an attorney sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof put the supposed tenant in the action out of his freehold. Also it is an offence within the statute to bring a *proceipe* against a poor man having nothing in the land, on purpose to oust the true tenant, or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice and to abuse the court.^(w) In most of these cases the court would probably grant an attachment against the offender on motion.^(x)

ChamPERTY. 1. *ChamPERTY* is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.^(y) It is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it.^(z) Little is to be met with in modern books upon this subject; but the statutes, and resolution upon their construction, may be shortly noticed.

Westm. 1, c. 25. No officer, &c., shall maintain pleas for lands, &c., to have part thereof *179

The statute Westminster 1, (3 Edw. 1.) c. 25, enacts, that "no officers of the king, by themselves nor by others, shall maintain pleas, suits, or matters, hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the king's pleasure." By the courts mentioned in this statute it hath been held that courts of record only are intended; and it has also *been held that under the words *covenant* all kinds of promises and contracts of this kind are included; that maintenance in personal actions, to have part of the debt or damages, is as much within the statute as maintenance in real actions for a part of the land; and that though a grant of rent out of other lands is not within the statute, yet the statute applies to a grant of rent out of the lands in question; but that a grant of part of a thing in suit, made in consideration of a precedent debt, is not within its meaning.^(a) The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a defendant or plaintiff. And it has been holden not to be material whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not.^(b)

Westm. 2, c. 46. Certain officers not to receive any church land, &c., so long as the thing is in plea.

The statute of Westminster 2, (14 Edw. 1.) c. 49, enacts, that "the chancellor, treasurer, justices, nor any of the king's council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the king's house, clerk ne lay, shall not receive any church nor advowson of a church, land nor tenement, in fee, by gift, nor by purchase, nor to form, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this act, either by himself or by another, or make any bargain, shall be punished at the king's

^(w) 2 Inst. 215. Dy. 362. 1 Hawk. P. C. c. 83, s. 33, *et seq.*

^(x) Bac. Abr. tit. *Maintenance*, in the margin.

^(y) 4 Bla. Com. 135.

^(z) Per Tindal, C. J., *Stanley v. Jones*,^a 7 Bing. 377. 5 M. & P. 193.

^(a) See the authorities collected in 1 Hawk. P. C. c. 84, s. 3, *et seq.* Bac. Abr. tit. *ChamPERTY*.

^(b) *Id.* *ibid.*

pleasure, as well he that purchaseth as he that doth sell." This statute extends only to the officers therein named, and not to any other person. (c) But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party. (d)

The 28 Edw. 1, c. 11, reciting that the king had theretofore ordained by statute that none of his ministers should take no plea for maintenance, by which statute other officers were not bounden, enacts that "the king will that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the king so much of his land and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this *atteindre*, whosoever will shall be received to sue for the king before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents or next friends." Upon this statute it seems to be agreed that champerty in an action at law is within it; and a purchase of land, pending a suit in equity concerning it, has also been holden to be within the statute; also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute *as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a preceding bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise thereof made by a father to his son, or by any ancestor to his heir-apparent, nor a gift of land in suit, after the end of it, to a counsellor, for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute. (e) [1] A bargain by a man, who has evidence in his own possession respecting a matter in dispute between third persons, and who at the time professes to have the means of procuring more evidence, to purchase from one of the contending parties at the price of the evidence, which he so professes or can procure, an eighth part or share of the sum of money, which shall be recovered by means of the production of that evidence, is an illegal agreement; and if there be any difference between such a contract, and direct champerty, it is strongly against the legality of such contract; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct tendency to pervert the course of justice. (f) So where a bill was filed for the purpose

Extended
by 28 Edw.
1, c. 11.

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(c) 2 Inst. 484, 485.

(d) 1 Hawk. P. C. c. 84, s. 12.

(e) Bac. Abr. tit. *Champerty*. 1 Hawk. P. C. c. 84, s. 14, *et seq.* But with respect to the counsellor, it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. 2 Inst. 564.

(f) *Stanley v. Jones*,^a 7 Bing. 369. 5 M. & P. 193. *Potts v. Sparrow*,^b 6 C. & P. 749.

[1] { See 1 Pick. 415, *Thuston v. Percival* }

^a Eng. Com. Law Reps. xx. 167.

^b Ib. xxv. 631.

amongst other things of declaring an agreement void, which had been made by a seaman for the sale of his chance of prize-money to his prize agents, who were to carry on the suit, Sir W. Grant, M. R., expressed an opinion that the agreement was void, as amounting to champerty.^(g)

Of buying or selling a pretended title.

3. Another species of maintenance appears to be the offence of *buying or selling a pretended title*; of which it is said in the books that it seems to be a high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested.^(h) Offences of this kind are also restrained by several statutes. The 1 Rich. 2, c. 9, enacts, that no gift or feoffment of lands or goods in debate under legal proceedings, as mentioned in the statute, shall be made; and that, if made, they shall be holden for none and of no value.⁽ⁱ⁾ And by the 13 Edw. 1, c. 49, no person of the king's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at the king's pleasure. There is also a provision of the 32 Hen. 8, c. 9, that no one shall buy or sell, or obtain any pretended right or title to land, unless the seller, his ancestors, or they by whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents *or profits for one whole year before, on pain that both seller and buyer shall each forfeit the value of such land, the one half to the king, and the other to him who shall sue ^(j)

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Place of trial for champerty, &c.

The offences of champerty and buying of titles, laid or alleged in any declaration or information, may be laid in any county, at the pleasure of the informer.^(k)

Punishment of maintenance by common law.

By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party aggrieved, but may also be indicted and fined, and imprisoned, &c.; and it seems that a court of record may commit a man for an act of maintenance in the face of the court.^(l)

By statute.

Some pains and penalties are also attached to this offence by statute. The 1 Rich. 2, c. 4, enacts, that no person whatsoever shall take or sustain any quarrel by maintenance, in the country or elsewhere, on grievous pain; that is to say, the king's counsellor's and great officers, on a pain that shall be ordained by the king himself, by the advice of the lords of this realm; and other officers of the king, on pain to lose their offices and to be imprisoned and ransomed, &c.; and all other persons, on pain of imprisonment and ransom. And by the 32 Hen. 8, c. 9,

^(g) *Stevens v. Bagwell*, 15 Ves. 139.

^(h) *Bac. Abr. Maintenance*, (E). 1 Hawk. P. C. c. 86, s. 1. Moore, 751. Hob. 115. Plowd. 80.

⁽ⁱ⁾ But as between the feoffer and feoffee, feoffments of this kind are effectual. Co. Lit. 369.

^(j) But the statute provides that any person, being in lawful possession by taking the rents and profits, may buy or get the pretended right or title of any other person to the same. And it also provides, that no person shall be charged with these penalties unless sued within a year after the offence. For the construction of this statute, see 1 Hawk. P. C. c. 86, s. 7, *et seq.*

^(k) 31 Eliz. c. 5, s. 4. 1 Hawk. P. C. c. 84, s. 20, and c. 86, s. 18.

^(l) 2 Roll. Abr. 114. 2 Inst. 208. Hetl. 79. 1 Hawk. P. C. c. 83, s. 38. *Bac. Abr. tit. Maintenance*, (C).

maintenance is subjected to a forfeiture of ten pounds; one moiety to the king, and the other moiety to the informer.(m)[A]

*CHAPTER THE TWENTY-FIRST.

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OF EMBRACERY, AND DISSUADING A WITNESS FROM GIVING EVIDENCE.

EMBRACERY is another species of maintenance, and consists in such practices as tend to affect the administration of Justice by improperly working upon the minds of jurors. It seems clear that any attempt whatsoever to corrupt or influence, or instruct a jury in the cause before-hand, or in any way to incline them to be more favourable to the one side than to the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.(a)† And it has been adjudged that the bare giving of money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not. It is also clear that it is criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever; except only by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as where persons by indirect means

(m) For the construction of these statutes, see 1 Hawk. P. C. c. 80, s. 43, *et seq.*
(a) 1 Hawk. P. C. c. 86, s. 1, 5. 4 Bla. Com. 140.

(A) Purchasing a pretended title, and prosecuting a suit in the name of another, but for the party's own benefit, is not an offence within the 9th section of the act to prevent and punish champerty and maintenance. *Ibid.* As to what will make the sale and consideration void in a civil action, upon the ground of maintenance, see *Whitaker v. Cone*, 2 Johns. Ca. 58. *Woodward v. Jones*, 2 Johns. Ca. 415. *Van Dyk v. Van Buren*, 1 Johns. Ca. 345. *Johnson v. Hudson*, 3 Johns. Rep. 375. *Teele v. Fonda*, 7 Johns. Rep. 251. *Teele v. Fonda*, 4 Johns. Rep. 304.

{*Williams v. Jackson*, 5 ib. 505. 6 Cowen, 431, *Burt v. Place*. 1 Wend. 433, *Lane v. Shears*. 4 ib. 306, *Campbell v. Jones*.} [The statute does not apply to judicial sales, *Jackson v. Tuttle*, 6 Wend. 213. *Saunders's Heirs v. Groves*, 2 J. J. Marsh. (Kentucky) Rep. 409. *Frizzle v. Veach*, 1 Dana (Ken.), 216. *Violett v. Violett*, 2 id. 325. The possession must be adverse and known to be so, *Preston v. Hunt*, 7 Wend. 53. *Etheridge v. Cromwell*, 8 id. 629. But an actual enclosure is not necessary to constitute a possession, *Mos. & al. v. Scott*, 2 Dana, 274. A mortgage is within the statute, *Redman & al. v. Saunders*, 2 id. 69.

MASSACHUSETTS.—The purchase of a dormant title to lands from a party not seized by a stranger out of possession, when made willingly to disturb the tenant in possession, constitutes the offence of maintenance, for which the parties may be punished by indictment. *Wolcott et al. v. Knight et al.*, 6 Mass. Rep. 418. *Everenden et al. v. Beaumont et al.*, 7 Mass. Rep. 76. *Sweet et al. v. Poor et al.*, 11 Mass. Rep. 549.

"The statute of 32 H. 8, c. 9, against buying and selling pretended titles, is only in affirmation of the common law; and there is no offence more deserving of animadversion. For if successfully practised, its tendency is to disturb the quiet of neighbourhoods, and produce distress to people, who, but for such intermeddlers, would be left in the quiet enjoyment of their possessions." Parker, Ch. Just., in delivering an opinion of the Court in *Sweet et al. v. Poor et al.*, 11 Mass. Rep. 554. {See also 5 Pick. 348, *Brinley v. Whiting*, 6 Dane's Ab. 743.}

† [*Gibbs v. Dewey*, 5 Cowen, 503. A witness has no right to deliver a paper to the jury without the direction of the court. *Ibid.*

procure themselves or others to be sworn on a *tales* in order to serve one side. (b)

It is said that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savouring of the nature of embracery; but this does not apply to the reasonable recompense usually allowed to jurors for their expenses in travelling. (c)

How far justifiable.

The law will not suffer a mere stranger so much as to labour a juror to appear, and act according to his conscience; but it seems clear that a person who may justify any other act of maintenance, (d) may safely labour a juror to appear and give a verdict according to his conscience: but that no other person can justify intermeddling so far. And no one whatsoever can justify the labouring a juror not to appear. (e)

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Punishment of embracery.

Offences of this kind subject the offender to be indicted and *punished by fine and imprisonment in the same manner as all other kinds of unlawful maintenance do by the common law. (f) They are also restrained by statutes; the 5 Edw. 3, c. 10, enacting, that any juror taking of the one party or the other, and being duly attainted, shall not be put in any assizes, juries, or inquests, and shall be commanded to prison, and further ransomed at the king's will; and the 34 Edw. 3, c. 8, enacting, that a juror attainted of such offence shall be imprisoned for a year. The 38 Edw. 3, c. 12, enacts, that if any jurors, sworn in assizes and other inquests, take any thing, and be thereof attainted, every such juror shall pay ten times as much as he hath taken. "And that all the embracers to bring or procure such inquest in the country, to take gain or profit, shall be punished in the same manner and form as the jurors; and if the juror or embracer so attainted have not the whereof to make gree in the manner aforesaid, he shall have the imprisonment of one year." (g) The 32 Hen. 8, c. 9, enacts, that no person shall embrace any freeholders or jurors upon pain of forfeiting ten pounds, half to the king, and half to him that shall sue within a year.

Embracers and corrupt jurors punishable by fine and imprisonment.

The 6 Geo. 4, c. 50, s. 62, repeals so much of the 5 Edw. 3, c. 10, "as relates to the punishment of a corrupt juror," and so much of the 34 Edw. 3, c. 8, "as directs the proceedings against jurors taking a reward to give their verdict;" and so much of the 38 Edw. 3, c. 12, "as ordains the penalty on corrupt jurors and embracers," and enacts and declares, by s. 61, that "notwithstanding any thing herein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person might have been before the passing of this act."

Dissuading a witness from giving evidence.

All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed. (h)

(b) 1 Hawk. P. C. c. 85, s. 4. The King v. Opie and others, 1 Sund. 301.

(c) 1 Hawk. P. C. c. 85, s. 3.

(d) *Ante*, 176, *et seq.*

(e) 1 Hawk. P. C. c. 85, s. 6.

(f) *Id.* s. 7. 4 Bla. Com. 140.

(g) Upon the construction of these statutes, see 1 Hawk. P. C. c. 85, s. 11, *et seq.*

(h) 1 Hawk. P. C. c. 21, s. 15. *Rex v. Lawley*, 2 Str. 904. See as to mere attempts to commit crimes, *ante*, p. 46, 47. And see an indictment for dissuading a witness from giving evidence against a person indicted, 2 Chit. Crim. L. 235; and an indictment for a conspiracy to prevent a witness from giving evidence, *Rex v. Stevenson and others*, 2 East, R. 362. And see *Rex v. Edwards*, *post*, Book V., Chap. I.

*CHAPTER THE TWENTY-SECOND.

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OF BARRATRY, AND OF SUING IN THE NAME OF A FICTITIOUS PLAINTIFF.(A)

A BARRATOR is defined to be a common mover, exciter, or maintainer, ^{Definition} of suits or quarrels, in courts of record, or other courts, as the county ^{of barratry.} court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours.(a) But one act of this description will not make any one a barrator, as it is necessary in an indictment for this offence to charge the defendant with being a *common barrator*, which is a term of art appropriated by law to this crime.(b) It has been ^{What persons may} holden, that a man shall not be adjudged a barrator in respect of any ^{commit the} number of false actions brought by him in his own right:(c) but this is ^{offence.} doubted, in case such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants.(d)†

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the commencing whereof he was in no way privy.(e) And it seems to have been holden that a *feme covert* cannot be indicted as a common barrator:(f) but this opinion is considered as questionable.(g)

In an indictment for this offence it seems to be unnecessary to allege ^{Indictment} it to have been committed at any certain place; because, from the nature ^{and pro-} of the crime, consisting in the repetition of several acts, it must be ^{ceedings.} intended to have happened in several places; wherefore it is said that the trial ought to be by a jury from the body of the county.(h) As the indictment may be in a general form, stating the defendant to be a common barrator, without showing any particular facts, it is clearly settled that the prosecutor must, before the trial, give the defendant a

(a) *Rex v. Urlyn*, 2 Saund, 308, note (1). 1 Hawk. P. C. c. 81, s. 1, 2. Co. Lit. 368. 8 Rep. 36. Barrator is said to be a forensic term from the Normans. The Icelandic and Scandinavian *baratta*, the Anglo-Norman *baret*, and the Italian *baratta*, are all words signifying a quarrel or contention. See the notes to Bac. Abr. tit. *Barratry* (A).

(b) 8 Co. 36. *Rex v. Hardwicke*, 1 Sid. 282. *Reg. v. Hannon*, 6 Mod. 311.

(c) Roll. Abr. 355.

(d) 1 Hawk P. C. c. 81, s. 3.

(e) 1 Hawk. P. C. c. 81, s. 4.

(f) Bac. Abr. tit. *Baron and Feme* (G), in the notes, citing Roll. Rep. 39.

(g) 1 Hawk. P. C. c. 81, s. 6.

(h) *Parcel's case*, Cro. Eliz. 195. 1 Hawk. P. C. c. 81, s. 11. Bac. Abr. tit. *Barratry* (B).

(A) MASSACHUSETTS.—The books are not perfectly explicit, whether three acts of barratry are absolutely, and in all cases, necessary to constitute the perpetrator of them a common barrator. The commencing of three suits, where one may serve every justifiable purpose, may be evidence of three acts of barratry, if particular directions were given to the attorney, with a malicious design to harass and oppress the debtor. But if there is no evidence of such direction, from which an inference may be drawn of an intention to oppress, the indictment cannot be supported, for without such evidence there is no barratry. *Commonwealth v. M' Culloch*, 15 Mass. Rep. 227. [See *The State v. Chitty*, 1 Bailey (S. Car.), 379. Where in the opinion three acts seems considered as necessary.]

† [The moving and exciting of criminal prosecutions is barratry; and this, though a wrong may have been done or petty offence committed, if the motive were bad. A magistrate as well as a private person, is liable to be indicted for this offence. *The State v. Chitty*, 1 Bailey, (S. Car.), 379.]

*185 note of the *particular acts* of barratry which he intends to prove against him; and that, if he omit to do so, the court will not suffer him to proceed in the trial of the *indictment.(i) And the prosecutor will be confined to his note of particulars; and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated.(k)†

Trial may be before justices of the peace. Punishment.

It has been adjudged that justices of the peace, *as such*, have, by virtue of the commission of the peace, authority to inquire and hear this offence, without any special commission of oyer and terminer.(l)

The punishment for this offence in common persons is by fine and imprisonment, and binding them to their good behaviour; and in persons of any profession relating to the law, a further punishment by being disabled to practice for the future.(m) And it may be observed, that by 12 Geo. 1, c. 29, sec. 4, if any person convicted of common barratry shall practice as an attorney, solicitor or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information, examine the matter in a summary way in open court; and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years.(n)

Of suing in the name of a fictitious plaintiff

In this place may be mentioned another offence of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion: but in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by the 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and treble damages to the party injured.(o)

*CHAPTER THE TWENTY-THIRD.

OF BIGAMY.

THE offence of having a plurality of wives at the same time is more

(i) *Rex v. Grove*, 5 Mod. 18. *J'Anson v. Stewart*, 1 N. R. 748, per Buller. And per Heath, J., in *Rex v. Wylie* and another, 1 New R. 95.

(k) *Goddard v. Smith*, 6 Mod. 262.

(l) *Barnes v. Constantine*, Yelv. 46. Cro. Jac. 32. S. C. recognized in *Bushy v. Watson*, 2 Blac. R. 1050. See *Rex v. Urlyn*, 2 Saund. 308, note (1). In *Hawk. P. C. c. 81, s. 8*, there is a *quere* to this point, as having been ruled differently in Rolle's Reports.

(m) 34 Edw. 3, c. 1. 1 *Hawk. P. C. c. 81, s. 14*. Bac. Abr. tit. *Barratry* (C). 4 Bla. Com. 134.

(n) This act was revived and made perpetual by 51 Geo. 2, c. 3.

(o) 4 Bla. Com. 134.

† [An indictment charging the defendant generally as a common barrator is sufficient. But the prosecutor must before the trial give the defendant a note of particulars. The note is not a matter of technical nicety. If it so identify the several legal proceedings intended to be given in evidence as acts of barratry, that the defendant by pursuing the notice could readily find the records of the several proceedings, it is sufficient. *Commonwealth v. Davis*, 11 Pick. 424. This note forms no part of the record, and cannot furnish ground for a motion in arrest of judgment. *The State v. Chitty*, 1 Bailey (S. Car.), 379. The st. 32 H. 8, c. 9, limiting suits and prosecutions for bracer, maintenance, champerty, &c., to one year after the offence committed, does not apply to barratry. *Ibid*]

correctly denominated *polygamy*: but the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (a) Originally this offence was considered as of ecclesiastical cognizance only; and though the 4 Ed. 1, stat. 3, c. 5, treated it as a capital crime, it appears still to have been left of doubtful temporal cognizance, until the Jac. 1, c. 11, declared that such offence should be felony. (A)

(a) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. 4 Bla. Com. 163, note b. And see Bac. Abr. tit. *Bigamy*, in the notes.

(A) The statute provisions in most of the United States, against bigamy or polygamy, are similar to, and copied from the statute of 1 Jac. 1, c. 11, excepting as to the punishment. The several exceptions in this statute are also nearly the same in the American statutes, but the punishment of the offence is different in many of the States. {2 Kent's Com. 69.}

NEW YORK.—The statute of bigamy does not render a second marriage legal, notwithstanding the former husband or wife may have been absent five years and never heard of. It merely purges the felony. *Fenton v. Reed*, 4 Johns. Reports, 42. [See *Williamson v. Williamson*, 1 Johns. Ch. R. 488.]

Except in prosecutions for bigamy, and in actions for criminal conversation, a marriage may be proved from cohabitation, reputation, acknowledgment of parties, reception in the family, and other circumstances. *Ibid.*

No formal solemnization of marriage is requisite; and a contract of marriage made *per verba de presenti*, amounts to an actual marriage, and is as valid as if made in *facie ecclesie*. *Ibid.*

{The punishment of bigamy, under the revised statutes, is imprisonment in a state prison not exceeding five years. Vol. ii. 687.}

PENNSYLVANIA.—Marriage is a civil contract that may be completed by any words in the present tense, without regard to form. *Hantz v. Sealey*, 6 Binn. 405.

Where the husband is in full life, though he has been absent eight or nine years, a second marriage is *ipso facto*, null and void. *Kenby v. Kenby*, 2 Yeates, 207.

MASSACHUSETTS.—The statute of 1786, for the solemnization of marriages, would be substantially conformed to, if the parties were to make a mutual engagement to take each other for husband and wife, in the presence of a minister or justice, with his assent, he undertaking on that occasion to act in his official character. *The Inhabitants of Milford v. The Inhabitants of Worcester*, 7 Mass. Rep. 48. But if the justice or minister refuse to assent to, or solemnize the marriage, it is not a lawful marriage within the statute.—*Ibid.* {2 Stra. 994, *Rez v. Ellis*, S. P.}

As to the *lex loci*, by which contracts are to be governed, see the case of *Barber v. Root*, 10 Mass. Rep. 260.

As to what marriages are valid, and what are not, and by what evidence a marriage may be proved, see the cases of *The Inhabitants of Milford v. The Inhabitants of Worcester*, 7 Mass. Rep. 48. *The Inhabitants of Medway v. The Inhabitants of Natick*, 7 Mass. Rep. 88. *The Inhabitants of Middleborough v. The Inhabitants of Rochester*, 12 Mass. Rep. 369. {1 Pick. 136. *Commonwealth v. Putnam*.}

[A marriage valid where it is contracted is valid in Massachusetts, if not incestuous by the law of nature, or not made void by the Revised Statutes, c. 75, s. 6, although it would be void by the law of Massachusetts if contracted there. *Sutton v. Warren*, 10 Metcalf, 450.

Under the Revised Statutes of Massachusetts, c. 130, s. 2, if a woman who has a husband living, marry another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard from for any term less than seven years, and though she honestly believes at the time of her second marriage that he is dead. *Commonwealth v. Marsh*, 7 Metcalf, 472.

The intermarriage of a man and his mother's sister, though void by the law of Massachusetts, is not incestuous by the law of nature, and was not void by the law of England before the statute of 6 Wm. 4, c. 54, though it was avoidable by process in the Ecclesiastical Court. *Sutton v. Warren*, 10 Metcalf, 451.

A nephew may lawfully marry his aunt; and if whilst she is alive he marry again, it is bigamy. *State v. Barefoot*, 2 Richardson, 209.

On an indictment for bigamy, a former marriage may be proved by the declaration of the defendant, and by evidence of long cohabitation. *State v. Hilton*, 3 Richardson, 434. *Wolverton v. Steel*, 16 Ohio, 173.

The offence is not the less committed because the second marriage would have been void

The provisions of this statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced *a mensâ et thoro*. The 9 Geo. 4, c. 31, therefore, repeals the statute of James, and by s. 22, enacts, "that if any person 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 elsewhere, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; (b)† and any such offence may be dealt with, inquired of, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county; provided, always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. The statute of James is however still in force *with respect to offences committed before or upon the last day of June, 1828.

9 Geo. 4,
c. 31, s. 22.
Bigamy.

Venue.

Exceptions.

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Construc-
tion of the
statute of
1 Jac. 1.

It was held under the 1 Jac. 1, that if a woman married a husband in Ireland, and afterward, such husband still living, married another husband in England, it was within the act. But that if she married a husband in England, and afterwards, such husband still living, married another husband in Ireland, it was not within the act: on the ground that the second marriage, which alone constituted the offence, was a fact done within another jurisdiction; and, though inquirable here for some purposes, like all transitory acts, was not cognizable as a crime by the rule of the common law: (c) but the 9 Geo. 4 makes the second marriage whether "in England or elsewhere," bigamy. In another case it was ruled, that if A. takes B. to husband in Holland, and then, in Holland, takes C. to husband living B., and then B. dies, and then A. living C. marries D., this is not marrying a second husband, the former being alive; the marriage to C. living B. being simply void. But if B. had been living, it would have been felony to have married D. in England. (d)

Excep-
tions. 1st.
Second
marriage
out of Eng.

The proviso in the new statute contains exceptions in respect of four cases, in which a second marriage is no felony within the statute. The *first exception* is that the statute shall not extend "to any second marriage contracted out of England by any other than a subject of his

(b) See as to accessories, *post*, p. 219.

(c) 1 Hale, 692, 693. 1 East. P. C. c. 12, s. 2, p. 465.

(d) Lady Madison's case, 1 Hale, 693.

as within the prohibited degrees of affinity. *Reg. v. Brown*, 1 C. & K. 144, Eng. C. L. xlvii. 144. *Reg. v. Chadwick*, 11 Q. B. 173, Eng. C. L. lxiii. 173.]

† [Where R. knows, at the time of his marriage with A., that she was a married woman, he may be convicted of the felony of counselling to commit bigamy, within this statute. *Reg. v. Brown*, 1 C. & K. 144, Eng. C. L. xlvii. 144.]

majesty." The *second exception* is, that it shall not extend to "any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." Here, by the express words of the clause, the party marrying again must have no knowledge of the former husband or wife being alive; and it does away with the absurd construction put upon the first exception in the 1 Jac. 1, that if the husband or wife were abroad for seven years, it was no offence, though the party remaining in England knew that the other was living.^(e) But the obligation of a party to use reasonable diligence to inform himself of the fact, and the question whether, if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are points which do not appear to be settled.^(f) The *third exception* provides that the act shall not extend "to any person who at the time of such second marriage, shall have been divorced from the bond of the first marriage.† A divorce, therefore, *mensâ et thoro*, which was held sufficient under the 1 Jac. 1,^(g) is now no longer an exception. It was held under the 1 Jac. 1, that if there be a divorce *a vinculo matrimonii*, and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by the exception.^(h) In a case upon the 1 Jac. 1, the *question arose, whether a divorce by the commissary or consistorial court of Scotland would operate so as to excuse a person, who, having been married in England, had been divorced by that court and had then married again in England, from the penalties of bigamy. And from the decision of the judges, it appears that if the first marriage has taken place in England, it will not be a defence to prove a divorce *a vinculo matrimonii* before the second marriage, if such divorce were out of England; unless the divorce were upon a ground which, by the law of England, would warrant such a divorce: the divorces and sentences referred to in the third section of the 1 Jac. 1, being divorces and sentences of the ecclesiastical courts within the limits to which that statute applies. The prisoner was indicted for bigamy; both his marriages were in England; but before his second marriage his wife had obtained a divorce *a vinculo* from him, in the commissary court of Scotland. It appeared that he took his wife into Scotland, that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for a divorce. A case being reserved and argued, the judges were unanimous that no sentence or act of any foreign country or state could dissolve an English marriage

land by other than subjects of this realm.
2d. Where husband or wife shall be absent for seven years, and not known to be living.
3d. Divorce a vinculo matrimonii.

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(e) 1 Hale, 693. 3 Inst. 88. 4 Bla. Com. 164. This is remarked upon as an extraordinary provision in 1 East, P. C. c. 12, s. 3, p. 466.

(f) See 1 East, P. C. c. 12, s. 4, p. 467, where Mr. East says, that they are questions which he does not find any where touched upon; but which seem worthy of mature consideration.

(g) 1 Hale, 694. 3 Inst. 89. 1 Hawk. P. C. c. 42, s. 5. 4 Bla. Com. 164. Middleton's case, Old Bailey, 14 Car. 2. Kel. 27. And see 1 East, P. C. c. 12, s. 5, p. 467.

(h) 3 Inst. 89. 1 Hale, 694, citing Co. P. C. c. 27, p. 89, and stating further, that if the sentence of divorce be repealed, a marriage afterwards is not aided by the exception, though there was once a divorce.

† [It is no defence to an indictment for bigamy, that *subsequently* to the second marriage, the first has been dissolved by the decree of a competent court for some cause other than the adultery of the defendant. Otherwise, if such a decree be obtained prior to the second marriage. *Baker v. The People*, 2 Hill, 325.]

4th. Marriage declared void by court of competent jurisdiction.

a vinculo for grounds on which it was not liable to be dissolved *a vinculo* in England; (i) and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was the divorce of a court within the limits to which this statute extends. (i) The judges gave no opinion upon the husband's conduct, in drawing on his wife to sue for the divorce, because the jury had not found fraud. (j) The *fourth exception* is, that the act shall not extend "to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." It was resolved, upon the 1 Jac. 1, by all the judges, that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. And further admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence; by proving it to have been obtained by fraud or collusion. (k) There is no exception in the new act where marriages are within the age of consent. (l)

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*It may be observed, that if a person marrying again come within the second of these exceptions, though the second marriage is not felony, yet, as before the statute, it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts. (m)

The true construction of the 9 Geo. 4, c. 31, s. 22, is not that the party, in order to be deprived of the benefit of its provision, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive. (n)

Where it appeared that the prisoner's first wife had left him sixteen years, and the second wife proved that she had known him for nine years living as a single man, and that she had never heard of the first wife, who appeared to have been living seventeen miles from where the prisoner

(i) It seems to admit of some doubt whether this case be any authority upon the present act. The words of the 1 Jac. 1, c. 11, were, "divorced by any sentence in the *Ecclesiastical Court*." The words in the 9 Geo. 4, c. 31, are, "divorced from the bond of the first marriage." These words are so much more general, that it may be contended that they except every case where, according to the laws of the country where the divorce takes place, there is a legal divorce *a vinculo matrimonii*, and the words "any court of competent jurisdiction," in the next clause, instead of the words "the Ecclesiastical Court, in the 1 Jac. 1, c. 11, seem to favour this view of the exception. C. S. G.

(j) *Rex v. Lolley*, December, 1812. MS. Bailey, J., and Rus. & Ry. 237. This case is referred to by the Lord Chancellor, and also by Mr. Brougham, in *Tovey v. Lindsay*, 1 Dow's Rep. 117. And see 5 Ev. Coll. Stat. 348, note (4). Upon the important subject of the dissolution of marriages, celebrated under the English law, by the consistorial court of Scotland, see a publication of Reports of some decisions of that court, by James Ferguson, Esq., Advocate, one of the Judges.

(k) *Duchess of Kingston's case*, Dom. Proc. 16 Geo. 3. 11 St. Tri. 262. 1 Leach, 146. 1 Hawk P. C. c. 42, s. 11.

(l) See *Rex v. Birmingham*, 8 B. & C. 29, *post*, p. 211.

(m) 4 Bla. Com. 164, note (3).

(n) *Reg. v. Cullen*, 9 C. & P. 681, *Patteson, J.*

(1) {14 Mass. R. 227, *Hanover v. Turner*. 1 Johns. R. 424, *Jackson v. Jackson*. 15 ib. 121, *Borden v. Fitch*. 1 Haggard's C. R. 297, *Sinclair v. Sinclair*, [Eng. Eccl. Rep. iv. 412.] 2 Kent's Com. 89-101, *acc.*}

resided, Cresswell, J., held that the prisoner was entitled to be acquitted under the proviso in sec. 22. (*mm*)

The 9 Geo. 4, c. 31, s. 22 provides, that the offender may be tried in the county where he shall be "apprehended or be in custody." But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed, for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed. (*m*)

It was held, on the 1 Jac. 1, which had only the word "apprehended," that where the prisoner, having been apprehended for another offence, is detained in the same county for bigamy, the detainer is such an apprehension as will warrant the indicting him in that county. The prisoner was taken up in Worcestershire for a larceny; and, whilst in the house of correction for that offence, a bill for bigamy was found against him, which came on to be tried at the assizes for that county; the second marriage was not in Worcestershire. The judges were of opinion that as the prisoner was in custody on a criminal charge, he was liable to be tried where he was imprisoned. (*n*) Where the indictment is preferred in a county not where the second marriage was, but where the prisoner was apprehended or in custody, it must expressly state that fact. (*o*)

A first marriage *de facto*, subsisting in fact at the time of the second marriage, was sufficient to bring a case within the 1 Jac. 1, though such first marriage were voidable by reason of consanguinity, affinity, or the like; for it was a marriage in judgment of law until it was avoided. (*p*) And now by the 5 & 6 Wm. 4, c. 54, s. 1, all marriages celebrated before the 31st of August, 1835, between persons being within the prohibited degrees of *affinity*, shall not be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit depending on the 31st of August, 1835, provided that nothing hereinbefore contained shall affect marriages between persons being within the prohibited degrees of *consanguinity*; and by sec. 2, all marriages celebrated after the said 31st of August, between persons within the prohibited degrees of *consanguinity or affinity* shall be absolutely null and void to all intents and purposes whatsoever. So that it should seem that where a marriage now takes place within the prohibited degrees of consanguinity or affinity, as such marriage is wholly void, a second marriage will not amount to the crime of bigamy. But it has been ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shown; (*q*) which it seems must be understood where there is *primâ facie* evidence of a *lawful marriage. (*r*) Where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the

Trial in the county where the party is apprehended or in custody.

Of the first marriage.

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(*mm*) Reg. v. Jones, 1 C. & Mars. 614.

(*m*) 1 Hale, 694. 3 Inst. 87. Starkie, 11.

(*n*) Rex v. Gordon, Mich. T. 1803, Russ. & Ry. 48. See Lord Digby's case, Hutt. 131.

(*o*) Rex v. Frazer, R. & M. C. C. R. 407. See Rex v. Treharne, R. & M. C. C. R. 298.

(*p*) 3 Inst. 88.

(*q*) By Denison, J., on the Norfolk circuit, referred to by the court in Morris v. Miller, 1 Blac. R. 632.

(*r*) Rex v. Brampton, 10 East, 287, note (*b*).

ceremony of marriage according to the Church of Rome was read, it was directed that the defendant should be acquitted.^(s) Willes, C. J., who tried him, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage,^(t) if the ceremony according to that church could be proved; namely, the words of the contracting part of it.

The former *marriage act*, 26 Geo. 2, c. 33, required all marriages to be by banns or license: and declared that all marriages solemnized in any other place than a church or public chapel (unless by special license), or solemnized without publication of banns or license, should be null and void to all intents and purposes. It contained also special provisions as to the publication of *banns*; and, as to marriages by *license* it provided that all such marriages, where either of the parties, not being a widower or widow, was under the age of twenty-one years, had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there was no such guardian or guardians, then to the mother (if living and unmarried); or if there was no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of chancery; should be absolutely null and void to all intents and purposes whatsoever.^(u) But these provisions as to marriages by license were repealed as to any marriages thereafter to be solemnized, by 3 Geo. 4, c. 75, s. 1, which passed on the 22d of July, 1822, and came into operation on the 1st of September following: and it was further enacted, that in all cases of marriage solemnized by license before the passing of this act of 3 Geo. 4, without any such consent, and where the parties had continued to live together as husband and wife till the death of one of them, or till the passing of the act, or had only discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, should be deemed good and valid to all intents and purposes.^(v)

Former
marriage
acts.

^(s) Lyon's case, Old Bailey, 1738. 1 East, P. C. c. 12, s. 10, p. 469, citing Serjeant Forster's MS.

^(t) To this Mr. East (id. *ibid.*) subjoins a *quære*, and says that it must at least be understood of the marriage of persons of that communion.

^(u) Sec. 11. By sec. 12 provision was made for a petition to the Lord Chancellor, &c., where the guardians or mother were not in a situation to consent, or to refuse to consent. By sec. 4, licenses were to be granted to solemnize matrimony in the church or chapel of such parish only, where one of the parties had resided for four weeks before. But by sec. 10, proof of the actual dwelling in the parishes, &c., where a marriage was by banns, or of the usual place of abode of one of the parties, where a marriage was by license, was made unnecessary after the solemnization of the marriage, and evidence was not to be received in either of these cases to prove the contrary, in any suit touching the validity of the marriage.

^(v) 3 Geo. 4, c. 75, 2. Sec. 3 provided that the act should not render valid any marriage declared invalid by any court of competent jurisdiction before the passing of the act; nor any marriage where either party should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person. Nor (by s. 4) any marriage, the invalidity of which had been established before the passing of the act, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage. Nor (by s. 5) any marriage the validity of which, or the legitimacy of any person alleged to be the lawful descendant of the parties married, had been duly brought into question in proceedings in any cause, &c., in which judgments or decrees, or orders of court, had been pronounced, or made before the passing of the act, in consequence of, or from the effects of proof in such causes, &c., of the validity of such marriage, or the illegitimacy of such descendant. By sec. 6, if before the act any property had been possessed, or any title of honour enjoyed, on the ground of the invalidity of any marriage, by reason that it was solemnized without consent, then, although no sentence had

*A pauper not being a widow, and being under age, was married by license in 1808, without the consent of her father, who was then living, and continued to live with her husband till 1825, when she married another man, her first husband being still alive; it was held that the first marriage was rendered valid by 3 Geo. 4, c. 75, s. 2, because the parties had lived together till that act passed, and was not rendered invalid by the pauper's subsequent marriage to another person.(v)

A prisoner was married on the 30th of August, 1822, by license, and without the consent of either of her parents, she being between sixteen and seventeen years of age; it was held, on a case, reserved, that the marriage was valid, for under the 3 Geo. 4, c. 75, which passed on the 22d of July, 1822, the 26 Geo. 2, c. 33, s. 12, had ceased to operate, and the provisions as to marriages by license in the 3 Geo. 4, c. 75, did not come into force till the 1st of September following.(x)

This act of 3 Geo. 4, contained also enactments as to the granting of licenses, the consent of parents and guardians, and the publication of banns, which have been repealed by the 4 Geo. 4, c. 17, which enacted that licenses should and might be granted by the same persons, and in the same manner and form, and, in the case of minors, with the same consent, and banns be published in the same manner and form as licenses and banns were respectively regulated by the 26 Geo. 2, c. 33; and enacted also (by sec. 2) that all marriages which had been or should be solemnized under licenses granted, or banns published, conformably to the provisions of the 3 Geo. 4, c. 75, should be good and valid; and that no marriage solemnized under any license granted in the form or manner prescribed, by either the 26 Geo. 2, c. 33, or the 3 Geo. 4, c. 75, should be deemed invalid on account of want of consent of any parent or guardian. The old marriage act was then in a great measure revived, though only for a short period, as will be presently seen. The statute 4 Geo. 4, c. 5, was passed to render valid certain marriages which had been solemnized by licenses granted through error, after the passing of the 3 Geo. 4, c. 75, by or in the name of bodies corporate, or persons their officers or surrogates, other than the archbishops of Canterbury and York, and the bishops within their respective dioceses, who were alone authorized to grant such licenses by the 3 Geo. 4, c. 75; but this provision of the 4 Geo. 4, c. 5, applies only to marriages solemnized *by such erroneous licenses granted after the 3^d Geo. 4, and before the passing of the 4 Geo. 4, c. 5.

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The principal *marriage acts* now in force are the 4 Geo. 4, c. 76, and the 6 & 7 Wm. 4, c. 85, many of the provisions of which require to be here noticed. †

been pronounced against the validity of such marriage, the right and interest in such property, or title of honor, should in no manner be affected or prejudiced. And by sec. 7, nothing in the act was to affect any act done before the passing of the act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust.

(v) *Rex v. St. John Delpike*, B. & Ad. 226.

(x) *Rex v. Waully*, R. & M. C. C. R. 163.

† [At common law, no formal ceremony is requisite to give validity to a marriage, but a contract between the parties *per verba de presenti* is enough. *Star & al. v. Peck*, 1 Hill, 270. So *semble* of such a contract, though *executory* in form, if followed by co-habitation: for the acts of the parties may be taken as giving a construction to their words, and rendering them personally operative. *Ibid.* *Hantz v. Scaly*, 6 Binn. 405. *Jackson v. Winne*, 7 Wend. 47.]

4 Geo. 4, c. 76, sec. 1, repeals 26 Geo. 2, c. 33, and 4 Geo. 4, c. 17.

The 4 Geo. 4, c. 76, recites that it is expedient to amend the laws respecting marriages in England; and then enacts, that from and after the 1st day of November, 1823, so much of the 26 Geo. 2, c. 33, as was in force immediately before the passing of this act, and also the 4, Geo. 4, c. 17, shall be repealed, save and except as to any acts, matters or things, done under the provisions of the said acts, or either of them, before the said first day of November, as to which the said acts are respectively to be of the same force and effect as if this act had not been made, save also and except so far as the said acts, or either of them, repeal any former act, or any clause, &c., therein contained.

S. 2. Banns where, when, and how published, and marriage to be solemnized where banns published.

By sec. 2, "after the 1st day of November (1823), all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three *Sundays* preceding the solemnization of marriage, during the time of morning service, or of evening service, (if there shall be no morning service in such church or chapel upon the *Sunday* upon which such banns shall be so published,) immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church, or in any such chapel as aforesaid, belonging to such parish or chapelry wherein each of the said persons shall dwell; and that all other the rules prescribed by the said rubric concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever."

S. 3. Bishop, with consent of the patron and incumbent, may authorize the publication of banns in any public chapel.

By sec. 3, "the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese."

S. 4. Notice to be placed in such chapel.

By sec. 4, "in every chapel in respect of which such authority shall be given as aforesaid, there shall be placed in some conspicuous part of the interior of such chapel a notice in the words following: 'banns may be published, and marriages solemnized in this chapel.'"

S. 5. Provisions relative to marriage registers extended to chapels so authorized as aforesaid.

By sec. 5, "all provisions now in force, or which may hereafter be established by law, relative to providing and keeping marriage registers in any parish churches, shall extend and be construed to extend to any chapel in which the publication of banns and solemnization of marriages shall be so authorized as aforesaid, in the same manner as if the same were a parish church; and every thing required by law to be done relative thereto by the churchwardens of any parish church, shall be done by the chapelwarden or other officer exercising analogous duties in such chapel." (a)

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(a) See as to the registration of marriages, 6 & 7 W. 4, c. 86, ss. 1, 30, and 31.

By sec. 6, "on or before the said 1st day of November, and from time to time afterwards, as there shall be occasion, the churchwardens and chapelwardens of churches and chapels, wherein marriages are solemnized, shall provide a proper book of substantial paper, marked and ruled respectively in manner directed for the register book of marriages; and the banns shall be published from the said register book of banns by the officiating minister, and not from loose papers; and after publication shall be signed by the officiating minister, or by some person under his direction."

S. 6. Book to be provided for the registration of banns, &c.

By sec. 7, "no parson, vicar, minister, or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver, or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged, in such house or houses respectively."

S. 7. Notice of names, and place and time of abode of parties to be given to the minister,

By sec. 8, "no parson, minister, vicar, or curate, solemnizing marriages after the 1st day of November next, between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians, unless such parson, minister, vicar, or curate, shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare, or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent, to such marriage, such publication of banns shall be absolutely void."

S. 8. How far ministers not punishable for marrying minors without consent. In what case publication of banns void

By sec. 9, "whenever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same, until the banns shall have been republished on three several *Sundays*, in the form and manner prescribed in this act, unless by license duly obtained according to the provisions of this act."

S. 9. In what case republication of banns necessary.

By sec. 10, "no license of marriage shall, from and after the said first day of November, be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such license."

S. 10. Licenses to marry in church, &c.

By sec. 11, "if any caveat be entered against the grant of any license for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no license shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the license is to issue, and until the judge has certified to the register that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the license for the said marriage, or until the caveat be withdrawn by the party who entered the same."

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S. 11. Where caveat entered, no license to issue till matter examined by judge.

S. 12.
Parishes,
where no
church or
chapel, and
extra-pa-
rochial
places,
deemed to
belong to
any adjoining
parish,
&c.

By sec. 12, "all parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually solemnized every Sunday, and all extra-parochial places whatever, having no public chapel wherein banns may be lawfully published, shall be deemed and taken to belong to any parish or chapelry next adjoining, for the purposes of this act only; and where banns shall be published in any church or chapel of any parish or chapelry adjoining to any such parish or chapelry where there shall be no church or chapel, or none wherein divine service shall be solemnized as aforesaid, or to any extra-parochial place as aforesaid, the parson, vicar, minister, or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in the same manner as if either of the persons to be married had dwelt in such adjoining parish or chapelry."

S. 13.
Where
churches
are demol-
ished, or
under re-
pair, banns
to be pro-
claimed in
a church or
chapel of an
adjoining
parish, &c.

By sec. 13, "if the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized, be demolished in order to be rebuilt, or be under repair, and on such account be disused for public service, it shall be lawful for the banns to be proclaimed in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service, during the repair or rebuilding of the church as aforesaid; and where no such place shall be so licensed, then, during such period as aforesaid, the marriage may be solemnized in the adjoining church or chapel wherein the banns have been proclaimed, and all marriages heretofore solemnized in other places within the said parishes or chapelries than the said churches or chapels, on account of their being under repair, or taken down in order to be rebuilt, shall not be liable to have their validity questioned on that account, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding or penalty whatsoever." This enactment being defective in not providing that marriages might be solemnized in the places licensed for the proclamation of banns; nor that marriages might be solemnized by license in an adjoining church or chapel; nor that the validity of marriages *thereafter* solemnized in other places than the churches and chapels out of repair, should not be questioned on that account; nor that the ministers who should *thereafter* solemnize such marriages, should not be liable to ecclesiastical censure, &c.; the 5 Geo. 4, c. 42, enacts, that "all marriages which have been heretofore solemnized, or which shall be hereafter solemnized in any place within the limits of such parish or chapelry so licensed for the performance of divine service, during the repair or rebuilding of the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized; or if no such place shall be so licensed, then in a church or chapel of *any adjoining parish or chapelry in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by license lawfully granted, shall not have their validity questioned on account of their having been so solemnized, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding." And that all licenses granted by any person having authority to grant them for the solemnization of marriages in a church or chapel, wherein marriages have been usually solemnized, shall be deemed to be licenses for the solemnization of marriages in any place within the limits of such parish

Provision
for former
marriages
so solemn-
ized.

or chapelry, which shall be licensed by the bishop for the performance of divine service, during the repair or rebuilding of any such church or chapel, or if no place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized. (y) And also that all banns proclaimed, and all marriages solemnized, according to the provisions of this act in any place so licensed, within the limits of any parish or chapelry, during the repair or rebuilding of the church, &c., shall be considered as proclaimed and solemnized in the church, &c., and shall be so registered accordingly. (z)

The 4 Geo 4, c. 76, s. 14, enacts, "for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any such license be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act has been obtained thereto: provided always, that if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license, notwithstanding the want of any such consent." (a)

S. 14. Oath to be taken before the surrogate as to certain particulars before license is granted.

By sec. 15, "it shall not be required of any person applying for such license to give any caution or security, by bond or otherwise, before such license is granted, any thing in any act or canon to the contrary thereof notwithstanding."

S. 15. Bond not required before granting license.

By sec. 15, "the father, if living, of any party under twenty-one *196 years of age, such parties not being a widower or widow; or, if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and, in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and, if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." (a)

S. 16. Who are to give consent, if parties are under age.

By sec. 17, "in case the father or fathers of the parties to be mar-

(y) Sec. 2.

(z) Sec. 3. Since the last edition of this work the following acts have passed on this subject: the 6 Geo. 4, c. 93, to render valid marriages solemnized in certain churches and public chapels, in which banns had not been usually published. The 11 Geo. 4, c. 18, to render valid marriages solemnized in certain churches and chapels, during the rebuilding or repairing churches, &c., and in churches of distinct or district parishes, established under the 53 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, and in certain chapels. The 4 & 5 Wm. 4, c. 28, as to marriages in Scotland by Roman Catholic priests. The 3 & 4 Wm. 4, c. 45, as to marriages at Hamburgh since the abolition of the British factory there. The 6 Wm. 4, c. 24, to render valid marriages in a chapel at Wandsworth. The 6 Wm. 4, c. 62, to render valid marriages at St. Clement's, Oxford.

(a) This section is merely directory, see *Rex v. Birmingham*, *post*, p. 211.

S. 17. If the father of minor be *non compos mentis* or if guardian or mother of minor be *non compos mentis* or beyond sea, &c., parties may apply to the lord chancellor.

ried, or one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid' to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably, or from undue motives, refuse, or withhold his, her or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the lord chancellor, lord keeper, or the lords commissioners of the great seal of Great Britain for the time being, master of the rolls, or vice-chancellor of England, who is and are respectively hereby empowered to proceed upon such a petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, master of the rolls, or vice-chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning had consented to such marriage."

S. 18. Surrogate to take oath of office.

By sec. 18, "from and after the said first day of November, no surrogate, hereafter to be deputed by any ecclesiastical judge who hath power to grant licenses, shall grant any such license until he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of one hundred pounds to the bishop of the diocese for the due and faithful execution of his said office."

S. 19. In what case new license to be obtained.

By sec. 19, "whenever a marriage shall not be had within three months after the grant of a license by any archbishop, bishop, or any ordinary or person having authority to grant such license, no minister shall proceed to the solemnization of such marriage until a new license shall have been obtained, unless by banns duly published according to the provisions of this act."

S. 20. Right of Archbishop of Canterbury to grant special licenses.
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By sec. 20, "nothing herein-before contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their proper officers, of the right which has hitherto been used, in virtue of a certain statute made in the 25th *year of the reign of the king Henry the Eighth, intituled, 'An act concerning Peter pence and dispensations,' of granting special licenses to marry at any convenient time or place."(b)

S. 22. Marriage void where persons wilfully marry in any other place than a church, &c.

By sec. 22, "if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license, as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such person shall be null and void to all intents and purposes whatsoever."(c)

(b) By sec. 21, persons solemnizing marriage in any other place than a church or chapel, or without banns, or license, or under pretence of being in holy orders, shall be transported for fourteen years, the prosecution to be commenced within three years.

(c) By sec. 33, where a marriage is solemnized between parties, one of whom is under age,

By sec. 26, "after the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage."^(d)

S. 26. Proof of actual residence of parties not necessary to validity of marriage, whether after banns or by license.

By sec. 28, all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration an entry shall be made in the register.

By sec. 30, "this act, or any thing therein contained, shall not extend to the marriages of any of the royal family."

S. 30. Proviso for royal family.

By sec. 31, "nothing in this act contained shall extend to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively."

S. 31. And for marriages of Quakers and Jews.

By sec. 33, the act only extends to England.

The 6 & 7 Wm. 4, c. 85, s. enacts, that after the 1st of March, 1837,^(e) "notwithstanding any thing in this act, contained, all the rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England who shall solemnize any marriage in England; provided, always, that where by any law or canon in force before the passing of this act it is provided that any *marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of the registrar's certificate as hereinafter provided;^(f) provided also, that nothing in this act contained shall affect the right of the Archbishop of Canterbury and his successors, and his and their proper officers, to grant special licenses to marry at any convenient time and place, or the right of any surrogate or other person now having authority to grant licenses for marriages."

After 1st of March, 1837, all rules prescribed by the rubric to be observed.

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Marriages may be solemnized on production of registrar's certificate.

By sec. 2, "the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and

Marriages of Quakers and Jews.

and not a widower or widow, contrary to the provisions of the act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage.

^(d) Upon an enactment nearly similar, it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when the point was reserved for the opinion of the judges. *Rex. v. Hind*, Mich. T. 1813. *Russ. & Ry.* 253.

^(e) By 7 Wm. 4, c. 1, the operation of this act was suspended until after the last day of June, 1837.

^(f) The 1 Vict. c. 22, s. 36, after reciting this provision, enacts, "that the giving the notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, as in the said act and by this act provided, shall be used and stand instead of the publication of banns to all intents and purposes where no such publication shall have taken place; and every parson, vicar, minister or curate in England, shall solemnize marriage after such notice and certificate as aforesaid in like manner as after due publication of banns; provided always that the church wherein any marriage according to the rites of the Church of England shall so be solemnized, shall be within the district of the superintendent registrar by whom such certificate as aforesaid shall have been issued."

solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the said society, or both persons professing the Jewish religion respectively, provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have issued in manner hereinafter provided."

Superintendent registrar of births to superintendent registrar of marriages. By sec. 3, "the superintendent registrar of births and deaths of every union, parish, or place shall be, in right of his office, superintendent registrar of marriages within such union, parish, or place, and that such union, parish, or place shall be deemed the district of such superintendent registrar of marriages."

Notice of every intended marriage to be given to the superintendent registrar of the district. By sec. 4, "in every case of marriage intended to be solemnized in England after the said 1st day of March,^(g) according to the rites of the Church of England, (unless by license or by special license, or after publication of banns,) and in every case of marriage intended to be solemnized in England after the said 1st day of March, according to the usages of the Quakers or Jews, or according to any form authorized by this act, one of the parties shall give notice under his or her hand, in the form of schedule (A.) to this act annexed, or to the like effect, to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, or if the parties dwell in the districts of different superintendent registrars, shall give the like notice to the superintendent registrar of each district, and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time not being less than seven days during which each has dwelt therein, and the church or other building in which the marriage is to be solemnized; provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards."^(h)

*199 Superintendent registrar to keep notices in a book. By sec. 5, "the superintendent registrar shall file all such notices, *and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book, to be for that purpose furnished to him by the registrar-general, to be called 'the marriage notice book,' the cost of providing which shall be defrayed in like manner as the cost of providing register book of births and deaths; and the marriage notice book shall be open at all reasonable times without fee to all persons desirous of inspecting the same; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling."

Notices to be read at meetings of guardians. By sec. 6, "if such superintendent registrar shall be clerk to the guardians of any poor-law union, or of any parish or place comprising the district for which such superintendent registrar shall act, he shall read such notices as hereinafter directed; and if he shall not be such clerk, then he shall transmit to such clerk on the day previous to each weekly meeting of such guardians all such notices of intended marriage as he shall have received on or since the day previous to the weekly meeting immediately preceding the same; and such clerk shall read

(g) See note to sec. 1, *ante*, p. 197.

(h) By 1 Vict. c. 22, s. 10, the registrar-general may unite two or more districts, and by sec. 11 may divide districts.

such notices immediately after the minutes of the proceedings of such guardians at their last meeting shall have been read; and such notices shall be so read three several times in three successive weeks at the weekly meetings of such guardians, unless in any case license for marriage shall be sooner granted, and notice of such license being granted shall have been given to such clerk: provided also, that if it shall happen that the board of guardians of any such union, parish, or place shall not so meet, it shall be sufficient for the purposes of this act, that such notices shall be read at any meeting of such guardians which shall be held within twenty-one days from the day of such notice being entered."

The 1 Vict. c. 22, s. 24, reciting this section, and that "it may happen in certain superintendent registrars' districts that there may be no such guardians," enacts, "that in every such case, but only until the election of such board of guardians and of a clerk to their board, every notice of marriage given according to the provisions of the said act for marriages, or a true and exact copy thereof, under the hand of the superintendent registrar, shall be suspended in some conspicuous place in the office of the superintendent registrar, during seven successive days if the marriage is to be solemnized by license, or twenty-one successive days, if the marriage is to be solemnized without license, before any marriage shall be solemnized in pursuance of such notice; and the particulars of every such notice shall be sent by the superintendent registrar to every registrar of marriages within his district, and shall be open to the inspection of every one who shall apply at reasonable times to such registrar to inspect the same."

Notices of marriage to be suspended in superintendent registrar's office, instead of being read at meetings of guardians, &c.

By sec. 7 of 6 & 7 Wm. 4, "after the expiration of seven days, if the marriage is to be solemnized by license, or of twenty-one days, if the marriage is to be solemnized without license, after the entry of such notice, the superintendent registrar, upon being requested so to do by or on behalf of the party by whom the notice was given, shall issue under his hand a certificate in the form of schedule (B.) to this act annexed, provided that no lawful impediment be shown to the satisfaction of the superintendent registrar why such certificate should not issue, and provided that the issue of such certificate shall not have been sooner forbidden in manner hereinafter *mentioned, by any person or persons authorized in that behalf as hereinafter is provided; and every such certificate shall state the particulars set forth in the notice, the day on which the notice was entered, and that the full period of seven days or of twenty-one days (as the case may be) has elapsed since the entry of such notice, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have a fee of one shilling."(i)

After seven days, or twenty-one days, certificate of notice to be given upon demand.

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By sec. 9, "any person authorized in that behalf; may forbid the issue of the superintendent registrar's certificate, by writing at any time before the issue of such certificate the word 'forbidden' opposite to the entry of the notice of such intended marriage in the marriage notice book, and

Issue of certificate may be forbidden.

(i) It was not the intention of this act that the registrar should have power to grant his certificate for marriages out of his own district, and, consequently, the superintendent registrar has no power to grant his certificate under this section, where it is proposed that the marriage should take place out of his district. *Ex parte Brady*, 8 Dow. P. C. 332. Paterson, J.

By sec. 8, the registrar-general is to furnish the superintendent registrars with forms of certificates, which are to be distinguished in certain ways where the marriage is by license, and where it is without license.

by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is authorized; and in case the issue of any such certificate shall have been so forbidden, the notice and all proceedings thereon shall be utterly void."

Consent.

By sec. 10, "after the said first day of March,^(j) the like consent shall be required to any marriage in England solemnized by license, as would have been required by law to marriages solemnized by license immediately before the passing of this act; and every person whose consent to a marriage by license is required by law, is hereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license or without license."

Superintendent registrar may grant licenses for marriage.

By sec. 11, "after the said 1st day of March,^(k) every superintendent registrar shall have authority to grant licenses for marriage in any building registered as hereinafter provided, within any district under his superintendence, or in his office, in the form of a schedule (C.) to this act annexed, and for every such license shall be entitled to have of the party requiring the same the sum of three pounds above the value of the stamps necessary on granting such license; and every superintendent registrar shall four times in each year, on such days as shall be appointed by the registrar-general, make a return to the registrar-general of every license granted by him since his last return, and of the particulars stated concerning the parties: provided, always, that no superintendent registrar shall grant any such license until he shall have given security by his bond in the sum of one hundred pounds to the registrar-general for the due and faithful execution of his office: provided, also, that nothing herein contained shall authorize any superintendent registrar to grant any license for marriage in any church or chapel in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England or licensed for the celebration of divine worship *according to the rites and ceremonies of the Church of England, or any license for marriage in any registered building which shall not be within his district."

Superintendent registrar to give security.
Proviso.

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Certificate to be given before the license is granted.

By sec. 12, "before any license for marriage shall be granted by any such superintendent registrar one of the parties intending marriage shall appear personally before such superintendent registrar, and in case the notice of such intended marriage shall not have been given to such superintendent registrar, shall deliver to him the certificate of the superintendent registrar or superintendent registrars to whom such notice shall have been given, and such party shall make oath, or shall make his or her solemn affirmation or declaration instead of taking an oath, that he or she believeth that there is not any impediment of kindred or alliance or other lawful hindrance to the said marriage, and that one of the said parties hath for the space of fifteen days immediately before the day of the grant of such license had his or her usual place of abode within the district within which such marriage is to be solemnized, and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is no person having authority to give such consent, as the case may be; and all such licenses and declarations shall be respectively liable to the same stamp duties as licenses for marriages granted

(j) See note to sec. 1, *ante*, p. 197.

(k) *Ib.*

by the ordinary of any diocese, and affidavits made in order to procure the same."

By sec. 13, "any person, on payment of five shillings, may enter a caveat with the superintendent registrar against the grant of a certificate or a license for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her caveat is founded, no certificate or license shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the certificate or license for the said marriage, or until the caveat be withdrawn by the party who entered the same; provided that in cases of doubt it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar-general, who shall decide upon the same: provided likewise, that in case of the superintendent registrar refusing the grant of the certificate or license, the person applying for the same shall have a right to appeal to the registrar-general, who shall thereupon either confirm the refusal or direct the grant of the certificate or license."

By sec. 14, "after the said first day of March (l) no marriage after such notice as aforesaid, unless by virtue of a license to be granted by the superintendent registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of the entry of such notice as aforesaid; and no marriage shall be solemnized by the license of any superintendent registrar or registered until after the expiration of seven days after the day of the entry of such notice as aforesaid."

*By sec. 15, "whenever a marriage shall not be had within three calendar months after the notice shall have been so entered by the superintendent registrar, the notice and certificate, and any license which may have been granted thereupon, and all other proceedings thereupon, shall be utterly void; and no person shall proceed to solemnize the marriage, nor shall any registrar register the same, until new notice shall have been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid." (m)

By sec. 18. "any proprietor or trustee of a separate building, certified according to law as a place of religious worship, may apply to the superintendent registrar of the district, in order that such building may be registered for solemnizing marriages therein, and in such case shall deliver to the superintendent registrar a certificate, signed in duplicate by twenty householders at the least, that such building has been used by them during one year at the least, as their usual place of public religious worship, and they are desirous that such place should be registered as aforesaid, each of which certificates shall be countersigned by the proprietor or trustee by whom the same shall be delivered; and the superintendent registrar shall send both certificates to the registrar-general, who shall register such building accordingly in a book to be kept for that purpose at the general register office; and the registrar general

(l) See note to sec. 1, ante, p. 197.

(m) By sec. 16, the superintendent registrar's certificate or license is to be delivered to the person by or before whom the marriage is solemnized. By sect. 17, the superintendent registrar may appoint registrars of the marriages.

shall indorse on both certificates the date of the registry, and shall keep one certificate with the other records of the general registrar office, and shall return the other certificate to the superintendent registrar, who shall keep the same with the other records of his office; and the superintendent registrar shall enter the date of the registry of such building in a book to be furnished to him for that purpose by the registrar general, and shall give a certificate of such registry under his hand, on parchment or vellum, to the proprietor or trustee by whom the certificates are countersigned, and shall give public notice of the registry thereof by advertisement in some newspaper circulating within the county, and in the 'London Gazette.'”(n)

Marriages may be solemnized in such registered places in the presence of some registrar and of two witnesses.

By sec. 20, “after the expiration of the said period of twenty-one days, or of seven days if the marriage is by license, marriages may be solemnized in the registered building stated as aforesaid in the notice of such marriage, between and by the parties described in the notice and certificate, according to such form and ceremony as they may see fit to adopt; provided nevertheless, that every such marriage shall be solemnized with open doors, between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses; provided also, that in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties shall declare,

‘I do solemnly declare, that I know not of any lawful impediment why I, *A. B.*, may not be joined in matrimony to *C. D.*’

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*And each of the parties shall say to the other,

‘I call upon these persons here present to witness that I, *A. B.*, do take thee *C. D.* to be my lawful wedded wife [or husband.]’

Provided also, that there be no lawful impediment to the marriage of such parties.”

Marriages may be celebrated before the superintendent registrar.

By sec. 21, “any person who shall object to marry under the provision of this act in any such registered building, may, after due notice and certificate issued as aforesaid, contract and solemnize marriage at the office and in the presence of the superintendent registrar and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours aforesaid making the declaration and using the form of words hereinbefore provided in the case of marriage in any such registered building.”(o)

Proof of residence of parties or consent, not necessary to establish the marriage.

By sec. 25, “after any marriage shall have been solemnized, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of either of the parties previous to the marriage within the district wherein such marriage was solemnized for the time required by this act, or of the consent of any person whose consent thereunto is required by law; nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.”

Bishops with consent of patrons,

By sec. 26, “with the consent under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated any public chapel with or without a chapelry

(n) By sec. 19, on the removal of the same congregation the new place of worship may be immediately registered, instead of the one disused, and after such substitution it shall not be lawful to solemnize any marriage in such disused building.

(o) Sec. 22 regulates the marriage fees of the registrar. By sec. 23, the registrar is to register all marriages solemnized before him in books to be sent by the registrar-general, and copies of the marriage register books are to be given quarterly to the superintendent registrar.

thereunto annexed, or any chapel duly licensed for the celebration of may
 divine service according to the rites and ceremonies of the Church of ^{license}
 England, or any chapel the minister whereof is duly licensed to officiate ^{chapels for}
 therein according to the rights and ceremonies of the Church of England, ^{the solemn-}
 or without such consent after two calendar months' notice in writing ^{ization of}
 given by the registrar of the diocese to such patron and incumbent ^{marriages}
 respectively, the bishop of the diocese may, if he shall think it necessary ^{in populous}
 for the due accommodation and convenience of the inhabitants authorize ^{places.}
 by a license under his hand and seal the solemnization of marriages in any
 such chapel for persons residing within a district the limits whereof shall
 be specified in the bishop's license, and under such provisions as to the
 amount, appropriation, or apportionment of the dues, and as to other
 particulars, as to the said bishop may seem fit, and as may be specified
 in the said license; provided that it shall be lawful for any patron or
 incumbent who shall refuse or withhold consent to the grant of any such
 license to deliver to the bishop, under his or her hand and seal, a state-
 ment of the reasons for which such consent shall have been so refused or
 withholden; and no such license shall be granted by any bishop until he
 shall have inquired into the matter of such reasons; and every instrument
 of consent of the patron and incumbent, or if such consent be refused or
 withholden, a copy of the notice under the hand of the registrar, and
 every statement of reasons alleged as aforesaid by the patron or incum-
 bent, with the *bishop's adjudication thereupon under his hand and seal, *204
 shall be registered in the registry of the diocese; and thenceforth and
 until the said license be revoked, marriages solemnized in such chapel
 shall be as valid to all intents and purposes as if the same had been
 solemnized in the parish church, or in any chapel where marriages might
 heretofore have been legally solemnized." (p)

By sec. 29, "there shall be placed in some conspicuous part of the ^{Notice of}
 interior of every chapel in respect to which such license shall be given ^{such licen-}
 as aforesaid a notice in the words following: 'Marriages may be solemn- ^{ses to be}
 ized in this chapel.'" (pp) ^{affixed in}
 chapels.

By sec. 30, "all provisions which shall from time to time be in force ^{Marriages}
 relative to marriages, and to providing, keeping and transmitting register ^{performed}
 books and copies of registers of marriages solemnized in any parish ^{in such}
 church, shall extend to any chapel in which the solemnization of mar- ^{chapels to}
 riages shall be authorized as aforesaid, in the same manner as if the ^{be under}
 same were a parish church, and every thing required by law to be done ^{the same}
 relating thereto by the rector, vicar, curate, or churchwardens respec- ^{regulations}
 tively of any parish church shall be done by the officiating minister, ^{as those}
 chapelwarden, or other person exercising analogous duties in such chapel ^{performed}
 respectively." ^{in parish}
 churches.

By sec. 31, "notwithstanding any such license as aforesaid to solemn- ^{Option of}
 ize marriages in any such chapel, the parties may, if they think fit, ^{parties to}
 have their marriages solemnized in the parish church, or in any chapel ^{be married}
 in which heretofore the marriage of such parties, or either of them might ^{at parish}
 have been legally solemnized." (q) ^{church.}

(p) Sec. 27 provides for the appropriation of fees on marriages performed in such chapel.
 By sec. 28, the patron or incumbent may appeal to the archbishop against such license.

(pp) See 2 Vict. c. 22, s. 33, *post*, p. 205.

(q) By sect. 32, the bishop, with consent of archbishops, may revoke such licenses; in
 which case, by sect. 33, the registers are to be sent to the incumbent of the parish church.
 By sect. 34 the registrars of the dioceses are to send to the register office, yearly, lists of the
 licensed chapels within their districts, and a list of all chapels and buildings registered, to be

Marrriages void if unduly solemnized with the knowledge of both parties.

By sec. 42, "if any persons shall knowingly and wilfully intermarry after the said first day of March under the provisions of this act in any place other than the church, chapel, registered building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, in case a license is necessary under this act, or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void: provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an act passed in the fourth year of his late majesty George the Fourth, intituled, 'An act for amending the Laws respecting the Solemnization of Marrriages in England.'" (r)

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4 Geo. 4, c. 76.

Extent of act.

Provision for marriages in the Welsh tongue.

*By sec. 45, "this act shall extend only to England, and shall not extend to the marriage of any of the royal family."

The 1 Vict. c. 22, s. 23, enacts, that "the registrar-general, under the direction of one of her majesty's principal secretaries of state, shall take order that the solemn declaration and form of words provided to be used in the case of marriages under the said act for marriages be truly and exactly translated into the Welsh tongue, and shall cause the same so translated to be furnished to every registrar of marriages throughout Wales, and in all places where the Welsh tongue is commonly used; and it shall be lawful to use the declaration and form of words so translated, and published by authority, in all places where the Welsh tongue is commonly used or preferred, in such manner and form and to the same intents and purposes as by the said act is prescribed in the English tongue."

Banns may be published in chapels where marriages may be solemnized.

By sec. 33, "the banns of marriage of any persons may be published in any chapel licensed by the bishop, according to the provisions of the said act for marriages, for the solemnization of marriages, in which those persons might lawfully be married; and instead of the notice required by the said act the words 'banns may be published and marriages may be solemnized in this chapel' shall be placed in some conspicuous part in the interior of every such chapel."

Marrriages may be in licensed chapels, though only one of the parties is resident in the district.

By sec. 34, which recites, that "doubts may arise whether under the said recited acts it is lawful for the bishop to license chapels for marriages between parties one only of whom resides within the district specified in such license;" "all such licenses shall be construed to extend to and authorize marriages in such chapels between parties one or both of whom is or are resident within the said district; provided always, that where the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts the banns for such marriage shall be published as well in the church or chapel wherein such marriage is intended to be solemnized as in the

Publication of banns

printed. By sect. 35, marriages under this act are to be cognizable. By sect. 36, the registrar may ask certain particulars of parties. By sect. 37, all persons vexatiously entering covenants are liable to the cost and damages. By sect. 38, all persons making false declarations &c., are guilty of perjury. By sect. 39, all persons unduly solemnizing marriages are guilty of felony. By sect. 40, the superintendent registrars who unduly issue certificates are guilty of felony; and by sect. 41, all prosecutions are to be commenced within three years. See also 1 Vict. c. 22, s. 3.

(r) By sect. 43, in cases of fraudulent marriages, the guilty party is to forfeit all property accruing from the marriage, as in 4 Geo. 4, c. 79, and by sect. 44, the provisions of the registry act are extended to this act.

chapel licensed under the provisions of the said recited act for the other district within which one of the parties is resident, and if there be no such chapel then in the church or chapel in which the banns of such last-mentioned party might be legally published if the said recited act had not been passed.”

where the parties reside in different districts.

By sec. 35, “any building which shall have been licensed and used during one year next before registration for public religious worship as a Roman Catholic chapel exclusively, shall be taken to be a separate building for the purpose of being registered for the celebration of marriages, notwithstanding the same shall be under the same roof with any other building, or shall form a part only of a building.”

Roman Catholic chapel may be registered for celebration of marriages.

By 3 & 4 Vict. c. 72, s. 1, reciting the 4 Geo. 4, c. 76, and 6 & 7 Wm. 4, c. 85, and 1 Vict. c. 22, and that it is expedient to restrain marriages under the 6 & 7 Wm. 4, from being solemnized out of the district, in which one of the parties dwells, unless either of the parties dwells in a district within which there is not any registered building, enacts, “that it is not and shall not be lawful for any superintendent registrar to give any certificate of notice of *marriage where the building in which the marriage is to be solemnized, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the time required by the said act of his late majesty, except as hereinafter is enacted.”

Certificate of notice not to be granted for marriages out of the district where the parties dwell, &c. *206

By sec. 2, “it shall be lawful for any party intending marriage under the provisions of the said act of his late majesty, in addition to the notice required to be given by that act, to declare at the time of giving such notice, by indorsement thereon, the religious appellation of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells any registered building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage; and after the expiration of seven days or twenty-one days, as the case may require, under the said act of his late majesty, it shall be lawful for the superintendent registrar to whom any such notice shall have been given to issue his certificate, according to the provisions of that act; and after the issuing of such certificate the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice: Provided, always, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the truth of the facts herein authorized to be stated in the notice, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.”

In what case marriage may be solemnized out of the district in which the parties dwell.

By sec. 5, “notwithstanding any thing herein or in the said recited acts or either of them contained, the Society of Friends commonly called Quakers, and also persons professing the Jewish religion, may lawfully continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively, after notice for that purpose duly given, and certificate or certificates duly issued, pursuant to the provisions of the said recited act of his late majesty, notwithstanding the building or place wherein such marriage may be contracted or

Provision as to marriages of members of the Society of Friends, and Jews.

solemnized be not situate within the district or either of the districts (as the case may be) in which the parties shall respectively dwell."

A marriage is good by banns or license where the party is married in an assumed name, if he be known in the place where he is married by such assumed name.
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The marriage act does not specify what shall be necessary to be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient, and would, indeed, be the proper publication where the party is not *known by his real name. Thus, where a person, whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the Court of King's Bench held that the marriage was valid.^(s) And in the same court it was subsequently held, that a marriage by license, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was valid. Lord Ellenborough, C. J., said, "If this name had been assumed for the purpose of fraud, in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage act and the rights of marriage, and the court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the marriage act, the party's true name."^(t)

Banns published in entirely wrong name, under 26 Geo. 2, c. 33.

Under the 26 Geo. 2, c. 33, if there was a total variation of a name or names, that is, if the banns were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial in such cases, whether the misdescription had arisen from accident or design, or whether such design were fraudulent or not. The pauper and her husband were married in 1817, by banns, by the names of Mary White and Joseph Betts. The husband had been baptized as the son of J. and M. Betts. M. Betts was the daughter of S. Wilson, and her husband having absconded shortly after their marriage, the pauper's husband was brought up by S. Wilson, and always called by the name of Wilson, and never called or known by any name either before or after his marriage. The pauper was the daughter of J. and M. Hodgkinson, and was never called by or known by any other name except Hodgkinson till after her marriage, but in the registrar of her baptism she was described as "Mary, the daughter of S. White and his wife," which entry was believed to have been a mistake of the clergyman who baptized her. It was held that the marriage was void. Whether the husband was sufficiently designated by the name of Betts it was unnecessary to inquire, as the court were clearly of the opinion

(s) *Rex v. Billingham*, 1815, 3 M. & S. 250. This was a settlement case: but the point was fully argued, and many cases from the consistory court were cited, notes of which are given in the report, 259, 267.

(t) *Rex v. Burton upon Trent*, 3 M. & S., 537.

that the woman was never known by, and never used the surname of "White," so as to make that, in any latitude of construction, "a true name" within the meaning of the 26 Geo. 2, c. 33, s. 2.(u)

But under the 26 Geo. 2, c. 33, if there was a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names had been such *as the parties had used, and been known by, at one time, and not at another; in such cases the publication might, or might not, be void; the supposed misdescription might be explained, and it became a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention.(x)

But the words of the 4 Geo. 4, c. 76, s. 22, are wholly different from those of the 26 Geo. 2, c. 33, s. 8, and it has been held that in order to invalidate a marriage under the 4 Geo. 4, c. 76, s. 22, it must be contracted with a knowledge by both parties that no due publication of the banns has taken place. Where, therefore, J. C. told Susannah Spencer that he would see the banns properly published, and she took no steps in the matter, he told her that they had been published; and he procured the banns to be published in the name of Agnes Watts, which name she had never borne; and in performing the service, the clergyman applied to her the name of Agnes, till which time she believed she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name; it was held that the marriage was valid.(y) But where both the man and the woman were aware that the banns had been published in a manner to conceal the identity of one of them, it was held that the marriage was void.(z)

It seems that the assuming a fictitious name, upon the second marriage, will not prevent the offence from being complete.(a) And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published; and when the marriage took place: and it was further holden that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna Timson whilst he had a wife living; the second marriage was by banns; and, it appeared, that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made; one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence: and the other question was, whether the charge of the prisoner's marrying Anna was proved. But the judges held, unanimously, that the second marriage was sufficient to constitute

(u) *Rex v. Tibshelf*,^a 1 B. & Ad. 190.

(x) Per Lord Tenterden, C. J. *Ibid.* see *Sullivan v. Sullivan*,^b 2 Hagg. C. R. 254. *Frankland v. Nicholson*, 3 M. & S. 261. 1 Phill. R. 147. *Pougett v. Tomkins*, 3 M. & S. 263. *Mather v. Ney*, 3 M. & S. 265.

(y) *Rex v. Wroxtton*,^c 4 B. & Ad. 640. 1 N. & M. 712.

(z) *Wiltshire v. Wiltshire*,^d 3 Hagg. Ecc. R. 332.

(a) *Rex v. Allison*, *post*, p. 217.

^a Eng. Com. Law Repts. xx. 375.

^c Eng. Ecc. Rep. xxiv. 131.

^b Eng. Ecc. Rep. iv. 534.

^d *Ib.* v. 130.

the offence; and that, after having called the woman "Anna" in the note he gave in for the publication of the banns, it did not lie in the prisoner's mouth to say, that she was not known as well by the name *of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. (b)

So were the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved by all the judges that the prisoner was rightly convicted. (c) So where the second wife had never gone or been known by the name of Thick, but had assumed it where the banns were published, that her neighbors might not know that she was the person intended, it was held that the parties could not be allowed to evade the punishment for their offence, by contracting a concertedly invalid marriage. (d) But where the only evidence that the name of the second wife was Hannah Wilkinson, (the name laid in the indictment,) was that the woman was married by that name, and there was no other proof that the woman was in fact Hannah Wilkinson, it was held that the proof was insufficient, and that to make it sufficient there should have been proof that the prisoner was married to a certain woman by the name of, and who called herself, H. Wilkinson, whereas, in fact, there was no proof that such was her name, or that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. (e)

The prosecutor must have shown the proper consent of parents, &c., if necessary, where a marriage was by license under the 26 G. 2, c. 33.

It has been seen that the sixteenth section of the 4 Geo. 4, c. 76, makes the consent of the father, guardians, or mother, necessary to the validity of a marriage by license, where the party is a minor. And it appears to have been held, upon the former marriage act, that the party prosecuting must show such consent.

Upon an indictment for bigamy, the first marriage imported by the register to have been by license, and the prisoner proved that at that time he was under age. A question was raised, whether this threw it upon the prosecutor to prove consent: and, it appearing that by the marriage act the register ought to state consent, if either party was under twenty-one, Wilson, J., held it did; and he directed an acquittal. (f) So, after a conviction, the judges, upon much discussion, were of opinion that the form of the register of the first marriage, then in question, which expressed the marriage to have been by license generally, without saying by consent of parents or guardians, together with the fact of the parents never having been known to have been in England, were *prima facie* evidence that the first marriage was had without the consent of parents or guardians, upon which the jury might have found the prisoner not guilty. (g)

(b) Rex v. Edwards, Mich. T. 1814. MS. Bayley, J., and Russ. & Ry. 283.

(c) Palmer's case, 1 Deac. Dig. Cr. L. 147. Rosc. C. E. 280.

(d) Rex v. Penon, 5 C. & P. 412. Gurney, B. See Reg. v. Orgill, *post*, p. 215.

(e) Drake's case, 1 Lewin, 25. Parke, J.

(f) Rex v. Morton, *cor.* Wilson, J., Newcastle, 1789. MS. Bayley, J., and Russ. & Ry. 19, note (a).

(g) James's case, Mich. T. 1802. Hil. T. 1803. Russ. & Ry. 17. And the Judges directed the prisoner to be discharged on his own recognizance. Lord Kenyon, at the first meeting, seemed to be of opinion that it was sufficient for the prisoner to prove himself under age at the time of the first marriage: and that it then rested with the prosecutor to show that the marriage was with the consent of parents or guardians, but that the prisoner ought not to be called upon to prove a negative.

* Eng. Com. Law Repts. xxiv. 387.

If the prisoner prove (as it is competent for him to do) that his first marriage took place while he was a minor, it must be shown, *on the part of the prosecution, that such marriage, if by license, was with the proper consent. The prisoner was indicted for bigamy, in marrying Elizabeth Field, his first wife Lydia being still living: and it was proved that on the 12th Feb., 1791, he was married to Lydia Blackwell, by license, and that she was living on the 8th of June last; and that on the 14th December, 1800, he married Elizabeth Field. On behalf of the prisoner it was proved that he was born on the 2d of January, 1771, and that his father was then alive; and it was then contended that the first marriage was void, as it was not proved to have been by the consent of his father. Lawrence, J., told the jury that he thought the marriage was to be presumed valid, unless the prisoner proved that he had not that consent, and under his direction the prisoner was found guilty. But the point being saved for the consideration of the judges, they held the conviction wrong; as it was clearly proved that the prisoner was under age at the time of the first marriage, and as there were no circumstances from which consent could be presumed. (h)

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Though illegitimate children are regarded by the law as not having any father, yet they were held to be within the marriage act of 26 Geo. 2; and a marriage by license between two illegitimate children, who were minors, without consent of parents or guardians, was therefore held to be void. (i)

Consent to marriage in the case of illegitimate children.

And formerly it was the opinion of the Court of King's Bench, that the power of consent given by the act to the *father* and mother, was intended to include reputed parents, as being interested in their children's welfare, and bound to provide for them by the laws of nature; (j) but in a case which came before the Consistorial Court in London, in 1799, a different doctrine was held by the very learned judge of that court, who was of opinion that the reputed parents were not enabled to consent, and that the consent could be lawfully given only by a guardian appointed by the Court of Chancery. (k) And in a more recent case, three of the judges of the Court of King's Bench adopted the latter opinion; and after much argument and consideration, certified to the Master of the Rolls that all marriages, whether of legitimate or illegitimate persons, were within the general provision of the marriage act, 26 Geo. 2, c. 33, which required all marriages to be by banns or license; and that the consent of the natural mother to the marriage, by license, of an illegitimate minor, was not a sufficient consent within the eleventh section of that act; and that consequently the marriage in question was void by said statute. (l)

But a marriage solemnized by license since the 4 Geo. 4, c. 76, without consent of parents, where one of the parties is a minor, is valid; for the section, which requires such consent, is only directory. The pauper, being under the age of twenty-one years, was married in 1826, by license, without the consent of his father, who was then living; it was objected

Since the 4 G. 4, c. 76, a marriage by a minor without consent is valid.

(h) *Rex v. Butler*, Mich. T. 1803. MS. Bayley, J., and Russ. & Ry. 61. It seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent.

(i) *Rex v. Hodnett*, 1 T. R. 96. (j) *Rex v. Edmonton*, Cald. 435.

(k) *Horner v. Liddiard*, Rep. by Dr. Croke.

(l) *Priestly v. Hughes*, 11 East, 1. Grose, J., differed, and sent a separate certificate. The question was afterwards brought before the House of Lords, in an appeal from the decree in this case.

*211 that his marriage was void under *the 4 Geo. 4, c. 76, for want of the father's consent; but it was held that the marriage was valid. The language of sec. 16^(m) is merely to *require* consent; it does not proceed to make the marriage void, if solemnized without consent. Sec. 22 declares that certain marriages shall be null and void, and a marriage by license without consent is not specified; and if there were any doubt, it is removed by sec. 23, which in such a case enacts, not that the marriage shall be void, but that all the property accruing from the marriage shall be forfeited.⁽ⁿ⁾

As the marriage of a minor, under the 4 Geo. 4, c. 76, without the necessary consent of parents is now valid, it seems that it is not necessary for the prosecutor to prove such consent, and that the absence of such consent would furnish no defence if proved on the part of the prisoner. The 6 & 7 Wm. 4, c. 85, s. 25, expressly provides, that after any marriage shall have been solemnized, it shall not be necessary, in support of such marriage, to give any proof of the consent of any person, whose consent thereunto is required by law; nor shall any evidence be given to prove the contrary in any suit touching the validity of any marriage.^(o)

A marriage celebrated by banns, in a chapel erected after the 26 Geo. 2, c. 33, was passed, and not upon the site of any ancient church or chapel, was held to be void, although marriages had been *de facto* frequently celebrated there; the words of the statute "in which chapel banns have been usually published," being held clearly to mean chapels existing at the time it was passed.^(p) But as soon as the determination of the court in this case was known, the 21 Geo. 3, c. 53, was passed, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. 3, c. 33, and consecrated, and providing that the registers of such marriages should be received as evidence. The fourth section enacted, that the registers of marriages thereby made valid, should, within twenty days after the first of August, 1781, be removed to the church of the parish in which such chapel should be situated; or, if it should be situated in an extra-parochial place, to the parish church next adjoining, to be kept with the registers of such parish. And these provisions were extended by the 44 Geo. 3, c. 77, and the 48 Geo. 3, c. 127, to marriages celebrated in such chapels before the 23d August, 1808; and the registers of such marriages are in like manner to be removed to parish churches, and transmitted to the bishop. The 6 Geo. 4, c. 92, recites, that since the 26 Geo. 2, c. 33, and the 44 Geo. 3, c. 77, divers churches and chapels had been erected in England, Wales, and Berwick-upon-Tweed, which had been duly consecrated, and divers marriages had been solemnized therein since the passing of the 44 Geo. 3, c. 77; but by reason that in such churches and chapels, banns of matrimony had not usually been published, before or at the time of passing the 26 Geo. 2, c. 33, nor any authority obtained for solemnizing marriages therein, under the provisions of the 4 Geo. 4, c. 76, such marriages had been or might be deemed to be void; and then enacts, that all marriages already solemnized in any church or public chapel in England, Wales, and Berwick-upon-Tweed,

Marriages celebrated in churches and chapels erected since the marriage act, 26 Geo. 2, c. 33.

^(m) See the section, *ante*, p. 195, 6.

⁽ⁿ⁾ *Rex v. Birmingham*,^a 8 B. & C. 29. S. C. 2 M. & R. 230.

^(o) See section, *ante*, p. 208.

^(p) *Rex v. Northfield*, Dougl. 659.

^a 1 Eng. Com. Law Reps. xv. 151.

erected since the *26 Geo. 2, c. 33, and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had usually been published before or at the time of passing the 26 Geo. 2. By s. 2, it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, "in which churches and chapels it has been customary and usual, before the passing of this act, to solemnize marriages;" and that all marriages hereinafter(x) solemnized therein shall be as good and valid as if they had been solemnized in parish churches, &c., wherein banns had usually been published before or at the time of passing the 26 Geo. 2. And the registers of marriage solemnized in the churches or chapels, by the 6 Geo. 4, enacted to be valid in law, or copies thereof, are to be received as evidence, in the same manner as the registers of marriages in parish churches, &c., in which banns were usually published before or at the time of the 26 Geo. 2, c. 33, or copies thereof, are received: but liable to the same objections as would be available to exclude the latter from being received.(q) But such registers of marriages, solemnized in any public chapel, and made valid by the 6 Geo. 4, c. 92, are, within three months from the passing of the act, to be removed to the parish church of the parish in which such chapel is situated; and if it be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by the 26 Geo 2.(r)

The 4 Geo. 4, c. 76, and 6 & 7 Wm. 4, c. 85, only extend to that part of the United Kingdom called England.(s) With respect to marriages in Scotland, though the point was formerly much doubted,(t) it appears to have been afterwards settled that where minors domiciled in England withdrew themselves into Scotland, or places beyond the seas, for the purpose of evading the marriage act, there marriage under such circumstances was nevertheless valid.(u)(1)† In a late case, a writer to the signet proved that, according to the law of Scotland, marriage is a civil contract solemnly and deliberately entered into, and as if the parties had a serious intention of living together as man and wife. The assent of both parties must, therefore, be very distinctly and clearly proved to have been given, in order to render the contract a valid one. It is not necessary to the validity of such contract, that the parties should afterwards live together as man and wife; but the fact of their afterwards living together as man and wife will operate to explain ambiguous

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Marriages in Scotland and places beyond the seas good, if performed according to the rites and customs of the country in which they were celebrated.

(x) Sic, it should be "hereafter."

(q) 6 Geo. 4, c. 92, s. 3.

(r) Ib. sec. 4.

(s) See ante, p. 197, 205.

(t) See Burn's Just. tit. *Marriage*, and the observations of Lord Mansfield in *Robinson v. Bland*, 2 Burr, 1079.

(u) *Crompton v. Bearcroft*, Bull. N. P. 113; and see the opinion of Eyre, C. J., in reasoning upon the case of *Phillips v. Hunter*, 2 H. Black. 412. And in *Ilderton v. Ilderton*, 2 H. Blac. 145, it was taken to be clear, that a marriage celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

[1] { That a marriage, if valid where contracted, is valid in all other places, see 3 Phillimore, 58, [Eng. Eccl. Rep. i. 363.] *Herbert v. Herbert*, 2 Kent's Com. 78-80. 2 Stark. Ev. 221, note (3), [new ed. 138, n. 1] 938, note (s) } [new ed. 509, n. a.] [*Phillips v. Gregg*, 10 Watts, 158. *Dumanley v. Fisher*, 3 Marsh. 370. *Medway v. Needham*, 16 Mass. 157.]

† [See Roscoe's Dig. Cr. Ev. 236, and the citations there from *Story on the Conflict of Laws*, 104, 107. And see also *Sneed v. Ewing & ux.*, 5 J. J. Mars. (Ken.) 474.]

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Marriage
in St. Do-
mingo.

words, if there be such in the contract itself. Where, therefore, the second marriage took place at Greta Green, and upon the whole evidence the assent of the second wife was not "distinctly and clearly proved," and though the parties had lived together afterwards, the evidence tended rather to show that they were living together in a state of concubinage, *inasmuch as the prisoner still continued to address her by her maiden name, Mr. B. Alderson directed the jury to find the prisoner not guilty. (v) And in the case of a marriage in such distant place, it appears to be sufficient to show that it was performed according to the rites and custom of the country in which it was celebrated. Where a soldier on service with the British Army in St. Domingo, in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English, by a person who officiated as clerk, and understood at the time by the woman to be the marriage service of the Church of England. This was held sufficient evidence, after eleven years cohabitation, that the marriage was properly celebrated, although the woman stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J., in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed, (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them,) and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the marriage act, and consequently would be so now in a foreign colony, to which that act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage. (w)

Marriage
by a clergy-
man of the
Church of
England in
a private
house in
Ireland.

Where a person was married at her father's house, in Ireland, in 1799, in the presence of the friends of both families, by a clergyman of the Church of England, who had been a curate of the parish for eighteen years; the parish church was standing, but persons of respectability were usually married at their own houses: the parties lived together for several years following as man and wife. Upon objection to the validity of this marriage, Best, C. J., said, I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland. The English marriage act does not apply, and I am aware of no Irish law, which takes marriages performed in that country out of the rules which prevailed in this before the passing of that act. *Dalrymple v. Dalrymple* (x) has placed it beyond a doubt that a marriage

(v) Graham's case, 2 Lew. 97. In the same case the same learned judge refused to admit the certificate as evidence of the marriage.

(w) *Rex v. Brampton*, 10 East, 282. See the 5 & 6 Vict. c. 118, which enacts, that all marriages theretofore had and celebrated in Ireland, by Presbyterian and other Protestant dissenting ministers and teachers, or those who, at the time of such marriage, had been such, shall be of the same force as if such marriages had been solemnized by clergymen of the United Church of England and Ireland.

(x) 2 Hagg. 54.

* Eng. Eccl. Repts. iv. 485.

so celebrated as this has been, would have been held valid in this country before the existence of that statute.(y)

Where in an action for criminal conversation, it appeared that the plaintiff had been married to his wife at the office of the British consulate at Beyrout, in Syria, in March, 1834, by a missionary clergyman of the United States, one attached to what in those states was known as the Episcopalian sect—the Church of England in this country—and the marriage was celebrated according to the forms of the Church of England, and the parties lived together for two years afterwards; Lord Abinger, C. B., held the marriage sufficiently proved for the purpose of the cause; but the Court of Exchequer have granted a rule, on the ground that the marriage was invalid, and have suspended their judgment till the House of Lords have decided *Reg. v. Carroll* and *Reg. v. Mills*.(yy)

*In a case at the Old Bailey, a question was made, whether a marriage of a dissenter in Ireland, when performed by a dissenting minister in a private room, was valid. It was contended, on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the marriage act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shown requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal; whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25,(z) enacted, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, should be good, without saying at what place they should be celebrated.(a)

(y) *Smith v. Maxwell*, R. & M. N. P. R. 80. His lordship added, that in one case Bayley, J., had held a marriage in Ireland invalid, because it had been performed in a private house, but that he was afterwards satisfied of the validity of the marriage. The case was *Rex v. Reilly*, 2 Burns' E. Law, 8 ed. 491, n. (7), 3 Burns' J. D. & W. 680. There the marriage was solemnized in Ireland, under a license from the Archbishop of Dublin, authorizing the clergyman to whom it was directed to marry the parties *at the usual canonical time and place*; the ceremony was performed by the curate of the clergyman to whom the license was directed, in a private house, and after the canonical hour. Bayley, J., after consulting Holroyd, J., thought that the non-compliance with the license, in respect of the place in which the ceremony was performed, rendered the marriage void. As to evidence of a marriage in Scotland, see *Rex v. Dent*. MSS. C. S. G., vol. 2, p. 811.

(yy) *Catherwood v. Caslon*, 1 C. & Mars. 431.

(z) And see 11 Geo. 2, c. 10. By 32 Geo. 3, c. 21, s. 12, Protestants may be married to Roman Catholics by clergymen of the established church; but sec. 13 contains a proviso that the act shall not authorize Protestant dissenting ministers or Popish priests to celebrate marriage between Protestants of the established church and Roman Catholics. The clause, however, does not enact that such a marriage celebrated by a Protestant dissenting teacher shall be void. Such a marriage, celebrated by a Popish priest, would be void by 19 Geo. 2, c. 13 (Irish); and the 33 Geo. 3, c. 21, s. 12, only authorizes Popish priests to celebrate marriage between a Protestant and a Papist, where such Protestant and Papist have been first married by a Protestant clergyman. See the 3 & 4 Wm. 4, c. 103, which repeals the penal enactments made by 6 Ann. (I.), 12 Geo. 1 (I.), 23 Geo. 2 (I.), 12 Geo. 3 (I.), 33 Geo. 3 (I.), against Catholic clergymen celebrating marriages between Protestants in Ireland.

(a) *Rex v. —*, Old Bailey, Jan. Sess. 1815, cor. Sir J. Silvester, Recorder, MS. The prisoner was an officer in the army: and his first marriage, upon which this question was raised, took place in 1787, at Londonderry. The second marriage was celebrated in London, according to the ceremonies of the church of England.

* Eng. Com. Law Reps xi. 390.

A marriage celebrated in Ireland between a Roman Catholic and a Protestant, by a Roman Catholic priest, is void.

Marriages between Catholic and Protestant by Catholic priest in Ireland.

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The prisoner was charged with bigamy, and the first marriage was proved to have been in Ireland, by a Roman Catholic priest, but the prisoner insisted that it was void in point of law, as he was a Protestant at the time of the marriage, and the woman a Roman Catholic; the only evidence to prove that he was a Catholic was, that on several occasions prior to the first marriage, he had attended mass: Mr. J. Patteson told the jury, that if they should be of opinion that the prisoner was a Roman Catholic when the first marriage took place, they must find him guilty; but that if they should be of opinion that he was a Protestant, they must acquit him. (b) But where the first marriage took place at Burton on Trent, and the second in Ireland, at the house of the Rev. W. O'Sullivan, a Roman Catholic priest, as was usual with the marriages of Roman Catholics in Ireland: the woman was a Roman Catholic, and before the commencement of the marriage service Mr. O'Sullivan asked the *prisoner if he was a Roman Catholic, and he said he was: a part of the ceremony was in Latin, and the remainder in English: the priest having asked the prisoner if he would take the woman as his wife, and having asked the woman if she would take the prisoner as her husband, and each of them having answered in the affirmative, he pronounced them married; it was held that the prisoner having at the time of the marriage held himself out to be a Roman Catholic, it was a good marriage as against him, and that he could not set up his protestation as a defence to an indictment for bigamy, and that there was sufficient evidence of the marriage in Ireland. (c)

Where a woman, being a Roman Catholic, and a man, being a Protestant, went in 1826, before Mr. Wood, a clergyman, residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of the man, and asked him whether he would be her husband, to which question both of them answered, I will; Wood was reputed to be a clergyman of the established church, and a document purporting to be letters of orders signed and sealed by W. late Archbishop of Tuam, dated 1799, whereby the archbishop certified that he had ordained Wood a priest, and which letters were found among Wood's papers at the time of his death, in July, 1829, was admitted without proof of the handwriting or seal of the archbishop, as being more than thirty years old. It was held that this document was properly received in evidence, being above thirty years old: if it had been only signed, there could have been no question as to its admissibility, but it was, in fact, also sealed, but although an archbishop is a corporation sole for many purposes, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation: and consequently that there was sufficient evidence of the marriage. (d)

With respect to the marriage of minors in Ireland, the statute 9 Geo. 2, c. 11, (Irish) contains some provisions. And the statute 58 Geo. 3,

(b) Sunderland's case, 2 Lew. 109.

(c) Reg. v. Orgill, 9 C. & P. 80. Alderson, B., who said the law on this subject had been much discussed by the Privy Council in Swift v. Swift.

(d) Rex v. Bathwick, 2 B. & Ad. 639. See this case, *post*, vol. 2, as to the competency of the wife.

* Eng. Com. Law Reps. xxxviii. 43.

† *Ib.* xxii. 152.

c. 84, was passed to remove doubts which had arisen as to the validity of marriages solemnized within the British territories in India, by ordained ministers of the Church of Scotland.

A marriage by license, in Ireland, where one of the parties was under age at the time, and there was no consent of the father, is not absolutely void, but only voidable within one year, under the 9 Geo. 2, c. 11, and if no proceedings are taken within the year to avoid the marriage, it is binding, and the party, if he marry again (during the life of his wife) may be properly convicted of bigamy. (e)

The statute 4, Geo. 4, c. 91, recites the expediency of relieving the minds of all his majesty's subjects from any doubt concerning the validity of marriages, solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other persons officiating under the orders of the commanding officer of a British army serving abroad: and then enacts, that "all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law." But there is a proviso that this act shall not confirm, or impair, or affect the validity of any marriages solemnized beyond the seas, save and except such as are solemnized as herein specified and recited. (f)

Marriages in the colony and dependencies of Newfoundland are especially regulated by the statute 5 Geo. 4, c. 68, which repeals a former statute, 57 Geo. 3, c. 51, upon the same subject.

In an action for criminal conversation the marriage of the plaintiff and his wife, who were both Quakers, had been performed according to the ceremonies of the sect, by a public declaration of the parties at a monthly meeting of the society, of their becoming man and wife, and a certificate to that effect entered in a register, signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as necessary to marriage among Quakers. (g)

The law of France as to marriage may be proved by the production of a book, purporting to contain the code of France, and proved by oral testimony of a witness acquainted with the law of France to contain the law of France. The articles of the law of France, which prescribe the forms essential to marriage, do not declare a marriage void for non-observance of those forms, but parol evidence is admissible to show that, by the law of France, a marriage in fact, without observance of the requisites prescribed by the articles, is void. (h)

It seems, that in order to prove a Jewish marriage, the marriage contract must be proved. Where two witnesses were called, who swore that they were present in the Jewish synagogue when a marriage took

(e) *Rex v. Jacobs*, R. & M. C. C. R. 140.

(f) Sec. 2.

(g) *Deane v. Thomas*,* M. & M. 361, no objection was made to the sufficiency of this evidence.

(h) *Lacon v. Higgins*,^b 3 Stark N. P. 178.

* Eng. Com. Law Reps. xxii. 333.

^b *Ib.* xiv. 176.

* *Ib.* xxxix. 425.

place, it was insisted that what took place in the synagogue was merely a ratification of a previous written contract, and as that contract was essential to the validity of the marriage it ought to be produced and proved; and the contract in the Hebrew tongue was accordingly put in and proved.⁽ⁱ⁾ So a Jewish divorce can only be proved by producing the document of divorce delivered by the husband to the wife.^(j)

Jewish
Divorce.

It was formerly held, that if an idiot contracted matrimony, it was good and should bind him: but modern resolutions appear to have proceeded upon a more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the statute 15 Geo. 2, c. 30, has provided, that if persons found lunatics under a commission, or committed to the care of *trustees by any act of parliament, marry before they are declared of sound mind by the lord chancellor, or the majority of such trustees, the marriage shall be totally void.^(k)

The mari-
riage of
lunatics
void.

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Marriage
by reputa-
tion not
sufficient.

Upon indictments for bigamy it has been held not to be sufficient to prove a marriage by reputation; but that either some person present at the marriage must be called, or the original register, or an examined copy of it, be produced.^(l)† The 4 Geo. 4, c. 76, s. 28, requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and the 6 & 7 Wm. 4, c. 86, s. 31, that it shall be registered in duplicate according to the form in the schedule, and that each entry shall be signed by the minister and parties married, and attested by two witnesses. But, upon a provision nearly similar in the former marriage act, it was held not to be necessary to call one of the subscribing witnesses to the register in order to prove the identity of the persons married; but that the register, or the copy of it, being produced, and any evidence which satisfied the jury as to the identity of the parties was sufficient; as if their handwriting to the register were proved; or that bellringers were paid by them for ringing for the wedding, or the like.^(m) And it was held that if the marriages were proved by a person present at them, it was not necessary to prove the registration, or license, or banns. The prisoner was indicted for marrying Ann Epton, whilst Jane, his former wife was living; each marriage was proved by a witness who was present at the ceremony, and it appeared that at the first marriage the prisoner went by the name of Allison, and at the second by the name of Wilkinson. Chambre, J., doubted whether the evidence was sufficient without proof of the registration of either marriage, or of any license, or publication of banns: but the judges held that it was.⁽ⁿ⁾

The second wife must be properly described in the indictment, and if she be described as a widow, when in fact she was not so, and had never been represented or reputed to be so, the variance will be fatal.

(i) *Horn v. Noel*, 1 Camp. 61.

(j) *Moss v. Smith*, * 1 Mann. & Gr. 228, and *qu.* whether such a divorce would be any defence to an indictment for bigamy. See the learned note of the reporters, *ibid.* 228.

(k) 1 Bla. Com. 438, 439.

(l) *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, Dougl. 162.

(m) 1 East, P. C. c. 12, s. 11, p. 472. Bull. N. P. 27.

(n) *Rex v. Allison*, East. T. 1806. MS. Bayley, J., and Russ. & Ry. 109.

† [*Sneed v. Ewing*, 5 J. J. Marsh, 474. On the trial of a man on an indictment for being found in bed with another man's wife, a marriage in fact must be proved. *State v. Rood*, 12 Vermont, 396.]

The prisoner was indicted for marrying E. Chant, widow, E. Rowe, his wife, being then alive, it appeared that E Chant was, in fact, and by reputation, a single woman: it was objected that she was improperly described in the indictment as a widow; and upon a case reserved, the judges were unanimously of opinion that the misdescription was fatal, though it was not necessary to have stated more than the name of the party (*n*)

Where upon an indictment against the prisoner for bigamy, in marrying A. Taylor, his first wife, Ann Gooding, being then alive, an examined copy of the certificate of the marriage of the prisoner and Sarah Ann Gooding was produced; Maule, J., held that the prisoner must be acquitted; there being no evidence to explain the circumstances of the difference in the name of the first wife, as described in the indictment, and in the certificate, and no evidence to show that the first wife was known by both names. (*oo*)

The 6 & 7 Wm. 4, c. 86, (an act for registering births, marriages, and deaths in England,) by sect. 38, enacts that "all certified copies of entries purporting to be sealed or stamped with the seal of the register office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid" (*p*)

How far the acknowledgment of the defendant upon the subject of his marriage is sufficient evidence of the fact may admit of some doubt. In *one case it was held, that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife for having contracted the marriage improperly (the marriage, however, being still good according to that law) was sufficient evidence of the first marriage; and upon such evidence, together with due proof of the second marriage, the prisoner was convicted. The point being reserved for the opinion of the judges, the whole (with the exception of Perryn, B., and Buller, J., who were absent), held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment; for the defendant had backed his assertion by the production of the copy of the proceeding: but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment (*q*)†

(*o*) *Rex v. Deeley*,^a R. & M. C. C. R. 303. S. C. 4 C. & P. 579.

(*oo*) *Reg. v. Gooding*, 1 C & Mars. 297. (*p*) See also the 3 & 4 Vict. c. 92.

(*q*) *Truman's case*, Nottingham Spr. Assizes, 1795, decided upon by the judges in East. T. 1795, MS. Jud 1 East, P. C. c. 12, s. 10, p. 470, 471, where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. That it may be difficult to say that it is not evidence to go to a jury; but that it must be admitted that it may, under circumstances, be entitled to little or no weight; for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as

† [The confession of the defendant, in a prosecution for bigamy, is adequate evidence of the marriage. *Commonwealth v. Murtagh*, 1 Ashmead's Rep. 272. See *The People v. Humphrey*, 7 John's, 314. *Ham's Case*, 11 Maine, 391.

On the trial of an indictment for bigamy, the first marriage may be proved by the declaration of the defendant and evidence of cohabitation. *State v. Hilton*, 3 Richardson, 434.

In prosecutions for bigamy, adultery, or incestuous adultery, it was held, that the defendant's admissions as to the fact of his marriage are admissible in evidence, and the marriage need not be proved in fact. *Cook v. The State*, 11 Georgia, 53.]

^a Eng. Com. Law Reps. xix. 534.

Where it was proved that the prisoner being charged with bigamy made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present, Mr. J. Erskine left the case to the jury, observing, that this was not an incautious statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him. (r)†

The true wife cannot be a witness.

After proof of the first marriage the second wife may be a witness: but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (s)

The prisoner was indicted for having married A. Walker, his first wife, A. Armstrong, being alive: the prisoner's first marriage with A. Armstrong was proved. The prisoner's defence was that the first marriage was void, as A. Armstrong had a husband living at the time, and he proposed to call A. Armstrong to prove that fact; it was objected to her competency, that the fact of her marriage with the prisoner having been proved, she must be taken to be his lawful wife. Mr. B. Alderson was at first inclined to think that she might be examined simply to the fact of her being the wife or not of the prisoner; but after conferring with Williams, J., he determined not to receive her evidence, but to reserve the point. (t)

evidence; more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time.

(r) *Rex v. Dennis Upton*, Gloucester Spr. Ass. 1839. It seems quite clear that this is the proper course, on the general principle that every thing which a prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may appear to them to deserve. C. S. G.

(s) 1 Hale, 693. 1 East. P. C. c. 12, s. 9, p. 469, and 1 Hawk. c. 42, s. 8, where it is said that this rule has been so strictly taken, that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786, is cited.

(t) Peat's case, 2 Lewin, 288. The prisoner was acquitted. The first impression of the very learned baron seems to have been the correct one. The only ground on which the witness could be rejected was, that she was the lawful wife of the prisoner, for "the general rule does not extend to a wife *de facto* but not *de jure*." 2 Stark, Ex. 402, 2 Ed. In *Wells v. Fletcher*,^a 5 C. & P. 12, S. C. M. & Rob. 99, a woman called for the defendant on examination on the *voire dire*, said she had been married to the plaintiff, and on re-examination that she was married to another person previously; but, not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff, but afterwards found that her first husband was living; and Patteson, J., held that the witness was competent, as the second marriage was a nullity. If Peat's case had been an indictment for larceny, and the witness called for the prisoner had proved her marriage to him on the *voire dire*, *Wells v. Fletcher* shows that she might have been rendered competent by proving her previous marriage, and it is difficult to see how proof by other evidence that she had married the prisoner, whether such evidence were given before or after she was called, could render her incompetent; for her evidence would not be inconsistent with such evidence, as it would admit the marriage with the prisoner, but show that it was void. *Rex v. Bathwick*, 2 B. & Ad. 639, shows that the competency of the wife does not depend upon the marshalling of the evidence, or the particular stage of the case in which she may be called; if, therefore, in Peat's case, the witness had been called before her marriage with the prisoner had been proved, and she would have been competent to prove her previous marriage, it is difficult to see how her marriage with the prisoner having been proved before she

† [On an indictment for bigamy, the first marriage may be proved by the admission of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the law of the country where the marriage was solemnized. *Reg. v. Simmonstu*, 1 C. & K. 164. Eng. C. L. xlvii. 164. In a case of bigamy there ought to be some proof of the first marriage beyond the mere statements of the prisoner while in custody; therefore, where a man went to a police station and stated that he had committed bigamy, and when and where the first marriage took place, and while in custody signed a statement to the same effect, the judge thought that this, though some evidence of the first marriage, was not sufficient, and so told the jury. *Reg. v. Flaherty*, 2 C. & K. 782. Eng. C. L. lxi. 781.]

^a Eng. Com. Law Repts. xxiv. 198.

*There is no presumption of law as to the death of a party, without reference to the accompanying circumstances, such for instance, as the age or the health of the party, and the only question is, what inference may fairly be drawn from the evidence? The presumption of innocence cannot shut out the presumption arising from the fact, that the party was alive within a short time of the second marriage. A pauper married E. Meadows, in 1821, who afterwards went abroad, and several letters had been received from her, dated from Van Dieman's Land, and one in her handwriting, dated Hobart Town, 17th March, 1831; the pauper married again on the 11th of April, 1831; it was held that the sessions were warranted in presuming that E. Meadows was alive at the time when the second marriage took place.^(u) *219

The fact of a letter being in the handwriting of a party, and dated at a particular time, is evidence that the party was alive at that time. A daughter wrote to her father in America, and in about two months afterwards received a letter in reply in his handwriting, dated the 1st of May, 1826, it was held that this was evidence that he was then alive.^(v)

The enactment of the new statute as to punishment is (as we have seen,) that the offender shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years. ^{Punishment.}

By s. 31, of 9 Geo. c. 31, accessories after the fact are liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years. ^{Accessories.}

*CHAPTER THE TWENTY-FOURTH.

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OF LIBEL AND INDICTABLE SLANDER. [A]

It appears to be well settled that publications blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, ^{What publications in general are libellous.}

was called, could render her incompetent, and it certainly would operate hardly on a prisoner, if such were the case, for the prosecutor might in the course of his case prove the marriage of the witness with the prisoner, and the prisoner might have no one except the witness to prove the former marriage. It may be added that Lord Hale, vol. 1, p. 693, says, that a second wife is not so much as a wife *de facto*. C. S. G.

^(u) Rex v. Harborne, 2 Ad. & E. 540 4 N. & M. 341.

^(v) Reed v. Norman, 8 C. & P. 65. Lord Denman, C. J.; his lordship held in the same case, that the postmark was evidence that the letter was put into the post, but that the letter might have been written at any time, and therefore proof was given that it was in reply to the daughter's letter; but this seems to have been unnecessary, for the date is *prima facie* evidence of the time when an instrument was written. Rex v. Harborne, Sincbir v. Baggaley, 4 M. & W. 313. Hunt v. Massey, 5 B. & Ad. 903.

(A) MASSACHUSETTS.—In the case of the *Commonwealth v. Clay*, 4 Mass. Rep. 163, Parsons, C. J., after giving the definition of a libel, and stating its pernicious tendency, lays down the law upon the subject of the motion before the court (which was, to be permitted to give the truth in evidence) in the following clear and conclusive language: "The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel as an offence against law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions and excite revenge is not diminished, but may sometimes be strengthened.

The inference therefore is very clear that the defendant cannot justify himself for publishing a libel merely by proving the truth of the publication; and that the direction of the judge was right.

^a Eng Com. Law Repts. xxix. 161.

^b Ib. xxix. 295.

^c Ib. xxvii. 230.

may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the

If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libelled. He is not a party to the prosecution, nor is he put on his defence; and the evidence at the trial might more cruelly defame his character than the original libel.

Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.

Upon this principle, a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true and made with the honest intention of giving useful information, and not maliciously or with intent to defame, the complaint will not be a libel.

And when any man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and the publication of the truth on this subject, with the honest intention of informing the people, will not be a libel; for it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offence against their laws.

And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct.

For the same reason the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their injury, and, it may be, to the loss of their liberties.

But the publication of a libel maliciously, and with the intent to defame, whether it be true or not, is clearly an offence against law, on sound principles, which must be adhered to, so far as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the commonwealth."

{ That the truth of a libel is not admissible in evidence, on the trial of an indictment for publishing it, was again asserted by the court, in the *Commonwealth v. Blanding*, 3 Pick. 304.

After that decision, the legislature enacted that in the trial of every prosecution for writing and publishing a libel, it shall be lawful for the defendant to give in evidence the truth of the matter contained in the publication charged as libellous; with a proviso, that such evidence shall not be a justification, unless it satisfactorily appear that the matter charged as libellous, was published with good motives and for justifiable ends. St. 1826, c. 107, § 1.

In *Commonwealth v. Holmes*, 17 M. R. 336, it was decided, that in an indictment for publishing an obscene book or print, it is sufficient to give a general description thereof, and to aver the evil tendency, without copying the book, or minutely describing the print. And per Parker, C. J., "It can never be required that an obscene book or picture should be displayed upon the records of the court. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it."

[The bill of rights was intended to give the citizen the general liberty of punishing without the previous license of any officer of the government, but not to restrain the legislative power in relation to the punishment of injuries to individuals or of the disturbance of the peace, by malicious falsehoods or obscene or profane publications or exhibitions. *Commonwealth v. Kneeland*, 20 Pick. 206.]

NEW YORK.—In this state the following cases have occurred, and points of law been decided: To charge a counsellor at law, with offering himself as a witness in order to divulge the secrets of his client is libellous. *Riggs v. Denniston*, 3 Johns. Cases, 198.

Charging a commissioner of bankrupts, with being a misanthropist, and violent partizan, stripping unfortunate debtors of every cent, and then depriving them of the benefit of the act, is libellous. *Ibid.*

No action will lie for charges against a public officer, contained in a petition to the council of appointment, praying his removal from office, although the words used are false and actionable in themselves, without proving express malice, or that the petition was actually malicious and groundless, and presented merely to injure the plaintiff's character. *Thorn v. Blanchard*, 5 Johns. Rep. 508.

And it seems that where a person addresses a complaint to persons competent to redress the grievances complained of, no action will lie against him, whether his statement be true or false, or his motives innocent or malicious. *Ibid.*

To publish of a member of congress that he is a fawning sycophant, or a misrepresenta-

subject, that such immodest and immoral publications as tend to corrupt the mind, and to destroy the love of decency, morality and good order,

tive in congress, and a grovelling office-seeker, that he has abandoned his post in congress to seek an office, is libellous. *Thomas v. Crosswell*, 7 Johns. Rep. 264.

And whether the person so libelled did leave his post for the purpose imputed to him, or had violated his duty as a representative in congress, are questions for the jury to decide. *Ibid*

Though a person may publish a correct account of the proceedings in a court of justice, yet if he discolours or garbles the proceedings, or adds comments or insinuations of his own, in order to asperse the character of the parties concerned, it is libellous. *Ibid*.

Words published in writing of a witness, which did not import a charge of perjury in the legal sense, were deemed libellous, as they held him up to contempt and ridicule, as being so thoughtless, or so criminal, as to be regardless of the obligations of a witness, and therefore unworthy of credit. *Steele v. Southack*, 9 Johns. Rep. 214.

Where a person published a direct and positive contradiction of what a witness had sworn on a trial, this was held not to be a libel, as it was not accompanied with any imputation of crime in the witness. *Ibid*.

A publication charging a man with insanity, is libellous. *Southwick v. Stevens*, 10 Johns. Rep. 443.

As to the publication.—Sending a sealed letter to the plaintiff himself, is no publication. And a letter is always to be understood as being sealed up, unless otherwise expressed. *Lyle v. Claxson*, 1 Caine's Rep. 558. No action will lie without a publication, but an indictment may. *Ibid*.

Whether the libel was published "of and concerning the plaintiff," or whether by the person mentioned in the libel the plaintiff was intended, is a question of fact for the jury. *Van Vechten v. Hopkins*, 5 Johns. Rep. 211.

The defendant had been chairman of a public meeting at which the libel in question was signed by him, and ordered by the meeting to be published; an affidavit of the defendant, and of one A., which the defendant in his own affidavit had referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits and referred to in them, were held sufficient evidence of the publication. *Lewis v. Few*, 5 Johns. Rep. 1.

Where a witness swore that he was a printer, and had been in the office of the defendant, where a certain paper was printed, and he saw it printed there, and that he believed the paper produced by the plaintiff was printed by the types used in the defendant's office, this was held to be *prima facie* evidence of the publication by the defendant. *Southwick v. Stevens*, 10 Johns. Rep. 442.

Justification.—It is no justification that the defendant signed the libellous paper, as chairman of a public meeting of citizens, convened for the purpose of deciding on a proper candidate for the office of governor at an approaching election, and that it was published by the order of such meeting. *Lewis v. Few*, 5 Johns. Rep. 1.

Charging a public minister with having traitorously betrayed the secrets of his government, is not justified by proof that he had published his instructions; for a public minister may, if he deems it necessary, publish his instructions. *Genet v. Mitchell*, 7 Johns. Rep. 120. And whether the party had traitorously made public his instructions, is a question to be submitted to the jury under the direction of the court. *Ibid*.

In an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer, to explain the subject matter, occasion, and extent of the defendant's publication, and in mitigation of damages. *Hotchkiss v. Lothrop*, 1 Johns. Rep. 286. But such prior publication will not be received in evidence as a justification. *Ibid*.

The question, whether (before the act, Sess. 28, c. 90) the defendant, on an indictment for a libel, would give the truth in evidence, and whether the jury were to decide both the law and the fact, was argued and decided in the cause of *The People v. Crosswell*, at great length and with great ability; for the arguments of counsel, and the opinions of the court, in this celebrated and highly important case, see the appendix to 3d vol. of Johnson's Cases. See also the act of April 6, A. D. 1805, Session 28, ch. 90, which act is also published at the end of that appendix.

PENNSYLVANIA.—To print and publish of a person "that he has been deprived of a participation of the chief ordinance of the church to which he belongs, by reason of his infamous and groundless assertions," is a libel. *M' Corkle v. Binns*, 5 Binn. 349. But it is no breach of the law to publish temperate investigations of the nature and forms of government. *Resp. v. Dennie*, 4 Yeates, 267.

Accusations preferred to the governor of the state against the character of public officers, are so far of the nature of judicial proceedings, that the accuser is not held to prove the truth of them. If he can show that they did not originate in malice and without probable cause, he is not liable to an action. *Gray v. Pentland*, 2 Serg. & Rawle, 23.

In an action for a libel, under the pleas of not guilty and a justification, the defendant

are also offences at common law. (a) It is also a misdemeanor wantonly to defame or indecorously to calumniate that economy, order, and constitution of things which make up the general system of the law and government of the country. (b) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state, (c) or the administration of justice by his judges. (d) And the same policy which prohibits seditious comments on the king's conduct and government extends, on the same grounds, to similar reflections on the proceedings of the two houses of parliament. (e) Such publications also as tend to cause animosities between this country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels. (f) With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. (g)

Of slanderous words. Upon some of these subjects a publication by slander, or words spoken only, though not properly a libel, (h) may be made the subject of criminal proceedings, as will be shown in the course of the chapter.

(a) See the cases collected in 2 Starkie on Lib. 155.

(b) Holt on Lib. 82.

(c) Rex v. Lambert and Perry, 2 Campb. 398.

(d) 2 Starkie on Lib. 194.

(e) Ib. 202.

(f) Rex v. Peltier, Holt on Lib. 78. Rex v. D'Eon, 1 Blac. R. 517.

(g) 1 Hawk. P. C. c. 73, s. 1, 2, 3, 7. Bac. Abr. tit. *Libel*; and see as to libel by a picture, Du Bost v. Beresford, 2 Campb. 511.

(h) A libel is termed *Libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal, written or expressed by symbols. Lamb. Sax. Law, 64. Bract. lib. 3, c. 36. 3 Inst. 174, 5 Co. 125. 1 Lord Raym. 416. 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. "There is no other name but that of *libel* applicable to the offence of libelling; and we know the offence specifically by that name, as we know the offences of horsetealing, forgery, &c., by the names which the law has annexed to them." By Lord Camden, in Rex v. Wilkes, 2 Wils. 121.

cannot give evidence of the authority from which he received it, in order to support his justification; but he may give it in evidence in mitigation of damages. *Romayne v. Duane*, [3 Wash. C. C. Rep. 246.]

In an action for a libel against the printer of a newspaper, it is not a justification in law that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business, though it may go in mitigation of damages. *Runkle v. Meyer et al.*, 3 Yeates, 518.

In the case of a libel, if the republication is made with malice, evidence of the libel having been originally published by another person, is admissible only in mitigation of damages; but if it appear that the republication was made innocently, and without malice, the republisher will be excused, if at the time of the republication he gave the true source of his information, so as to afford the injured party an opportunity of bringing an action against the real libeller. *Binns v. M' Corkle*, 2 Browne, 90.

In action for a libel, published in a newspaper, of which the defendant was editor, evidence of a writing purporting to be the copy of an anonymous letter sent to the preceding editor, was ruled to be admissible in mitigation of damages, to show that the defendant was not the inventor of the charge. *Morris v. Duane*, 1 Bin. 90, in note.

In an action for a libel on the plaintiff, contained in an affidavit sent to the governor relative to the plaintiff's official conduct in an office held at the governor's will, the want of probable cause may be left to the jury as evidence of malice. The proof of the fact from which malice is to be inferred, lies on the plaintiff. *Gray v. Pentland*, 4 Serg. & Rawle, 420.

It is sufficient proof of a person being the printer of a newspaper in which a libel was published, for such paper to go to the jury, that the papers were deposited in a hole behind the door of a public library, and that the person's clerk received payment therefor. *Respublica v. Davis*, 3 Yeates, 128.

Upon an indictment for writing and publishing a libel, the jury found the defendant guilty of writing and publishing a bill of scandal against the prosecutors." Judgment

*A libel may be as well by descriptions and circumlocutions as in express terms; therefore, scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, "*You will not play the Jew, nor the hypocrite,*" and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vain glory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing; (as by proposing such a one to be imitated for his courage, who was known to be a great statesman, but no soldier; and another to be imitated for his learning, who was known to be a great general, but no scholar,) such a publication being as well understood to mean only to upbraid the parties with the want of these qualities, as if it had done so directly and expressly.⁽ⁱ⁾ And, upon the same ground, not only an allegory but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel; and a court, notwithstanding its obscurity and perplexity, shall be allowed to judge of its meaning, as well as other persons.^(k) So a libel may be by asking questions; for if a man insinuates a fact in asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms^(l) And it is now well established, that slanderous words must be understood by the court in the same sense as the rest of mankind would ordinarily understand them.^(m) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them and which they were intended to convey.⁽ⁿ⁾†

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be under-

(i) 1 Hawk. P. C. c. 73, s. 4. Bac. Abr. tit. *Libel* (A) 3.

(k) Holt on Libel, 235, 236.

(l) Gathercole's case, 2 Lewin, 255, per Alderson, B.

(m) *Woolnoth v. Meadows*, 5 East, 463. In this case the defendant had said of the plaintiff, "that his character was infamous—that he would be disgraceful to any society—that delicacy forbid him from bringing a direct charge—but it was a male child who complained to him;" and these words were understood to mean a charge of unnatural practices.

(n) By Lord Ellenborough, C. J., in *Rex v. Lambert and Perry*, 2 Campb. 403. And in a case of libel, *Rex v. Watson and others*, 2 T. R. 206, Buller, J., said, "Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed."

was reversed, because the defendant was not found guilty of the offence charged in the indictment. *Sharff v Commonwealth*, 2 Binn. 514.

SOUTH CAROLINA.—A handbill issued by the plaintiff, and alluded to in the libel, may be admitted in evidence, to explain the occasion and manner of publishing the libel, and as going to show the *quo animo*. One libel cannot be pleaded or set off as a justification for another, but whatever is material to the issue must be admitted in evidence. *Thompson v. Boyd*, South Carolina Rep. Constitutional C. 80.

IN CONNECTICUT, VERMONT, NEW YORK, and some other of the States, the truth of the supposed libellous matter may be given in evidence in public prosecutions, by virtue of statutes made for that purpose. {See Const. of New York, Art. 7, § 8, and the Revised Statutes, Vol. 1. 94.}

† [The defendant, who was the editor of a newspaper, owed the plaintiff money upon an award of arbitrators, in speaking of which and of the plaintiff, in an article in his paper, he said: "The money will be forthcoming on the last day allowed by the award: but we are not disposed to allow him to put it into Wall street for shaving purposes before that period"—held that this was not libellous. *State v. Cooper*, 2 Denio, 293.]

stood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is understood by every one of the meanest capacity cannot possibly be understood by a judge or jury. (o)

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Indictment will lie for a libel on a body of men.

*An indictment lies for general imputations on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law. (p) And scandal published of three or four persons is punishable at the complaint of one or more, or all of them. (q)

Actions and indictments for libels co-extensive.

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing. (r)

The party cannot justify that the contents of a libel are true.

It is quite clear that upon an indictment or criminal prosecution for a libel, the party cannot justify that its contents are true, or that the person upon whom it is made had a bad reputation. † The ground of the criminal proceeding is the *public mischief*, which libels are calculated to create in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country; and where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. The law, therefore, does not permit the defendant to give the truth of the libellous matter in justification; any attempts at which in the instances of libels against religion, morality, or the constitution, would be attended with consequences of the greatest absurdity; and, in the case of libels upon individuals, might be extremely unjust, and could never afford a substantial defence to the charge. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only show the greater malice in the defendant; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed, that the greater appear-

(o) 1 Hawk. P. C. c. 73, s. 5. Bac. Abr. tit. *Libel* (A) 3, where it is said in the marginal note, that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. In one case, Lord Ellenborough, C. J., held, upon argument, that the declarations of spectators, while they looked at a libellous picture in an exhibition room, were evidence to show that the figures portrayed were meant to represent the parties stated to be libelled. *Du Bost v. Beresford*, 2 Campb. 512.

(p) Holt on Libel, 237.

(q) *Id. ibid.* In *Rex v. Benfield and Sanders*, 2 Burr. 980, it was held, that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. A libel upon one of a body of persons, without naming him, is a libel upon the whole, and may be so described; and where a paper is published equally reflecting upon a number of people, it reflects upon all; and readers, according to their different opinions, may apply it so. *Rex v. Jenour*, 7 Mod. 400.

(r) *Starkie on Lib.* 150, 165, 550. 1 Ed. Holt on Lib. 215, 216. *Bradley v. Methuen*, 2 Ford's MS. 78. This must be understood, however, of cases, where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

† [*Barthelemy et al. v. The People*, 2 Hill, 248. *State v. Lehre*, 2 Brevard, 446.]

In an indictment for a libel, charging that the prosecutor "was called a murderer and forsworn," it is not competent for the defendant to justify by proving that there was and long had been a general report to that effect. *State v. White*, 7 Iredell, N. C. 180.]

ance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to complain, for every injury done to him, in the ordinary course of law, and not by any means to revenge himself by the odious proceeding of a libel.(s)

*If a libel contain matters imputing to another a crime capable of being tried, evidence of the truth of those imputations is not admissible.(t) *223
But in one case where evidence of the falschood of the libel was adduced by the prosecutor as necessary to support the charge, and no objection was made to it, Lord Tenterden, C. J., although not free from doubts in his own mind, yet adverting to the particular nature of the libel, which was little more than a narrative of certain facts supposed to have taken place in one of the West India Islands, did not think himself warranted in interposing under the very peculiar circumstances of that case: and, having received evidence of the falschood, he would have received evidence of the truth, if any such had been offered, on the part of the defendant.(u)

A party will not be excused by showing that the libel with which he is charged was copied from some other work, even though he may have stated it to be merely a copy, and disclosed the name of the original author at the time of its publication. Thus, where to a declaration for a libel the defendant pleaded that he had the libellous statement from another person, and at the time of publishing the libel he stated that the libel had been published to him by such other person, it was held that the plea was bad; for wrong is not to be justified, or even excused, by wrong; if a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in a newspaper: no authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander.(x) So it is no defence to an action for oral slander for the defendant to show that he heard the slander from another, and named the person at the time, unless he also show that he believed it to be true, and uttered the slander on a justifiable occasion.(y)

But there are some circumstances which will protect a publication from being deemed libellous. A petition to the king to be relieved from the king.

(s) 1 Hawk. P. C. c. 73, s. 6. Bac. Abr. tit. *Libel* (A) 5. 4 Bla. Com. 150, 151. 2 Starkie on Libel, 251, *et seq.* Holt on Libel, 275, *et seq.* But though the truth is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, that it will not grant an information for a libel, unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule, however, may be dispensed with if the persons libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament. 4 Bla. Com. 151, note (6). Dougl. 271, 372.

(t) *Rex v. Burdett*, 4 B. & Ald. 95. "In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance, suppose a paper were to state that A. was on a given day tried at a given place, and convicted of perjury; if that be true it may be no libel, but if false, it is from beginning to end calumnious, and may no doubt be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement, by the production of the record, might afford an answer to a prosecution for libel." *Ibid.* per Bayley, J., p. 147. *Sed tamen quære.* C. S. G.

(u) Case mentioned by Lord Tenterden, C. J., in *Rex v. Burdett*, 4 B. & Ald. 182, but see *Rex v. Grant*, *post*.

(x) *De Crespigny v. Wellesley*, 5 Bing. 292. 2 M. & P. 695.

(y) *M'Pherson v. Daniels*, 10 B. & C. 263.

^a Eng. Com. Law Reps. vi. 358.

^b *Ib.* xv. 474.

^c *Ib.* xxi. 69.

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doing what the king has directed the party to do, if *bonâ fide* and in respectful terms, is no libel, though it call in question the legality of the king's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes 25 & 30 Car. II., and directed that it should be read two days in every church and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the *king praying that he would not insist upon their distributing and reading it, principally because it was founded on such dispensing power as had often been declared illegal in parliament, and that they could not in prudence, honour, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up for it; and, not choosing to give bail, were sent to the Tower, and tried. The publication was proved; and Wright, C. J., and Allibone, J., thought it a libel. But Holloway and Powell, Jr., thought otherwise, there not being any ill intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the king's command. The jury found them not guilty. (z)

Petitions to parliament, and other authorized proceedings.

It has been resolved that no false or scandalous matter contained in a petition to a committee of parliament or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a court of justice. (a) Thus where a charge was, that the defendant, in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely, the court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. (b) It is also held that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their inquires with that freedom and readiness which the public good requires. (c) Where an action was brought against the president of a military court of inquiry for a libel contained in the minutes of such court, which had been

(z) Case of the Seven Bishops, 12 St. Tri. 183; and see *post*, as to communications made *bonâ fide*, and in the proper course of proceeding.

(a) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A) 4. And see the judgment of Holroyd, J., in *Hodgson v. Scarlett*, 1 B. & A. 244. It is holden by some that no want of jurisdiction in the court to which the complainant shall be exhibited will make it a libel: because the mistake of the court is not imputable to the party, but to his counsel; but Hawkins says (1 Hawk. P. C. c. 73, s. 8), that if it manifestly appears that a prosecution is entirely false, malicious and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the show of a legal proceeding, he cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one. Upon this point, Mr. Starkie, after referring to the several authorities, says, that it may be collected generally that no action can be maintained for any thing said or otherwise published in the course of a judicial proceeding, whether criminal or civil; though for a malicious and groundless prosecution, an action, and *perhaps* an indictment, may be supported, founded on the whole proceeding. 1 Starkie on *Libel*, 254, 2 ed.

(b) *Astley v. Younge*, 2 Burr. 817.

(c) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A) 4.

delivered by the defendant to the commander-in-chief and deposited in his office, it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. (d) And where a court-martial, after stating in their sentence the acquittal of an officer *against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge advocate; and Mansfield, C. J., in delivering his opinion, said, "If it appear that the charges are absolutely without foundation,—is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor; or can it be any offence for him to state that the charge is groundless and malicious?" (e) *225

The members of the two houses of parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public should, in the execution of their high functions, be wholly uninfluenced by private considerations. (f) And speeches of members of parliament are privileged.

Thus the actual proceedings in courts of justice and in parliament are exempted from being deemed libellous: it becomes important to inquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

It has always been held that a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (g) But provided it were of that character, the doctrine seems at one time to have been that it might be made to the full extent of stating what had actually taken place. (h) More recently, however, it has been said that it must not be taken for granted that the publication for every matter which passes in a court of justice, however truly represented, is, under all circumstances and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. (i) And Lord Ellenborough, C. J., said, "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect: and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous merely because the matter had been given in evidence in a court of justice." (j) How far the publication of proceedings in courts of justice is allowable. In a subsequent

(d) *Horne v. Lord F. C. Bentinck*, 4 Moore, 563.

(e) *Jekyll v. Sir John Moore*, 2 N. R. 341.

(f) *Holt on Libel*, 190. 1 Starkie on Libel, 239. *Rex v. Lord Abingdon*, 1 Esp. Rep. 226. By 4 Hen. 8, c. 8, members of parliament are protected from all charges against them for any thing said in either house; and this is further declared in the Bill of Rights, 1 Wm. & M. st. 2, c. 2.

(g) *Waterfield v. The Bishop of Chichester*, 2 Mod. 118. *Rex v. Wright*, 8 T. Rep. 297, 298, per Lawrence, J. *Stiles v. Nokes*, 7 East, 493.

(h) *Curry v. Walter*, 1 Bos. & Pull 523, referred to by Lawrence, J., in *Rex v. Wright*, 8 T. R. 298.

(i) By Lord Ellenborough, C. J., and Grose, J., in *Stiles v. Nokes*, 7 East, 503.

(j) *Id. ibid.* And see *Rex v. Salisbury*, 1 Ld. Raym. 341, that it is indictable to publish

* Eng. Com. Law Reps. vi. 43.

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case, not relating directly to this point but to the publication of proceedings in parliament, Bayley, J., said, "It has been argued that the proceedings in courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. *Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that which for the purposes of justice the court is bound to hear? I should think not; and it is not true therefore that in all instances the proceedings of a court of justice may be published. Again, it may be said that counsel have a right, in pursuance of their instructions, and whilst the cause is going on, to endeavour to produce an effect by making such observations on the credit and character of parties and their witnesses as sometimes, when the cause is over, perhaps they are sorry for. But have they, therefore, or any person who hears them, a right afterwards to publish those observations? I have no hesitation in saying, that when the occasion ceased, the right also would cease; and that it would be no justification to plead that such a publication was a transcript of the counsel's speech." (k) [1] This doctrine was recognized and acted upon in a recent case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and, upon showing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a court of justice: but the court were clear she had not, if that statement contained any thing defamatory, seditious, blasphemous, or indecent: and the rule was made absolute. (l) And where it is allowable to publish what passes in a court of justice, the party must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. Thus, where the libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge, and, after setting out the speech, said that a witness was called who proved all that had been stated by counsel, and that the defendant was immediately afterwards acquitted upon a defect in proving some matter of form; and the plea stated that in fact such a speech was made, and that the witness called proved all that had been so stated, but it did not set out the evidence or justify the truth of the charges made in the counsel's speech; it was holden that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. (m) And the party making the publication will not be justified, unless he confines himself to what actually passed in court. In a case where an action was brought for a libel concerning the plaintiff in his profession as an attorney, and

The whole case, and not merely the conclusion from it, must be published.

And nothing but what actually passes in court.

a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

(k) *Rex v. Creevey*, 1 M. & S. 281. In the same case Lord Ellenborough, C. J., said, "As to *Curry v. Walter* [*ante*, note (h)], it is not necessary for the present purpose to discuss that case; whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to Eyre, C. J."

(l) *Rex v. Carlisle*,^a 3 B. & A. 167.

(m) *Lewis v. Walter*,^b 4 B. & A. 605.

[1] { Slanderous matter cannot justifiably be published in an account of a trial, unless for the purpose of giving information fit and proper to be given to the public. 4 B. & C. 473, *Flint v. Pike*. } [Eng. Com. Law Rep. x. 380.]

^a Eng. Com. Law Reps v. 252.

^b *Ib.* vi. 535.

the libel, as stated in the declaration, began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law which contained matter injurious to the plaintiff's professional character, and the defendant had pleaded that the supposed libel contained a true account of the proceedings in the court of law; it was holden *(after verdict for the defendant) that the plea was bad, inas-
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 much as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.(n) It is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings.(o)† A report of a charge made against the plaintiff at the mansion-house, added, "Mr. Hobler, the chief clerk, observed that it was exceedingly improper under any circumstances to obtain the signature of the complainant, a mere boy, to bills of exchange;" it was held that this was a substantive reflection on the character and conduct of the plaintiff, which was altogether unwarranted: it was not made in the course of any judicial proceeding by any one whose duty called upon him to make it; but was uttered by a person, who, for this purpose, must be considered as an entire stranger.(p) The subsequent publication of a speech made by a counsel in the course of a cause containing observations injurious to the character of a party, attorney, or witness in the cause, is not lawful, because such publication is not required for the due administration of justice;(q) but a party is at liberty to publish a history of a trial, viz., of the facts of the case, and of the law of the case as applied to those facts.(r)

The report must contain no defamatory observations.

Speech of counsel

It should be observed also, that the publication of preliminary examinations before a magistrate, taken *ex parte*, will not come within the principle by which the fair reports of proceedings in courts of justice have been held to be privileged. Such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and if they contain libellous matter, will be considered as highly-criminal.(s) And the Court of King's Bench has gone to the extent of granting a criminal information for publishing in a newspaper

Publication of *ex parte* examinations before a magistrate may be libellous.

(n) *Lewis v. Clement*,^a 3 B. & A. 702. In this case the question was raised whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the inquiry; but it became unnecessary to decide this point.

(o) Per Tindal, C. J. *Delegal v. Highley*,^b 3 B. N. C. 950.

(p) *Delegal v. Highley*, *supra*.

(q) Per Bayley, J. *Flint v. Pike*,^c 4 B. & C. 473. 6 D. & R. 528. See also per Holroyd, J., *ibid.*, and per Tindal, C. J. *Roberts v. Brown*,^d 10 Bing. 519; see *Saunders v. Mills*,^e 6 Bing. 213. S. C. 3 M. & P. 520.

(r) Per Bayley, J. *Flint v. Pike*, *supra*.

(s) *Rex v. Lee and another*, 5 Esp. 123. *Rex v. Fisher and others*, 2 Campb. 563. *Duncan v. Thwaites and others*,^f 3 B. & C. 556. 5 D. & R. 447. *Delegal v. Highley*, 3 B. N. C. 950. And still less can the defendant justify the publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions. *M'Gregor v. Thwaites and another*,^g 3 B. & C. 24. 4 D. & R. 695.

† [The editor of a newspaper has a right to publish the fact that an individual is arrested and upon what charge; but he has no right while the charge is in the course of investigation to assume that the person accused is guilty or to hold him out to the world as such. *Usher v. Leverance*, 20 Maine, 9.]

^a Eng. Com. Law Reps. v. 427.

^b *Ib.* xxxii. 398.

^c *Ib.* x. 382.

^d *Ib.* xxv. 224.

^e *Ib.* xix. 60.

^f *Ib.* x. 179.

^g *Ib.* 6.

a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication.(*t*) So the publication of proceedings before a commissioner of inquiry respecting corporations, cannot be justified by showing that it is a true report of what occurred before the commissioner.(*u*)

How far the publication of proceedings in parliament is allowable.

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Though the publication of a proceeding in parliament will, in general, be considered as privileged and protected from being *deemed libellous;(x) and the printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of parliament and their committees, has been held to be justifiable:(y) yet it may be doubted how far the circulation of a copy of a writing containing matter of an injurious tendency to the character of an individual, though published for the use of the members, is legitimate and exempted from prosecution.(z) And it is clear that the publication of the speech of a member of parliament, if it contain matter of libel, is not protected, even though such publication be made by the member himself. In a case upon this subject, Lord Kenyon, C. J., observed, that if the words in question had been spoken in the House of Lords, and confined to its walls, the Court of King's Bench would have had no jurisdiction to call a member of that house before them; to answer for such words as an offence; but that the offence was the publication of them in the public papers, under the authority of the member, with his sanction, and at his expense: that a member of parliament had certainly a right to publish his speech, but that his speech should not be made the vehicle of slander against any individual; if it were, it would be a libel (*a*) And in a more recent case it was held, that a member of the House of Commons may be convicted upon an indictment for a libel, in publishing for a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers.(*b*)

Stockdale v. Hansard.

It has recently been decided in a case, which underwent the most profound consideration, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the house, and thereupon became part of the proceedings of the house, and which was afterwards, by orders of the house, printed and published by the defendant; and that the House of Commons heretofore resolved, "that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament, as the representative portion of it."(*c*)

(*t*) *Rex v. Fleet*, 1 Barn. & Ald. 379. See *East v. Chapman*,^a M. & M. 46. 2 C. & P. 570.

(*u*) *Charlton v. Watton*,^b 6 C. & P. 385.

(*x*) *Rex v. Wright*, 8 T. R. 293. In this case a former case of *Rex v. Williams*, 2 Show. 471, Comb. 18, was animadverted upon by Lord Kenyon, C. J., and Grose, J., as having happened in the worst of times.

(*y*) *Lake v. King*, 1 Saund. 131.

(*z*) See the judgment of Lord Ellenborough, C. J., in *Rex v. Creevey*, 1 M. & S. 278.

(*a*) *Rex v. Ld. Abingdon*, 1 Esp. 226.

(*b*) *Rex v. Creevey*, 1 M. & S. 273.

(*c*) *Stockdale v. Hansard*,^c 9 A. & E. 1, 2 P. & D. 1.

^a Eng. Com. Law Reps. x. 268.

^b *Ib.* xxv. 450

^c *Ib.* xxxvi. 13.

In consequence of this decision the 3 & 4 Vic. c. 9, was passed, which by sec. 1, reciting, "whereas it is essential to the due and effectual exercise and discharge of the functions and duties of parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either house of parliament as such house of parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or *acting under the authority of the houses of parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:" enacts, "that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either house of parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the lord high chancellor of Great Britain, or the lord keeper of the great seal, or of the speaker of the House of Lords, for the time being, or of the clerk of the parliaments, or of the speaker of the House of Commons, or of the clerk of the same house, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this act."(cc)

By sec. 2, "in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, will on affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ, or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this act."

By sec. 3, "it shall be lawful in any civil or criminal proceeding to

(cc) The act is imperative upon the court to stay proceedings. *Stockdale v. Hansard*, 3 P. & D. 346.

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Proceedings, criminal or civil, against persons for publication of papers printed by order of parliament, to be stayed, upon delivery of a certificate and affidavit to the effect that such publication is by order of either house of parliament.

In any proceedings it may be shown that such extract was *bona fide* made. be commenced or prosecuted for printing any extract from or an abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue, such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants."

By sec. 4, "nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of parliament in any manner whatsoever."

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*Having treated generally of the publications which may be considered as libellous, it may be useful to refer to some of the particular points which have been holden, respecting publications:—1. Against the Christian religion.—2. Against morality.—3. Against the constitution.—4. Against the king.—5. Against the two houses of parliament.—6. Against the government.—7. Against the magistrates and the administration of justice.—8. Against private individuals.—And 9. Against foreigners of distinction.

Of publications against the Christian religion.

1. It has been before observed, (*d*) that blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, is an indictable offence. At common law, all blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion; are considered as offences tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment, in the discretion of the court. (*e*)

Statutes upon the subject.

Some provisions have also been made upon this subject by statutes. The 1 Ed. 6, c. 1, (*f*) enacts, that persons reviling the Sacrament of the Lord's Supper, by contemptuous words or otherwise, shall suffer imprisonment. The statute 1 Eliz. c. 2, enacts, that if any *minister* shall speak anything in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. By the 3 Jac. 1, c. 21, a person using the name of the Holy Trinity profanely, or jestingly, in any stage-play, interlude, or show, shall be liable to a *qui tam* penalty, of ten pounds. The 1 Wm. 3, c. 18, s. 17, enacted, that whoever should deny in his preaching or writing the doctrine of the Blessed Trinity, should lose all benefit of the act for granting toleration. The section is now repealed by 53 Geo. 3, c. 160: but while it was in existence it was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor

(*d*) *Ante*, p. 220.

(*e*) See the cases collected in 1 Hawk. P. C. c. 5. Gathercole's case, 2 Lewin, 287.

(*f*) Repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1.

at common law. (*ff*) The 9 & 10 Wm. 3, c. 32, enacted, that if any person, educated in or having made profession of the Christian religion, should, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser *of lands, and should suffer three years' imprisonment without bail. (*g*) A person offending under this statute was held to be also indictable at common law. (*h*) This doctrine was considered in a recent case where a motion was made in arrest of judgment, after conviction on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence: and the court were clear that it had not, considering that the provisions of the statute were cumulative. (*i*) *231

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale, C. J., observed, that such kind of wicked blasphemous words were not only an offence of God and religion, but a crime against the laws, state, and government, and therefore punishable in the Court of King's Bench. That to say religion is a cheat, is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. (*j*) In a late case where a libel stated that Jesus Christ was an imposter, a murderer in principle, and a fanatic, a juryman asked whether a work denying the divinity of our Saviour was a libel; and Abbott, C. J., answered, that a work speaking of Jesus Christ in the language here used was a libel; and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer, the court without difficulty held that the answer was right, and refused the rule. (*k*)

In a case where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law: but the court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law: and, therefore, that whatever derided Christianity derided the law, and consequently must be an offence against the law. (*l*) It was also moved in arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it; and that though there were professions in the book that its design

To reproach the Christian religion is to speak in subversion of the law.

The Christian religion is part of the law of the land.

But though to write against Christianity in general is an offence at common law, the court will not meddle

(*ff*) By Lord Kenyon, in *Rex v. Williams*, 1797. Holt on Libel, 66.

(*g*) But the delinquent publicly renouncing his error in open court, within four months after the first conviction, is to be discharged for that once from all disabilities.

(*h*) Barnard, 162. 2 Str. 834. Fitzgib. 64. *Rex v. Williams*, 1797. *Rex v. Caton*, 1812. This statute also related to persons denying, as therein mentioned, respecting the *Holy Trinity*; but such provisions are repealed by 53 Geo. 3, c. 160.

(*i*) *Rex v. Carlisle*, 3 B. & A. 161.

(*j*) *Rex v. Taylor*, Vent. 293. 3 Keb. 607.

(*k*) *Rex v. Waddington*, 1 B. & C. 26.

(*l*) *Rex v. Woolston*, Barnard, 162. 2 Str. 834. Fitzgib. 64.

^a Eng. Com. Law Reps. v. 252.

^b Ib. viii. 14.

with differ- was to establish Christianity upon a true bottom by considering these ences of narrations in Scripture as emblematical and prophetical, yet that such opinion upon professions were not to be credited, and that the rule is *allegatio contra* upon con- *factum non est admittenda*. But the court also said, that though to troverted points. write against Christianity in *general* is clearly an *offence at common *232 law, they laid a stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the court, Raymond, Lord C. J., said, "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at."(m)

The dread of future punishment is one of the principal sanctions of the law. The doctrine of the Christian religion constituting part of the law of the land was recognized in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel, called *Paine's Age of Reason*.(n) Ashurst, J., said, that although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments.(o)

Rational and dispassionate discussions are allowable. Contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship.(p) A sensible writer upon the subject of libel says, as to this point,—“that it may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice.”(q)

Where a defendant was charged with publishing a libel upon a religious order, consisting of females, professing the Roman Catholic faith, called the Scorton Nunnery, Mr. B. Alderson observed, a person may without being liable to a prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established

(m) *Rex v. Woolston*, Fitzgib. 66.

(n) This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His disciples, and the Sacred Scriptures.

(o) *Rex v. Williams*, 1797. Holt on Libel, 69, note (e). 2 Stark. on Lib. 141.

(p) 4 Bla. Com. 51.

(q) Starkie on Libel, 1. ed. 496, 497. See 2 ed., vol. 2, 146-7.

religion of the country; and the only reason why the latter is in a different situation from the other is, because it is the form established by law and is therefore a part of *the constitution of the country. For the same reason any general attack on Christianity is the subject of a criminal prosecution, because Christianity is the established religion of the country. Any person has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion and its institutions; but *he has no right in so doing to attack the characters of individuals.*(*r*)

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As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment.(*s*)

2. When the Star Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, have cognizance of all offences against the public morals:(*t*) under which head may be comprehended representations, whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people.(*u*) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts;(v) but a different doctrine has since been established.(*w*) And in late times indictments for obscene writings and prints have frequently been preferred, without any objection having been made to the jurisdiction of the temporal courts.†

Of publica-
tions
against
morality.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality, as in the case of the performance of an obscene play.(*x*)

Oral com-
munications.

3. Libels against the constitution, abstracted from all personal allusions, do not appear, either in ancient or modern times, to have been often made the subject of legal inquiry. In general, publications upon the constitution, avoiding all discussions of personal rights and privileges, are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal.(*y*)

Of publi-
cations
against the
constitu-
tion.

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they are not the laws of God; yet that it would be otherwise to say that the laws of the realm are contrary to the laws of God (*z*) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors

(*r*) Gathercole's case, 2 Lewin, 237.(*s*) 2 Starkie on Libel, 144, 2d ed.(*t*) Sir Ch. Sedley's case, 1663. Keb. 720. 2 Str. 790. Sid. 168.(*u*) Holt on Libel, 73.(*v*) Rex v. Read, 11 Mod. 142. 1 Hawk. P. C. c. 73, s. 9.(*w*) Rex v. Curl, 2 Str. 788. Rex v. Wilks, 4 Burr. 2527.(*x*) 2 Starkie on Libel, 159. In Rex v. Curl, 2 Str. 790, it was stated that there had been many prosecutions against the players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment.(*y*) Holt on Libel, 86.(*z*) 2 Roll. Abr. 78.† [Procuring obscene prints with intent to publish is indictable. *Dugdale v. Reg.* 1 El. & Bl. 435. Eng. C. L. lxxi. 435.]

*234 who adjudged King Charles *the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion (a) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the act of settlement was represented as illegal, and that the revolution and settlement of the crown as by law established, had been attended with fatal and pernicious consequences to the subjects of this kingdom (b)

Of publi-
cations
against the
king.

4. Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent or reprehensible they may be, are not in themselves overt acts of high treason, but only a misprision, punishable at common law by fine and imprisonment, or other corporal punishment. (c) Though words may expound an overt act, and show with what intent it was done. (d) And, generally speaking, any words, acts, or writing, tending to vilify or disgrace the king, or lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision, punishable by fine and corporal punishment. (e)

Statutes.

There are also some legislative provisions upon this subject. The 3 Ed. 1, c. 34, enacts, that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander, may grow between the king and his people, and the great men of the realm. (f) And with a view to the security of the succession of the house of Hanover, according to the act of settlement, a law was passed declaring it to be treason to write or print against it. (g)

The nature of the offence of libel against the monarch personally has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in a case of recent occurrence.

Rex v. Lam-
bert and
Perry. It
is not libel-
ous for a
writer who
allows the
sovereign
to be soli-
citous for
the welfare
of his sub-
jects, and
who has no
intention of
calumniat-
ing.

The defendant was charged with having published a libel to the following tenor and effect: "What a cloud of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system? Of all monarchs, indeed, since the revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." Lord Ellenborough, C. J., in addressing the jury, stated, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression "change of system," was a change of political system—not a change in the frame of the established government, *but in the measures of policy which had been for some time pursued; and that by a total change of system was certainly not meant *subversion* or *demolition*, the descent

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(a) Rex v. Harrison, 1677. 3 Keb. 841. Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government. Rex v. Bedford, 1711. 2 Str. 789. Gilb. 297.

(b) Rex v. Nutt, 1754. Dig. L. L. 126, and see Dr. Shebbeare's case, and Rex v. Paine, Holt on Lib. 88, 89, and 2 Starkie on Lib. 164.

(c) 1 East, P. C. c. 2, s. 55, p. 117.

(d) Crohagan's case, Cro. Car. 332.

(e) 4 Bla. Com. 123.

(f) It is said to have been resolved by all the judges that all writers of false news are indictable and punishable (4 Read St. L. Dig. L. L. 23); and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal. Starkie on Lib. 546, 1 ed.

(g) 6 Anne, c. 7; and see other statutes which were passed for the purpose of guarding the king's character and title, cited in 2 Starkie on Lib. 171, 2 ed.

of the crown to the successor of his majesty being mentioned immediately after. His lordship then proceeded:—"If a person who admits the wisdom and virtues of his majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate that his majesty acts from any partial or corrupt views, or with an intention to favour or oppress any individual or class of men, and it would become most libellous." Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded: "Now, do these words mean, that his majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that his majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel." And again, towards the conclusion of his address, his lordship said, "The question of intention is for your consideration. You will not distort the words but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; (h) and if you consider it as meant to represent that the reign of his majesty is the only thing interposed between the subjects of this country and the possessions of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render his majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly, according to your reasoning, to impute any proposed mal-administration to his majesty, or those acting under him, but may be fairly construed as an expression of regret, that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men." (i)

Falsely publishing that the king is labouring under mental derangement is a libel; it tends to unsettle and agitate the public mind, and to lower the respect due to the king. (j)

5. *The two houses of parliament are an essential part of the constitution, and entitled to reverence and respect, on account of the important public duties which they have to discharge. But as they have the power of treating libels against them as breaches of their privileges, and vindicating him, or of bringing his personal government into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy.

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Of publications against the two houses of parliament.

(h) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character.

(i) *Rex v. Lambert, and Perry*, 2 Camp. 398.

(j) *Rex v. Harvey* * 2 B. & C. 257, and malice will be implied from such wilful defaming without excuse. See the case, *post*.

cating them in the nature of contempts, more cases of such libels are to be met with in their journals, than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of parliament; ^(k) and it seems rather to have been the inclination of parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of the *King v. Stockdale*, ^(l) the attorney-general in his speech to the jury, after stating the address of the House of Commons to the king, praying that his majesty would direct the information to be filed, proceeded thus, "I state it a measure which they have taken, thinking it in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purpose of vindicating themselves against insult and contempt, but which in the present instance they have wisely forborne to exercise, thinking it better to leave the offender to be dealt with by a fair and impartial jury." ^(m)

Of publi-
cations
against the
govern-
ment.

6. The extent to which the measure of the king, or the proceedings of his government, may be fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance: but it is not within the scope and design of this Treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

It may be observed, that the liberty of discussion, which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot:—the man who would condemn only with a view to genuine and constitutional reformation. Upon a late prosecution for a libel the attorney-general, in his opening to the jury, thus expressed himself: "The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty
*237 to prosecute any person for writing, printing, *and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what he may honestly conceive to be grievances, nor for proposing legal means of redress." ⁽ⁿ⁾ Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and

^(k) As in *Rex v. Rayner*, 2 Barnard, 293, where the defendant was convicted of printing a scandalous libel on the Lords and Commons; and in *Rex v. Owen*, 25 Geo. 2, MS. Dig. L. l. 67. In *Rex v. Stockdale*, 28 Geo. 8, an information was filed by the Attorney-General for a libel upon the House of Commons. A prosecution was also instituted in *Rex v. Reeves*, 36 Geo. 3, in consequence of a resolution of the House of Commons, declaring a pamphlet, published by the defendant to be a libel. In the pamphlet which was called "Thoughts on the English Government," there was this passage amongst others which the house deemed libellous—"That the King's government might go on if the Lords and Commons were lopped off." The jury considered the expressions as merely metaphorical, and acquitted the defendant.

^(l) *Ante*, note ^(k).

^(m) See 2 Ridgway's speeches of the Hon. T. Erskine, p. 208.

⁽ⁿ⁾ *Rex v. Perry* and another, 1873. See 2 Ridgway's speeches, 371.

if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; and if the paper go beyond that limit, and be calculated to excite tumult, it is a libel."^(o)

In many cases which may occur, the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination; as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has, however, been proposed as a test, by which the intrinsic illegality of such publications may be decided: (*p*) "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards the government?"

However innocent and allowable it may be to canvass public political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public capacity receive an aggravation as they tend to scandalize the government by reflecting on those who are entrusted with the administration of public affairs; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.^(q) If a paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel.^(r)

A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; and this was held to be a libel, though no magistrate in particular was mentioned, and though it was not averred that the magistrate suffered those vices knowingly.^(s)

In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent, and could not be considered as libellous, because it did not reflect upon particular persons. But Holt, C. J., said, "They say nothing is a libel but what reflects on some particular person. But this is a very strange doctrine to say that it is not a libel, reflecting on the government, endeavouring to *possess the people that the government is mal-administered by corrupt persons that are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished."^(t)

This doctrine was recognized in a more modern case, where the de-

(o) Reg. v. Collins, 9 C. & P. 456. Littledale, J.

(p) Starkie on Lib. 525, 1 ed.

(q) 1 Hawk. P. C. c. 73, s. 7, Bac. Abr. tit. *Libel* (A) 2. Rex v. Franklin, 9 St. Tri. 255.

(r) Reg. v. Lovett, 9 C. & P. 462. Littledale, J.

(s) Bac. Abr. tit. *Libel* (A) 2.

(t) Reg. v. Tuchin, 1704. Holt's R. 424. 5 St. Tri. 532.

*Eng. Com. Laws Repts. xxxviii. 183.

Cases.
Reg. v.
Tuchin.

*238

Rex v.
Cobbett.

fendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the lord lieutenant and lord chancellor of Ireland. Lord Ellenborough, C. J., in his address to the jury, observed, "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into dis-esteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another. The case of *Reg. v. Tuckin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and, although at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the court by an application for a new trial." And afterwards his lordship said, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." (u)

Of publica-
tions
against
magistrates
and the
administra-
tion of
justice.

7. As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice; contempts against the king's judges, and scandalous reflections upon their proceedings, have always been considered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. (v)

Generally, any contemptuous or contumacious words spoken to the judges of any courts in the execution of their offices are indictable; and when reflecting words are spoken of the judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of *scandalum magnatum*, whether the words relate to their office or not. (w)

Cases.

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Any publication reflecting upon, and calumniating, the administration of justice, is, without doubt, of a libellous nature; and where a libel was published in a newspaper, in the form of an advertisement, *reflecting on the proceeding of a court of justice, it was characterized as a reproach to the justice of the nation, a thing insufferable and a contempt of court (x) So an order made by a corporation and entered in their books stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas,) was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J., said, that the assertion that A. was actuated by motives of

Rex v.
Watson
and others.

(u) *Rex v. Cobbett*, 1804. Holt on Lib. 114, 115. 2 Starkie on Lib. 193, where see in the note other cases referred to.

(v) Holt on Lib. 153.

(w) 2 Starkie on Lib. 195, where see the cases collected. And see 1 Hawk. P. C. c. 7, et seq. The proceeding by writ of *scandalum magnatum* upon the statutes 3 Ed. 1, c. 34. 2 R. 2, st. 1, c. 5. 12 R. 2, c. 11, is of a civil, as well as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and nobles. But the civil proceeding is now almost obsolete, the nobility preferring to waive their privileges in any action of slander and to stand upon the same footing, with respect to civil remedies, as their fellow-subjects.

(x) Vin. Abr. tit. *Contempt* (A) 44. Pool v. Sacheverel, 1720.

public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J., said, "nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself." (y)

In a late case the same doctrine was acted upon: but it was at the same time clearly admitted that it would be lawful to discuss the merits of the verdicts of a jury, or the decisions of a judge, provided it be done with candour and decency. An information was filed against the defendants, the proprietors and printers of a Sunday newspaper, for a libel upon Le Blanc, J., and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J., said, that "it certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal: but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country." (z)

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the *time in the actual execution of their duty, or at least unless the words affect them directly in their office; though it may be good cause for binding the offender to his good behaviour. (a) This doctrine was recognized in a modern case, where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was a *scoundrel and a liar*. (b) Lord Ellenborough, C. J., said, "the words not being spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt in a case in *Salkeld*; (c) and in *Rex v. Pycok* in *Strange* (d) the Court of King's Bench refused to grant an information for saying of a justice in his absence, that he was a *for-sworn rogue*. However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say whether these words were

(y) *Rex v. Watson and others*, 2 T. R. 199.

(z) *Rex v. White and another*, 1808. 1 Camp. 359. The defendants were found guilty. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J. Holt on Lib. 170, 171.

(a) 2 Starkie on Lib. 195. 1 Hawk. P. C. c. 21, s. 13.

(b) *Rex v. Weltje*, 2 Camp. 142.

(c) *Rex v. Wrightson*, 2 Salk. 698.

(d) 2 Str. 1157. And see *Rex v. Penny*, 1 Lord Raym. 153.

spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported; and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in commission of the peace for the county of Middlesex."(e) But it has been holden to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, "you are a rogue and a liar."(f) The court will not, however, grant an information for calling a magistrate a liar, accusing him of misconduct in having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless they tend to a breach of the peace.(g)†

Of publica-
tions
against
private
individuals.

8. As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious or ludicrous light,(gg) whether expressed in printing or writing, or by signs or pictures; for these equally create ill-blood, and provoke the parties to acts of revenge and breaches of the peace.(h)

Words
spoken are
not indict-
able.

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But it should be observed, that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey *challenge to fight.(i) But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous.(j)‡

(e) *Rex v. Weltje*, 2 Campb. 143.

(f) *Rex v. Revel*, 1 Str. 420.

(g) *Ex parte Chapman*,^a 4 A. & E. 773.

(gg) *Cooke v. Ward*,^b 6 Bing. 409. 4 M. & P. 99.

(h) *Ante*, p. 220. Bac. Abr. tit. *Libel* (A) 2. So in the case of *Thornley v. Lord Kerry*, 4 Taunt. 364, Mansfield, C. J., delivering the opinion of the court, said, "there is no doubt this is a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies." And in *Rex v. Cobbett*, Holt on Lib. 114, 115, Lord Ellenborough, C. J., said, "No man has a right to render the person or abilities of another ridiculous; not only in publications, but if the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel."

(i) *Reg. v. Langley*, 6 Mod. 125. *Rex v. Bear*, 2 Salk. 417. By Holt, C. J. *Villars v. Mansley*, 2 Wils. 403, and see 2 Starkie on Lib. 208. In *Thornley v. Lord Kerry*, 4 Taunt. 355, (in the Exchequer chamber,) it was held, that an action may be maintained for words written for which an action could not be maintained if they were merely spoken. Mansfield, C. J., stated the arguments that would have prevailed in his mind to repudiate the distinction between written and spoken scandal, but that the distinction had been established by some of the greatest names known to the law, Lord Hardwicke, Hale, Holt, and others; and that Lord Hardwicke, C. J., has especially laid it down, that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it.

(j) Bac. Abr. tit. *Libel* (A) 2.

† [It is libellous to publish of one in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under consideration upon a game of draughts. *Commonwealth v. Wright*, 1 Cushing, 46.]

‡ [When a publication is malicious, and its obvious design and tendency is to bring the subject of it into contempt and ridicule, it will be a libel, although it imputes no crime liable to be punished with infamy. *State v. Henderson*, 1 Richardson, 179.]

^a Eng. Com. Law Repts. xxxi. 177.

^b *Ib.* xix. 117.

Upon these principles it has been held to be libellous to write of a ^{Cases.} man that he had the itch, and stunk of brimstone. (k) And an information was granted against the mayor of a town for sending to a nobleman a license to keep a public house. (l). An information also was granted for a publication reflecting upon a person who had been unsuccessful in a law suit; (m) and against the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (n) A defendant was convicted for publishing a libel in a review, tending to traduce, vilify and ridicule an officer of high rank in the navy, and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of a conceited, obstinate and incendiary disposition. (o) And an information was granted against a printer of a newspaper, for publishing a paragraph containing a libel on the Bishop of Derry, by representing him as a bankrupt. (p) But in an action on the case for publishing a libel by posting it on a paper in the Cassino room at Southwold, containing these words: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" the Court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life. (q)

A publication reflecting upon a man in respect of his trade may also be libellous; as where A., a gunsmith, published in an advertisement that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was a gunsmith to the Prince of *Wales; and B., another gunsmith, counter-advertised, "That whereas, &c. (reciting the former advertisement) he desired all gentlemen to be cautious, for that the said A. durst not engage with an artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B.'s house." The court held, that though B., or any other of the trade, might counter-advertise what was published by A., yet it should have been done without any general reflections on him in the way of his business: that the advice to "all gentlemen to be cautious," was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in

Publication reflecting upon a man in respect of his trade. *242

(k) *Villars v. Monsley*, 2 Wils. 403. The libel, the material part of which is stated in the text, was in rhyme, and very abusive.

(l) *The Mayor of Northampton's case*, 1 Str. 422.

(m) 2 Barnard, 84.

(n) *Rex v. Kinnersey*, 1 Bac. R. 254. It was sworn that the nobleman was a married man; and the court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(o) *Rex v. Dr. Smollet*, 1759. Holt on Lib. 224.

(p) *Rex v. —*, Hil. T. 1812. Though it is not the object of this work to treat of the practice and modes of proceeding in criminal prosecutions, it may be proper shortly to observe, that the Court of King's Bench always exercises a discretionary power in granting an information for a libel, and will, in many cases, leave the party to his ordinary remedy: as where the application is made after a great length of time, or where the matter complained of as a libel happens to be true. See Bac. Abr. tit. *Libel*, 2, and 1 Starkie on Lib. cxlvii.

(q) *Robinson v. Jermyn and others*, 1 Price R. 11.

general terms; and that the expression "except out of a leather gun" was charging him with a lie, the word *gun* being vulgarly used for *lie*, and *gunner* for a *liar*, and that therefore these words were libellous. (r)

So words spoken of a person in respect of his office or profession are slanderous, if they impute incapacity or misconduct, or want of some qualification necessary to carry on the office or profession of such person, but not otherwise. (s)

General imputations upon a body of men are indictable.

General imputations upon a body of men are indictable, though no individuals may be pointed out (t) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad street, because the child was begotten by a Christian. (u) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were. (v) But the court said, that admitting an information for a libel might be improper, yet the publication of this paper was deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. (w) And if some of the individuals affected by the libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified. (x)

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Where a publication stated, that upon the death of her late majesty, none of the bells of the several churches at Durham were tolled; and ascribed this omission to the clergy, and then proceeded *to make some very severe observations on that body, a criminal information was granted. (y)

Libel upon a person deceased.

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous: but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the king's sub-

(r) *Harman v. Delaney*, Barnard, K. B. 289. Fitzgib. 121. 2 Str. 898. S. C.

(s) *Lumby v. Allday*, 1 Tyrw. 217. 1 C. & J. 301. *Ayre v. Craven*,^a 2 Ad. & E. 2. *Doyley v. Roberts*,^b 3 B. N. C. 835. *Brayne v. Cooper*, 5 M. & W. 249.

(t) *Ante*, p. 222.

(u) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal and lived in Broad street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(v) *Rex v. Orme*, 3 Salk. 224. 1 Lord Raym. 486, was cited.

(w) *Rex v. Osborne*, Sess. Cas. 260. 2 Barnard, 138, 166. Kel. 230, pl. 183.

(x) *Rex v. Griffin and others*, Holt on Lib. 239.

(y) *Rex v. Williams*,^c 5 B. & A. 597; and this upon an affidavit merely stating the purchase of the paper, and that the defendant was the proprietor or publisher of it, without any affidavit of the charge being untrue.

^a Eng. Com. Law Reps. xxix. 11.

^b *Ib.* xxxii. 346.

^c *Ib.* vii. 200.

jects against his relations, and to induce them to break the peace in vindicating the honour of the family.(z)

But there are some exceptions to the general rules and doctrine concerning libels, in the case of comments upon literary productions, and also in case of communications considered as confidential, or made *bonâ fide* with a view of investigating a fact, or in the regular and proper course of a proceeding. Exceptions to the general rules.

A publication commenting upon a literary work, exposing its follies and errors, and holding up the authors to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and every one has a right to publish a comment of this description.(a) But if a person under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller.(b) A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel.(c) Comments upon literary productions.

Confidential communications are in some cases privileged: as where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was not a libel.(d) And if a person in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father in relation to some faults of his children; these, it seems, will not be considered as libellous, but as acts of friendship, not designed for defamation but reformation.(e) Confidential communications.

But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace; (f) and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely that it enforces the party to

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(z) *Rex v. Topham*, 4 T. R. 126.

(a) *Carr v. Hood*, 1 Campb. 355. And in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publication. *Tabart v. Tipper*, 1 Campb. 350.

(b) *Nightingale v. Stoekdale*, 49 Geo. 3, *cor. Ellenborough, C. J.*, Selw. N. P. 1044. And it was held, that though it is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable *falsely* to impute to him the publication of any immoral or absurd literary production. *Tabart v. Tipper*, 1 Campb. 354. And see in *Herriott v. Stuart*, 1 Esp. 437, and *Stuart v. Lovell*,* 2 Stark. R. 93, that the editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper.

(c) *Dibdin v. Swan*, 1 Esp. N. P. C. 28; and see also *Ashley v. Harrison*, 1 Esp. N. P. C. 48. *Peake, N. P. C. 194.*

(d) *M'Dougall v. Claridge*, 1 Campb. 276. *Wright v. Woodgate*, 1 T. & G. 12.

(e) *Peacock v. Sir George Reynell*, 2 Brownl. 151, 152. Bac. Abr. tit. *Libel* (A) 2, in the notes.

(f) Bac. Abr. tit. *Libel* (B) 2. *Rex v. Cator*, 2 East, R. 361. *Thornley v. Lord Kerry*, 4 Taunt. 355. In the last case the letter was unsealed, and opened and read by the bearer.

whom the letter is directed to publish it to his friends, and thus induces a compulsory publication. (g) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious; (h) yet in such a case malice may be inferred from the circumstances. (i)

Where a writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interests of another, that which he writes under such circumstances is a privileged communication, if he write it *bonâ fide*. If, therefore, a tenant be desired by his landlord to make communications to him in respect to any neglect of duty in his gamekeepers, any communication made by him in respect of any such neglect of duty is privileged, if written *bonâ fide*, and on the supposition that he was doing his duty to his landlord. (j)

Communi-
cations
made *bona*
fide, or
with a view
of investi-
gating a
fact.

If a man *bonâ fide* writes a letter in his own defence, and for the defence of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another. (k)†

Although that which is written may be injurious to the character of another, yet if done *bonâ fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A., it was holden that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (l)

Or made in
the proper
course of a
proceeding.

A communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, is a privileged communication. (m) And if the communication be made in the regular and proper course of proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at Whitehall with fire and candle, had been *improperly obtained by a captain C. was directed to a general officer, and the four principal officers of the guards, to be presented to his majesty for redress, an information was refused, on the ground that the writing was no libel, but a representa-

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(g) Poph. 189, cited in Holt on Lib. 222.

(h) *Weatherstone v. Hawkins*, 1 T. R. 110. *Edmonson v. Stephenson*, Bull. N. P. 8. *Child v. Affleck*,^a 9 B. & C. 403. 4 M. & R. 338.

(i) *Rogers v. Sir G. Clifton*, 3 Bos. & Pul. 587. *Pattison v. Jones*,^b 8 B. & C. 578. 3 M. & R. 101. *Kelly v. Partington*,^c 4 B. & Ad. 700. 2 Nev. & M. 460.

(j) *Cockayne v. Hodgkinson*, 5 C. & P. 543, Parke, B.

(k) *Coward v. Wellington*,^d 7 C. & P. 531. Littledale, J.

(l) *Delaney v. Jones*, 4 Esp. 191. *Lay v. Lawson*,^e 4 A. & E. 795.

(m) *Toogood v. Spyring*, 4 Tyrw. 582. 1 C. M. & R. 181. See *Spencer v. Amerton*, 1 M. & Rob. 470. *Warren v. Warren*, 4 Tyrw. 850. 1 C. M. & R. 150. *Wright v. Woodgate*, 2 C. M. & R. 573. 1 T. & G. 12.

† [An indictment for a libel charged the defendant with publishing of the plaintiff that he "was the most swindling and worthless speculator who ever brought ruin upon the city of St. Louis." On the issue of not guilty, the jury found a special verdict of "guilty of charging the plaintiff of being a visionary, worthless speculator," held, that the verdict found matter not charged in the indictment, and was also bad in not finding malice. *Webber v. State*, 10 Miss. 4.]

^a Eng. Com. Law Reps. xvii. 405.

^b Ib. xv. 303.

^c Ib. xxiv. 144.

^d Ib. xxxii. 616.

^e Ib. xxxi. 182.

tion of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every bill in chancery, which is never held libellous if relative to the subject-matter. (n) So a petition addressed by a creditor of an officer in the army to the secretary of war, *bonâ fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable. (o) A letter written to the postmaster-general, or to the secretary to the general post-office, complaining of misconduct in a postmaster, or guard of a mail, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered. (p) And where the defendant, being a deputy-governor of Greenwich Hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating the characters of many of the hospital, (who were *public* officers,) and Lord Sandwich in particular, who was first lord of the Admiralty, with much asperity, and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel. (q) And where the publication is an admonition, or in the course of the discipline of a religious sect, as a sentence of expulsion from a society of Quakers, it is not libellous. (r) So a letter written by a son-in-law to his mother-in-law, containing imputations on the character of a person whom she was about to marry, and desiring a diligent and attentive inquiry into his character, if written *bonâ fide*, is a privileged communication. (s) And it has been decided, that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G., being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the discourse; the words being delivered only as a matter of history, and not with any intention to slander, it was adjudged for the defendant. (t)

*The proper meaning of a privileged communication is this: that the occasion on which the communication was made, rebuts the inference, *primâ facie*, arising from a statement prejudicial to the character of the

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Proper meaning of a privileged

(n) *Rex v. Bayley*, Andr. 229, Bac. Abr. tit. *Libel* (A) 2. As to the privilege of proceedings in courts of justice, see *ante*, p. 225.

(o) *Fairman v. Ives*,^a 5 B. & A. 642; and if an action be brought for such publication, the writer may, even upon the general issue, give evidence to show that he believed the fact stated in the petition to be true.

(p) *Woodward v. Lander*,^b 6 C. & P. 548, Alderson, B. *Blake v. Pilford*, 1 M. & Rob. 198, Taunton, J.

(q) *Rex v. Bailie*, 30 Geo. 3. Holt on Lib. 173. I Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield seems to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(r) *Rex v. Hart*, 2 Burn's Ecc. L. 779.

(s) *Todd v. Hawkins*,^c 8 C. & P. 88, Alderson, B.

(t) Bac. Abr. tit. *Libel* (A) 2.

^a Eng. Com. Law Repts. vii. 220.

^b Ib. xxv. 537.

^c Ib. xxxiv. 304.

communi-
cation.

plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. This may be made out, either from the language of the letter itself, or by extrinsic evidence, or by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill-will.^(u) But where the publication is *primâ facie* privileged, juries ought not to look too strictly at the particular expressions used, but ought clearly to see that the letter was written with a malicious intent before they find it to be a libel.^(v)

Of publica-
tions
against
foreigners
of distinc-
tion.

9. 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 the command of the crown, for a libel on a French 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 deprecate the defendant at the court of Versailles.^(w) And Lord George Gordon was found guilty 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 the 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.^(x) So a defendant was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by this inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight."^(y)

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And in a case which occurred shortly afterwards, where the defendant was charged by an information with a libel upon Napoleon Bonaparte, 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 *a libel: and particularly when it has a tendency to interrupt the pacific relations between the two countries."^(z)

Of indict-
ment and
evidence.

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the indictment and evidence on a prosecution for this offence.

^(u) Wright v. Woodgate, 2 C. M. & R. 573. 1 T. & Gr. 12. See Blake v. Pilford, 1 M. & Rob. 198. Taunton, J.

^(v) Woodward v. Lander,^a 6 C. & P. 548, Alderson, B. Todd v. Hawkins,^b 8 C. & P. 88.

^(w) Rex v. D'Eon, 1 Blac. Rep. 510. The defendant was convicted.

^(x) Rex v. Lord George Gordon, 1787.

^(y) Rex v. Vint, 1801.

^(z) Rex v. Peltier, 43 Geo. 3. Holt on Lib. 78, *et seq.* 2 Starkie on Lib. 218. The defendant was convicted, but never was called upon to receive the judgment of the court. Shortly after the trial, war broke out between Great Britain and France.

^a Eng. Com. Law Reps. xxxv. 537.

^b Ib. xxxiv. 304.

An indictment for a libel must import to whom the libellous matter referred: and stating that the libel was published to defame and vilify J. S., and to bring him into disgrace, and concluding that it was against the peace, and to the great scandal and disgrace of J. S., is not sufficient to show that the libellous matter referred to J. S. An indictment stated that the defendant intended to vilify W. S., Mayor of Colechester, and a justice: and in order to cause it to be believed that W. S., as such mayor, had been guilty of great abuse in granting an ale-license to J. L., and in order to bring him into great disgrace, published a certain scandalous libel, in which said libel was contained, &c., and the libel stated a speech supposed to have been made before the borough magistrates by a fictitious character, called Excise, who was supposed to lay before them a case of gross corruption, sanctioned by the mayor, (*innuendo* the said W. S.) to the great scandal, injury, and disgrace of the said W. S. The usual allegation, that the libellous matter was of and concerning W. S., was omitted; and, on account of this omission, a rule was obtained for arresting the judgment; and, upon cause shown, the court held the objection fatal. (a)†

Where a libel is charged to be of and concerning the government of the kingdom, though it do not in express terms impute to the government any of the facts which it mentions, the court is to judge from its whole tenor and import (understanding it as other men would understand it) whether it does not mean to cast that imputation. And as an imputation upon some part of a body of men may be a libel, though it does not define what part it means, an allegation that the defendant published of and concerning the said persons, and an *innuendo* that he meant the said persons, will be understood to apply to that undefined part. An information stated, that the defendant, intending to excite hatred against the government of the realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the king, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged, that unarmed and unresisting men had been inhu-

(a) *Rex v. Marsden*, 4 M. & S. 164. Lord Ellenborough said, that if by inevitable construction no other person could have been intended but W. S., he should have been inclined to support the indictment; but that did not appear. *Clement v. Fisher*,* 7 B. & C. 459, 1 M. & R. 281, S. P. {2 Taylor's (N. C.) Rep. 270. *State v. Neese*.}

† [If an indictment for libel does not profess on its face to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient in demurrer or in arrest of judgment. It is not sufficient to profess to set it forth according to its substance or effect.

When the indictment charged that the libel "contained among other things, in substance, the following false, malicious and libellous matters and things, according to the tenor and effect following, that is to say," &c., it was held that this averment professed to set forth the substance and not the words of the libel, and was therefore invalid.

Each specification of libellous matters must allege the words published to have been of and concerning the prosecutor.

Prosecutions for libels have always been regarded with jealousy, and the greatest strictness has been required in the pleadings. *State v. Brownlow*, 7 Humph. 63. *The Commonwealth v. Wright*, 1 Cush. 46.

Marks of quotations, used in an indictment for a libel to distinguish the libellous matter are not sufficient to indicate that the words thus designated are the very words of the alleged libel.

The words "according to the purport and effect and in substance," in an indictment for a libel, do not import that the very words are set out. The word "tenor" imports an exact copy, and that it is set out in words and figures. *The Commonwealth v. Wright*, 1 Cush. 46.

* Eng. Com. Law Repts. xiv. 82.

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manly cut down by the dragoons, (meaning the said troops,) and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c. ; but it did not, in terms, say that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear *that the libel was written of and concerning the government, nor of or concerning what troops it was written ; but the court held, that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government ; that it was a libel to impute crime to any of the king's troops, though it did not define what troops in particular were referred to ; and that the *innuendo* of "the said troops" meant the undefined part of those troops. (b)

Where written or printed matter in itself imports a libel on a person, no statement of extrinsic circumstances by way of inducement is necessary ; and if, in such a case, there be innuendoes improperly enlarging the sense, they may be rejected as surplusage after verdict, (c) for on motion in arrest of judgment, or on error, an innuendo which is not warranted by the words themselves, or properly connected with them by prefatory matter, may be rejected. (d) But if an innuendo ascribes to certain words a particular meaning, which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated on the trial, so as to let in proof that the words have another meaning (e) If words be laid to be uttered with intent to convey a particular meaning to persons present, it must be proved that the party uttering them had that meaning, and that they were so understood by the hearers, (f) and the whole of an innuendo must be proved, unless it is bad on the face of it. (g)

Of the making and publication of a libel.

If one man repeats a libel, another writes it, and a third approves what is written, they will all be makers of the libel ; and it may be laid down generally that all who are concerned in composing, writing, and publishing a libel, are guilty of a misdemeanor, unless the part they had in the transaction was a lawful or an innocent act ; (h) and ignorance has been held not to excuse. Thus upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as servant to the printer, and clapped down the press : and few or no circumstances were offered of his knowing the import of the paper, or being conscious that he was doing any thing illegal : and Raymond, C. J., held that this made the defendant guilty, and so the jury found him. (i) But there must be a publication ; and the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible ; nor will he be held to have published the paper, if he

(b) *Rex v. Burdett*, 4 B. & A. 314.

(c) *Harvey v. French*, 2 Tyrw. 585, 1 C. & M. 11.

(d) *Williams v. Stott*, 2 Tyrw. 688, 1 C. & M. 675. Per Bayley, B.

(e) *Williams v. Stott*, *supra*.

(f) Per Bayley, B., *ibid.*, citing *Woolnoth v. Meadows*, 5 East, 470. See as to the office and nature of an innuendo, 1 Stark. on Libel, 418, *et seq.* *Clegg v. Laffer*, 10 Bing. 250, 3 M. & S. 727. *Day v. Robinson*, 1 Ad. & E. 554, 4 N. & M. 884. *West v. Smith*, 1 T. & G. 825. *Kelly v. Partington*, 5 B. & Ad. 645.

(g) Per Bayley, B., *Williams v. Stott*, *supra*.

(h) Bac. Abr. tit. *Libel* (B) 1.

(i) *Rex v. Clerk*, 1 Barnard, 304. *Sed qu.* and *vide Day v. Bream*, *post*, p. 262.

* Eng. Com. Law Repts. vi. 431.

^b Ib. xxv. 120.

^c Ib. xxviii. 151.

^d Ib. xxx. 422.

^e Ib. xxvii. 144.

deliver it, by mistake, out of his study.(j) But this position admits of great doubt, and two very great judges seem to have been of opinion, that one who composes or writes a libel with intent to defame another, is guilty of a misdemeanor, although the libel be not published.(k) A count charging a defendant with having an obscene libel in *his possession, with intent to publish it, seems to be bad.(l) And it will not be a publication of a libel if a party take a copy of it, provided he never publishes it:(m) but a person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by showing another to be the author, or prove the act to be innocent in himself.(n) For by Holt, C. J., if a libel appears under a man's handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man.(o) Where the manuscript of a libel was in the handwriting of the defendant, and a printer had printed 500 copies from it, 300 of which had been posted about Birmingham, but there was no evidence to connect the defendant with the printing or the posting, except the handwriting, it was held that there was evidence to go to the jury that it was published by the defendant.(p)

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The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable: though this has been doubted.(q) But it seems to have been agreed that if he who hath

(j) *Rex v. Paine*, 5 Mod. 165, 167.

(k) Lord Tenterden, C. J., and Holroyd, J., in *Rex v. Burdett*,^a 4 B. & A. 95. Lord Tenterden said, "The composition of a treasonable paper intended for publication, has, on more than one occasion, been held an overt act of high treason, although the actual publication has been intercepted or prevented, and I have heard nothing on the present occasion to convince my mind, that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published." Holroyd, J., said, "Where a misdemeanor has been committed by writing and publishing a libel, the writing of such a libel so published is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing it." And again, "The composing and writing, with intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion of itself a misdemeanor, in whatever county the publishing of it took place. Upon the principle that an act done, and a criminal intention joined to that act, are sufficient to constitute a crime (*ante*, p. 48), it should seem that writing a libel with intent to defame is a crime." C. S. G.

(l) *Rex v. Rosenstein*,^b 2 C. & P. 414, Park, J. J. A. This count seems clearly bad, on the ground that no act was charged; it is precisely similar to *Rex v. Stewart*, *ante*, p. 48. C. S. G.

(m) Com. Dig. tit. *Libel* (B) 2. Lamb's case, 9 Co. 596. But see *Rex v. Beare*, 2 Salk. 417. 1 Lord Raym. 414.

(n) Bac. Abr. tit. *Libel* (B) 1. Lamb's case, 9 Co. 59. The writing a libel may be an innocent act in the clerk who draws the indictment, or in the student who takes notes of it. But in a late case (*Mahoney v. Bartley*, 3 Campb. 210), Wood, B., held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(o) *Rex v. Beare*, 1 Lord Raym. 417. 2 Salk. 417.

(p) *Reg. v. Lovett*,^c 9 C. & P. 462, Littledale, J.

(q) Bac. Abr. tit. *Libel* (B) 2. This is doubted in 1 Hawk. P. C. c. 73, s. 14, on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

^a Eng. Com. Law Reps. vi. 431.

^b *Ib.* xii. 196.

^c *Ib.* xxxviii. 183.

either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. (r) In a late case, however, of an action for libel contained in a caricature print, where the witness stated, that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, *Lord Ellenborough, C. J., ruled, that this was not sufficient evidence of publication to support the action. (s)

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Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information. (t) † And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication. (u) The production of a letter containing a libel, with the seal broken, and the post-mark on it, is *primâ facie* evidence of publication. (x)

Acknowledgment of defendant.

In an information for a libel against the doctrine of the Trinity, the witness of the crown, who produced the libel, swore that it was shown to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted*. The counsel for the defendant objected that this evidence would not entitle the attorney-general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J., allowed it to be read, saying he would put it upon the defendant to show that there were material variances. (y)

Procuring another to publish is a publication.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest

(r) Bac. Abr. tit. *Libel* (B) 2.

(s) *Smith v. Wood*, 3 Campb. 323. And see *Rex v. Paine*, 5 Mod. 165, where a *qu.* is made in the margin, whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of *publishing* it.

(t) 1 Hawk. P. C. c. 73, s. 11. Bac. Abr. tit. *Libel* (B) 2. *Ante*, p. 244, n. (f), Selw. N. P. 1050, n. (9) And see *ante*, 244. A further publication is necessary to support an action. Thus it has been held, that where the action was brought for a libel contained in a letter, transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication except to the plaintiff himself, and that, if there has not, the defendant is entitled to their verdict. *Clutterbuck v. Chaffers*,^a 1 Stark. R. 471. But in another case of an action for a libel contained in a letter written by the defendant to the plaintiff, it was held that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was evidence to go to the jury, of the defendant's intention that the letter should be read by a third person. *Delacroix v. Thevenot*,^b 2 Stark. R. 63.

(u) *Rex v. Burdett*,^c 4 B. & A. 95, *post*, 258.

(z) *Warren v. Warren*, 4 Tyrw. 850. 1 C., M. & R. 360. *Shipley v. Todhunter*,^d 7 C. & P. 680.

(y) *Rex v. Hall*, 1 Str. 416.

† [*The State v. Avery*, 7 Conn. 266. *Swindle v. The State*, 2 Yerger, 581. Depositing a libel (which was in the form of an anonymous letter) in the post office, where it was mailed and despatched, together with the fact of its production by the plaintiff, on the trial, is sufficient evidence of its publication, without the oath of the person to whom it was addressed, who, living out of the State, was out of the jurisdiction of the court. *Callan v. Gaylord*, 3 Watts, 321.]

^a Eng. Com. Law Reps. ii. 471.

^b *Ib.* iii. 245.

^c *Ib.* vi. 431.

^d *Ib.* xxxii. 685.

security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (z) Where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations, not affecting the sense; it was held that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read without producing the written account delivered by the reporter to the editor. (a)

Upon this foundation it has for a long time been held that the buying of a book or paper containing libellous matter, in a *bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it will not be presumed that it was bought and sold there by a stranger; but the master must, if he suggests any thing of this kind in his excuse, prove it. (b) So the proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it can be shown that such publication was without the privity of the proprietor; (c) for a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although it cannot be shown that he was individually concerned in the particular publication; (d) and these are acts done in the course of the trade or business carried on by the master. But there may be cases in which the presumption arising from the proprietorship of a paper may be rebutted (e) In a case of an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff who

Publication
by book-
sellers and
proprietors
of news-
papers.
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(z) Bac. Abr. tit. *Libel* (B) 2. 1 Hawk. P. C. c. 73, s. 10.

(a) Adams v. Kelly, * R. & M. N. P. C. 157.

(b) Bac. Abr. tit. *Libel* (B) 2. Rex v. Nutt, Fitzgib. 47. 1 Barnard, K. B. 306. 2 Sess. Cas. 33, pl. 38. And see also Rex v. Almon, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. "Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print any thing that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous"

(c) Rex v. Walter, 3 Esp. N. P. C. 21. And in Rex v. Dod, 2 Sess. Cass. 33, pl. 38, Lord Raymond, C. J., said, it had been ruled that where a master lived out of town, and his trade was carried on by his servant, the master would be chargeable if his servant should publish a libel in his absence. In 1 Hawk. P. C. c. 73, s. 10, (edit. 7.) is the following marginal note: "But if a printer is confined in a prison to which his servants have no access, and if they publish a libel without his privity, the publication of it shall not be imputed to him. Woodfall's case, Essay on Libels, p. 18. Sed vide Salmon's case, B. R. Hil. 1777, and Rex v. Almon, 5 Burr, 2687."

(d) Rex v. Gutch, ^b Moo. & M. 433, Lord Tenterden, C. J.

(e) Rex v. Gutch, Moo. & M. 438, Lord Tenterden, C. J., and see Rex v. Almon, 5 Burr, 2686.

* Eng. Com. Law. Repts. xxi. 403.

^b Ib. xxii. 352.

had inspected and reduced the bill for the customer; it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant. (f)

6 & 7 W. 4, c. 76, facilitates proceedings against printers, &c., of newspapers. No person to print or publish a newspaper until a declaration be made and delivered at the stamp-office. *252

The proceedings against the printers, publishers, and proprietors of newspapers for any libel contained in such papers were much facilitated by the 38 Geo. 3, c. 78, which is repealed by the 6 & 7 Wm. 4, c. 76; the 6th section of which enacts, "That no person shall print or publish, or shall cause to be printed or published, any newspaper (y) before there shall be delivered to the commissioners *of stamps and taxes, or to the proper authorized officer at the head office for stamps in Westminster, Edinburgh, or Dublin respectively, or to the distributor of stamps or other proper officer appointed by the said commissioners for the purpose in or for the district within which such newspaper shall be intended to be printed and published, a declaration in writing containing the several matters and things hereinafter for that purpose specified; that is to say, every such declaration shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer, or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom, who shall be a proprietor of the

(f) *Harding v. Greening*,^a 8 Taunt. 42. And it was also held in this case that the daughter could not be compelled to prove by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

(g) By sec. 4, and schedule A, the word newspaper includes any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom to be dispersed and made public.

Also any paper printed in any part of the United Kingdom, weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

And also any paper containing any public news, intelligence, occurrences, or any remarks or observation thereon, printed in any part of the United Kingdom for sale, and published periodically or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers, where any of the said papers, parts, or numbers respectively shall not exceed two sheets of the dimensions hereinafter specified (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed), or shall be published for sale for a less sum than sixpence, exclusive of the duty by this act imposed thereon: provided always, that no quantity of paper less than a quantity equal to twenty-one inches in length and seventeen inches in breadth, in whatever way or form the same may be made or may be divided into leaves, or in whatever way the same may be printed, shall, with reference to any such paper, part, or number as aforesaid, be deemed or taken to be a sheet of paper:

And provided also, that any of the several papers hereinbefore described shall be liable to the duties by this act imposed thereon, in whatever way or form the same may be printed or folded, or divided into leaves, or stitched, and whether the same shall be folded, divided, or stitched, or not.

Exemptions.

Any paper called "Police Gazette, or Hue and Cry," published in Great Britain by authority of the Secretary of State, or in Ireland by the authority of the Lord Lieutenant.

Daily accounts of bills of goods imported and exported, or warrants and certificates for the delivery of goods, and the weekly bills of mortality, and also papers containing any lists of prices current, or of the state of the markets, or any account of the arrival, sailing, or other circumstances relating to the merchant ships or vessels, or any other matter wholly of a commercial nature: provided such bills, lists or accounts do not contain any other matter than what has been usually comprised therein.

^a Eng. Com. Law Repts. iv. 13.

same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two, then of such two persons, being such proprietors resident in the United Kingdom, the amount of whose respective proportional shares in the property or in the profit or loss of such newspaper shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher, and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration: and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and by such of the said persons named therein as proprietors as shall be resident within the United Kingdom; *and a declaration of the like import shall be made, signed, and delivered in like manner whenever and so often as any share, interest, or property soever in any newspaper named in any such declaration shall be assigned, transferred, divided, or changed by act of the parties or by operation of law, so that the respective proportional shares or interests of the persons named in any such declaration as proprietors of such newspaper, or either of them, shall respectively become less than the proportional share or interest of any other proprietor thereof, exclusive of the printer and publisher, and also whenever and so often as any printer, publisher, or proprietor named in any such declaration, or the person conducting the actual printing of the newspaper named in any such declaration shall be changed, or shall change his place of abode, and also whenever and so often as the title of any such newspaper or the printing office or the place of publication thereof shall be changed, and also whenever in any case, or on any occasion for any purpose, the said commissioners, or any officer of stamp duties authorized in that behalf, shall require such declaration to be made, signed, and delivered, and shall cause notice in writing for that purpose to be served upon any person, or to be left or posted at any place mentioned in the last preceding declaration delivered as aforesaid, as being a printer, publisher, or proprietor of such newspaper, or as being the place of printing or publishing any such newspaper respectively; and every such declaration shall be made before any one or more of the said commissioners, or before any officer of stamp duties or other person appointed by the said commissioners, either generally or specially in that behalf; and such commissioners or any one of them, and such officer or other person, are and is hereby severally and respectively authorized to take and receive such declaration as aforesaid.” (h)

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Fresh declarations to be made in certain cases.

Before whom declarations are to be made.

Declarations to be filed, and certified, copies to be admitted in evidence against the persons making the same.

By sec. 8, “all such declarations as aforesaid shall be filed and kept in such manner as the commissioner of stamps and taxes shall direct for the safe custody thereof; and copies thereof, certified to be true copies as by this act as directed, shall respectively be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance

(h) The same section makes persons knowingly and wilfully making false or defective declarations, guilty of a misdemeanor; and sec. 7 imposes a penalty of 50l. on any person knowingly and wilfully publishing a newspaper where a declaration has not been made.

respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the publication question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher or proprietor of such newspaper, and did duly deliver the same to the said commissioners or to such officer as aforesaid, or unless it shall be proved that previous to such occasion as aforesaid, a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid respecting the same newspaper, in which *the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorized officer by whom any such declaration shall be kept according to the directions of this act, shall, upon application in writing made to them or him respectively by any person requiring a copy certified according to this act of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy or cause the same to be delivered to the person applying for the same upon payment of the sum of one shilling, and no more; and in all proceedings upon all occasions whatsoever a copy of any such declaration certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any and every person named in such declaration as a person making or signing the same as sufficient proof of such declaration, and that the same was duly signed and made according to this act, and of the contents thereof; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration of which the copy so produced and certified shall purport to be a copy had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against any person having signed and made such declaration, and a newspaper shall afterwards be produced in evidence intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher and the place of printing, shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration,^(h) or shall purport to be the same, whether such title, name, and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, informant, or prosecutor in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the

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Commissioners, &c. to deliver certified copies of declarations, and the same to be received in evidence.

After production of the declaration, and a newspaper intituled as therein mentioned, it shall not be necessary to prove the purchase of the paper.

(h) The following provision is new.

same may be usually sold; and if any person, not being one of the said commissioners or the proper authorized officer, shall give any certificate purporting to be such certificate as aforesaid, or shall presume to certify any of the matters or things by this act directed to be certified by such commissioner or officer, or which such commissioner or officer is hereby empowered or intrusted to certify; or if any such commissioner and officer shall knowingly and wilfully falsely certify under his hand that any such declaration as is required to be made by this act was *duly signed and made before him, the same not having been so signed and made, or shall knowingly and wilfully falsely certify that any copy of any declaration is a true copy of the declaration of which the same is certified to be such copy, the same not being such true copy, every person so offending shall forfeit the sum of one hundred pounds."

Penalty on unauthorized persons giving certificates, and on commissioners or officers giving false certificates, 100l. *255

By sec. 9, in all proceedings civil or criminal, service of process at the place of printing or publishing mentioned in the declaration is sufficient.

By sec. 10, the titles of newspapers, and the names of the printers and publishers are to be entered in a book at the stamp-office, and all persons are to have liberty to inspect it.

By sec. 13, "the printer or publisher of every newspaper printed or published in the cities of London, Edinburgh, or Dublin, or within twenty miles of any of the said cities respectively, shall upon every day on which such newspaper shall be published or on the day next following which shall not be a holiday, between the hours of ten and three on each day, deliver or cause to be delivered to the commissioner of stamps and taxes, or to the proper authorized officer, at the head office for stamps in one of the said cities respectively in or nearest to which such newspaper shall be printed or published, one copy of every such newspaper and of every second or other varied edition or impression thereof so printed or published, with the name and place of abode of the printer or publisher thereof, signed and written thereon after the same shall be printed, by his proper hand and in his accustomed manner of signing, or by some person appointed and authorized by him for that purpose, and of whose appointment or authority notice in writing, signed by such printer or publisher in the presence of and attested by an officer of stamp duties, shall be given to the said commissioners, or to the officer to whom such copies are to be delivered: and the printer or publisher of every newspaper printed or published in any other place in the United Kingdom shall, upon every day on which such newspaper shall be published, or within three days next following, in like manner between the hours of ten and three, deliver or cause to be delivered to the distributor of stamps or other authorized officer in whose district such newspaper shall be printed or published, two copies of every such newspaper, and of every second or other varied edition or impression thereof so printed or published, with the name and place of abode of the printer or publisher thereof signed and written thereon in manner aforesaid after the same shall be printed, and the same copies shall be carefully kept by the said commissioners, or by such distributor or officer as aforesaid, in such manner as the said commissioner shall direct; and such printer or publisher shall be entitled to demand and receive from the commissioners, or such distributor or officer, once in every week, the amount of the ordinary price of the newspapers so delivered; and every printer and publisher of such newspaper who shall neglect to deliver or cause to be

Copies of newspapers shall be delivered to the commissioners of stamps and taxes on penalty of 20l., and may be produced in evidence.

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delivered in manner hereinbefore directed such copy or copies signed as aforesaid, shall for every such neglect respectively forfeit the sum of twenty pounds; and in case any person shall make application in writing to the said commissioner, or to such distributor or officer as aforesaid, in order that any newspaper so signed as aforesaid may be produced in evidence in any proceeding, civil or criminal, the said *commissioners, or distributor or officer, shall, at the expense of the party applying, at any time within two years from the publication thereof, either cause such newspaper to be produced in the court in which and at the time when the same is required to be produced, or shall deliver the same to the party applying for the same, taking according to their discretion reasonable security, at the expense of such party, for returning the same to the said commissioners, or such distributor or officer, within a certain period to be fixed by them respectively; and in case by reason that such newspaper shall have been previously applied for in manner aforesaid by any other person, the same cannot be produced or cannot be delivered according to any subsequent application, in such case the said commissioner, or such distributor or officer as aforesaid, shall cause the same to be produced or shall deliver the same as soon as they are enabled so to do; and all copies so delivered as aforesaid shall be evidence against every printer, publisher, and proprietor of every such newspaper respectively in all proceedings, civil or criminal, to be commenced and carried on, as well touching such newspaper as any matter or thing therein contained, and touching any other newspaper and any matter or thing therein contained which shall be of the same title, purport, or effect with such copy so delivered as aforesaid, although such copy may vary in some instances or particulars either as to title, purport, or effect; and every printer, publisher, and proprietor of any copy so delivered as aforesaid shall to all intents and purposes be deemed to be the printer, publisher, and proprietor respectively of all newspapers which shall be of the same title, purport, or effect with such copies or impressions so delivered as aforesaid, notwithstanding such variance as aforesaid, unless such printer, publisher, or proprietor respectively shall prove that such newspapers were not printed or published by him, nor by nor with his knowledge or privity: provided always, that if any printer or publisher of any newspaper which shall not be printed and published in the cities of London, Edinburgh, or Dublin, or within twenty miles of the said cities respectively, shall find it more convenient to cause such copies of such newspapers to be delivered to any other distributor of stamps than the distributor in whose district such newspaper shall be published, and such printer or publisher shall state such matter by petition to the commissioners of stamps and taxes, and pray that he may have liberty to cause such copies to be delivered to such other distributor as he shall so name at the office of such distributor, it shall be lawful for the said commissioners to order the same accordingly, and from and after the date of such order the place of publication of such newspaper shall for that purpose only be deemed and taken to be within the district of such other distributor until the same shall be otherwise ordered by the said commissioners.”(i)

Commissioners may allow the printer to lodge his paper with any distributor.

(i) By sec. 14, at the end of every newspaper, and of any and every supplement sheet or piece of paper, shall be printed the Christian name and surname, addition, and place of abode, of the printer and publisher of the same, and also a true description of the house or building wherein the same is actually printed and published respectively, and the day of the week, month and year on which the same is published; and if any person shall know-

*Before the 38 Geo. 3, c. 78, it was holden upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp-office pursuant to the 29 Geo. 3, c. 50, s. 10, for securing the duties on the advertisements, and that he had from time to time applied to the stamp-office respecting the duties on the paper, was evidence to be left to the jury, to show that the defendant was the publisher.^(h) And since the statute it has been held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there.⁽ⁱ⁾ This was held in a case where it had been previously ruled that in order to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under the statute 38 Geo. 3, c. 78, it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *alunde*.^(j) So the delivery of a newspaper to the officer at the stamp-office is a sufficient publication to sustain an indictment for a libel in the paper.^(k) So proof that the defendant, as proprietor of the newspaper, in which a libel is contained, accounted with the distributor of stamps for the duty on advertisements in the paper, is sufficient evidence of a publication by the defendant.^(l) An affidavit according to the statute, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be.^(m) The same rule applies to criminal informations ⁽ⁿ⁾ But if the affidavit from the stamp-office and the paper vary in the place where the paper is stated to be printed, as where the affidavit stated it to be "in Union-street, Castle-street," and the paper "in Union Buildings, John-street," the production of the affidavit and paper is not sufficient.^(o) So where the affidavit described the proprietor's residence to be in "Red Lion-street, St. Ann-square," and on the paper it was described as in "St. Ann's-square;" Lord Tenterden held that as the party was not excluded from other proof of publication, if he relied on the statutory proof, he must bring himself within the statute, and that the discrepancy was fatal.^(p) In moving for a criminal information a prosecutor is not bound to adopt the statutory proof, but if he adopt any other the publication must be shown by some direct proof, as that a party

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Proof of
publication
at common
law, and by
the statute.

ingly and wilfully print or publish, or cause to be printed or published, any newspaper or supplement thereto, whereon the several particulars aforesaid shall not be printed, or whereon there shall be printed any false name, addition, place or day, or whereon there shall be printed any description of the place of printing or publishing such newspaper which shall be different in any respect from the description of the house or building mentioned in the declaration, required by this act to be made relating to such newspaper, as the house or building wherein such newspaper is intended to be printed or published, every such person shall for any and every such offence, forfeit the sum of twenty pounds.

^(h) Rex v. Topham, 4 T. R. 126.

^(j) Id. ib. 99.

^(l) Cook v. Ward,^b 409, 4 M. & P. 99.

^(m) Rex v. Hart, 10 East, 94. Mayne v. Fletcher,^c 9 B. & C. 382, 4 M. & R. 311.

⁽ⁿ⁾ Rex v. Donnison,^d 4 B. & Ad. 698.

^(o) Rex v. Franceys,^e 2 Ad. & E. 49.

^(p) Murray v. Souter, cited, 6 Bing. 414, in Cook v. Ward.^f These cases were before the new act, which seems framed to avoid trifling variances, see p. 254.

^a Eng. Com. Law Reps. x. 275.

^d Ib. xxiv. 143.

^b Ib. xix. 117.

^e Ib. ix. 147.

^c Ib. xvii. 401.

^f Ib. xix. 117.

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bought the libel at the defendant's shop; and it is not sufficient to produce an affidavit stating merely that the defendant printed and published a libel in a certain newspaper called, &c., a copy of which libel is hereto annexed, and to annex such copy. (*pp*) And a newspaper may be *given in evidence, though it is not one of the copies published, and though it be unstamped at the time of trial. (*q*)

Where in an action for libel, published in "The Leicester Herald and Midland Counties Advertiser," a certified copy of the declaration from the stamp-office was put in, in which the title of the paper was stated to be "The Leicester Herald and Midland Counties Advertiser," and the intended place of publication, "No. 23, Charles street, in the parish of St. Margaret, in the borough of Leicester: and a paper was offered in evidence, which agreed with that in the stamp-office declaration, but the place of publication was stated to be "at the corner of Charles street and Hadfield street, in the parish of St. Margaret, in the borough of Leicester;" Lord Denman, C. J., held that the evidence of identity was sufficient, and that the paper might be given in evidence. (*qq*) It afterwards appeared that the house at which the paper was published, which was at the corner of Charles street and Hadfield street, was No. 23, Charles street.

The libel must be produced, and must correspond with the indictment.

Upon the trial the libel must in general be produced on the part of the prosecution, and, after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. (*r*) The libellous matter must be set out in the indictment; (*s*) and the libel proved must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. (*t*) But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal. (*u*)

And must be proved to have been published in

The libel must also be proved to have been published, by the party accused, in the county laid in the indictment. (*v*) But if a man writes a libel in one county and consent to its publication in another, the consent is sufficient to charge him in the latter county. (*w*) (1) So if a man write

(*pp*) *Reg. v. Baldwin*,^a 8 A. & E. 168, and see *Watts v. Fraser*,^b 7 A. & E. 223, and *qu.* whether the means of proof given by the 6 & 7 Wm. 4, c. 76, be applicable to a libel published by a plaintiff.

(*q*) *Rex v. Pearce*, Peake's N. P. C. 75.

(*qq*) *Baker v. Wilkinson*, 1 C. & Mars. 399.

(*r*) By Buller, J., in *Rex v. Watson* and others, 2 T. R. 201.

(*s*) *Rex v. Sacheverell*, 15 Sta. Tri. 466. *Baylis v. Lawrence*, 11 A. & E. 920. S. P. and *Newton v. Rowe*, in C. P., T. T., 1843, S. P.

(*t*) *Tabart v. Tipper*, 1 Camp. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage omitted. *Id. ibid.* It is settled that the whole libel need not be set forth in the indictment: but if any part qualifies the rest, it may be given in evidence, 2 Salk. 417. See the 9 Geo. 4, c. 15, as to amendments of variances, *post*, 2 vol.

(*u*) *Rex v. Beech*, 1 Leach, 133. *Rex v. Hart*, 1 Leach, 145.

(*v*) *Case of the Seven Bishops*, 12 Sta. Tri. 354.

(*w*) 12 Sta. Tri. 331.

(1) {A libel was published in Rhode Island, in a newspaper that usually circulated in the county of Bristol (Mass.), and the number containing the libel was received and circulated in that county; it was held that this was competent and conclusive evidence of publication there. 3 Pick. 304, *Commonwealth v. Blanding*.}

^a Eng. Com. Law Reps. xxxv. 366.

^b *Ib.* xxxiv. 82.

a libel in London, and send it by post addressed to a person in Exeter, ^{the} he is guilty of a publication in Exeter. (x) And where the defendant ^{country.} wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against him was in Leicestershire; three of the judges held the information right: but Bayley, J., doubted. (y) From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it is so delivered; and further, that if delivering open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *primâ facie* evidence that the defendant delivered it open to C. in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The information was in the county of Leicester, for writing and publishing a libel: and it was proved by the date of the letter that the defendant wrote it in that county, and that Bickersteth delivered it to Brooks for publication in the county of Middlesex, it being then unsealed. Bickersteth was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as Bickersteth had it open, they might presume that he received it open; and that, as the defendant wrote it in the county of Leicester, it might be presumed that he *received it in that county; and the jury accordingly found the defendant guilty. A rule having been obtained for a new trial, three judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the delivering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester. (z) It appears from this case, that the dating a libel at a particular place, is evidence of its having been written at that place. (a) The post-mark upon a letter has been considered as no evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (b) But it appears to be the better opinion that such post-marks, whether in town or country, proved to be such, are evidence that the letters on which they exist were in the offices to which the post-marks belong at the dates thereby specified. (c) But a mark of double postage having been paid on such letter, is not of itself sufficient evidence that the letter contained an enclosure. (d) If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to sup-

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(x) 12 Sta. Tri. 332.

(y) *Rex v. Burdett*, 4 B. & A. 95.(z) *Rex v. Burdett*, 4 B. & A. 95, and MS. Bayley, J.(a) *Rex v. Burdett*, 4 B. & A. 95.(b) *Rex v. Watson*, 1 Campb. 215. Lord Ellenborough, C. J., said the post-mark might have been forged.(c) *Rex v. Plumer*, Hil. T. 1814. MS. Bayley, J., and Russ. & Ry. 264. *Rex v. Johnson*, 7 East, 65. 2 Stark. Evid. 456, and *Fletcher v. Braddyll*, note (g), ibid(d) *Rex v. Plumer*, ante, note (c). Some person who paid or received the postage should be called.

port the indictment.(e) Owing the signature to a libel is no evidence in what county it was signed. This was held in the celebrated case of the Seven Bishops; but additional evidence being afterwards given that the bishops applied to the Lord president of the council about delivering a petition to the king, and that they were admitted to the king for that purpose in Middlesex, the case was left to the jury.(f) It has been held to be sufficient to prove a defendant to have *published* a libel without proving him to have *composed* it, upon a count in an information charging him with having "composed, printed, and published" it.(g) So if the defendant is charged by a count in an indictment with having "composed, *printed*, and published" a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing.(h) Or *he may be found guilty of the printing only, upon an indictment for printing and publishing, if the evidence shows him to have assisted in the printing, and to have had nothing to do with the publishing.(i)

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If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. Thus upon the trial of an information against the defendant for a libel in the French language on Napoleon Bonaparte, after a witness had proved the purchase of some copies of the book from a certain bookseller, and the bookseller had proved that the defendant was the publisher, and had employed him to dispose of the copies on his account, and that he had accounted for them; an interpreter was called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original; and that the translation was read by the clerk at Nisi Prius.(j)

Where an information for libel stated that the prosecutor had received certain anonymous letters, and that the defendant published a libellous placard of and concerning those letters, and the placard asked, "Were you not warned that your character was at stake?" and the prosecutor stated that he should not have understood the meaning of the placard if he had not also seen the letters, and that he understood the passage in the placard to allude to the letters, it was held that the letters were admissible without proving who wrote or sent them, as the placard referred

(e) *Rex v. Watson*, 1 Campb. 215; and see *Rex v. Middleton*, 1 Str. 77. In the case of *Rex v. Johnson*, 7 East, 65, the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register, after which he received two letters in the same handwriting, directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed, it was held that this was a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(f) Case of the Seven Bishops, 12 St. Tri. 183.

(g) *Rex v. Hunt* and another, 2 Campb. 583.

(h) *Rex v. Williams*, 3 Campb. 646, Lawrence, J., said, "There is certainly no proof that the defendant *printed* the libel in question; but he may be acquitted of the printing, and found guilty of the composing and publishing. His delivering the libel in his own handwriting to the printer is abundant evidence of the latter offence." A verdict was accordingly found and recorded of "Guilty, except as to printing the libel."

(i) *Rex v. Knell*, 1 Barnard, 305.

(j) *Rex v. Peltier*, Selw. N. P. 1048.

to them, and would not be intelligible without them, and that a defendant, who refers to other papers in his publication, must submit to have them read as explanatory of such publication. (k)

Depositions taken before a magistrate were not evidence upon a trial for a libel, under the 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, (l) which extended only to cases of felony. (m) But as the 7th Geo. 4, c. 64, extends to misdemeanors, it should seem that such depositions would now be evidence. It has been held that a Gazette is evidence to prove an averment in an information for a libel, "that divers addresses, &c., had been presented to his majesty by divers of his loving subjects." (n) *The King's proclamation*, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, has been held admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts. (o) And a preamble to an act of parliament, reciting the existence of such outrages, and making provisions against them, was also held to be admissible for the same purpose. (p)

The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be at fault, and show a malicious intention to *defame; for, if published inadvertently, it will not be a libel: but where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. (q) It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malò animo* towards the person injured: and this is all that is meant by a charge of malice in a declaration for libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose. (r)† The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it: and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect. (s) Publishing what is a libel without excuse, is indictable, though the publisher be free from what in common parlance is called malice; for defaming wilfully without excuse, is in law malicious. And even if

Depositions, a Gazette, the King's proclamation, and a preamble to an act of parliament, are evidence for certain purposes.

Criminal intention of the defendant. *261

(k) *Rex v. Slaney*,^a 5 C. & P. 213, Lord Tenterden, C. J.

(l) Repealed by 7 Geo. 4, c. 64, s. 33.

(m) *Rex v. Paine*, 5 Mod 163.

(n) *Rex v. Holt*, 5 T. R. 436.

(o) *Rex v. Sutton*, 4 M. & S. 532.

(p) *Id. ibid.*

(q) By Lord Kenyon, C. J., in *Rex v. Lord Abingdon*, 1 Esp. 228. And see *Rex v. Topham*, 4 T. R. 127, and *Rex v. Woodfall*, 5 Burr. 2667. In a case of an action for a libel contained in the Statesman newspaper, subsequent publications by the defendant in the Statesman newspaper were tendered in evidence, to show, *quo animo* the defendant published the paragraph in question. Lord Ellenborough said, "No doubt they would be admissible in the case of an indictment; and so they would here show the intention of the party, if it were at all equivocal; but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing the damages." *Stuart v. Lovell*,^b 2 Stark. R. 93.

(r) Per Lord Tenterden, C. J., *Duncan v. Thwaites*,^c 3 B. & C. 584-5.

(s) *Rex v. Burdett*,^d 4 B. & A. 95. *Reg. v. Lovett*, 9 C. & P. 462, Littledale, J.

† [Malice in the publisher of a libel does not imply personal ill-will towards the person libelled. *Commonwealth v. Benner*, 9 Metcalf, 410.]

^a Eng. Com. Law Repts. xxiv. 285.

^d *Ib.* iii. 261.

^c *Ib.* x. 179.

^b *Ib.* vi. 431.

it could be an excuse, that the publisher held what he published to be true, it is not so if he professes to publish it from authority. A newspaper contained this paragraph: "the malady under which his majesty labors is of an alarming nature (meaning insanity): it is from authority we speak." At the trial of the indictment for this publication, the jury asked if a malicious intention were necessary to constitute a libel; to which Abbott, C. J., answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial, it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed the king to have been so afflicted, and that the answer to the question by the jury was incorrect. But the court thought otherwise, as the defendant must know if he spoke from authority, and could have proved it: and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice.^(a) A person who publishes matter injurious to the character of another, must be considered, in point of law, to have intended the consequences resulting from that act,^(b) for every man must be presumed to intend the natural and ordinary consequences of his own act.^(c) The judge, therefore, ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the tendency of the publication was injurious to such person.^(d) *In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence. In an action for a libel it appeared that the plaintiff, an attorney, was employed by one Nash to bring an action against an executor; and that the defendant, who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to Nash blaming him for allowing the plaintiff to sue, and containing this passage, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when you have once ordered your attorney to write to Mr. G., he would not do any more without your further orders; but if you once set him about it, he will go any length without further orders." And it was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury.^(e)

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Defendant's evidence.

As the defendant is not allowed to prove the truth of the libellous matter in justification of his conduct,^(f) the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party; as where a person delivers a letter without knowing its contents, or delivers one paper instead of another;^(g) and evidence to such effect may be pro-

(a) *Rex v. Harvey*,^a 2 B. & C. 257.

(b) Per Lord Tenterden, C. J. *Fisher v. Clement*,^b 10 B. & C. 472.

(c) Per Lord Tenterden, C. J. *Haire v. Wilson*,^c 9 B. & C. 643, 4 M. & R. 605.

(d) *Haire v. Wilson*, *supra*.

(e) *Godson v. Home*,^d 3 Moore, 223. And it seems that in this case, if the point had been made at the trial, whether this was a confidential communication or not, such point would not necessarily have been left to the jury.

(f) *Ante*, p. 222.

(g) By Lord Kenyon, C. J., in *Rex v. Topham*, 4 T. R. 127, 128. *Rex v. Nutt*, Fitz. 47. And see *ante*, p. 223, *et seq.*

^a Eng. Com. Law Repts. ix. 77.

^b Ib. xxi. 117.

^c Ib. xvii. 465.

^d Ib. v. 3.

duced. Where, therefore, an action was brought against the porter of a coach for a libel contained in a hand-bill, which he had delivered tied up in a paper parcel, evidence was admitted that he delivered the parcel in the course of his business without any knowledge of its contents.^(h) But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it.⁽ⁱ⁾ It was held, in a case where the supposed libel was contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character.^(k) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury, yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the court will hear this argued by his counsel.^(l)

If a libel imputes to a man a triable offence, proof of the truth of such imputation is inadmissible; for it would be trying the question behind the man's back, and creating a prejudice upon it. Where a libel imputed murder to certain soldiers, evidence was offered of *the truth of such imputation, and rejected; and the Court of King's Bench were unanimous that such evidence was rightly rejected; for the persons charged might afterwards come to be tried, and might be prejudiced by the previous inquiry.^(m)

Where a libel stated that there was a riot at Carmarthen, and that a person fired a pistol at an assemblage of persons, and it was proposed to prove the truth of these facts in order to enable the jury to decide whether the remarks in the libel were not within the limits of free discussion, it was held that the evidence was inadmissible, for the jury were to judge upon the examination of the libel itself.⁽ⁿ⁾

Where an information for a libel states that certain transactions took place, and that the libel was published of and concerning them and then sets out the libel as referring to them, and general evidence is given in proof of such transactions on the part of the prosecution, the defendant cannot, therefore, give evidence of the particular nature of those transactions so as to bring into issue the truth or falsehood of the libel. But if such evidence were adduced, *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, it is admissible.^(o)

It had been held in many cases, that, on trials for libels, the facts of writing, printing, or publishing, and the truth of the innuendoes inserted in the proceedings, were the only matters to be submitted to the consideration of the jury; but the justice of such doctrine being questioned and ably arraigned,^(p) the statute 32 Geo. 3, c. 60, was passed, which enacts "that on every such trial, the jury sworn to try the issue may

^(h) Day v. Bream, 2 M. & Rob. 54. Patteson, J., who said "*primâ facie* he was answerable, he had in fact delivered and put into publication the libel complained of, and was therefore called upon to show his ignorance of the contents."

⁽ⁱ⁾ Rex v. Holt, 5 T. R. 436.

^(k) Rex v. Lambert and Perry, 2 Campb. 398.

^(l) Rex v. White, 3 Campb. 98.

^(m) Rex v. Burdett, 4 B. & A. 95.

⁽ⁿ⁾ Rex v. Brigstock, 6 C. & P. 184, Patteson, J.

^(o) Rex v. Grant, 5 B. & Ad. 1081.

^(p) See the celebrated speeches of Mr. Erskine, in the case of the Dean of St. Asaph, 1 vol. of Ridgway's col. p. 234 and 264.

^a Eng. Com. Law Reps. vi. 431.

^b *Ib.* xxv. 346.

^c *Ib.* 272.

The jury may give a general verdict upon the whole matter put in issue.

give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.”(q) But it provides also, that “the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases.”(r)

The judge is not bound under this act to state whether in his opinion the writing is a libel, but he may do so.

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In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence; this act made it the same in cases of libel, the practice having been otherwise before.(s) It has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved *to their satisfaction; and that, whether the libel is the subject of a criminal prosecution or civil action. Whether the particular publication, the subject of inquiry, is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact. The judge, as a matter of advice to them in deciding that question, may give his own opinion as to the nature of the publication, but is not bound to do so.(t)†

It appears to have been considered that the judge may tell the jury that they are to take the law from him, unless they are satisfied that he is wrong.(u)

Judgment.

The judgment in cases of libel is in the discretion of the court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace.(v) In some cases prior to the statute 56 Geo. 3, c. 138, the offender was also sentenced to the pillory.

In cases of a blasphemous or seditious libel a second offence was punishable by banishment, but

In the case of a blasphemous or seditious libel, a second offence is more highly punishable by 60 Geo. 3, & 1 Geo. 4, c. 8, s. 4, which enacts, that “if any person shall be legally convicted of having composed, printed, or published, any blasphemous libel, or any such seditious libel as aforesaid (i. e. by s. 1, a libel tending to bring into hatred or contempt the person of his majesty, his heirs or successors, or the regent, or the government and constitution of the United Kingdom, as by law

(q) Sec. 1.

(r) Sec. 2. By sec. 3 it is provided that the jury may find a special verdict, in their discretion, as in other criminal cases. And sec. 4 provides that defendant may move in arrest of judgment as before the passing of the act.

(s) Per Parke, B. *Parmiter v. Coupland*, 6 M. & W. 105.

(t) *Parmiter v. Coupland*, *supra*.

(u) *Rex v. Burdett*, 4 B. & A. 95.

(v) 1 Hawk. P. C. c. 73, s. 21. Bac. Abr. tit. *Libel* (C). *Rex v. Middleton*, Fort. 201. As to the punishment of leasing, making sedition and blasphemy in Scotland, see 6 Geo. 3, c. 47.

† [In an indictment for a libel, the indictment must set forth matter on its face libellous, in which case the court is to judge whether it be so or not, or it must aver that the matter charged, though not on its face libellous, was intended in fact to be so, and then the question is to be submitted to a jury. *State v. White*, 6 Iredell, N. C. 418.]

* Eng. Com. Law Reps. vi. 431.

established, or either house of parliament, or to excite his majesty's subjects to attempt the alteration of any matter in church or state, as by law established, otherwise than by lawful means), and shall after being so convicted offend a second time, and be thereof convicted before any commissioner of oyer and terminer, or goal delivery, or in the Court of King's Bench, such person may on such second conviction be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanors, or to be banished^(w) from the United Kingdom and all other parts of his majesty's dominions for such terms of years as the court in which such conviction shall take place shall order."

A provision is made as to a certificate of every indictment and conviction of any offender convicted of having composed, &c., any blasphemous or seditious libel, which is to be given by the officer having the custody of the records, upon the request of the prosecutor upon his majesty's behalf, to the justices of assizes, &c., where such offender shall be indicted for any second offence, and is to be sufficient proof of the conviction of such offender.^(x)

By this statute, in all cases in which any verdict or judgment by default shall be had against any person for publishing any blasphemous or seditious libel, the judge or court may make an order for the seizure and carrying away and detaining all copies of the *libel in the possession of the party, or of any other person named in the order for his use.^(y)

If a libel imputes to a man a triable offence, affidavits of its truth cannot be given in evidence in mitigation of punishment. But if a libel imports to be founded on certain newspaper reports, affidavits of the existence of such newspaper reports are admissible: and in such case affidavits of the falsehood of such reports cannot be received in aggravation. A libel imported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder: after conviction the defendant offered affidavits that the newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the defendant stood at the time he wrote the libel, and showed the impression under which he wrote; but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice.^(z)

Where an indictment for a libel on the governor of a parish workhouse was preferred by the direction, and carried on at the expense, of the select vestry of the parish, and the defendant having removed it into the King's Bench by *certiorari* was convicted, it was held that the party libelled was not the "party grieved" within the 5 & 6 Wm. & M. c. 11, s. 3, and, therefore, was not entitled to costs.^(a)

(w) The 11 Geo. 4, and 1 Wm. 4, c. 73, s. 1, repeals "so much and such parts of this act as relate to the sentence or banishment for the second offence."

(x) Sec. 7. 60 Geo. 3, and 1 Geo. 4, c. 8.

(y) See sec. 1, 2, and also sec. 3, as to Scotland. Sec. 8 & 9 provide for the limitation of actions brought for any thing done in the execution of the act. By s. 10 the punishment of persons convicted of libel in Scotland is not to be altered."

(z) *Rex v. Burdett*, 4 B. & A. 314.

(a) *Rex v. Dewhurst*, 5 B. & Ad. 405. See *Reg. v. Hawdon*, 3 P. & D. 44.

^a Eng. Com. Law Reps. vi. 431.

^b *Ib.* xxvii. 103.

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*CHAPTER THE TWENTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.[A]

THE distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a *motion to execute*; and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute.*(a) These offences may be treated of more at large in the order in which they have been mentioned.

(a) 1 Hawk. P. C. c. 65, s. 1, 8, 9. 3 Inst. 176. 4 Bla. Com. 146.

(A) NEW HAMPSHIRE.—By statute of Feb. 16, 1791, riots, routs, and unlawful assemblies by twelve or more persons, are punished by imprisonment not exceeding one year, and fine not exceeding one thousand dollars. The provisions of this statute, as to the words creating the offence, and mode of dispersing the rioters by proclamation, are similar to those of 1 G. 1, st. 2, c. 5, s. 1. Laws of N. Hamp. p. 331.

MASSACHUSETTS.—By statute 1786, ch. 38, against riots, &c., by persons to the number of twelve or more, the provisions of the statute of 1 G. 1, st. 2, c. 5, s. 1, are substantially adopted, so far as relates to the description of the offence, proclamations by a magistrate or other officer, &c.

If an unlawful assembly riotously and tumultuously disturb the selectmen of a town in the exercise of their duty on a public day, and in a public place, and obstruct the inhabitants of a town in the use of their constitutional privileges of election, it is an aggravated riot. And there may be riot without terrifying any one, if an unlawful act be committed. *Commonwealth v. Runnels & al.* 10 Mass. Rep. 518.

In an indictment for that species of riot, which consists in going about armed, without committing any act, it is necessary to aver that it was *in terrorem populi*; because the offence consists in terrifying the public; but such averment is not necessary where actual violence is charged to have been committed. *Ibid.*

And if an indictment for a riot allege that the defendants, with force and arms, unlawfully assembled, and being so assembled, committed the acts charged, it will be sufficient without repeating the words force and arms, as these words as first used, will apply to every distinct allegation. *Ibid.*

PENNSYLVANIA.—If a number of persons assemble in a town in the dead of night, and by noise or otherwise disturb the peaceable citizens, it is a riot. *Pennsylvania v. Cribbs & al.* Addis. 277.

If several persons assemble together for an unlawful purpose, every man is guilty of all the acts done in execution of, or contributing or tending to that purpose. If they meet for a lawful purpose and proceed to an unlawful act, it is riot. *Pennsylvania v. Cribbs & al.* *Ibid.*

It is the duty of every citizen to endeavour to suppress a riot, and when the rioters are engaged in treasonable practices, the law protects other persons in repelling them by force. *Respub. v. Montgomery*, 1 Yeates, 419.

To make a man a party in a riot, he must be active either in doing, countenancing, or supporting; or ready if necessary to support the unlawful act. *Pennsylvania v. Craig & al.* Addis. 191.

Collecting a party for any purpose of a violent tendency, renders the authors guilty of all consequences plainly to be foreseen. *Pennsylvania v. Cribbs & al.* Addis. 277.

In an indictment for a riot against one settler, for burning the cabin of another, on land claimed by both, the defendant was permitted to show that he had made lines round the land as evidence of a possession, circumscribed by reasonable limits. *Pennsylvania v. Bugher & al.* Addis. 333.

SOUTH CAROLINA.—Where two or more are jointly indicted for a riot and assault, the court will not consent to their being tried separately; for a riot is an offence of a complicated nature, where the act of each is imputable to the other. *The State v. Littlejohn & Berry*, 1 Bay's Rep. 316.

A negro is one of the persons, who, in contemplation of law may, with white men, commit a riot. It is not necessary that a man should be possessed of civil rights to make him amenable to justice for his offences. *State v. Thaskam & Mayson*, 1 Bay's Rep. 358.

{See 4 Connect. Rep. 111, *Tracy v. Williams.*}

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

In some cases, in which the law authorizes force, it is not only lawful ^{Where the law authorizes force, an assembling will not be riotous.} but also commendable, to make use of it; as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of, lands. Also it seems to be the duty of a sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in endeavoring to execute them, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not to be lawful for them to raise a force for the execution of a civil *process, unless they find a resistance; and it is certain that they are highly punishable for using any needless outrage or violence. (c) ‡

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(b) 1 Hawk. P. C. c. 65, s. 1. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but it should be observed, that in Hawkins (c. 65, s. 2, 5, 7.) the words "more than three persons" are three times over inserted instead of "three persons or more;" which in Burn's Just. tit. *Riot*, sec. 1, is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from the work of Mr. Serjeant Hawkins, is submitted as that which would probably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In *Reg. v. Soley* and others, 11 Mod. 116, Holt, C. J., said, "The books are obscure in the definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, in *terrorem populi*, though *no act is done*, it is a riot. If three come out of an ale-house, and go armed, it is a riot."

(c) 1 Hawk. P. C. c. 65, s. 2. 19 Vin Abr. tit. *Riots*, §c. (A) 4.

† [Indictment against eight persons for an *unlawful assembly*. Five of the defendants appeared and pleaded not guilty, and two of these five were found guilty and three not guilty. *Held*, that judgment should be entered against the two found guilty; but that they must have been discharged had all the others indicted been tried and acquitted. *The State v. Bailey et al.*, 3 Blackf. 209.

Indictment against three persons for a riot. Plea, not guilty. Verdict of guilty as to one and of not guilty as to the other. *Held*, that upon this verdict, a judgment would not be rendered against the defendant found guilty. *Aliter*, if the indictment had been against the defendants together with those whose names were unknown. *Terpin v. The State*, 4 Blackf. 72.

A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist each other against any one who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not. *State v. Connelly*, 3 Richardson, 337.

Under an indictment charging four with riot and a riotous assault and battery, one may be convicted of an assault and battery, and the others acquitted generally. *Shouse v. The Commonwealth*, 5 Barr, 83]

‡ [In an indictment for a riot, it is necessary to aver and prove a previously unlawful assembly; and hence if the assembly were lawful, as upon summons to assist an officer in the execution of legal process, the subsequent illegal conduct of the persons so assembled will not make them rioters. *State v. Stalcup*, 1 Iredell, 30.

If persons innocently and lawfully assembled afterwards confederate to do an unlawful act of violence, suddenly proposed and assented to, and thereupon do an act of violence in pursuance of such purpose, although their whole purpose should not be consummated, it is a riot. *State v. Snow*, 18 Maine, 346.

To constitute a person a rioter it is not necessary that he should be actively engaged in

How far
the object
must be of
a private
nature.

It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only; as the inclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. For the proceedings of a riotous assembly on a public or general account, as to redress grievances, pull down all inclosures, or to reform religion, and also resisting the king's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the king. (*d*)

As to the
degree of
violence or
terror.

It seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. (*e*) But it is not necessary, in order to constitute this crime, that personal violence should have been committed. (*f*)

Upon these principles, assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. (*g*) And upon the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a man assemble a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot if the number of persons are not more than are necessary for the purpose; and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act therefore is wrong and unlawful. (*h*) Much more may any person, in a peaceable manner, assemble a fit number of person to do any lawful thing; as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is

(*d*) 4 Bla. Com. 147. 1 Hawk. P. C. c. 65, s. 6.

(*e*) 1 Hawk. P. C. c. 65, s. 5.

(*f*) Per Mansfield, C. J., in *Clifford v. Brandon*, 2 Camp. 369.

(*g*) 1 Hawk. P. C. c. 65, s. 5. But see in 2 Chit. Crim. L. 494, an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking about foot-balls on a Shrove Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. And in Sir Anthony Ashley's case, 1 Roll. R. 109, Coke, C. J., said that the *stage players* might be indicted for a riot and unlawful assembly; and see Dalt. Just. c. 136 (citing Roll. R.) that if such players by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. tit. *Riots*, §c. (A) 8.

(*h*) 1 Hawk. P. C. c. 65, s. 5. Reg. v. Soley, 11 Mod. 117. Dalt. c. 137. Burn's Just. tit. *Riots*, s. 1.

the riot; it is sufficient that he be present giving countenance, support, or acquiescence to the act. *Williams v. The State*, 9 Miss. 270.

Two or more persons should actually be engaged in some physical act of violence to constitute a riot. Where a single person is engaged in the act of violence and others stand by inciting him to the act, it is not a riot. *Scott v. United States*, 1 Morris, 142.

An indictment for a riot need not allege any other unlawful purpose for which the rioters assembled, than that of disturbing the peace. *The State v. Renton*, 15 New Hampshire, 169.]

received from the nuisance, and may also enter into another man's ground for the purpose. *Thus, where a man having erected a wear across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the wear, in order to turn the water and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot.⁽ⁱ⁾

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But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; † from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry: or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful.^(k) And if, in removing a nuisance, the persons assembled use any threatening words, (such as, they will do it, though they die for it, or the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot.^(l)

The legality or illegality of the act intended to be done, not material if there be violence and tumult.

But the violence and tumult must in some degree be premeditated. For if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention.^(m) But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held that although the audience in a public theatre have a right to express the feeling excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot.⁽ⁿ⁾

How far the violence and tumult must be premeditated.

Even though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to arise amongst them, form themselves into parties, *with promises of mutual assistance, and then make an affray, it is said that they are guilty of

Though the parties assembled in the first instance, *269

(i) Dalt. c. 137. Burn. tit. *Riot*, s. 1.

(k) 1 Hawk. P. C. c. 65, s. 7. The law will not suffer persons to seek redress for their private grievances by such dangerous disturbances of the public peace; but the justice of the quarrel in which such an assembly may have been engaged will be considered as a great mitigation of the offence. And *Per Cur.* in 12 Mod. 648, Anon., if one goes to assert his right *with force and violence*, he may be guilty of a riot.

(l) Dalt. c. 137. Burn's Just. tit. *Riot*, s. 1, where it is said, that if there is cause to remove any such nuisance, or do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, in order to remove it; and that such persons tend their business only, without disturbance of the peace, or threatening speeches.

(m) 1 Hawk. P. C. c. 65, s. 3.

(n) Clifford v. Brandon, 2 Campb. 328.

instance for a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and it seems to be clear that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another. (o)

If any person, seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprize: and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design. (p) And the law is that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. (q) It has been ruled, however, that if three or more being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and is no more. (r) The *inciting* persons to assemble in a riotous manner, appears also to have been considered as an indictable offence. (s)

Concerning some acts done in a tumultuous and riotous manner, especial provision is made by particular statutes. The statute 7 & 8 Geo. 4, c. 30, s. 8, enacts, "that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, ware-house, office, shop, mill, malt-house, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any *steam engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, every such offender shall

(o) 1 Hawk. P. C. c. 65, s. 3.

(p) Id. *ibid.*

(q) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 370. And see *Rex v. Royce*, 4 Burr, 2073, and the second and third resolutions in the *Sissinghurst* house case, 1 Hale, 463.

(r) 19 Vin. Abr. tit. *Riots*, §c., (A) 12. *Reg. v. Ellis*, 2 Salk. 595.

(s) See a precedent, *Cro. Circ. Comp.* 420 (8th ed.), the first count of which is for *inciting* persons to assemble, and that in consequence of such excitement they did so; and the second count states the *inciting*, and omits the *assembling* in consequence of it. See a similar precedent in 2 *Chit. Crim. L.* 506, and the principles stated, *ante*, p. 46, *et seq.*

Any person taking part in a riot is a rioter; all are principals.

7 & 8 Geo. 4, c. 30, s. 8. Rioters demolishing, &c., a church, chapel, house, or certain buildings, or any machinery in any manufactory or mine.

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be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

By s. 26, "in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

The 4 & 5 Vict. c. 56, s. 2, after reciting the 7 & 8 Geo. 4, c. 30, s. 4 & 5 Vict. c. 56, s. 2. 8, enacts, that "from and after the commencement of this act, if any person shall be convicted of any of the said offences hereinbefore last specified, whether as principal, or as principal in the second degree, or as accessory before the fact, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited, ordered to be given or awarded against persons convicted of the said last mentioned offence, or any of them respectively, be liable, at the discretion of the court, to be transported beyond the seas for any term not less than seven years, or to be imprisoned for any time not exceeding three years."

Sec. 4, enacts, that "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such punishment to be with or without hard labour, in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, whether the same be with or without hard labor, not exceeding one month at any time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

The 6 & 7 Vict. c. 10, reciting the 7 & 8 Geo. 4, c. 30, s. 8, and the 4 & 5 Vict. c. 56, s. 2, and that doubts have arisen whether such offenders were liable under the provisions of the 4 & 5 Vict. c. 56, s. 2, to be transported beyond the seas for the term of their natural lives, enacts, that "from and after the passing of this act, if any person shall be convicted of any of the offences hereinbefore in the said act first recited specified, such person shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any time not exceeding three years."

Upon an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for riotously and tumultuously assembling together and beginning to demolish a house, the jury cannot convict unless they are satisfied that the prisoners intended to leave the house no house at all in fact; for if they intended to leave it still a house, though in a state however dilapidated, they are not guilty of the offence. To have left off the work of devastation without interruption would lead to the inference that the prisoners did not intend to destroy the house; but even if they were interrupted, the question still remained, what was their ultimate intention. If they had been some time at their work of ruin before they were interrupted, it is for the jury to say, looking to the nature of the things which they had destroyed, whether their purpose was to demolish the house itself.^(ss) Since the

(ss) Reg. v. Adams, 1 C. & Mars. 299, Coleridge, J.

^a Eng. Com. Law Reps. xli. 167.

4 & 5 Vict. c. 65, s. 2, an indictment for riotously demolishing a house ought to conclude "against the form of the statutes;" and if it do not, it is bad upon demurrer, and in such a case the prisoner may demur, and plead over to the felony at the same time.(sss)

If rioters desist from demolishing of their own accord that is evidence that they did not intend to destroy the house.

If rioters, after proceeding a certain length, leave off of their own accord before the act of demolition be completed, that is evidence from which a jury may infer that they did not intend to demolish the house.

A party of rioters came to a house about midnight, and in a riotous manner burst open the door, broke some of the furniture, all the windows, and one of the window-frames, and then went away, there being nothing to hinder them from doing more damage; it was held that although the breaking and damage done was a sufficient beginning to demolish the house, yet, unless the jury were satisfied that the ultimate object was to destroy the house, and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it, it was not a beginning to demolish within the act.(t) So where a mob pursued a person to a public house, where he took refuge, and the doors and windows were all secured, and the mob demanded that he should be given up to them, or they would pull the house down, and the front door and lower windows were beaten in, and the shutters and frames of some of them much broken, and part of the mob entered the house and did much damage to the furniture, but in about twenty minutes, being unable to find the person who had there taken refuge, and a rumour being spread that the mayor was coming, they went away: it was held that this offence was not within the act; for the persons committing the outrage must have the intention of destroying the house, before they can be charged with a felonious beginning to demolish, and here they had no such intention, but their intention was to get possession of the person who had entered the house.(u)

But if they are interrupted, the jury may infer they did intend to destroy the house,

But if rioters are interrupted in the work of demolition by the police or any other force, that is evidence to show that they were compelled to desist from that which they had designed, and it is for the jury to infer that they had begun to demolish within the meaning of the act. A party of coal whippers having a feeling of ill-will to a coal lumper, who paid less than the usual wages, created a mob, riotously went to the house where he kept his pay table, cried out that they would murder him, threw stones, brickbats, &c., broke windows and partitions, and threw down part of a wall in a yard, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police; it was held that this case was distinguishable from

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**R. v. Thomas*, because the mob did not leave off voluntarily, but after the threats of the police, and that they might be convicted of beginning to demolish the house, though their principal object was to injure the lumper, provided it was also their object to demolish the house.(x) The beginning to pull down means not simply a demolition of a part, but a part with an intent to demolish the whole. The prisoners were indicted for beginning to demolish a building used in carrying on a trade. It appeared that they began by breaking the windows and doors, and

The beginning to pull down must be with intent to demolish the whole house.

(sss) *Reg. v. Adams, supra.*

(t) *Rex v. Thomas*,^a MS, C. S. G. and 4 C. & P. 237, Littledale, J. See also *Reg. v. Howell*,^b 9 C. & P. 437.

(u) *Rex v. Price*,^c 5 C. & P. 510, Tindal, C. J.

(x) *Rex v. Batt*,^d 6 C. & P. 329, Gurney, B.

^a Eng. Com. Law Reps. xix. 363. ^b Ib. xxxviii. 179. ^c Ib. xxiv. 432. ^d Ib. xxv. 423.

having afterwards entered the house, they set fire to the furniture, but no part of the house was burnt. Parke, J., told the jury "the beginning to pull down, means not simply a demolition of a part, but a part with an intent to demolish the whole. It is for you to say if the prisoners meant to stop where they did, and do no more, because if they did, they are not guilty; but if they intended when they broke the windows and doors, to go farther, and destroy the house, then they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence from which you may judge that they meant the work of demolition to stop where it did. If you think that they originally came there without intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally without such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner, as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner."^(y)

If a person forms part of a riotous assembly at the time the act of demolition commences, or if he wilfully joins such riotous assembly, so as to co-operate with them whilst the act of demolition is going on, and before it is completed, in either case he comes within the description of the offence, although he may not have assisted with his own hand in the demolition of the building.^(z)

In order to prove that there was a beginning to demolish the house, it must be proved that some part of the freehold was destroyed; it is not therefore sufficient to prove that the window-shutters were demolished.^(a)

Although setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to.^(b)

If rioters destroy a house by fire this is a felonious demolition of it within the 7 & 8 Geo. 4, c. 30, s. 8, and the persons guilty of such an offence may be convicted on an indictment founded on that enactment, and need not be indicted for arson.^(bb)

Where a house was demolished by rioters by means of fire, which was lighted before one o'clock in the night, and there was no evidence to show that the prisoner was present at the time when the house was set on fire, but it was proved that he was there between two and three o'clock whilst the house was burning, and whilst the mob who set it on fire was still there; it was held that the prisoner was properly convicted as a principal. For although it was possible, if this had been an indictment for burning the house, that the prisoner could not have been

^(y) Ashton's case, 1 Lewin, 296, Parke, J.

^(z) Per Tindal, C. J., Bristol Special Commission, ^a 5 C. & P. 265, note.

^(a) Reg. v. Howell, ^b 9 C. & P. 437, Littledale, J.

^(b) Ibid.

^(bb) Reg. v. Harris, ^c 1 C. & Mars. 661. Reg. v. Simpson, ^d 1 C. & Mars. 669, Tindal, C. J., Parke, B., and Rolfe, B.

^a Eng. Com. Law Reps. xxiv. 423.

^b Ib. xxxviii. 179.

^c Ib. xli. 358.

^d Ib. 362.

convicted as a principal, yet this was an offence under an enactment that made it felony if persons riotously and tumultuously assembled together to the disturbance of the public peace, and when so assembled destroyed a house; therefore it was not simply the fact of destroying a house by fire, but it was the combined fact of riotously assembling together and, whilst the riot continued, demolishing the house. Now to make a party guilty of that, he must be shown to be one of those who were present at the offence. But as it was not only the burning, but also the riotously assembling together, the whole of the prisoner's conduct on that day was left to the jury: and it was distinctly left to them that unless they were satisfied that the prisoner had by his language excited the mob to the act which was the subject-matter of the inquiry, and afterwards been present at it, he was not guilty. (c)

Where on an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house, it appeared that some of the prisoners set fire to the house itself, and that others carried furniture out of the house and burnt it on the gravel walk in front of the house, the jury were directed that, in order to convict the latter, they must be satisfied that they, being at the spot at the time, were taking such steps in the transaction that they might be said to have encouraged and assisted, and by their acts to have aided and abetted, in the object and design of destroying the house. (cc)

Upon an indictment on the 7 & 8 Geo. 4, c. 38, s. 8, for riotously and feloniously demolishing a house, it is a sufficient demolishing of the house if it be so far destroyed as to be no longer a house; and the fact that the rioters left the chimney standing will make no difference (d)

The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common law definition of a riot must be resorted to, and in such a case, if *any one* of her majesty's subjects be terrified, this is a sufficient terror and alarm to substantiate that part of the charge. (dd)

If persons riotously assemble and demolish a house, *really believing* that it is the property of one of them, an act *bonâ fide* in the assertion of a supposed right, this will not be a felonious demolition of the house within the 7 & 8 Geo. 4, c. 30, s. 8, even though there be a riot. (e)

33 Geo. 3, c. 67, s. 1. Seamen, &c., riotously assembled who shall forcibly prevent the loading, &c., of any vessels, &c., to be committed to prison. *272

The 33 Geo. 3, c. 67, s. 1, reciting that seaman, keelman, &c., had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the *trade and navigation of the kingdom, enacts, "that if any seaman, keelman, casters, ship-carpenters, or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating of such ship, keel, or other vessel, every seaman, keelman, caster, ship-carpenter, and other person," (being lawfully convicted of any of the offences aforesaid upon any indictment found in any court of oyer and terminer, or general or

(c) Reg. v. Simpson, ^a 1 C. & Mars. 669, Tindal, C. J., Parke, B., and Rolfe, B.

(cc) Reg. v. Harris, ^b 1 C. & Mars. 661, Tindal, C. J., Parke, B., and Rolfe, B.

(d) Reg. v. Langford, ^c 1 C. & Mars. 602, by all the judges.

(dd) Ibid.

(e) Ibid.

^a Eng. Com. Law Reps. xli. 362.

^b Ib. xli. 358.

^c Ib. xli. 327.

quarter sessions of the peace for the county, division, district, &c., wherein the offence was committed) shall be committed either to the common gaol or to the house of correction for the same county, &c., there to continue and to be kept to hard labour for any term not exceeding twelve calendar months, nor less than six calendar months. The fourth section provides, that the act shall not extend to any act, deed, &c., done in the service or by the authority of his majesty. The seventh section enacts, that offences committed on the high seas shall be triable in any session of oyer and terminer, &c., for the trial of offences committed on the high seas within the jurisdiction of the Admiralty. And by the eighth section it is provided, that no person shall be prosecuted by virtue of the act for any of the offences therein mentioned, unless such prosecution be commenced within twelve calendar months after the offence committed.(c)

Women are punishable as rioters; but infants under the age of discretion are not.(d)

II. By some books the notion of a *rout* is confined to such assemblies Of a rout. only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact, it generally agrees in all the particulars with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise.(e) And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *rout*; inasmuch as they move and proceed in rout and number.(f)

III. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards its execution. Mr. Sergeant Hawkins, however, thinks this much too narrow an opinion; and that any meeting of *great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an assembly.(g) † So in recent cases it has been ruled that an assembly

Of an
unlawful
assembly.

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(c) This statute was at first only temporary, but was made perpetual by 41 Geo. 3, c. 19.

(d) 1 Hawk. P. C. c. 65, s. 14. *Ante*, 2 *et seq.* and 20. But an infant above the age of discretion is punishable; and, though under the age of eighteen, need not appear by guardian, but may appear by attorney. *Reg. v. Tanner*, 2 Lord Raym. 1284.

(e) 1 Hawk. P. C. c. 65, s. 8.

(f) 19 Vin. Abr. tit. *Riots*, §c., (A) 2, referring to 18 Ed. 3, c. 1, 13 Hen. 4, c. ult., and 2 Hen. 5, c. 8.

(g) 1 Hawk. P. C. c. 65, s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose, *contra pacem*, though they do nothing, Br. tit. *Riots*, pl. 4. Lord Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a rout, and do not do it 3 Inst. 176.

† [That advising, plotting or consulting, for the purpose of encouraging, exciting, aiding, or assisting an insurrection or rebellion, make treason in other nations, which offence is

of great numbers of persons, which from its general appearance and accompanying circumstances is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. (*h*) And it has been well laid down by a very learned judge, that "any meeting assembled under such circumstances as, according to the opinion of rational and firm men are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly: and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they 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." (*i*) And all persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. (*j*)

Difference between an unlawful assembly and a riot.†

The difference between a riot and unlawful assembly is this; If the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. (*jj*)

An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c., is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle. (*k*) He is not, however, to arm himself and assemble his friends in defence of his close. (*l*)

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An assembly of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. (*m*) Where sixteen persons, with their faces blackened, met at

(*h*) Per Bayley, J., in *Rex v. Hunt and others*, York Spring Assizes, 1820; and per Holroyd, J., in *Redford v. Birley*,^a Lancaster Spring Assizes, 1822, 3 Stark, N. P. C. 76.

(*i*) Reg. v. Vincent,^b 9 C. & P. 91, Alderson, B. See Reg. v. Neale,^c 9 C. & P. 431, Littledale, J.

(*j*) Per Holroyd, J., *Redford v. Birley*, *supra*.

(*jj*) Per Patteson, J. *Rex v. Birt*,^d 5 C. & P. 154.

(*k*) 1 Hawk. P. C. c. 65, s. 9, 10. 19 Vin. Abr. tit. *Riots, &c.*, (A) 5, 6. And by Holt, C. J., in *Reg. v. Soley*, 11 Mod. 116, though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.

(*l*) By Heath, J., *Rex v. The Bishop of Bangor*, Shrewsbury Summer Ass. 1796.

(*m*) *Rex v. Billingham*,^e 2 C. & P. 234, Burrough, J. See *Rex v. Perkins*,^f 4 C. & P. 537, per Patteson, J.

recognized, under a peculiar definition, in the constitutions of the United States and Alabama—does not preclude the legislature from denouncing these acts as a distinct offence, punishable capitally. *State v. M'Donald*, 4 Porter, 449.]

^a Eng. Com. Law Reps. xiv. 167. ^b Ib. xxxviii. 48. ^c Ib. xxxviii. 176. ^d Ib. xxiv. 252.

^e Ib. xii. 105.

^f Ib. xix. 515.

a house at night, intending to go out for the purpose of night poaching, Holroyd, J., held, that it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly. *(n)*

The conspiring of several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, of exciting discontent and disaffection, and of exciting the king's subjects to hatred of the government and constitution, may be prosecuted by an indictment for a conspiracy. *(o)*

Unlawful assemblies and seditious meetings having, in many instances appeared to threaten the public tranquillity and the security of the government, several statutes have been passed for the purpose of their more immediate and effectual suppression. Statutes.

The 1 Geo. 1, st. 2, c. 5, s. 1, reciting that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace and the endangering of his majesty's person and government, and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts, "that if any persons to the number of *twelve* or more, being unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more, (notwithstanding such proclamation made) unlawfully, riotously and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy." *(p)*

By sec. 2, the justice of the peace, or other person authorized by the act to make the proclamation, shall, among the said rioters, or *as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect;—"Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King." And every justice, sheriff, &c., within the limits of their respective jurisdictions, are authorized and required, on notice or knowledge of any such lawful assembly of twelve or more persons, to

1 Geo. 1, st. 2, c. 5, s. 1. Twelve persons or more unlawfully assembled, and not dispersing after being commanded by one justice, &c. by proclamation; to be adjudged felons.

S. 2, provides as to the form of the proclamation, and manner in which it shall be made.

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(n) Rex v. Brodribb, ^a 6 C. & P. 571, *ante*, p. 125.

(o) Rex v. Hunt and others, ^b 3 B. & A. 566.

(p) See *post*, p. 276, as to the present punishment.

resort to the place, and there to make or cause such proclamation to be made.

Sec. 3. Persons so assembled, and not dispersing within an hour, to be seized and taken before a justice.

By sec. 3, if the persons so unlawfully, riotously and tumultuously assembled, or twelve or more of them, after such proclamation, shall continue together and not disperse themselves within one hour, that it shall be lawful for every justice, sheriff, or under-sheriff of the county where such assembly shall be, and for every constable or other peace-officer within such county, and for every mayor, justice, sheriff, bailiff, and other head officer, constable, and other peace-officer of any city or town where such assembly shall be, and for such other persons as shall be commanded to be assisting unto any justice, sheriff, or under-sheriff, mayor, bailiff, or other head officer (who are thereby authorized to command all his majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend such persons so unlawfully, riotously and tumultuously continuing together after proclamation made; and they are thereby required so to do. And that they shall carry the person so apprehended before one or more of his majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law.

And if they make resistance, the persons killing them are indemnified.

And the section also enacts, that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing or apprehending them, or in the endeavour to do so, by reason of their resisting, then every such justice, &c., constable or other peace-officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming or hurting.

Sec. 5. Preventing such proclamation from being made, a felony.

By sec. 5, "if any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting such person or persons, so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy; and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy; and that also every such person or persons being so unlawfully, riotously and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number *of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." (q)

Persons so assembled where the proclamation is hindered, and not dispersing within an hour, felons.

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Prosecutions to be commenced in twelve months.

By sec. 8, no person shall be prosecuted by virtue of the act for any offence committed contrary to it, unless the prosecution be commenced within twelve months after the offence committed. (r)

The 1 Vict. c. 91, recites sec. 1 & 5 of this act, and provides that after

" (q) Sec *infra*, as to present punishment.

(r) The 9th section enacts, that sheriffs, &c., in Scotland, shall have the same power for putting the act in execution as justices, &c., have here; and that offenders in Scotland shall suffer death, and confiscation of moveables. This statute is commonly called the *Riot Act*; and is required by sec. 7 to be openly read at every quarter session, and at every leet or law day.

the 1st of October, 1837, any person convicted of any of the said offences shall not suffer death, but be liable to transportation for life, or for any term not less than fifteen years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.(s)

The 1 Geo. 1, st. 2, c. 5, contains no provisions as to principals in the second degree, or accessories; there may, however, be such principals and accessories. The principals in the second degree are within the terms of the act, and punishable as principals in the first degree;(t) and the accessories are punishable with transportation for seven years, or imprisonment for not exceeding two years, with or without hard labour, in the common gaol or house of correction, and they may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year; and if males, may be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment.(u) If the magistrate omit the words "God save the king," the proclamation is insufficient.(v) If an indictment upon sec. 1, in setting out the proclamation, omit the words "of the reign of," which were contained in the proclamation read, this is a fatal variance.(w) The hour is to be computed from the first reading of the proclamation. Where, therefore, a magistrate read the proclamation a second and a third time before an hour had elapsed from the time of his reading it the first time, and it was objected that the second and third readings must be considered as new warnings, as if the former readings were abandoned, it was held that the second, or any subsequent reading of the proclamation, did not at all do away with the effect of the first reading, and that the hour was to be computed from the time of the first reading of the proclamation.(w)

If there be such an assembly that there would have been a riot, if the parties had carried their purpose into effect, it is within the act.(x)

Upon an indictment under sec. 1, it was not proved that the *prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour; it was held that it was a question for the jury, upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for although he might have occasion to separate himself for a minute or two, yet if in substance he was there during the hour, he would not be thereby excused.(y)

A riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the Riot Act has not been read, the effect of that being 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.(z)

(s) See the sections, *ante*, p. 92.

(t) *Rex v. Boyce*, 4 Burr, 2073.

(u) See note (t) *ante*, p. 65.

(v) *Rex v. Child*,^a 4 C. & P. 442, Vaughan, B., and Alderson, J.

(w) *Rex v. Woolcock*,^b 5 C. & P. 516, Patteson, J.

(x) *Rex v. Woolcock*, *supra*.

(y) *Rex v. James*, Gloucester Sum. Ass. 1831. MS. C. S. G. Patteson, J.

(z) *Rex v. Fursey*,^c 6 C. & P. 81, Gaselee and Parke, J.s., where it was held that a meeting to adopt preparatory measures for holding a national convention was illegal.

^a Eng. Com. Law Reps. xix. 465.

^b *Ib.* xxiv. 434.

^c *Ib.* xxv. 293.

39 G. 3, c.
79, s. 1.
Certain
societies
suppressed.

By the 39 Geo. 3, c. 79, s. 1, reciting that divers societies had been instituted in this kingdom and in Ireland, of a new and dangerous nature, inconsistent with public tranquillity, and with the existence of regular government, particularly certain societies calling themselves "*Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and The London Corresponding Society,*" and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law established, it is enacted, "That all the said societies of *United Englishmen, United Scotsmen, United Irishmen, and United Britons,* and the said society commonly called the *London Corresponding Society,* and all other societies called *Corresponding Societies,* of any other city, town, or place, shall be, and the same are hereby utterly suppressed and prohibited, as being unlawful combinations and confederacies against the government of our sovereign lord the king, and against the peace and security of his majesty's liege subjects."

Sec. 2. So-
cieties, the
members of
which shall
take unlaw-
ful oaths,
&c., or
where the
names of
some of the
members
shall be
kept secret,
or where
there are
divisions,
or branch
societies,
are unlaw-
ful combi-
nations and
confedera-
cies.

By sec. 2, the said societies, and every other society then established, or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take an oath or engagement which shall be an unlawful oath or engagement, within the intent or meaning of the 37 Geo. 3, (a) c. 123, or to take any oath not required or authorized by law; and every society, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society: and every society, the members whereof shall take, subscribe, or assent to any test or declaration not required by law, or not authorized in manner hereinafter mentioned; every society of which the names of the members, or any of them, shall be kept secret from the society at large, or which shall have any committee, or select body so chosen or appointed, that the members constituting the same shall not be known by the society at large, to be members of such committee, or select body; or which shall have any president, &c., or other officer, so chosen and appointed, that the election or appointment shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, &c., shall not be entered in a book to be kept for that purpose, and open to the inspection of all the members; and every society which shall be composed of different divisions or branches, or of different parts, acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, &c., or other officer, elected or appointed by, or for such part, or to act as an officer for such part; shall be deemed and taken to be *unlawful combinations and confederacies.* (b) And further, that every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, &c., or other officer, or member thereof as such, or who shall by contri-

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Persons
corres-
ponding
with such
societies,
or aiding
them,
guilty of an
unlawful
combina-
tion and

(a) *Ante*, p. 124, *et seq.*

(b) By the 59 Geo. 3, c. 19, s. 27, this enactment is not to extend to meetings of Quakers, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

bution of money or otherwise, aid, abet, or support such society, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination and confederacy.

There is a provision, that the act shall not extend to declarations ap- proved by two justices, and registered with the clerk of the peace; but that such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session. (c) And it is also enacted, that it shall not extend to the meetings of societies, or lodges of Freemasons, which, before the passing of the act, had been usually held, under the denomination of "Lodges of Freemasons," and in conformity to the rules prevailing among such societies; (d) provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c., being, within two months after the passing of the act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members, are to be registered yearly. (e) The clerk of the peace is required to enrol such certificate and registry, and to lay the same once in every year before the general session of the justices; and the justices may upon complaint, upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued; and any such meeting, held notwithstanding such order or discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed an unlawful combination or confederacy under the provisions of the act. (f)

The act not to extend to declarations ap- proved by two justices, nor to lodges of Freema- sons, where there is a certificate and regis- try.

The justi- ces may order the meetingst be discontin- ued, &c.

By sec. 8, "every person who, at any time after the passing of this act, shall, in breach of the provisions thereof, be guilty of any such unlawful combination and confederacy as in this act is described, shall and may be proceeded against for such offence in a summary way, either before one or more justice or justices of the peace for the county, stewardry, riding, division, city, town, or place, where such persons shall happen to be, or by indictment to be *preferred in the county, riding, division, city, town, or place in England wherein such offence shall be committed, or by indictment in the Court of Justiciary, or in any of the circuit courts in Scotland, if the offence shall be committed in Scotland; and every person being convicted of any such offence, on the oath of one or more credible witness or witnesses, by such justice or justices as aforesaid, shall be by him or them committed to the common gaol, or house of correction, for such county, &c., there to remain without bail or mainprize, for the term of three calendar months; or shall be by such justice or justices adjudged to forfeit and pay the sum of twenty pounds, as to such justice or justices shall seem meet; and in case such sum of money shall not be forthwith paid into the hands of such justice or justices, he or they shall, by warrant under his or their hand and seal, or hands and seals, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale; and, for want of sufficient distress, shall commit such offender to the common gaol, or house of correction, of such county, &c., for any term not exceeding three calendar months; and

Sec. 8. Pro- ceedings against offenders before justices, or by indictment.

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(c) 39 Geo. 3, c. 79, s. 3.
(e) Ib. sec. 6.

(d) Ib. sec. 5.
(f) Ib. sec. 7.

every person convicted of any such offence, upon indictment by due course of law, shall and may be transported for the term of seven years, in the manner provided by law for transportation of offenders: or imprisoned for any time not exceeding two years, as the court before whom such offender shall be tried shall think fit; and every such offender, who shall be ordered to be transported, shall be subject and liable to all laws concerning offenders ordered to be transported."

Justices may mitigate the punishment.

Persons once prosecuted, are not liable to other prosecutions.

Offenders may be indicted if not prosecuted, under this act.

60 G. 3, & 1 G. 4, c. 1. Meetings for the purpose of military exercise prohibited; and persons attending such meetings, for the purpose of training others, or aiding therein, liable to be transported or imprisoned, &c.

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But the justice or justices, before whom any person shall be convicted of any unlawful combination or confederacy, may mitigate the punishment, so as it be not thereby reduced to less than one-third of the punishment by the act directed to be inflicted, whether by imprisonment or fine. *(g)* And it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way. *(h)* But the act is not to extend to prevent any prosecution by indictment or otherwise, for any thing which shall be an offence within the intent and meaning of the act, and which might have been so prosecuted if the act had not been made, unless the offender shall have been prosecuted for such offence under the act, and convicted or acquitted of such offence. *(i)*

The 60 Geo. 3 and 1 Geo. 4, c. 1, reciting that in some parts of the United Kingdom men clandestinely and unlawfully assembled had practised military training and exercise, to the great terror and alarm of his majesty's peaceable and loyal subjects, and to the danger of the public peace, enacts, "that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his majesty, or the lieutenant, or two justices of the peace of the county or riding, or of any stewardry, by commission *or otherwise, for so doing shall be, and the same are hereby prohibited as dangerous to the peace and security of his majesty's liege subjects, and of his government; and every person who shall be present at, or attend any such meeting or assembly for the purpose of training or drilling any other person or persons, to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment, not exceeding two years, at the discretion of the court in which such conviction shall be had." *(j)*

(g) 39 Geo. 3, c. 79, s. 9.

(h) *Ib.* sec. 10

(i) *Ib.* sec. 11.

(j) Sec. 2 provides for the dispersion of persons so assembled, or their detention and giving bail. By sec. 5 and 6 actions for any thing done in pursuance of the act must be commenced within six months. And by sec. 7 prosecutions for offences against the provisions of the act must be commenced within six months after the offence committed.

A statute, 57 Geo. 3, c. 19, and a more recent statute 60 Geo. 3, and 1 Geo. 4, c. 6, contained many enactments relating to assemblies of persons, collected for the purpose, or under pretext of deliberating on public grievances, and of agreeing on petitions and addresses to the throne, or to the houses of parliament, which were only temporary enactments, and appear to have now expired.

But the statute 57 Geo. 3, c. 19, contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration.

The twenty-third section, reciting, that it is highly inexpedient that public meetings or assemblies should be held near the houses of parliament, or near the courts of justice in Westminster Hall, on certain days; enacts, "that it shall not be lawful for any person to convene, or to give any notice for convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within the distance of a mile from the gate of Westminster Hall, (except such parts of the parish of St. Paul's, Covent Garden, as are within such distance) for the purpose of considering of or preparing any petition, &c., for alteration of matters in church or state, on any day on which the two houses, or either house of parliament, shall meet and sit, nor on any day on which the courts shall sit in Westminster Hall. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a provision that the enactment shall not apply to any meeting for the election of members of parliament, or to persons attending upon the business of either house of parliament, or any of the said courts."

The twenty-fourth section recites, that divers societies and clubs had been instituted in the metropolis, and in various parts of the kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity and the existence of the established government, laws, and constitution, of the kingdom; and that the members of many such societies or clubs had taken unlawful oaths and engagements of fidelity and secrecy, and had taken or subscribed or assented to illegal tests and declarations; and that many of these societies or clubs appointed or employed committees, delegates, &c., to confer or correspond with other societies or clubs, and to induce other persons to become members; and by such means maintained an influence over large bodies of men, and deluded many ignorant and unwary persons into the commission of acts highly criminal: and recites also, that certain societies or clubs, calling themselves *Spenceans* or *Spencean Philanthropists*, professing for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom; and that it was expedient and necessary that they should be utterly suppressed and prohibited as unlawful combinations and confederacies highly dangerous to the peace and tranquillity of the kingdom, and to the constitution of its government. And then it enacts, "that all societies or clubs calling themselves *Spenceans*, or *Spencean Philanthropists*, and all other societies or clubs, by whatever name or description the same are called or known, who hold and profess, or who shall hold and profess, the same objects and doctrines, shall be, and the same are hereby utterly suppressed and prohibited, as being *unlawful combinations and confederacies* against the government

57 G. 3, c. 19, & 60 G. 3, & 1 G. 4, c. 6, temporary enactments.

57 Geo. 3, c. 19.

Sec. 23. No meetings to be held on certain days within a mile of Westminster Hall.

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59 Geo. 3, c. 19, s. 24, recites concerning societies taking unlawful oaths, &c., or electing committees, delegates, &c.

And also concerning Spencean societies or clubs, &c.

Spencean societies or clubs, &c., suppressed and prohibited as unlawful.

of our sovereign lord the king, and against the peace and security of his majesty's liege subjects."

S. 25. Soci-
eties taking
unlawful
oaths, &c.
or electing
commit-
tees, dele-
gates, &c.
deemed
unlawful
combina-
tions and
confedera-
cies.

The twenty-fifth section enacts, "that all and every the said societies or clubs, and also all and every other society or club now established, or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of the 37 Geo. 3, c. 123,^(k) or within the meaning of the 52 Geo. 3, c. 104,^(l) or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, by becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to, any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be *unlawful combinations and confederacies*, *within the meaning of the 39 Geo. 3, c. 79,^(m) and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said act; and every person who, from and after the passing of this act, shall become a member of any such society or club, or who, after the passing of this act, shall act as a member thereof, and every person, who, from and after the passing of this act, shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money, or otherwise, aid, abet, or support, such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the 39 Geo. 3, c. 79, and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said act, with regard to the prosecution and punishment of unlawful combinations and confederacies."⁽ⁿ⁾

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S. 26. Not
to extend
to lodges of
Free-
masons;
nor to de-
clarations
approved
by justices,
&c.

Nothing contained in this act is to extend to lodges of Freemasons, complying with the regulations of the 39 Geo. 3, c. 79;^(o) nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at general quarter session of the peace, pursuant to the regulations in the said act of the 39 Geo. 3, c. 79;^(p) nor to meetings of *Quakers*; nor to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter or business shall be discussed.^(q)

(k) *Ante*, 124.

(m) *Ante*, 277, *et seq.*

(o) *Ante*, 278.

(l) *Ante*, 125.

(n) *Ante*, 278.

(p) *Ante*, *Ibid.*

(q) 57 Geo. 3, c. 19, s. 26.

Any person knowingly permitting any meeting of any society, or club, declared by this act to be an unlawful combination or confederacy, or of any division or committee of such society or club, to be held in any place belonging to him, or in his possession or occupation, is made liable, for the first offence, to a forfeiture of five pounds; and for any offence committed after the conviction for such first offence is to be deemed guilty of an *unlawful combination and confederacy* in breach of this act.^(r) And two justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c., licensed for the sale of liquors, with the knowledge and consent of the persons keeping such house, &c., may adjudge the license to be forfeited.^(s)

S. 28.
Offences of persons permitting unlawful meetings.

S. 29.
Licenses of houses where held to be forfeited.

The thirtieth and three following sections relate to the recovery of the pecuniary penalties, which may be incurred under the act, their application, and the limitation of actions against justices, &c., for any thing done in pursuance of the act. Penalties exceeding 20*l.* may be recovered by action of debt; and those not exceeding 20*l.* may be recovered before a justice in a summary way.

S. 30, 31, 32, 33. Recovery of penalties and limitation of actions.

By sec. 35, nothing contained in the act shall be deemed to take away or abridge, any provision already made by the law of the realm, for the suppression or punishment of any offence described in the act. And by sec. 36, it is provided that no person shall be prosecuted, *under the act, for having been a member of any illegal society, if such person shall not have acted as a member, after the passing of the act; but that the act shall not extend to prevent any prosecution, by indictment or otherwise, for anything which shall be an offence within the act, and which might have been so prosecuted, if the act had not been made.

By s. 35, act not to effect other provisions made by law; and by s. 36, not to operate on persons not acting after passing of act.

Sec. 36 also provides that no person prosecuted and convicted, or acquitted, of any offence against the act, shall be liable to be again prosecuted for the same offence.

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S. 36.

By sec. 37, where any proceeding or prosecution shall be instituted for any offence against the 39 Geo. 3, c. 79, or this act, either by action or information before any justice or justices, or otherwise, the attorney-general in England, or the lord advocate in Scotland, may order them to be stayed; and, in case of any judgment or conviction, one of his majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof.

S. 37. The attorney-general or lord-advocate may stay proceedings.

The act does not extend to Ireland.^(t)

As to Ireland the Irish act, 33 Geo. 3, c. 29, and the 4 Geo. 4, c. 87, declares certain societies, clubs, &c., in that country, to be unlawful assemblies, combinations, and confederacies; makes the members guilty of an unlawful combination or confederacy, and provides for the suppression of the societies and the punishment of the members. And the 6 Geo. 4, c. 4, was passed to amend the former acts relating to unlawful assemblies in Ireland; but it is to continue in force only for two years from the passing of the act, and until the end of the then next session of parliament.^(u)

Unlawful societies in Ireland.

Several statutes have been passed for the purpose of regulating places

Places used

(r) Ib. sec. 28. Sec. 13 of the 39 Geo. 3, c. 79, is nearly similar.

(s) Ib. sec. 29. Sec. 14 of the 39 Geo. 3, c. 79, is similar, except that it does not contain the words "with the knowledge and consent of the person keeping such house," &c.

(t) Sec. 39.

(u) Sec. 12. The 6 Geo. 4, c. 4, is extended for five years by the 2 & 3 Vict. c. 74.

for lectures, used for delivering lectures, and holding debates: but the enactments &c. contained in them are for the most part of limited duration.

36 Geo. 3, c. 8. Many of the sections of the 36 Geo. 3, c. 8, were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the king's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the act, and until the end of the then next session of parliament.^(v) It is referred to in the 39 Geo. 3, c. 79, s. 15, which, reciting that divers places had been used for lectures and debates, which were not within the former act, but which lectures or debates had in many instances been of a seditious and immoral nature, and that other places had been used for seditious and immoral purposes, under the pretence of being places of meeting for the purpose of reading books, pamphlets, newspapers, or other publications, enacts, that every house, room, field, or other place at or in which any lecture or discourse shall be publicly delivered, or any public debate shall be had on any subject whatever, for the purpose of raising or collecting money, or any other valuable thing, from the persons admitted; or to which any person shall be admitted by payment of money, or by any ticket*or token of any kind, delivered in consideration of money or other valuable thing, or in consequence of paying or giving, or having paid or given, or having agreed to pay or give, in any manner, any money, or other valuable thing; or where any money or other valuable thing shall be received from any person admitted, either under pretence of paying for any refreshment, or other thing, or under any other pretence, or for any other cause, or by means of any device or contrivance whatever; and every house, &c., which shall be opened or used as a place of meeting, for the purpose of reading books, pamphlets, newspapers, or other publications, and to which any person shall be admitted by payment of money, or by any ticket, &c., (as before) shall be deemed a *disorderly house or place*, within the 36 Geo. 3, unless the same shall have been previously licensed in the manner afterwards mentioned in the act. And the persons by whom such house, &c., shall be opened or used, are to forfeit 100*l.* for every time of opening or using, and be otherwise punished as the law directs in cases of disorderly houses; and every person conducting the proceedings, debating, or furnishing books, &c., and also every person giving or receiving money, &c., in respect of the admission to any such house, &c., or delivering out, or receiving, any tickets or tokens, knowing such house, &c., to be opened or used for any such purpose, is, for every such offence, to forfeit twenty pounds.

39 G. 3, c. 79, s. 15. Places of lecturing, debating, or reading, for the purpose of raising money, &c. to be deemed disorderly, unless previously licensed.

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39 G. 3, c. 79, s. 16. Who are liable as persons opening houses, &c. Justices, suspecting any place, may demand ad- It is further enacted, that any person appearing as master, or as having the management of any such house, &c., shall be deemed to be a person by whom the same is opened, or used, and liable to be sued or prosecuted, though not the real owner or occupier.^(w) A power is also given to any justice who shall, by information upon oath, have reason to suspect that any house, &c., is opened or used for lectures, debates, reading, &c., contrary to the act, to go to such house, &c., and demand to be admitted; and in case of admittance being refused, such house, &c., is to be deemed a *disorderly house or place* within this act, and the 36

^(v) The date of the act is the 18th of December, 1795.

^(w) 39 Geo. 3, c. 79, s. 16.

Geo. 3, and the provisions in both the acts are to be applied to such house, &c., where such admittance shall have been so refused; and every person refusing is to forfeit twenty pounds.^(x)

Sec. 18 relates to the licensing any place for lecturing, or reading, by two or more justices at their general sessions, or at a special session held for the purpose; but gives a power to the justices at any general sessions to revoke such license. And any justice may demand admittance to any licensed place; and, in case of refusal, such place is to be deemed, notwithstanding the license, a *disorderly house or place*, within the act: and every person refusing such admittance is to forfeit twenty pounds.^(y) It is also provided, that any two justices upon evidence, on oath, that any licensed place is commonly used for lectures or discourses of a seditious or immoral tendency, or that books, &c., of a seditious or immoral nature are there commonly kept, and delivered to be read, may declare the license to have been forfeited.^(z) Every house, &c., licensed for the sale of ale, or liquors, is to be deemed licensed for reading within the act: but two or more justices on evidence, on oath, that seditious or immoral publications are usually distributed there for the purpose of being read, may declare the license for selling ale, or liquors to have been forfeited.^(a)

The act is not to extend to lectures delivered in the universities by members, &c., or to lectures delivered in the hall of any of the inns of court by persons authorized; and payments to schoolmasters are not to be deemed payments for admission to lectures within the act.^(b) And prosecutions for any penalty imposed by the act are to be commenced within three months after it shall have been incurred.^(c)

The 13 Car. 2, c. 5, reciting the mischiefs of *tumultuous petitioning*, enacts, that no person shall solicit or procure the getting of hands or other consent of any persons above the number of twenty, to any petition, &c., to the king or the houses of parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices, or by the major part of the grand jury of the county, &c., at the assizes or quarter sessions; or in London, by the lord mayor, aldermen, and common council: and that no person shall repair to his majesty or the houses of parliament, upon pretence of presenting or delivering any petition, &c., accompanied with excessive number of people, nor at any one time with above the number of ten persons: upon pain of incurring a penalty not exceeding one hundred pounds, and three months' imprisonment for every offence; such offence to be prosecuted in the Court of King's Bench, or at the assizes or quarter sessions, within six months, and proved by two credible witnesses.^(d) But there is a proviso, that the act shall not hinder persons, not exceeding twenty in number, from presenting any public or private grievance or complaint to any member of parliament, or to the king, for any remedy to be thereupon had; nor extend to any address to his majesty by the members of the houses of parliament, during the sitting of parliament.^(e)

(x) 39 Geo. 3, c. 79, s. 17.

(y) Ib. 19, s.

(a) Ib. s. 21.

(c) Ib. s. 34.

(z) Ib. s. 20.

(b) Ib. s. 22.

(d) 13 Car. 2, st. 1, c. 5, s. 2.

(e) 13 Car. 2, st. 1, c. 5, s. 3. By 1 W. & M. sess. 2, c. 2, s. 1, art. 5, usually styled the Bill of Rights, it is enacted, "That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal." It was contended, that this article had virtually repealed the statute 13 Car. 2, c. 5, but Lord Mansfield

Suppression of riots.—
By common law.

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The common law, and also several more ancient statutes than those which have been mentioned, authorize proceedings for the restraining and suppression of riots. By the common law, the sheriff, under-sheriff, constable, or any other peace-officer, may, and ought to do, all that in them lies towards the suppressing of a riot, and may command all other persons to assist them; and by the common law also any private person may lawfully endeavour to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. (*f*) It has been holden also, that private persons may arm themselves in order to suppress a riot; (*g*) from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of *rebellion. (*h*) But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do anything to prevent the perpetration of a felony. (*i*) In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate: in consequence of which much mischief was done, which might otherwise have been prevented. (*j*)

In order 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; first, that the constable actually saw a breach of the peace committed by two or more persons: secondly, that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and lastly, 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; and whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question of the criterion. (*jj*)

Upon an information against the Mayor of Bristol for neglect of duty in not suppressing the Bristol riots in 1831, which was tried at the bar of the King's Bench, it was laid down that the general rules of law require of magistrates, that at the time of riots, they should keep the peace, restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them, which they are bound to do upon reasonable warning; and in point of law, a magistrate would be justified in giving fire-arms to those who thus came to assist him, but it would be imprudent in him to give them to those who might not know their use, and who might be under no control, and who not being used to act together, might be cut off from the rest of the force, and the arms, by those means, get into the hands of the rioters. (*k*)

declared it to be the unanimous opinion of the court, that neither that nor any other act of parliament had repealed it, and that it was in full force. *Rex v. Lord George Gordon*, Dougl. 571.

(*f*) 1 Hawk. P. C. c. 65, s. 11.

(*g*) Case of arms, Poph. 121, Kel. 76.

(*h*) 1 Hawk. P. C. c. 65, s. 11.

(*i*) By Chambre, J., in *Handcock v. Baker and others*, 2 Bos. & Pul. 265.

(*j*) By Heath, J., in *Handcock v. Baker and others*, 2 Bos. & Pul. 265.

(*jj*) *Rex v. Brown*,^a 1 C. & Mars. 314, Alderson, B.

(*k*) *Rex v. Pinney*,^b 5 C. & P. 254. 3 B. & Ad. 946, Littledale, Parke, and Taunton, Js., and see *Rex v. Kennett*,^d 5 C. & P. 282.

^a Eng. Com. Law Reps. xli. 175. ^b Ib. xxiv. 306. ^c Ib. xxiii. 227. ^d Ib. xxiv. 321.

It is no part of the duty of a magistrate to go out and head the constables, or to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot: nor to keep a body of men, as a reserve, to act as occasion may require: neither is he bound to call out the Chelsea Pensioners, any more than any of the rest of the king's subjects: nor is it any part of his duty to give any orders respecting the fire-arms in gunsmith's shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him. (1)

*The statute 34 Ed. 3, c. 1, empowers justices of the peace to restrain and arrest rioters; and, having been construed liberally, it has been resolved, that a single justice may arrest persons riotously assembled, and may also authorize other to arrest them by a parol command. By the statute 13 Hen. 4, c. 7, s. 1, the justices of the peace, three or

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Suppression of riots, By statutes.

(1) *Rex v. Pinney*, Ibid. The duties of private persons, soldiers, sheriffs, and peace officers in such cases were most clearly and elaborately expounded by Lord C. J. Tindal, in his charge to the Bristol Grand Jury [1832, 5 C. & P. 261^a] as follows:—"By the common law every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace." "It would undoubtedly be more prudent to attend, and be assistant to the justices, sheriffs, or other ministers of the king in doing this, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger were sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms; and at all events the assistance given by men, who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed, than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the king as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a stronger degree with a military force. But when the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the king not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer, is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that undertaking. By an early statute (13 H. 4, c. 7,) any two justices, with the sheriff or under-sheriff of the county, may come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here I most distinctly observe, that it is not left to the choice or will of the subject, as some has erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly. See *Reg. v. Neale*,^b 9 C. & P. 431, per Littledale, J.

^a Eng. Com. Law Repts. xxiv. 310.

^b Ib. xxxviii. 182.

two of them at the least, and the sheriff or under-sheriff of the county where any riot, assembly, or rout of people against the law shall be made, shall come with the power of the county (if need be) to arrest them; and shall arrest them; and shall have power to record that which they shall find so done in their presence against the law: and by such record the offenders shall be convicted in the same manner as is contained in the statute of forcible entries.(m) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to the justices in suppressing riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable.(n)

Of the indictment and trial.

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An indictment for a riot must show for what act the rioters assembled, that the court may judge whether it was lawful or not:(o) and it must state that the defendants unlawfully assembled; for a riot is a compound offence: there must be not only an unlawful act to be done, but an unlawful assembly of more than two persons.(p) In a case where six persons being indicted for a riot, two *of them died without being tried, two were acquitted, and the other two were found guilty, the court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot.(q)[1] But as two persons only cannot be guilty of a riot, it was held, that where several were indicted, and all but two were acquitted, no judgment could be given against the two.(r)† And though the indictment in this case charged a battery upon an individual as well as a riot, and it was argued that the *riotose, &c.*, was only to express the manner of the assault, and a kind of aggravation of the offence, it was held that the two persons could not be intended to be guilty of the battery; that the offence was special and laid as a riot, the *riotose* extending to all the facts, and the battery being but part of the riot; so that the defendants being acquitted of the riot were acquitted of the whole of which they were indicted. But it was also held, that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, and the verdict had been as in this case, the king might have had judgment.(s)

(m) 5 R. 2, stat. 1, c. 7.

(n) 4 Bla. Com. 146, 147. 1 Hale, 495. The statutes 17 R. 2, c. 8, 2 H. 5, c. 8, and 19 H. 7, c. 13, relate also to summary proceedings of justices, &c., in case of riots, which it is not thought necessary to mention further in this work. The different statutes and the construction put upon them may be seen in 1 Hawk. P. C. c. 65, s. 14, *et seq.* and Burn. tit. *Riots, &c.*, II., III., IV., V. The statutes 2 H. 5, c. 8, 2 H. 5, c. 9, and 2 H. 6, c. 14, relate to process out of chancery in cases of riots.

(o) Reg. v. Gulston and others, 2 Lord Raym. 1210.

(p) Reg. v. Soley et al., 2 Salk. 593, 594.

(q) Rex v. Scott and another, 3 Burr. 1262.

(r) Rex v. Sadbury and others, 1 Lord Raym. 484, and see 19 Vin. Abr. tit. *Riots* (E) 1.

(s) Rex v. Sadbury and others, 1 Lord Raym. 484, S. C. 2 Salk. 693, and 12 Mod. 262. 19 Vin. Abr. tit. *Riots* (E) 6.

[1] [2 Haywood's (N. C.) Rep. 55, *State v. Pugh & al. acc.* But where on an indictment for a riot, against the defendant and two others named, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names; and the grand jury found a true bill, only against the defendant and one other, to which the defendant pleaded guilty—the court arrested the judgment. 1 M'Cord, 532, *State v. O'Donald*]

† [Acc. *Penn'a v. Hurton & al.*, Addis, 334. But see the *State v. Allison*, 3 Yerger (Tenn.) Rep. 428.

If an indictment for a riot and assault do not conclude in *terrorem populi*, and there be no evidence of an assault, the defendants must be acquitted, (t) but if such an indictment charge the defendants with a riot and cutting down fences, they may be convicted of an unlawful assembly, notwithstanding the want of such a conclusion. (u) An indictment, however, upon the 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation has been made, need not charge the riot to have been in *terrorem populi*. (v)

Upon an indictment against H. Hunt and others, for a conspiracy and unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, at which meeting H. Hunt was the chairman, it was holden, that resolutions passed at a former meeting assembled a short time before, in distant place, but at which H. Hunt also presided, and the avowed object of which meeting was the same as that of the meeting mentioned in the indictment, were admissible in evidence, to show the intention of H. Hunt in assembling and attending the meeting in question. And it was holden that a copy of these resolutions delivered by H. Hunt to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, was admissible, without producing the original. (w)

Evidence upon an indictment for a conspiracy in unlawfully assembling, &c., to excite discontent and disaffection.

In the same case it appeared, that large bodies of men had come to the meeting in question from a distance, marching in regular order resembling a military march: and it was holden to be admissible evidence, to show the character and intention of the meeting, *that within two days of the time at which it took place considerable numbers were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting; and that, upon their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. And it was also admitted as evidence for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing. (x)

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It was decided in this case, that parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals. (y)

And another point was also decided in this case; namely, that upon the indictment in question evidence of the supposed misconduct of those who dispersed the meeting was not admissible. (z)

In another case where the question was, with what intention a great number of persons assembled to drill, declarations made by those assembled and in the act of drilling, and further declarations made by others who were proceeding to the place, and solicitations made by them to others to accompany them declaratory of their object, were held to be admissible in evidence for the purpose of showing their object. (a) And

Declarations of the

(t) Rex v. Hughes, ^a 4 C. & P. 373, Park, J. J. A.(u) Rex v. Cox, ^b 4 C. & P. 538, Patteson, J.(v) Rex v. James, ^c 5 C. & P. 158, Patteson, J. MS. C. S. G. S. C.(w) Rex v. Hunt, ^d 3 B. & A. 566.(y) Id. *ibid.*(a) Redford v. Birley, ^e *cor.* Holroyd, J. 2 Stark. N. P. C. 76.(x) Rex v. Hunt, ^d 3 B. & A. 566.(z) Id. *ibid.*^a Eng. Com. Law Repts. xix. 425.^b *Ib.* xix. 516.^c *Ib.* xxiv. 251.^d *Ib.* v. 377.^e *Ib.* xiv. 166.

parties as- in general, evidence is admissible to show that the meeting caused alarm
sembling. and apprehension, and to prove information given to the civil authorities,
and the measures taken by them in consequence of such information. (b)

It was held by the judges, (c) on the special commission of 1830, 1831,
at Salisbury, that the prisoners must first be identified as forming part
of the crowd before the riot is proved, and the fifteen judges confirmed
the holding of the special commission. (d)

Where several were indicted for a riot, it was moved, that the prose-
cutor might name two or three, and to try it against them, and that the
rest might enter into a rule to plead not guilty (*guilty if the others
were found guilty*;) and a rule was made accordingly; this being to
prevent the charges in putting them all to plead. (e)

Punish-
ment.

The *punishment* for offences of the nature of riots, routs, or unlawful
assemblies, at common law, is fine and imprisonment, in proportion to
the circumstances of the offence: (f) and formerly, in cases of great
enormity, it appears that the offenders were sometimes punished with
the pillory; (g) but such punishment is now taken away by the statute
56 Geo. 3, c. 138.

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And by the 3 Geo. 4, c. 114, whenever any person shall be convicted
of a riot, "it shall and may be lawful for the court before which any
such offender shall be convicted, or which by law is *authorized to pass
sentence upon any such offender, to award and order, if such court shall
think fit, sentence of imprisonment, with hard labour, for any term not
exceeding the term for which such court may now imprison for such
offences, either in addition to, or in lieu of any other punishment which
may be inflicted on any such offenders, by any law in force before the
passing of this act; and every such offender shall thereupon suffer such
sentence, in such place, and for such time as aforesaid, as such court
shall think fit to direct."

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*CHAPTER THE TWENTY-SIXTH.

OF AFFRAYS. (1)

AFFRAYS are the fighting of two or more persons in some public
place, to the terror of his majesty's subjects. (a) The derivation of the
word *affray* is from the French *effrayer*, to terrify; and as in a legal
sense it is taken for a public offence to the terror of the people, it seems
clearly to follow that there may be an assault which will not amount to
an affray: as where it happens in a private place, out of the hearing or
seeing of any except the parties concerned; in which case it cannot be
said to be to the terror of the people. (b)† And there may be an affray

(b) *Redford v. Birley*,^a *cor. Holroyd*, J. 2 Stark. N. P. C. 76.

(c) *Vaughan B., Parke and Alderson*, Js.

(d) *Per Alderson, B.*, in *Nicholson's case*, 1 Lew. 300, where the same course was adopted.

(e) *Anon.* 2 Salk. 317. Reg. *Middlemore*, 6 Mod. 212.

(f) 1 Hawk. P. C. c. 65, s. 12.

(g) *Id. ibid.*

(a) 4 Blac. Com. 144. 3 Inst. 158. *Burn. Just. tit. Affray*, I.

(b) 1 Hawk. P. C. c. 63, s. 1. In 3 Inst. it is said that an affray is a public offence to the
terror of the king's subjects; and is an English word, and so called, because it affrighteth
and maketh men afraid; and is inquirable in a leet as a common nuisance.

(1) {See the form of an indictment for an affray, in *Archbold's Crim. Pl.* 337.}

† [An indictment for an affray must charge the fighting to have been in a public place.
State v. Heftin, 8 Humphreys, 84.

An indictment charged that two persons with force, and arms, &c., "did make an affray

^a Eng. Com. Law Rep. xiv. 166.

which will not amount to riot, though many persons be engaged in it; as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention.^(c) An affray differs also from a riot in this, that *two* persons only may be guilty of it; whereas three persons at least are necessary to constitute a riot, as has been shown in the preceding chapter.

An affray may be much aggravated by the circumstances under which it takes place, either, first, in respect of its dangerous tendency; secondly, in respect of the persons against whom it is committed; or, thirdly, in respect of the place in which it happens. Aggravated affrays.

An affray may receive an aggravation from its dangerous tendency; as where persons coolly and deliberately engage in a duel which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves.^(d) And an affray may receive an aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or the *bare attempt to make such a rescue; the ministers of the law being under its more immediate protection.^(e) And further, an affray may receive an aggravation from the place in which it is committed; it is therefore severally punishable when committed in the king's courts, or even in the palace-yard near those courts; and it is highly fineable when made in the presence of any of the king's inferior courts of justice.^(f) And upon the same account, also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated.^(g)

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It is said, that no quarrelsome or threatening words whatsoever can amount to an affray; and that no one can justify laying his hands on Words will not make an affray.

(c) 1 Hawk. P. C. c. 65, s. 3.

(d) 1 Hawk. P. C. c. 63, s. 21. This would apply to such duels as were fought in ancient times; and to such as have been occasionally heard of, in more modern days, in neighbouring countries, fought amidst a number of spectators. But *qu.* if a duel, as usually conducted in this country of late years, would be an affray.

(e) 1 Hawk. P. C. c. 63, s. 22. And see *post*, Chap. on *Rescue*.

(f) 1 Hawk. P. C. c. 21, s. 7, 10, c. 63, s. 23. As to striking in the courts of justice, see *post*, Book III., Chap. on *Aggravated Assaults*.

(g) 1 Hawk. P. C. c. 63, s. 23. And see *post*, Chap. xxviii. *Of Disturbances in Places of Public Worship*.

by fighting." It is held that this charge of fighting was sufficiently certain and definite and the indictment valid. *The State v. Benthal*, 5 Humphreys, 519.

Mere words do not constitute an affray; nor is a party guilty of that offence, who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant. *O'Neill v. The State*, 16 Alabama, 65.

Words alone will not constitute an affray; but accompanied by acts, such as drawing knives or attempting to use them in a public street of a city will. *Hawkin v. The State*, 13 Georgia, 322.

A field surrounded by a forest and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly guilty of an affray. *Taylor v. The State*, 22 Alabama, 15.]

But there may be an affray where there is no actual violence, as where a person goes armed.

2 Edw. 3, c. 3. Persons prohibited from going armed.

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Construction of 2 Edw. 3, c. 3, as to persons going armed.

those who shall barely quarrel with angry words, without coming to blows; but it seems that a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. And granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law, and is strictly prohibited by several statutes.^{(h)†}

The principal of these statutes is 2 Ed. 3, c. 3, sometimes spoken of as the statute of Northampton. It enacts, that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace,⁽ⁱ⁾ nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. The statute also provides, that the king's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables and wardens of the peace within their wards, shall have power to execute the act; and that the judges of assize may inquire and punish such officers as have not done that which pertained to their office. This statute is further enforced by 7 Rich. 2, c. 13, and by the 20 Rich. 2, c. 1, which adds the further punishment of a fine.‡

In the exposition of this statute of 2 Ed. 3, it has been holden, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; *from whence it seems clearly to follow, that persons of quality are in no dangers of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.^(k) And no person is within the intention of the statute, who arms himself to suppress dangerous rioters, rebels or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm.^(l) But a man cannot excuse wearing such armour in public by alleging that a person threatened him, and that he wears it for the safety of his person from the assault; though no one will incur the penalty of the statute, for assembling his neighbours and friends in his

^(h) 1 Hawk. P. C. c. 63, s. 23. And see *post*, chap. xxviii. *Of Disturbances in Places of Public Worship*.

⁽ⁱ⁾ The words of the statute are *en affrai de la pees*. But Lord Coke, in 3 Inst. 158, cites it as an *en affrai de la pais*; and observes, that the writ grounded upon the statute says *in quorundam de populo terrorem*, and that therefore the printed book (*en affray de la pece*) should be amended.

^(k) 1 Hawk. P. C. c. 63, s. 9.

^(l) *Ib.* sec. 10.

† [*Contra*, *Simpson v. The State*, 5 Yerger (Tenn.) Rep. 356.]

‡ [A statute prohibiting all persons, except travellers, from wearing or carrying concealed weapons is not unconstitutional. *The State v. Mitchell*, 3 Blackf. 229.]

own house, against those who threaten to do him any violence therein, because a man's house is as his castle.^(m)

It may be useful to mention shortly the acts which may be done for the suppression of an affray, by a private person, by a constable, or by a justice of peace.

It seems to be agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding securities for the peace; and it said that any private person may stop those whom he shall see coming to join either party.⁽ⁿ⁾[1] Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer; and so any person may arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it. Both cases fall within the same principle, which is that for the sake of the preservation of the peace, any individual who sees it broken, may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those who are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray, the constable may, not merely on his own view, but on the information and complaint of another, *arrest the offenders, and of course the person so complaining is justified in giving the charge to the constable. The plaintiff went into the defendant's shop, and offered to purchase an article at a price marked on a ticket; the plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do, and declared he would strike any man who laid hands on him; a shopman then struck him on the face; the plaintiff returned the blow, and a contest commenced, the noise of which brought down the defendant from the room above; when he came down the plaintiff was scuffling with the shopman; the defendant sent for a policeman, and on his arrival the plaintiff was requested by the defendant to go from the shop quietly, but he refused; he was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the

Of the suppression of affrays by private persons.

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(m) 1 Hawk. P. C. c. 63, s. 8, and see in ss. 5, 6, 7, as to the proceedings of justices, &c., executing the act. As to arms in Ireland, the 47 Geo. 3, sess. 2, c. 54, was passed, and is intitled, "An act to prevent improper persons from having arms in Ireland;" and having been continued and amended from time to time, was further continued for one year, and until the end of the then next session of parliament by 3 and 4 Vic. c. 32. By this act of 47 Geo. 3, it is felony to make pikes, &c., under certain circumstances, without a license. s. 11. And by sec. 12, justices may search for pikes, &c.; and persons having such instruments in possession under certain circumstances, are punishable by twelve months' imprisonment for the first offence, and for any subsequent offence to be adjudged felons.

(n) 1 Hawk. P. C. c. 63, s. 11. Where it is said that from hence it seems clearly to follow, that if a man receive a hurt from either party, in thus endeavoring to preserve the peace, he shall have his remedy by an action against him; and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commands, he may well justify it; inasmuch as he is in no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness. See particularly the charge of Tindal, C. J., to the Bristol grand jury, *ante*, p. 286, note.

[1] {*Phillips v. Trull*, 11 Johns. R. 486, *acc.* But a private person cannot, of his own authority, lawfully arrest one for an affray, &c., after it is over. *Ibid.* See 6 Dane's Ab. 729.}

policeman, who took him to the police station. It was held that the defendant had a right, the danger continuing, to deliver the plaintiff into the hands of the policeman, and that the circumstance that the plaintiff was not guilty of the first illegal violence made no difference; for at the time the defendant interfered he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned from violence. (n) And it seems to be clear, that if either party be dangerously wounded in such an affray, and a stander-by endeavouring to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him until it appear whether the party will live or die, or carry him before a justice of peace. (o)

Of the suppression of affrays by a constable.

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It seems agreed that a constable is not only empowered, as all private persons are, to part an affray which happens in his presence, but is also bound, at his peril, to use his best endeavours for this purpose; (oo) and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to give him, they are punishable with fine and imprisonment. And it is laid down in the books, that if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly in a house, and he follow with a fresh suit, he may break open the doors to take them. (p) And so far is the constable intrusted with a power over all actual affrays, that although he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself, but also imprison the offender in the same manner as if he were in no way a party. (q) It is said also, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, &c., or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, *or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c., or he may imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case is to command them, under pain of imprisonment, to avoid fighting. (r)

Where the affray was not in the presence of

It has been much doubted whether a private individual who has seen an affray committed, may give in charge to a constable who has not; and whether such constable may, therefore, take into his custody the

(n) Timothy v. Simpson, 6 Tyrw. 244. 1 C., M. & R. 757.

(o) 1 Hawk. P. C. c. 63, s. 12. 3 Inst. 158.

(oo) See the charge of Tindal, C. J., ante. p. 286, note.

(p) 1 Hawk. P. C. c. 63, s. 13, 16. But *qu.* if a constable can safely break open the doors of a dwelling house in such case, without a magistrate's warrant? At least it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(q) Id. *ibid.* sec. 15.

(r) Id. *ibid.* sec. 14.

affrayers, or either of them, in order to be carried before a justice, after the affray is entirely ceased, after the offenders have quitted the place, where it was committed, and there was no danger of renewal ;(s) but it seems now to be settled that a constable has no power to arrest a man for an affray done *out of his own view*, without a warrant from a justice of peace,(t) unless a felony be done, or likely to be done ; for it is the proper business of a constable to preserve the peace, not to punish the breach of it ; and where a breach of the peace has been committed, and is over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate.(u) It is said that he may carry those before a justice who were arrested by such as were present at an affray and delivered by them into his hands.(v)

There is no doubt but that a justice of peace may and must do all such things for the suppression of an affray, which private men or *constables are either enabled or required by the law to do ; but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view. Yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. Also it seems that a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable ; for there does not seem to be any good authority, that these have any power to take sureties of such an offender ; but it seems certain that a justice of the peace has a discretionary power, either to commit him or to bail him till the year and day be past. It is said, however, that a justice ought to be very cautious how he takes bail, if the wound be dangerous ; since, if the party die, and the offender do not appear, the justice is in danger of being severely fined, if upon the whole circumstances of the case he has been too favourable.(w)

(s) See *Timothy v. Simpson*, 5 Tyrw. 244. S. C. 1 C., M. & R. 757. The court did not decide the question. They observed, "the power of a constable to take into his custody, upon a reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath *Sharrock v. Hannemer*, Cro. Eliz. 375, Owen, 105. S. C. *non Scarrett v. Tanner*. But whether he has that power in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power, 2 H. P. C. 89, and the same rule has been laid down at Nisi Prius by Lord Mansfield, in a case referred to in 2 East, 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. N. P. 421. On the other hand, there is a dictum to the contrary in *Brooke's Abridgment*, tit. *Faux Imprisonment*, which is referred to and adopted by Lord Coke, in 2 Inst. 52 ; and Lord Holt, in 2 Lord Ray. 1301. *Reg. v. Tooley*, expresses the same opinion. Lord C. J. Eyre, in *Coupey v. Henley*, 1 Esp. C. N. P. 540, does the same, and many of the modern text-books state that to be the law. *Burn's Just.* 26th ed. tit. *Arrest*, 258. Bac. Abr. (D) tit. *Trespass*, 53. 8 East, P. C. 506. Hawk. P. C. b. 2, c. 13, s. 8."

(t) *Cook v. Nethercote*,^a 6 C. & P. 741, Alderson, B. *Fox v. Gaunt*,^b 3 B. & Ad. 798. *Rex v. Curvan*, R. & M. C. C. R. 132. *Rex v. Bright*,^c 4 C. & P. 387. See these cases, *post*, Book III., tit. *Manslaughter in Resisting Officers*.

(u) *Cook v. Nethercote*, *supra*.

(v) 1 Hawk. P. C. c. 63, s. 17, citing Lamb. 131, and Dalt. c. 8. Dalton however does not seem to warrant the position ; but on the contrary, he says, that "the constable may not imprison the parties unless the affray was in his presence," and it seems the position is very doubtful : the constable cannot apprehend affrayers on the information of others, because in misdemeanors he cannot act except upon view, and the same reason applies to the case of a person brought in custody by a person who apprehended him on the spot. C. S. G.

(w) 1 Hawk. P. C. c. 63, s. 19. As maliciously wounding is now a felony under the 1 Vict. c. 85, s. 4, whether the case would have been murder or manslaughter, in case death

^a Eng. Com. Law Repts. xxv. 627.

^b Ib. xxiii. 187.

^c Ib. xix. 434.

Punishment of affrays.

The punishment of common affrays is by fine and imprisonment; the measure of which must be regarded by the circumstances of the case; for where there is any material aggravation, the punishment will be proportionably increased.(x)

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*CHAPTER THE TWENTY-SEVENTH.

OF CHALLENGING TO FIGHT.(A)

IT is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight.(a) And it will be no excuse for a party so offending, that he has received provocation; for as, if one person should kill another in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second; the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace.(b)

Of endeavouring to provoke another to send a challenge.

The offence of endeavouring to provoke another to send a challenge to fight was much considered in a modern case, in which it was held to be an indictable misdemeanour; and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the king's peace.(c)† And the sending such letter was held to be an act done towards the procuring the commission of the misdemeanour meant to be accomplished.(d) In this case, with respect to the *intent* of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment; but that where the act is in itself unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution.(e)

Of the intent.

had ensued, the proper course in such cases is to commit, unless the case be one of doubt, within the 7 Geo. 4, 64, s. 1. C. S. G.

(x) 4 Bla. Com. 145. 1 Hawk. P. C. c. 63, s. 20.

(a) 1 Hawk. P. C. c. 63, s. 3. 3 Inst. 158. 4 Bla. Com. 150. Hick's case, Hob. 215.

(b) Rex v. Rice, 3 East, 581.

(c) Rex v. Phillips, 6 East, 464. The letter was, "Sir—It will, I conclude, from the description you gave of your feelings and ideas with respect to insult, in a letter to Mr. Jones, of last Monday's date, be sufficient for me to tell you, that in the whole of the Caermarthenshire election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make."

(d) See *ante*, p. 46, 47.

(e) Rex v. Phillips, 6 East, 470 to 475.

(A) The offence of challenging to fight a duel, either by word or letter, is made punishable by statute in most of the United States, to which the reader is referred. But I have met with no case in the reports which has been the subject of individual investigation, excepting one in Virginia, in which it was decided that an attorney at law is not bound, as a requisite to his admission to the bar of any court, to take the oath prescribed by the 3d section of the act to suppress duelling. Leigh's case, 1 Munf. Rep. 468.

† [No set phrase is necessary to constitute a challenge. Parol testimony is admissible to explain it. If the jury think it mere empty boast, and not intended as a challenge in earnest,

It has been considered that mere words of provocation, as "liar" and "knave," though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threatening to beat another. (*f*) *But words which directly tend to a breach of the peace may be indictable; as if one man challenges another by words; (*g*) and if it can be proved that the words used were intended to provoke the party, to whom they were addressed to give a challenge, the case would seem to fall within the same rule. (*h*) †

Of words of provocation.

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In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post-office in a street in Westminster, addressed to the prosecutor in the city of London, by whom it was there received; Lord Ellenborough, C. J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post-office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same. (*k*)

The venue may be in the county in which the challenge is put into the post-office.

It may be observed, before this subject is concluded, that sending a challenge is an offence for which the Court of King's Bench will grant a criminal information; but in a case where it appeared, upon the affidavits that the party applying for an information had himself given the first challenge, the court refused to proceed against the other party by way of information; and left the prosecutor to his ordinary remedy by action or indictment. (*l*) A rule to show cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified. (*m*)

Proceeding by criminal information.

The punishment for this offence, as a misdemeanor, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in each particular case. (*n*)

Punishment.

(*f*) King's case, 4 Inst. 181. (*g*) Reg. v. Langley, 6 Mod. 125. S. C. 2 Lord Raym. 1031.

(*h*) The rule given in 3 Inst. 158, is—*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

(*k*) Rex v. Williams, 2 Campb. 506.

(*l*) Rex v. Hankey, 1 Burr. 316, where it is said that the court held that it might have been right to have granted *cross informations*, in case each party had applied for an information against the other.

(*m*) Rex v. Chappel, 1 Burr. 402.

(*n*) Rex v. Rice, 3 East, 584, in which case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to mitigate his offence) was sentenced to pay a fine of 100*l.* and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for two years, himself in 100*l.* and two sureties in 250*l.* each, and to be further imprisoned till such fine was paid and such securities given. Hawkins, speaking of the pernicious consequences of duelling, says, "upon which considerations persons convicted of barely sending a challenge have been adjudged to pay a fine of 100*l.*, and to be imprisoned for one month without bail, and also to make a public acknowledgment of their offence, and to be bound to their good behaviour." 1 Hawk. P. C. c. 63, s. 21.

they may acquit. *Commonwealth v. Hart*, 6 J. J. Marsh. (Ken.) Rep. 120. Expressing a readiness to accept a challenge does not, however, amount to one. *The Commonwealth v. Tibbs*, 1 Dana (Ken.) Rep. 524.

No particular form of words is necessary to constitute a challenge to fight a duel; whether a challenge to fight in single combat with deadly weapons was intended, or whether it was the mere effusion of passion or folly or the idle boast of a braggart, not intended at the time to lead to any result or to be understood by the other party as a challenge to fight a duel, are questions which the jury must determine. *Ivey v. State*, 12 Ala. 276.]

† [*The Commonwealth v. Tibbs*, 1 Dana (Ken.) Rep. 524.]

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*CHAPTER THE TWENTY-EIGHTH.

OF DISTURBANCES IN PLACES OF PUBLIC WORSHIP.(A)

It has been already stated that affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated;(a) and upon this consideration all irreverent behaviour in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal, which would be commendable if done in another place; as arrests by virtue of legal process.(b)†

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics.

5 & 6 Ed. 6, c. 4, as to quarrelling or brawling in a church or church-yard. The 5 & 6 Edw. 6, c. 4, enacts, "that if any person whatsoever shall, by words only, quarrel, chide, or brawl, in any church or church-yard, that then it shall be lawful unto the ordinary of the place where the offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient, according to the fault."

S. 2. Smiting, &c., in church or church-yard. By the second section of the same statute, "if any person or persons shall smite or lay violent hands upon any other, either in any church or church-yard, then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."(c)

Construction of the statute. In the construction of this statute it has been held that the Ecclesiastical Court may proceed upon the two first sections, and is not to be prohibited; for though the offence mentioned in the second section of smiting in the church or church-yard is still an offence at common law, and the offender may be indicted for it; yet, besides this, he may, by the act, be *ipso facto* excommunicated.(cc) No previous conviction is necessary in this case; though, if there be *one, the ordinary may use it as proof of the fact. But before the Ecclesiastical Court could pro-

(a) *Ante*, 292.

(b) 1 Hawk. P. C. c. 63, s. 23.

(c) The 9 Geo. 4, c. 31, repeals this act as far "As relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned." The statute has three degrees of offences, per Lord Mansfield, C. J., 1 Burr. 242, and only the last seems to be repealed. C. S. G.

(cc) *Wilson, Clerk, v. Greaves*, 1 Burr. 240.

(A) Disturbances in places of public worship are made punishable by statute provisions in most of the United States. The enactments are in general similar with respect to the nature of the offence; but the punishment and mode of prosecution are different in different States, to the particular statutes of which the reader is referred.

† [A camp meeting, or temporary encampment of a denomination of Christians, for the purpose of religious exercises, is "a place set apart for the worship of Almighty God," within the intent and meaning of the act of 1809. *The State v. Hall*, 2 Bailey (S. Car.), Rep. 151.]

ceed for the offence, in the third section, (now repealed,) there must have been a previous conviction, and a transmission of the sentence to the ordinary. *(d)* Indeed, if the Ecclesiastical Court proceeds for damages on either clause, the Court of King's Bench will prohibit them; for the proceedings of the Ecclesiastical Court are *pro salute animæ*. *(e)*

Cathedral churches, and the church-yards which belong to them, are within the statute. *(f)* And it has been held that it will be no excuse for a person who strikes another in a church, &c., to show that the other assaulted him. *(g)* But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. *(h)*

The statute 1 Mary, sess. 2, c. 3, enacts, "that if any person or persons, of their own power and authority, do and shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful ways or means disquiet or misuse, any preacher or preachers, licensed, allowed, or authorized, to preach by the queen's highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the Universities of Oxford and Cambridge, or otherwise lawfully authorized or charged by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his or their open sermon, preaching, or collation, that he or they shall make, declare, preach, or pronounce in any church, chapel, church-yard, or in any other place or places, used, frequented, or appointed, or that hereafter shall be used or appointed to be preached in; or if any person or persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble, any parson, vicar, parish-priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments, or sacramentals, as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorized, by the queen's majesty; or, if any person or persons shall unlawfully, contemptuously, or maliciously, of their own power or authority, pull down, deface, spoil, or otherwise break, any altar or altars, or any crucifix or cross, in any church, chapel, or church-yard," every such offender, his aiders, procurers, or abettors, may be apprehended by any constable or church-warden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence, and being so apprehended, shall be brought before some justice of the peace, by whom he shall, upon due accusation, be committed forthwith; and within six days next after the accusation, the said justice, with one other justice, shall diligently examine the offence; and if the *two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which

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(d) Wilson, Clerk, *v.* Greaves, 1 Burr. 240.

(e) Id. ib. And by Lord Mansfield, C. J., in the same case, "We proceed to *punish*, they to *amend*."

(f) Dethick's case, 1 Leon. 248.

(h) Id. *ibid.* s. 29.

(g) 1 Hawk. P. C. c. 63, s. 28.

sessions he is upon repentance to be discharged, finding surety for his good behaviour for a year; and if he will not repent, he is to be further committed till he does. (*i*)

It has been resolved, that the disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should be afterwards authorized by Queen Mary, impliedly includes such service also as should be authorized by her successors, upon the principle that as the king never dies, a prerogative given generally to one goes of course to others. (*h*)

The party must maliciously, wilfully, or of purpose molest the minister.

The 1 Mary, stat. 2, c. 3, merely gave to the common law cognizance of an offence, which was before punishable by the ecclesiastical law; and in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. The plaintiff on a Sunday presented a notice to the parish clerk, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene Creed had been read, and whilst the minister was walking from the communion table to the vestry-room, and whilst no part of the service was actually going on, the plaintiff stood up in his pew and read a notice that a vestry would be held to choose church-wardens, whereupon the minister desired a constable to take him out of the church, which the constable did, and detained him an hour after the service was over, and then allowed him to go upon promising to attend before a magistrate the next day. It was held, that although the constable might be justified in removing him from the church, and detaining him till the service was over, he could not detain him afterwards to take him before a magistrate under this statute. Abbott, C. J., said, "had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mary, stat. 2, c. 3, warranted his detention in order that he might be taken before a justice." (*l*)

Rescuing offenders or hindering their arrest. Escape of offenders.

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence. (*m*) And if any offenders be not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inhabitants of the parish where the escape was suffered are to forfeit five pounds. (*n*)

Precedents are to be met with of indictments for breaking the windows of a church, by firing a gun against them: (*o*) but it has been doubted whether such an indictment is sustainable, as being for a mere trespass. (*p*)

*302 *By the 9 Geo. 4, c. 31, s. 23, "if any person shall arrest any clergyman engaged in or shall, with the knowledge of such person be going to perform the

(*i*) 1 Mar. sess. 2, c. 3, s. 2, 3, 4, 5, 6.

(*h*) 1 Hawk. P. C. c. 63, s. 31. Gibs. 372.

(*l*) Williams v. Glenister, 2 B. & C. 699. It was also held that the case did not come within the 1 W. & M. c. 18, *post*, p. 302.

(*m*) Sec. 7.

(*n*) Sec. 8.

(*o*) 2 Chit. Crim. L. 23.

(*p*) *Id. ibid.*, and see *ante*, 53.

same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment by fine and imprisonment, or both, as the court shall award." (r)

The statute 1 Wm. & M. c. 18, s. 18, which was passed for the purpose of exempting Protestants dissenting from the Church of England from the penalties of certain laws therein mentioned, enacts, "that if any person or persons shall, willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher; such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of fifty pounds; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of twenty pounds," to the use of the king.

Before this statute the Court of King's Bench refused to grant a *certiorari* to remove an indictment at the sessions against a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the court considered it properly to come within the cognizance of the justices of the peace. (s) An indictment upon the statute, found at the quarter sessions, may be removed by *certiorari* before verdict, notwithstanding the words of the statute, which seems at the first view to confine the cognizance of the offence to the justices in the first instance, and in the next to the quarter sessions. (t)

The oaths taken by a preacher under this act are matter of record, and cannot be proved by parol evidence; but it is not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister has taken the oaths. (u) It is no defence to such an indictment, that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk. (v) And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute. (w) Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds. (x)

The 1 Wm. & M. c. 18, only applies where the thing is done wilfully, and of purpose to disturb the congregation or misuse the minister. (y)

A late statute makes further provision for the punishment of persons disturbing religious assemblies; and enacts, "that if any person or persons do and shall wilfully and maliciously or contemptuously *disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or

divine service.

1 W. & M. c. 18. Disturbing congregations.

Points decided upon this statute.

52 Geo. 3, c. 155, further provision against the disturbance of religious assemblies. *303

(r) But the arrest notwithstanding, if not on a *Sunday*, is good in law. Wats. c. 34. Burn. Just. tit. *Public Worship*.

(s) *Rex v. —*, 1 Keb. 491. Burn's Just. tit. *Public Worship*.

(t) *Rex v. Hube*, 5 T. R. 542.

(u) *Rex v. Hube, Peake*, R. 131.

(v) *Id. ibid.*

(v) *Id. ibid.*

(x) *Rex v. Hube*, 5 T. R. 542.

(y) *Per Abbott, C. J., Williams v. Glenister, ante*, 301. See the case.

congregation, or any person or persons there assembled; such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of fifty pounds to answer for such offence; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction for the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds."(*yy*) A subsequent section of the statute provides that nothing contained in the act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them.(*z*)

Certiorari. It has been holden upon this statute, in conformity to the decision which has been mentioned upon the 1 Wm. & M. c. 18, (*a*) that an indictment found at the quarter sessions may be removed into the Court of King's Bench by *certiorari* before trial,(*b*) and may be tried at the assizes.

31 Geo. 3, c. 32, disturbing Roman Catholic congregations. A similar provision to that contained in the 1 Wm. & M. c. 18, s. 18,(*c*) relating to Protestant dissenters, is enacted in the 31 Geo. 3, c. 32, s. 10, with respect to *Roman Catholic* congregations, or assemblies of religious worship permitted by the latter statute.

The facts attending disturbances of religious assemblies may sometimes authorize proceedings at common law for a conspiracy or a riot:(*d*) and we have seen that by the 7 & 8 Geo. 4, c. 30, s. 8, if persons riotously assembled begin to demolish or pull down any church or chapel, or any chapel for the religious worship of persons dissenting from the worship of the United Church of England and Ireland, duly registered or recorded, they will be guilty of felony.(*e*)

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*CHAPTER THE TWENTY-NINTH.

OF FORCIBLE ENTRY AND DETAINER. (A)

Offence at common law.

A *FORCIBLE entry or detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law.(*f*) It has been laid down in the books that, at common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon lands or tene-

(*yy*) 52 Geo. 3, c. 155, s. 12.

(*a*) *Rex v. Hube*, *ante*, 302.

(*c*) *Ante*, 289.

(*e*) *Ante*, 269.

(*z*) *Id.* s. 14.

(*b*) *Rex v. Wadley*, 4 M. & S. 508.

(*d*) See *Preced.* 2 Chit. Crim. L. 29.

(*f*) 4 Bla. Com. 148.

(A) The proceedings in cases of forcible entry and detainer are regulated by statute in the several States, which are too long to be here inserted or abridged. The judicial decisions upon this subject, which are numerous, are as follows:

MASSACHUSETTS.—A mere refusal to deliver possession of land, when demanded, is not a foundation for the process of forcible entry and detainer under the statute of 1784, c. 8, but the possession must be attended with such circumstances as would tend to excite terror in the owner, and prevent him from claiming or maintaining his rights: such as, apparent violence offered in deed or in word to the person of another; or the being furnished with unusual offensive weapons; or attended with any unusual multitude of people. *Commonwealth v. Dudley*, 10 Mass. Rep. 403. The same degree and kind of force are necessary in a forcible detainer as in a forcible entry. *Ibid.*

The proceedings in these cases, in this State, have usually been in the mode pointed out by the statute, and not by indictment.

{The possession of a tenant at will is not the possession of the lessor so as to enable him to maintain forcible entry and detainer against a third person for expelling the tenant. 3 Pick. 31, *Commonwealth v. Bigelow*. See also 3 Halstead's R. *Bennett v. Montgomery*.

ments, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful; (b) and that even at this day he who is wrongfully dispossessed of his goods, may justify the re-

(b) Lahr. Jnst. 297. Lamb. 135. Crom. 70, a, b. 2 Hawk. P. C. c. 64, s. 1, 2, 3. Bac. Abr. tit. *Forcible Entry and Detainer*.

Where a writ of restitution has been executed, and the proceedings are afterwards quashed upon *certiorari*, the court has power to award a writ of restitution. 3 Pick. *ubi sup.*;

VERMONT.—Upon a complaint brought upon the second section of the act to prevent forcible entry and detainer, it is necessary that the magistrate issuing the process should enter on the complaint a minute of the time of its exhibition. *Hall v. Brown*, 2 Tyler's Reports, 64.

CONNECTICUT.—On a reversal of a judgment in a case of forcible entry and detainer, the court will not award restitution of possession. *Bird v. Bird*, 2 Root's Rep. 411.

In a prosecution for forcible entry and detainer, the jury must find the force, or the verdict will be bad. *Bull v. Olcott*, 2 Root's Rep. 472.

NEW YORK.—Although the statute of forcible entry and detainer, renders the forcible entry of a person having right, indictable, yet it does not extend so far as to authorize an action of trespass against him. *Hyatt v. Wood*, 4 Johns. Rep. 150.

The record of conviction, under the first section, is not traversable; and if it shows that the justice had jurisdiction, and proceeded regularly, it is conclusive, and a bar to any suit brought against the justice. *Mather v. Hood*, 8 Johns. Rep. 44.

Where the justice acts on his own view, without any inquisition by a jury, he can only punish the party guilty of the force, but cannot meddle with the possession. In the matter of Shotwell, 10 Johns. Rep. 304. And if he order or permit a restitution of possession, it is irregular. *Ibid*.

Where the justice proceeds under the second section of the act, it is not necessary that he should previously go in person, and record the force. *The People v. Anthony*, 4 Johns. Rep. 198. The remedy afforded in the second section of the act is distinct from the former section. *Ibid*.

The indictment must state a seisin in the prosecutor at the time of the entry. *The People v. Shaw*, 1 Caines's Rep. 125. *The People v. King*, 2 Caines's Rep. 98.

An entry either peaceable or forcible by the defendant, must be averred; that he detains only, is sufficient. *The People v. Shaw*, 1 Caines's Rep. 125.

In the indictment it is enough, if the complainants or party injured, and the injury, are stated with sufficient certainty to enable the court to ascertain the injury, and award restitution; and any variance, not essential in the name or description of a corporation, will not vitiate the proceedings. *The People v. Runkell*, 9 Johns. Rep. 147.

The defendant's landlord may be let in to defend his right, as in ejectionment. *The People v. Burtch*, 2 Johns. Ca. 400.

If twenty-four persons be sworn on the grand jury, the conviction will be bad. *The People v. King*, 2 Caines's Rep. 98. So also, where the defendant, voluntarily appearing, was not permitted to traverse the indictment. *Ibid*.

It seems, that the traverse to the indictment need not be in writing. The jury may find the defendant guilty of the detainer only. A fine is required to be imposed against the party, only where there is a conviction upon view, according to the first section of the act. *The People v. Anthony*, 4 Johns. Rep. 198.

Where the indictment is not traversed, or no traverse is returned, costs are not allowed. *The People v. Shaw*, 1 Caines's Rep. 125.

The granting a *certiorari* to remove a forcible entry and detainer, is a matter of course. *The People v. Runkle*, 6 Johns. Rep. 334.

Where the indictment is removed into the supreme court, the prosecutor cannot rule the defendant to assign errors; such a rule would be a nullity, and the subsequent proceedings would be set aside; but the prosecutor should either call on the defendant to plead, or abide by his former plea, or if he was not entitled to plead *de novo*, should proceed to trial. *The People v. Burtch*, 2 Johns. Ca. 400.

Bail is not required where the indictment is removed by *certiorari* from before a justice. *Case v. Shepard*, 2 Johns. Ca. 27.

Where a restitution has been improperly awarded, or the proceedings below were irregular, the supreme court will, of course, award a restitution. *The People v. Shaw*, 1 Caines's Rep. 125. Same point in the matter of Shotwell, 10 Johns. Rep. 304.

The supreme court, in awarding restitution, is not required by the statute to impose a fine. *The People v. Runkell*, 9 Johns. Rep. 147.

Where a *certiorari* has been issued to return the proceedings, and the justice dies before any return is made, the supreme court will hear and decide the case, on motion and affidavits. In the matter of Shotwell, 10 Johns. Rep. 304. And the proceedings may be quashed, on motion and affidavits, for irregularity, and restitution awarded; but the court will not investigate the title. *Ibid*.

taking of them by force from the wrong-doer, if he refuse to re-deliver them.(c) However, it is clear that, in many cases, an indictment will lie at common law for forcible entry if it contain, not merely the com-

(c) 2 Hawk. P. C. c. 64, s. 1.

Where the record of the indictment, after being removed into the supreme court, had been lost, the court gave leave to file one, *nunc pro tunc*. *The People v. Burdock*, 3 Caines's Rep. 104.

On an indictment for forcible entry, &c., the title to the premises does not come in question, but it is sufficient for the complainant to recover, if he shows himself to have been in peaceable possession before the defendant's entry. And peaceable possession is evidence of a seisin to support the allegation in the indictment, that the complainant was seized. *The People v. Leonard*, 11 Johns. Rep. 504.

Where on an indictment for a forcible entry and detainer, no return could be obtained to a *certiorari* by reason of the death of the justice before whom the proceedings were had, and the supreme court investigated the cause on affidavits and awarded a restitution, it was held that the court of errors might, on a writ of error, review the proceedings on the evidence presented to the court below. *Clason v. Shotwell*, 12 Johns. Rep. 31.

As to what is a proper service of notice of inquiry, see *Forbes and Nelson v. Glashan*, 13 Johns. Rep. 158.

An indictment for a forcible entry and detainer under the statute must set forth a seisin or possession within the purview of the act, and whether the estate of the relator be a freehold or term of years, and on the traverse, the allegations as to his estate must be proved by the prosecutor. *The People v. Nelson*, 13 Johns. Rep. 340.

The defendant cannot justify the force by showing a title in himself, but he may controvert the facts by which the prosecutor attempts to show a title in himself. *Ibid*.

A purchaser of land under a *fi. fa.* cannot enter upon the land, being in the actual possession of another, without rendering himself liable to an indictment. *Ibid*.

On the trial of the traverse of an indictment for a forcible entry, &c., the justice before whom it is tried, is authorized by the 5th section of the act, to assess the costs and damages of the party complaining; held that the justice cannot, under this act, award to the party a gross sum independently of his costs, as a compensation for the injury sustained; but that the damages given by the statute were intended to reimburse the party prosecuting, after the trial of the traverse, for the costs, which he had been put to on that particular occasion, for other damages arising from the wrongful entry, he must resort to his action of trespass. *Fitch v. The People*, 16 Johns. Rep. 141.

{The same circumstances of violence or terror which will constitute a forcible entry will amount to a forcible detainer. 8 Cowen, 226, *People v. Rickart*. The title of the defendant is not in question on the trial of an indictment for forcible entry or detainer. *Ibid*. See Revised Statutes, Vol. ii. 507-511.}

NEW JERSEY.—It is not necessary that the justice, before whom an inquisition of forcible entry and detainer is taken, should sign it. The inquisition is not vitiated by the dates being expressed in figures. This proceeding is in some respects a civil suit. *Covenhoven v. State*, 1 Coxe's Rep. 258.

An inquisition purporting to be taken on the oaths or affirmations of A. B., &c., is bad, unless it states that those who were affirmed were Quakers, or conscientiously scrupulous of taking an oath. *The State v. Putnam*, 1 Coxe's Rep. 260.

If the defendant has no notice of an inquisition of forcible entry, &c., it is a fatal defect. 1 Coxe's Rep. 392. *The State v. Stokes*.

The estate of the plaintiff, in the lands forcibly entered upon, must be specified in the complaint exhibited to the justice; and treble costs are allowed. Pennington's Rep. 108 to 111. A regular judgment is required in this action. Pennington's Rep. 340, 1, 2. No notice to deliver possession is necessary. *Ibid*.

{See 1 Southard's R. 125, *Pullen v. Boney*. 1 Halsted's Rep. 396, *State v. Covenhoven*. 3 lb. 48. 4 lb. 37, *Wall v. Hunt & al.* 6 lb. 84, *Adams v. Decker*. 1b. 315, *Smith v. Williamson*. 1b. 25, *Delancey v. Lawrence*.}

PENNSYLVANIA.—The statutes of forcible entry and detainer require, as an indispensable ingredient in the offence, "force of arms and a strong hand; and proceedings under these acts should be discouraged, unless the party charged has been guilty of an *evident force*. *Respublica v. Desore*, 1 Yeates, 501. And where no other force is used than is implied in every trespass, the case is not within the statute. *Respublica v. Dixon*, 1 Smith's Laws, 3.

To make an entry forcible, there must be such acts of violence, or such threats, menaces, signs or gestures, as may give reason to apprehend personal danger or injury in standing in defence of the possession. *Pennsylvania v. Robinson*, Addis. 14, 17. Three years' peaceable possession bars restitution, but does not justify the offence of forcible entry. *Ibid*.

A forcible entry may be made on land, whether woodland or otherwise, within the bounds of a tract possessed by another, although the whole tract be not enclosed by a fence, or cultivated. *Ibid*. 17.

mon technical words, "with force and arms," but also such a statement as shows that the facts charged amount to more than a bare trespass, for which no one can be indicted. (d) And, in a modern case in the Court of

(d) *Rex v. Bake and others*, 3 Burr. 1731. *Rex v. Bathurst*, Sav. 225, referred to in *Rex v. Storr*, 3 Burr. 1699, 1702. *Rex v. Wilson and others*, 8 T. R. 357, in which last case the indictment charged the defendants (twelve in number) with having *unlawfully and with a strong hand* entered, &c., and it was held good.

Unless there be possession in another, at the time of the entry, whatever be the degree of force, the entry is not an offence at law. *Pennsylvania v. Waddle*, Addis. 43. *Same v. Lemon*, Id. 316. *Same v. Leach & al.*, Id. 355.

Surveying land, building cabins, and leaving them unoccupied, is not such possession as is necessary to prove a forcible entry. *Pennsylvania v. Waddle*, C. P. Addis. 316. The question whether there be such possession is a question of law, to be determined by the court. The truth of the evidence to prove possession, is a question for the jury. *Pennsylvania v. Leach & al.* Addis. 353.

A forcible entry, and a forcible detainer, are distinct offences, and although both are charged in the same indictment, the defendants may be acquitted of one and convicted of the other. So if the one be defectively set out, and the other well, they may be convicted of that which is well. *Commonwealth v. Rogers & al.* 1 Serg. & Rawle, 124. There may be a forcible detainer, though the entry was peaceable; and it is sufficient if it appear from the indictment that the party aggrieved was forcibly kept out of the possession. *Ibid.*

In an indictment for a forcible entry, it is sufficient to describe the premises as "a certain close of two acres of arable land situate in S. township, in the county of H., being part of a larger tract of land, adjoining lands of A. and B." *Dean & al. v. Commonwealth*, 3 Serg. & Rawle, 418.

An indictment in forcible entry and detainer, that "A. was peaceably possessed in his demense as of fee" of certain lands, and "continued so seized and possessed, until B. thereof disseized him," and him "so disseized and expelled," did keep out, &c., was held good on error. *Fitch & al. v. Rempubliam*, 3 Yeates, 49. S. C. 4 Dall. 212.

An indictment for forcible entry, stating that the prosecutor was seized, without saying when he was seized, was held good. *Respublica v. Shryber & al.*, 1 Dall. 68.

Where an indictment for forcible entry laid the force against the seizin of A., it was ruled that evidence was not admissible of an entry on land leased by A. and B. to C. and of force against C. 2 Yeates, 229. 1 Smith's Laws, 3.

So where the indictment was for a forcible entry and detainer of a message in possession of A. for a term of years, and the evidence was of a forcible entry into a field, and no lease was produced, it was held that the indictment could not be supported. *Pennsylvania v. Elder*, 1 Smith's Laws, 3.

An indictment for a forcible entry into a message, tenement and tract of land, without mentioning the number of acres, was held *bad* after conviction. *M'Nair & al. v. Rempubliam*, 4 Yeates, 326.

A warrant and survey may be shown on an indictment for a forcible entry, as evidence of the boundary of the possession. *Pennsylvania v. Leach & al.*, Addis. 355.

In an indictment for forcible entry, it was resolved on a solemn argument, that title could not be given in evidence by the defendant, to prevent restitution. *Respublica v. Shryber & al.*, 1 Dall. 68.

The proceedings on an inquisition of forcible entry, &c., were quashed because the defendant was stated in the inquest to have been *possessed*, but no estate or term was laid. *Respublica v. Campbell*, 1 Dall. 354.

On a conviction of a defendant in an inquisition of forcible entry, held before two justices, the justices have no power to assess damages, except in the case of a plea of three years' possession, under the stat. 31 Eliz. c. 11. *Commonwealth v. Stoever*, 1 Serg. & Rawle, 480.

In an indictment for forcible entry and detainer, certainty to a reasonable extent is all that is required in the description of the premises. *Torrence v. The Commonwealth*, 9 Barr, 184.

{ See 3 Serg. & Rawle, 418, *Dean v. Commonwealth*. 6 ib. 252, *Burd v. Commonwealth*. }

MARYLAND.—An inquisition was quashed as to the detainer, and affirmed as to the forcible entry only. *Proprietary v. Brown*, April term, 1772. 1 Harris and M'Henry's Rep. 423.

SOUTH CAROLINA.—An indictment will lay against a third person, for a forcible entry and detainer, who introduces himself on the land, or enters after judgment against a former intruder; and the sheriff who has the writ of restitution, may lawfully turn him out of possession, as well as he might have done the original intruder, had he found him in the possession of the premises. 2 Bay's Rep. 355.

{ See 2 Nott & M'Cord, 121, *State v. Dayley*. 1 Const. R. 325, *State v. Huntingdon*. 2 ib. 489, *Burt v. The State*. }

NORTH CAROLINA.—An indictment will lie for this offence in the superior courts, but the indictment must show the continuance of the terms, at the time the writ of restitution is

King's Bench, it was mentioned, by the great judge who then presided in that court, as a part of the law which ought to be preserved, that no one shall with force and violence assert his own title.^(e) But on a subsequent day of the same term he said that the court wished that the grounds of their opinion in that case might be understood, and desired that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: "Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched: it appearing by this indictment that the defendants unlawfully entered, and therefore the *court cannot intend that they had any title."^(f) There seems now to be no doubt that a party may be guilty of forcible entry by violently, and with force, entering into that to which he has a legal title.^{(g)†}

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Offence by statutes.

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice; and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved.

^(e) By Lord Kenyon, C. J., *Rex v. Wilson and others*, 8 T. R. 361, and in *Taunton v. Costar*, 7 T. R. 431. The same learned judge said, "If the landlord had entered with a strong hand to dispossess the tenant by force [after the expiration of his term] he might have been indicted for a forcible entry," and see *Turner v. Meymot*,^a 1 Bing. 158, 7 Moor. 574.

^(f) 8 T. R. 364.

^(g) In *Newton v. Harland*,^b 1 M. & Gr. 644, the judges of the Court of Common Pleas seem to have been of opinion that a landlord who entered forcibly into the house of a tenant after the expiration of his term, would be guilty of a forcible entry, both at common law and under the statutes; and the only doubt was whether, supposing there was such a forcible entry upon a tenant after the expiration of the term, the possession thereby obtained was legal. *Tindal, C. J., Bosanquet and Erskine, Js.*, holding that if the landlord, in making his entry upon the tenant, had been guilty of a breach of a positive statute, or of an offence against the common law, that such violation of the law, in making the entry, caused the possession thereby gained to be illegal. *Coltman, J.*, holding that although the defendant, if guilty of a forcible entry, was responsible for it in the way of a criminal prosecution, yet that, as against the tenants, who are wrong-doers, and altogether without title, he had obtained by his entry a lawful possession, and might justify in a civil action removing them, in like manner as in the case of any other trespasser. *Parke and Alderson, Bs.*, who had each tried the case, seem to have been of the same opinion as *Coltman, J.* See *Butcher v. Butcher*,^c 7 B. & C. 399. 1 M. & R. 220. *Hillary v. Gay*,^d 6 C. & P. 248.

moved for, which writ may be awarded: the term "message" is a sufficient description. *Cameron and Norwood's Rep.* 327 and 340.

[KENTUCKY.—See *Moreland and Brown's Dig.* vol. 1, p. 725, where the statutes and judicial decisions of Kentucky upon the subject may be found collected and digested.]

† [An indictment lies at common law, for a forcible entry and detainer, inasmuch as it tends to disturb the peace; and in such an indictment it is not necessary to allege that the party ousted had any estate in the land, but it is sufficient to aver that he was in quiet possession: so an indictment under the statutes 5 Rich. 2, st. 1, c. 8, or 15 Rich. 2, c. 2, need not show who had the freehold; as these statutes are levelled only against the violent mode of taking possession, without regard to the estate of the party ousted. But it is otherwise in an inquisition under the statutes 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, which entitles the party ousted to a writ of restitution. *State v. Spieren*, 1 Brevard, 119.

On an indictment for forcible entry and detainer, judgment of restitution cannot be awarded unless the estate of the ejected party be laid in the indictment. *Torrence v. Commonwealth*, 9 Barr, 184.]

^a Eng. Com. Law Reps. viii. 280.

^b *Ib.* xxxix. 581.

^c *Ib.* xiv. 59.

^d *Ib.* xxv. 398.

By the 5 R. 2, c. 8, none shall make entry into any lands and tenements but in cases where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, on pain of imprisonment and ransom. This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers. The 15 R. 2, c. 2, goes further, and enacts, that on complaint of forcible entry into lands and tenements, or other possessions whatsoever, to the justices of the peace or any of them, the justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry, they shall commit them to the next gaol, there to abide, convict by the record of the same justices or justice, until they make fine and ransom; and that the people of the county and the sheriff shall assist, &c., on pain of imprisonment and fine. And it also enacts that it shall be done in the same manner of them that make such forcible entries in benefices or offices of holy church. But this statute gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave no power to the justice to restore the party injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. Further enactments were therefore necessary. (h)

The statute 8 H. 6, c. 9, enacts that though the persons making forcible entries be present or else departed before the coming of the justices or justice, the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have authority to inquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements as of them which hold the same with force; and if it be found that any doth contrary to this statute, then the justices or justice shall cause to re-seize the lands and tenements, and shall put the party in full possession as before. (i) And after making provision concerning the precepts of the justices to the sheriff to return a jury to inquire of forcible entries, the qualification of the jurors, and the remedy by *actioui* against those who obtain forcible possession of lands, &c., it enacts that mayors &c., of cities, towns, and boroughs, having franchise, shall have in such cities, &c., like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties. (j) And it is then provided, that they which keep their possessions with force in any lands or tenements, whereof they or their ancestors or they whose estates they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endangered by force of this statute. (k)

This proviso is further enforced by the 31 Eliz. c. 11, which enacts, "that no restitution, upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found; and his, her, or their estate or estates therein not

(h) Upon the imposing and levying the fine under this statute of R. 2, see 1 Hawk. P. C. c. 64, s. 8, and the cases collected in Bac. Abr. tit. *Forcible Entry and Detainer* (A) in the notes.

(i) Sect. 3.

(j) Sect. 6.

(k) Sect. 7.

Statutes, 5 R. 2, c. 8. None shall enter into lands, &c., with strong hand.

15 R. 2, c. 2. On complaints of forcible entry, justices may commit the offender until fine and ransom.

*306 8 H. 6, c. 9. Justices may inquire as well of those that make forcible entries as of those that hold lands, &c., with force.

This statute does not extend to those who maintain possession after peaceable enjoyment for three years.

31 Eliz. c. 11. No restitution to be made if the party indicted hath been three years in quiet

possession, and his estate not ended.

Costs.

Doubt upon the statutes whether lessee for years or copyholder ousted by the lessor or lord could have restitution. *307

Removed by 21 Jac. 1, c. 15.

ended or determined; which the party indicted shall and may allege for stay and restitution, and restitution to stay until that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges and justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."

The 15 Ric. 2, c. 2, gave magistrates a summary jurisdiction in all cases of forcible entry; but in cases of forcible detainer, only where there had been a previous forcible entry; notwithstanding that statute, a party who had acquired the possession of lands peaceably but unlawfully, might afterwards detain them forcibly; that was a mischief the 8 Hen. 6, c. 9, was intended to remedy; and it gives justices summary jurisdiction only in cases of forcible detainer, preceded by an *unlawful* entry, and therefore a conviction by justices on that statute merely stating an entry and a forcible detainer is insufficient. (I)†

In the construction of these statutes it has been holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, be found in an indictment of forcible entry, the court may, in their discretion, *award a restitution of the possession to such a lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, whether a lessee for years or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 H. 6, the words of which are, that the justice "shall cause to re-seise the lands," &c., and by which it seems to be implied that the party must be ousted of such an estate whereof he may be said to be seised, which must at least be a freehold. For the purpose of removing this doubt, it was enacted by 21 Jac. 1, c. 15, that such judges or justices of the peace as by reason of any act of parliament then in force, were authorized to give restitution to tenants of any estate of freehold of their lands, &c., entered upon by force or withholden by force, shall have the like authority (upon indictment of such forcible entries or forcible withholdings) to give like restitution of possession to tenants for terms of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple. It has been holden, that a tenant by the verge is not within this statute: but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the copy of court roll, seems at least to be within the meaning, if not within the words, of the statute. (m) [1]

If a lessor eject his lessee for years, and afterwards be forcibly put out

(I) *Rex v. Oakley*,^a 4 B. & Ad. 307. See *Rex v. Wilson*,^b 1 A. & E. 627. *Rex v. Wilson*,^c 3 A. & E. 817, as to the form of such a conviction.

(m) 1 Hawk. P. C. c. 64, s. 17.

† [An indictment for forcible entry and detainer, under the statutes 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, need not show that the inquisition was taken at the place alleged to be forcibly entered; although it is otherwise as to a conviction under the st. 15 Ric. 2, c. 15. *State v. Spiera*, 1 Brevard, 119.]

[1] {In Alabama, a tenant at will may maintain a writ of forcible entry and detainer. 1 Minor's R. 98. *McDonald v. Gayle*. But the process can be maintained only by one who has had actual possession. *Ibid.* 132, *Childress v. Gehee*.}

^a Eng. Com. Law Reps. xxiv. 307.

^b Ib. xxviii. 169.

^c Ib. xxx. 229.

of possession again by such lessee, he has no remedy for restitution by force of any of the above-mentioned statutes: there seems, however, to be no doubt but that a justice of the peace, &c., may remove the force, and commit the offender.⁽ⁿ⁾

The law upon these statutes respecting forcible entries and detainers may be further considered with reference,—I. to the persons who may commit the offence; II. to the nature of the possessions in respect of which it may be committed; III. to the acts which will amount to a forcible entry; and, IV. to the acts which amount to a forcible detainer.

I. A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these statutes.^{(o)†} Where a wife was indicted with others for a forcible entry into a house, which she had taken for herself, but of which her husband had afterwards obtained possession with the landlord's consent, and it was objected that a wife could not be guilty of a forcible entry into the house of her husband; Lord Tenterden, C. J., said, "although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied that, if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on the breach of the public peace." "As at present advised, I think she may be guilty of a forcible entry, if her entry was made under *circumstances of violence amounting to a breach of the public peace."^(p) But a joint tenant or tenant in common may offend against the statutes either by forcibly ejecting or forcibly holding out his companion: for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury, done to his companion; and consequently, an indictment of forcible entry into a moiety of a manor, &c., is good.^{(q)‡} Also, where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry.^(r) It does not follow from the decision in *Rex v. Oakley*,^(s) that the 8 H. 6, c. 9, does not apply to the case of a tenant at will or for years, holding over after the will is determined or

(n) 1 Hawk. P. C. c. 64, s. 17, 18.

(o) Bac. Abr. tit. *Forcible Entry*, §c. (D). 1 Hawk. P. C. c. 64, s. 32, where it is said also that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will; but a *qu.* is subjoined. And see *Rex v. Wilson*, 8 T. R. 364. *Taunton v. Costar*, 7 T. R. 431. *Turner v. Meymott*,^a 1 Bing. 158, and *Newton v. Harland*, ante, p. 305, note (g), which seem to show that the position in the text is erroneous. C. S. G.

(p) *Rex v. Smyth*,^b 1 M. & Rob. 155. 5 C. & P. 201.

(q) 1 Hawk. P. C. c. 64, s. 33.

(r) Id. s. 22, 34. Crom. 69. Dalt. c. 77. Co. Lit. 256.

(s) 4 B. & Ad. 307,^c ante, p. 306.

† [Roscoe's Dig. Cr. Ev. 378. And see *Acc. Com'th v. Keeper of the Prison*. 1 Ashmead (Penn.) Rep. 140.

And see *Morris v. Bowles*. 1 Dana (Ken.) 97. It is no forcible entry for a man to enter premises of which his wife is in possession.]

‡ [*Eads v. Rucker*, 2 Dana (Kent.) Rep. 111.]

^a Eng. Com. Law Reps. viii. 280.

^b Ib. xxiv. 279.

^c Ib. xxiv. 61.

term expired, because the continuance afterwards may account in judgment of law to a new entry.^(t)

As to the possessions in respect of which the offence may be committed.

II. A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage-houses, &c., as much as if it were done to a temporal inheritance. And it has been holden, as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute as for tithes, &c. It is, however, questioned whether there be any good authority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. No one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement which is no possession.[†] But it seems that a man cannot be convicted, upon view, by force of the 15 R. 2, c. 2, of a forcible detainer of any corporeal inheritance wherein he cannot be said to have made a precedent forcible entry.^(u)

As to the acts which will amount to a forcible entry.

III. A forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb: it must be accompanied with some circumstances of actual violence or terror, and an entry which has no other force than such as is implied by the law in every trespass is not within these statutes.^{(v)‡} An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuses to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house, and *perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c., which being found in an assize of *novel disseisin*, will make the defendant a disseisor with force, and subject him to fine and imprisonment.^(w) If a man enters to distrain for rent in arrear with force, this is a forcible entry, because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force; but if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party; but he cannot have a writ of restitution; for the statute does not give the justices power to re-seize the rent, but only the lands and tenements themselves.^(x) If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry.^{(y)§}

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(t) Per Parke, J. *Rex v. Oakley*, *supra*.

(u) 1 Hawk. P. C. c. 64, s. 31. Bac. Abr. tit. *Forcible Entry*, §c. (C).

(v) Bac. Abr. tit. *Forcible Entry*, §c. (D). Dalt. 300. 1 Hawk. P. C. c. 64, s. 25.

(w) 1 Hawk. P. C. c. 64, s. 26. (x) Bac. Abr. tit. *Forcible Entry*, §c. (B)

(y) 1 Hawk. P. C. c. 64, s. 26, where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

† [Nor for a ferry. *Keys v. Lawless*, Little's Select (Ohio) Cases, 184.]

‡ [Indictment for forcible entry, &c., cannot be supported without some evidence of actual force or threats and appearance of personal ill usage. *State v. Cargill*, 2 Brevard, 445.]

§ [It is not necessary to constitute a forcible entry, that it should be made by a multitude

And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession, because whatever a man does by agents is his own act: but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and, therefore, their being upon the land continues no possession. (z)†

Whenever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible: whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance. (a) And there is no necessity that any one should be assaulted; for if the entry be with such number of persons and show of force, as is calculated to deter a rightful owner from sending them away, and resuming his own possession, that is sufficient. (b) But a forcible entry is not proved by evidence of a mere trespass, there must be proof of such force, or at least such a show of force as is calculated to prevent any resistance. (c) And though a man enter peaceably; yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry. (d) But threatening to spoil the party's goods, or destroy his cattle, and to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. (e)

If a person who pretends a title to lands merely to go over them, either with or without a great number of attendants, armed or unarmed, *in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statutes; otherwise, if he make an actual claim with any circumstances of forces or terror. (f) Drawing a latch and entering a house

(z) Bac. Abr. tit. *Forcible Entry*, §c. (B). *Turner v. Meymott*,^a 1 Bing. 158.

(a) 1 Hawk. P. C. c. 64, s. 27.

(b) *Milner v. Maclean*,^b 2 C. & P. 17, Abbott, C. J.

(c) *Rex v. Smyth*,^c 5 C. & P. 201, Lord Tenterden, C. J. S. C. 1 M. & R. 155.

(d) *Dalt.* 299. Bac. Abr. tit. *Forcible Entry*, §c., (B).

(e) 1 Inst. 257. Bro. tit. *Duress*, 12, 16. 1 Hawk. P. C. c. 64, s. 28.

(f) 1 Hawk. P. C. c. 64, s. 20, 21.

of people; even where the entry is lawful, it must not be made by a multitude; where it is not lawful, it must not be made at all. The jury, from the evidence of a forcible *detainer*, may find the defendant guilty of a forcible entry. *Burt ads. v. The State*, 3 Brevard, 413.]

† [In order to constitute a forcible entry, the possession must not be scrambling, but quiet, peaceable and actual, and the entry must be accompanied by actual force or intimidation. *Com. v. The Keeper of the Prison*, 1 Ashmead's Rep. 140.

Locking the doors of a house and keeping the keys, closing the windows and driving a portion of the stock upon the premises constitute evidence of an actual possession of land, which will authorize a recovery in forcible entry and detainer. *Davidson v. Phillips*, 9 Yerger, 93.

To constitute a forcible entry and detainer, it is not necessary that violence and outrage upon persons or property should be resorted to. If the actual possession of another be taken and held, under circumstances which show that it will not be surrendered without a breach of the peace, it is a forcible entry and detainer. *Childress et al., v. Black and ex.*, 9 Yerger, 317.]

^a Eng. Com. Law Reps. viii. 280.

^b *Ib.* xii. 5.

^c *Ib.* xxiv. 270.

seems not to be a forcible entry according to the better opinion ;(g) so if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries.(h)

A single person may commit a forcible entry as well as a number.(i) But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not.(j) So if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act: but it is otherwise where one had a right of entry, for there they only come to do an unlawful act, and therefore it is the force of him only who used it.(k) And he who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force.(l)

As to the acts which will amount to a forcible detainer.

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible.† From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter: and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault any one who shall attempt to make entry into it; and that he is in like manner guilty who shuts his doors against a justice of the peace coming to view the force, and obstinately refuses to let him come in.(m) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry: or to a lessee at will detaining with force after the will is determined:(mm) and it will apply in like manner to a detainer with force by a mortgagor after the mortgage is forfeited, or to the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence.(n)

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Circumstances which do not amount

*But a man will not be guilty of an offence of forcible detainer for merely refusing to go out of the house, and continuing there in despite of another.(o) So that it is not a forcible detainer if a lessee at will after the determination of the will, denies possession to the lessor when

(g) There have been different opinions upon this point, Noy, 136, 137. Bac. Abr. tit. *Forcible Entry*, §c. (B). 1 Hawk. P. C. c. 64, s. 26.

(h) Com. Dig. tit. *Forcible Entry*, §c. (A) 3.

(i) Id. (A) 2. 1 Hawk. P. c. 64, s. 29.

(j) 1 Hawk. P. C. c. 64, s. 22.

(k) Bac. Abr. tit. *Forcible Entry*, §c. (B).

(l) 1 Hawk. P. C. c. 64, s. 24.

(m) 1 Hawk. P. C. c. 64, s. 30.

(mm) See per Parke, J. *Rex v. Oakly*,^a 4 B. & Ad. 307, ante, p. 306.

(n) Com. Dig. tit. *Forcible Detainer*, (B) 1.

(o) 1 Hawk. P. C. c. 64, s. 30.

† [To sustain a complaint for a forcible detainer of land after a peaceable entry, the complainant must allege that he was in actual possession of the land at the time of the defendant's entry. *Phelps & al. v. Baldwin*, 17 Conn. 109.]

he demands it; or shuts the door against the lessor when he would enter; or if he keeps out a commoner, by force, upon his own land. (p) And it has been seen that the statute 8 Hen. 6, c. 9, does apply to a person who has been in possession for three years by himself, or any other under whom he claims. (q) But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted. (r)

The remedies against such as are guilty of forcible entries or detainers, are either by action, by complaint to justices of peace (who may proceed upon view or inquisition), or by indictment at the general sessions. (s) And if a forcible entry or detainer be made by three persons or more, it is also a riot; and may be proceeded against as such, if no inquiry has before been made of the force. (t) Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed. (u)

The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*: but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*; but it is not sufficient to say only that the party entered *vi et armis*, since that is the common allegation in every trespass. (v) No particular technical words are necessary in an indictment at common law; all that is required is, that it should appear by the indictment, that such force and violence have been used as constitute a public breach of the peace. (w)

The tenement in which the force was committed must be described with convenient certainty; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession. † Thus an indictment of forcible entry into a tenement, (x) which may signify any thing whatsoever wherein a man may have an estate of freehold, (y) or into a house or tenement, (z) or into two closes of meadow or pasture, (a) or into a rood or half a rood of land, (b) or into certain lands belonging to such a *house, (c) or into such a house without showing in what town it lies, (d) or into a tenement, with the appurte-

(p) Com. Dig. tit. *Forcible Detainer*, (B) 2.

(q) *Ante*, 306. And by 31 Eliz. c. 11, (*ante*, 306,) no restitution is to be given on an indictment of forcible entry and detainer, where the party has been three years in quiet possession before the indictment found, and his estate not determined.

(r) Com. Dig. tit. *Forcible Detainer*, §c. (B) 2.

(s) See the statutes, *ante*, 305 and 306. Com. Dig. tit. *Forcible Entry*, (C). 4 Bla. Com. 148. Burn. Just. tit. *Forcible Entry*, §c., III., IV., V.

(t) Burn. Just. tit. *Forcible Entry and Detainer*, VII. *Ante*, 268.

(u) As to the proceedings by justices of peace, see Burn. Just. tit. *Forcible Entry*, §c., V. Com. Dig. tit. *Forcible Entry*, (D).

(v) Baude's case, Cro. Jac. 41. Rast. Ent. 354. Bac. Abr. tit. *Forcible Entry*, §c. (E).

(w) By Lawrence, J., in *Rex v. Wilson and others*, 8 T. R. 362.

(x) Dalt. 15. 2 Roll. R. 46. 2 Roll. Abr. 80, pl. 8. 3 Leon. 102.

(y) Co. Lit. 6, a.

(z) 2 Roll. Abr. 80, pl. 4, 5. Roll. R. 334. Cro. Jac. 633. Palm. 277.

(a) 2 Roll. Abr. 81, pl. 4.

(b) Bulst. 201.

(c) 2 Leon. 186. 3 Leon. 101. Bro. tit. *Forcible Entry*, 23.

(d) 2 Leon. 186.

† [*Acc. Murphy v. Lucas*, 2 Ohio Rep. 255. *Moore v. Masie*, 3 Litt. (Ohio) 247. *Clements v. Clinton*, Martin & Yerger, (Tenn.) 198.]

nances called *Truepenny* in D.,(e) is not good.† But an indictment for a forcible entry *domum mansionalem sive messuagium*, &c., is good, for these are words equipollent.(f) And an indictment for an entry into a close called Sergeant Herne's close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment.(g) And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land may be quashed as to the land, and stand good as to the house.(h) Upon an indictment against a wife for a forcible entry into a house, which she had originally taken in her own name, but into which her husband had afterwards entered for the purpose of giving up possession to the owner, the house is well described as the house of the husband.(i)

Description of the estate of the party expelled.

An indictment on the 8 Hen. 6, c. 9,(j) must show that the place was the freehold of the party grieved at the time of the force.(k) And in a case where the court quashed an indictment, because it did not appear what estate the person expelled had in the premises, they said that it was absolutely necessary that this should appear, otherwise it would be uncertain whether any one of the statutes relative to forcible entries extended to the estate from which the expulsion was: the 5 Ric. 2, c. 7, the 15 Ric. 2, c. 2, and the 8 Hen. 6, c. 9, only extending to freehold estates; and the 21 Jac. 1, c. 15, extending only to estates holden by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute merchant, and statute staple.(l) And it has been laid down as a general rule, that an indictment cannot warrant a restitution, unless it find that the party was seized at the time.(m)[1]‡ So also an inquisition under the 8 H. 6, c. 9, will not warrant a justice in restoring possession, unless it set forth the estate possessed by the party in the pro-

(e) 2 Roll. Abr. 80, pl. 7.

(f) Ellis's case, Cro. Jac. 633. Palm. 277.

(g) Bac. Abr. tit. *Forcible Entry*, §c., (E). 1 Hawk. P. C. c. 64, s. 37.

(h) Bac. Abr. tit. *Forcible Entry*, §c., (E). 1 Hawk. P. C. c. 64, s. 37.

(i) *Rex v. Smyth*,^a 1 M. & Rob. 155, S. C. 5 C. & P. 201.

(j) *Ante*, 305.

(k) *Rex v. Dorny*, 1 Lord Raym. 210. 1 Salk. 260. Anon. 1 Vent. 89. 2 Keb. 495. *Hedl.* 73. *Latch.* 109.

(l) *Rex v. Wannop*, Say R. 142.

(m) Bac. Abr. tit. *Forcible Entry*, §c. (E), where, and in 1 Hawk. P. C. c. 64, s. 38, see the cases on this subject collected. And see also *Rex v. Griffith et al.* 3 Salk. 169.

† [An indictment for forcible entry was arrested for want of certainty, the words being "a certain messuage, with the appurtenances, for a term of years, in the district of Spartanburg." It was adjudged that the *place where* was not described with sufficient legal certainty. *State v. Walker et al.*, 2 Brevard, 255.]

[1] {Where the indictment charged that the defendants into a messuage, &c., then and there being in the possession of one W. P., he the said W. P. then and there being also seized thereof, with force and arms, &c., did enter, and the said W. P. from the peaceable possession, with force and arms, &c., did put out—it was held, after conviction, that this was a sufficient averment of the present seizin of W. P. to warrant an award of a writ of restitution. 6 M. & S. 266, *Rex v. Hoare* and others. And an averment in an indictment merely that the prosecutor was "seized," is sufficient to found an application for a writ of restitution; and it need not be shown that he still continues seized. 2 Chitty's R. 314, *Rex v. Dillon* and others. [Eng. Com. Law Reps. xvii. 349.] In an indictment for forcible entry, at common law, it is not necessary to allege a seizin of the *locus in quo*. 1 Greenleaf, 22, *Harding's case*.}

‡ [See *The People v. Nostrand*, 9 Wend. 60. *The People v. Reed*, 11 Wend. 158. *Yeates v. Allison*, 2 Dana, (Ken.) 134. *Munfield v. Duvall*, 2 Bibb, (Ken.) 582. *Taylor v. White*, 1 Mon. (Ken.) 38. *Smith v. Dedman*, 4 Bibb. 192. *Beauchamp v. Morris*, *Ibid.* 312.]

^a Eng. Com. Law Reps. xxiv. 279.

party.(n) But an indictment which charges that the defendants forcibly entered into a messuage of one W. P., he the said W. P., then and there being seized thereof, sufficiently avers the present seisin of W. P., to warrant the court in awarding restitution.(o) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises.(p)

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault: as where it is alleged that the party was possessed of a term of years, or of a copyhold estate, and *that the defendants disseised him; or that the defendants disseised J. S. of land then and yet being his freehold, for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all.(q) It seems that an indictment on 8 Hen. 6, c. 9, setting forth an entry and forcible detainer is good, without showing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force.(r) The time and place of the disseisin must be sufficiently set forth in the indictment; but it appears to be sufficient to state, that the defendant on such a day entered, &c., and disseised, &c., without adding the words *then and there*; for it is the natural intendment that the entry and disseisin both happened together.(s) A disseisin is sufficiently set forth by alleging that the defendant entered, &c., into such a tenement, and disseised the party, without using the words "unlawfully," or "expelled," for they are implied.(t) But no indictment can warrant an award of restitution, unless it find that the wrong-doer ousted the party grieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is in vain to award it to one who does not appear to have lost it.(u)

If a bill, both of a forcible entry and forcible detainer, be preferred to a grand jury, and found "not a true bill" as to the entry with force, and "a true bill" as to the detainer it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill, true for part, and false for part, as a petit jury may.(v)[1]†

Upon an indictment founded on the 21 Jac. 1, c. 15, or 8 Hen. 6, c. Evidence.

(n) *Rex v. Bowser*, 8 D. P. R. 128, Coleridge, J.

(o) *Rex v. Hoare*, 6 M & S. 267.

(p) *Rex v. Wilson and others*, 8 T. R. 357.

(q) 1 Hawk. P. C. c. 64, s. 39. Bac. Abr. *Forcible Entry*, &c., (E).

(r) 1 Hawk. P. C. c. 64, s. 40. Bac. Abr. *ibid.* And see the statute, *ante*, 305.

(s) *Baude's case*, Cro. Jac. 41. 1 Hawk. *ibid.* s. 42.

(t) Bac. Abr. *Forcible Entry*, &c., (E).

(u) 1 Hawk. P. C. c. 64, s. 41.

(v) 1 Hawk. P. C. c. 64, s. 40. But this it seems does not apply to the case of different counts in the same indictment, but only where the grand jury find a "true bill," and "not a true bill" upon different parts of one and the same charge. See *Rex v. Fieldhouse*, Cowp. 323.

[1] † Under an indictment for a forcible entry and detainer the jury may find the defendant guilty of a forcible detainer only. 8 Cowen, 226. *People v. Rickert* †

† [A warrant for a forcible entry or detainer is good—and an inquisition on such a warrant finding a forcible entry and detainer is valid. *M. Brayer &c. v. Wash*, 6 J. J. Marsh. (Ken.) 465. The finding of either is sufficient. *Swartzweider v. U. S. Bank*, 1 J. J. Marsh. 44. If one only is charged, the defendant cannot be found guilty of the other. *Cammack v. Macey*, 3 Mar. 297. *Sinclair v. Sanders*, 3 J. J. Marsh. 303.

9, whereby restitution of the possession of lands entered upon by force, or holden by force, may be awarded to the respective tenants thereof: the tenant whose land has been entered upon, or withholden by force, is not a competent witness for the prosecution, as he has a direct interest in causing the defendant to be convicted. (*w*)

On an indictment at common law, the prosecutor need only prove a peaceable possession at the time of the ouster. (*x*) On an indictment upon the statutes a seisin in fee or the existence of a term or other tenancy, but proof that the prosecutor holds colourably as a freeholder or leaseholder will suffice; and the court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action. (*y*)

Of the
award of
restitution.

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The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award *restitution*: but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* *into the Court of King's Bench; and that court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to re-seise, it may as well be done by them in court as out of it. (*z*) But the justices of *oyer and terminer*, or general gaol delivery, though they may inquire of forcible entries, and fine the parties, yet cannot award a writ of restitution. (*a*)

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and those who are guilty of it punished, which may be done by 15 R. 2, c. 2. (*b*) And restitution is to be awarded only to him who is found by the indictment to

(*w*) *Rex v. Williams*, ^a 9 B. & C. 549. 4 M. & R. 471. *Rex v. Beavan*, ^b R. & M. N. P. C. 242.

(*x*) Talf. Dickenson, 377.

(*y*) Per Vaughan, B., in *Rex v. Williams*, Monm. S. A. 1828, and confirmed on a motion for a new trial. Talf. Dickenson, 377; and see *Jayne v. Price*, 5 Taunt. 326.

(*z*) Bac. Abr. tit. *Forcible Entry*, §c. (F).

(*a*) *Id. ibid.* and 1 Hawk. P. C. c. 64, s. 51, where it is said that justices of *oyer and terminer* have no power either to inquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as justices of *oyer and terminer* have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission *ad inquirend de omnibus*, &c. be construed to have any such powers as are specially limited to justices of peace. But in Com. Dig. tit. *Forc. Entr.* (D. 5,) it is said that justices of gaol delivery may award restitution upon an indictment before them: and Sav. 78, is cited: and afterwards *Id.* (D. 7,) it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, if the indictment was not found before them; and H. P. C. 840, Dalt. c. 44, 131, are cited; assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution: and see *infra*, Reg. v. Harland.

(*b*) 1 Hawk. P. C. c. 64, s. 45. Lamb. Just. 153. Co. Lit. 323.

^a Eng. Com. Law Reps. xvii. 440.

^b *Ib.* xxi. 428.

have been put out of the *actual possession*, and not to one who was only seized in law. (c)† Upon the removal of the proceedings into the Court of King's Bench by *certiorari*, that court may award a restitution discretionally; and will so award, unless the defendant plead very soon, and take notice of trial within the term. (d) And the same principle applies to a judge of assize upon the finding of an indictment for forcible entry; namely, that the proceedings being *ex parte*, a discretion may be exercised. Where, therefore, an indictment for a forcible entry and detainer is found at the assizes, it is in the discretion of the judge whether he will grant restitution or not; and if he refuse to grant it, the Court of Queen's Bench will not inquire whether he has exercised his discretion rightly, or grant a mandamus to the judge to grant restitution. (e) But in the case of local magistrates, who are to go to the spot, and make inquiry by the inquisition of a jury, and examination of witnesses; if the jury find the facts, it is imperative on the justices to grant restitution; and the reason is that there has been a fair inquiry. (f) And where a conviction *of a forcible entry was quashed in the Queen's Bench for uncertainty, but the restitution was opposed to on an affidavit that the party's title (which was by lease) was expired since the conviction, the court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. (g)

It appears in the proviso in the statute of 8 Hen. 6, c. 9, and also by the 31 Eliz. c. 11, that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden, that such possession must have continued without interruption during three whole years next before the indictment. (h) And it has also been said that the three years' possession must be of a lawful estate; and therefore that a disseisee can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee having, by his laches, lost his right of entry. (i) Wherever such possession is pleaded in bar of a restitution, either in the King's Bench or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried; and such plea need not show under what title, or of what estate, such possession was; because not the title, but the possession only, is material. (j) If the defendant tender a traverse of the force (which must be in writing,) no restitution ought to be till such traverse be tried; in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury: but if such

(c) Lamb. Just. 153. Dalt. c. 83.

(d) Rex v. Marrow, Ca. temp. Hardw. 174.

(e) Reg. v. Harland, * 8 Ad. & E. 826. S. C. 1 P. & D. 93, 2 M. & Rob. 826. See Rex v. Hake, note (a) Rex v. Williams, 4 M. & R. 583, where a judge upon such an inquisition, granted a writ of restitution, not as a matter of right, but in the exercise of his discretion.

(f) Ibid. per Patteson, J. (g) Rex v. Jones, 1 Str. 474.

(h) Bac. Abr. tit. *Forcible Entry*, §c. (G). 1 Hawk. P. C. c. 64, s. 53.

(i) Bac. Abr. tit. *Forcible Entry*, §c. (G). 1 Hawk. c. 64, s. 54.

(j) 1 Hawk. c. 64, s. 56.

† [But naked possession without some estate or interest in the prosecutor is not enough. *Burd v. The Commonwealth*, 6 Serg. & R. 252.]

In a proceeding by inquisition for a forcible entry and detainer before a writ of restitution can be awarded the jury must find by their verdict that the party, forcibly dispossessed, had either a freehold or a term for years in the land, of the possession of which he has been deprived. *Mitchell v. Fleming*, 3 Iredell, 123.]

jury finds so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false. *(k)* Where the defendant pleads three years' possession in stay of restitution, according to 31 Eliz. c. 11, and it is found against him, he must pay costs. *(l)†*

Of super-
seding the
restitution.

The same justices who have awarded a restitution on an indictment of forcible entry, &c., or any two or one of them, may afterwards *supersede* such restitution upon an insufficiency in the indictment appearing unto them: but no other justices or court whatsoever have such power, except the Court of King's Bench: a *certiorari* from whence wholly closes the hands of the justices of the peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice. *(m)*

Of setting
aside resti-
tution.

The Court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, that court may *set it aside*, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict found for him on the traverse thereof, &c.; for the power of granting a restitution is vested in the King's Bench only, by an equitable construction of the general words of the statutes, and is not expressly given by those statutes; and is never made use of by that court but when, upon consideration of the whole circumstances *of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. *(n)*

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Where
conviction
is quashed
restitution
must be
awarded.

But where a conviction for a forcible entry or detainer is quashed by the Queen's Bench they have no discretionary power, but are bound to award re-restitution, although the conviction be quashed for a merely technical error, and the lease of the dispossessed person had expired during the litigation. *(o)*

The Court of King's Bench has been so favourable to one who, upon his traverse of an indictment upon these statutes being found for him, has appeared to have been unjustly put out of his possession, that they have awarded him a restitution, notwithstanding it has been shown to the court that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in the lord's

How resti-
tution
shall be
made.

court. *(p)*

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it. *(q)* The sheriff, if need

(k) Bac. Abr. tit. *Forcible Entry*, §c. (G). 1 Hawk. c. 64, s. 58, 59. Reg. v. Winter, 2 Salk. 588.

(l) Reg. v. Goodenough, 2 Lord Raym. 1836. And see the words of the statute, *ante*, 306.

(m) Bac. Abr. id. *ibid.* 1 Hawk. c. 64, s. 61, 62.

(n) Bac. Abr. id. *ibid.* 1 Hawk. c. 64, s. 63, 64, 65.

(o) Rex v. Jones, 1 Stra. 474. Rex v. Wilson, 3 A. & E. 817. S. P. 5 N. & M. 164.

(p) Bac. Abr. id. *ibid.* 1 Hawk. c. 64, s. 66. *(q)* 1 Hawk. c. 64, s. 49.

† [Upon an inquisition for forcible entry and detainer, the defendant is entitled to traverse the force, or he may plead three years' possession, under the st. 31 Eliz. c. 11, and if he tender a traverse, the justices are bound to accept it, and ought not to grant a writ of restitution, but should return the inquisition without *certiorari*, to the Court of Sessions, there to be tried like other indictments; otherwise that court will grant a *certiorari*, which will be a *supersedeas* to such restitution, or after trial, a writ of re-restitution will be awarded if the defendant be acquitted or judgment arrested. *State v. Spierca*, 1 Brevard, 119.]

* Eng. Com. Law Reps. xxx. 229.

be, may raise the power of the county to assist him in the execution of the precept; and therefore, if he make a return thereto that he could not make a restitution by reason of resistance, he shall be amerced.^(r) And it is said, that a justice of peace or sheriff may break open a house to make restitution.^(s)

If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition: but the second writ must be applied for within a reasonable time *(t)* And where restitution is not ordered till three years after the inquisition, it is bad.^(u)

*CHAPTER THE THIRTIETH.

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OF NUISANCES.

NUISANCE, *nocumentum* or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects; and *private* nuisances, which may be defined as any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.^(a) Private nuisances, as they are remedied only by civil proceedings, do not come within the scope of this treatise; but public or common nuisances, as they annoy the whole community in general, and not merely some particular person, are properly punishable by indictment, and not the subject of action; for it would be unreasonable to multiply suits by giving every man a separate right for what damnifies him in common only with the rest of his fellow subjects.^(b) In treating of public or common nuisances, we may consider,—I. Of public nuisances in general.—II. Of nuisances to public highways.—III. Of nuisances to public rivers.—And IV. Of nuisances to public bridges.

Nuisances
are public
and pri-
vate.

(r) 1 Hawk, c. 64, sect. 52.

(s) Com. Dig. tit. *Forcible Entry*. (D. 6.)

(t) *Rex v. Harris*, 1 Lord Raym. 482.

(u) *Rex v. Harris*, 3 Salk. 312.

(a) 3 Bla. Com. 216. 2 Inst. 406.

(b) 4 Bla. Com. 166. There are, however, circumstances mentioned in the books upon which a party has been admitted to have a private satisfaction by civil suit for that which is a public nuisance; namely, where he has sustained some extraordinary damage by it beyond the rest of the king's subjects. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, not common to others, it has been held, that the party may have his action. Co. Litt. 56. 5 Rep. 73. 3 Bla. Com. 219. And see also *Fowler v. Sanders*, Cro. Jac. 446. But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull, N. P. 26. In *Rex v. Dewsnap* and another, 16 East, 196, Lord Ellenborough, C. J., said, "I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustain a special injury, from it, he has an action." And in *Duncan v. Thwaites*, 3 B. & C. 584, Abbott, C. J., said, "I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful, on the ground of public injury, may maintain an action for his special injury." And see *Rose v. Miles*, 4 M. & S. 101. *Butterfield v. Forrester*, 11 East, 60.

SECT. I.

Of Public Nuisances in General.(A)

Of public nuisances. PUBLIC nuisances may be considered as offences against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a

(A) NEW HAMPSHIRE.—“An act to prevent common nuisances,” was passed January 3d, 1792, by which the erection of slaughter-houses, and houses for the trying of tallow, is prohibited; also permitting carts, trucks, &c., to pass without drivers in the streets or lanes of the town of Portsmouth; riding on a gallop in compact towns; erecting houses of office; leaving the bodies of dead beasts in such places as are described in the statute, whereby they become offensive; are declared to be nuisances, and are prohibited and are punished as such. *Laws of New Hampshire*, p. 337.

MASSACHUSETTS.—The offensive trades, the exercise of which is prohibited by statute of 1785, chap. 1, are “the killing of creatures, distilling of spirits, trying of tallow or oil; currying of leather, and making earthenware.” By the same statute, all fences or buildings erected on public landing places, without permission, are declared nuisances, and are to be abated.

By an additional statute of 1799, chap. 75, further provision is made for the removal of nuisances mentioned in the former statutes, and a special action on the case is given to any person sustaining injury from such nuisances, in which it is provided, that in such actions, the defendant may plead the general issue, and give any special matter in evidence.

By a statute of 1801, chap. 16, the proceedings for the speedy removal of nuisances, are particularly pointed out. Jurisdiction is given to two justices of the peace *quorum unus* to inquire into all nuisances by a jury. The forms of proceeding are provided and established in the statute from the commencement to the conclusion of the process.

It has been decided that an action on the case lies against him who creates a nuisance, and against him who continues a nuisance created by another. *Staple v. Spring et al.*, 10 Mass. Rep. 72.

The occupant as well as the owner of a house or mill, erected to the nuisance of another, is liable to an action for the nuisance; which may be brought by the successive owners and occupants of the place where the injury is sustained. *Ibid.*

After judgment and damages recovered in an action for creating a nuisance, another action will lie for the *continuance* of the same nuisance. *Ibid.*

It is not necessary in an indictment for a nuisance, to allege the continuance of the nuisance to have been with *force and arms*. *Commonwealth v. Gowen*, 7 Mass. Rep. 378.

{See 7 Pick. 76, *Shaw v. Cumiskey*.}

CONNECTICUT.—For the prevention and punishment of nuisances, see Connecticut Laws, p. 532. This statute relates to nuisances in highways and rivers. See also title “Sickness,” (Connecticut Laws,) numbers 52, 53, 54, 56, 57, 58, 59, which relate to the power and duty of the board of health in removing nuisances.

It has been decided that a license from a town to erect a mill dam, is no justification in an action for a private nuisance. *Nichols v. Pixley*, 1 Root's Rep. 129. And that a man may use the waters of a stream running through his own land for necessary and useful purposes. *Perkins v. Dow*, *ibid.* 535.

NEW YORK.—The following points of law have been decided in New York. The court will not grant a writ to prostrate a nuisance, until the record of the conviction below be regularly made out and returned. *The People v. Valentine*, 1 Johns. Cas. 336. Keeping gunpowder near dwelling-houses, and near a public street, or transporting it through the street, are not nuisances unless rendered so by negligent keeping, or other particular circumstances. *The People v. Sands*, 1 Johns. Rep. 78.

PENNSYLVANIA.—Actions which would otherwise be nuisances may be justified by necessity. A man may throw wood into the street for the purpose of having it carried into his house; and it may lie there a reasonable time. *Commonwealth v. Passmore*, 1 Serg. & Rawle, 219. Materials for building may be placed in the street, provided it be done in the most convenient manner. *Ibid.* A merchant may have his goods placed in the street for the purpose of removing them into his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them. *Ibid.* And there is no difference in this respect between a *public auctioneer*, and a private merchant.

The proviso in the ordinance of the corporation of Philadelphia, of Jan. 18, 1790, which exempts auctioneers from the penalties imposed on persons who place goods in the streets does not render them less liable to the penalties of a nuisance at common law. *Ibid.* 220.

It is doubtful whether the corporation of Philadelphia has a right to license a nuisance. *Commonwealth v. Passmore*, 1 Serg. & Rawle, 217.

An *assize of nuisance* cannot be removed from the common pleas to the supreme court by

thing which the common good requires.(c) But the annoyance or neglect must be of real and substantial nature; and the fears of mankind, though they may be reasonable, will not create a nuisance.(d)†

Offensive trades and manufactures may be public nuisances. A *brew-house*, erected in such an inconvenient place that the business cannot be carried on without greatly inconveniencing the neighbourhood, may be indicted as a common nuisance; and so in the like case may a *glass-house* or *swineyard*. With respect to a *candle manufactory*, it has been holden, that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended that it is necessary to make them in a town.(e)

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place: as where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared in evidence, that the noise only affected the inhabitants of three numbers of the chambers in Clifford's Inn, and that by shutting the windows

The existence of the nuisance depends upon the number of

(c) 4 Bla. Com. 166. 1 Hawk. P. C. c. 75, s. 1. 2 Roll. Abr. 83.

(d) By Lord Hardwicke, Anon. 3 Atk. 750.

(e) 1 Hawk. P. C. c. 75, s. 10. In Bac. Abr. tit. *Nuisance*, (A) it is said, "It seems the better opinion that a brewhouse, glasshouse, chandler's shop, and sty for swine, set up in such inconvenient parts of a town that they cannot but greatly incommode the neighbourhood, are common nuisances:" and 2 Roll. Abr. 139. Cro. Car. 510. Hut. 136. Palm. 536. Vent. 26, Keb. 500. 2 Salk. 485, 460. 2 Lord Raym. 1163, are cited.

habeas corpus. *Livezey et al., v. Gorgas et al.*, 1 Binn. 251. But it may be by *certiorari*; and the supreme court has power to re-summon the jury who viewed the nuisance to try the cause. *Livezey v. Gorgas*, 2 Binn. 192.

An indictment for a nuisance, in obstructing an ancient watercourse, whereby a public highway was overflowed and spoiled, need not state how far in length or breadth, the water stood on the road. *Republica v. Arnold*, 3 Yeates, 447. Laying the nuisance to be in the "Commonwealth's highway or road leading from B. to J." is good. *Ibid.*

On an indictment for a nuisance, for erecting a wharf on public property, the defendant was not allowed to go into evidence to prove that the matter complained of was beneficial to the public. *Resp. v. Caldwell*, 1 Dall. 150. (Lord Hale was of a different opinion; and held, "that in many cases it was an advantage to a port to build a wharf or quay." And "that it is not *ipso facto*, a common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nuisance or not is *questio facti*, and to be determined by a jury upon evidence and not *questio juris*." 1 Harg. Law Tracts, 85.) {See *Agnell on Tide Waters*, c. viii. *Wightwick's Rep.* 134, 167. 6 B. & C. 566, *Rez v. Russel et al.* [Eng. Com. L. Rep. xiii. 254.] 3 Am. Jurist, 185. *Commonwealth v. Wright & Dame* }

MARYLAND.—An action for a nuisance will lie against the assignee if he has done any act to keep up the nuisance; but no adventitious, accidental advantages derived from a nuisance will amount to a continuance of it, unless some act be done by the defendant to keep it up. *Hughes v. Mung*, 3 Harris & M'Henry's Rep. 441.

The different nuisances mentioned in the following parts of this section, are the subjects of statute provision and regulation in most of the United States, to which the reader is referred.

† [Though an individual may be liable to a pecuniary punishment for a prohibited offence, yet the habitual practice of that offence may constitute the place or house where it is so habitually carried on, a public nuisance. *Smith v. The Commonwealth*, 6 B. Monroe, 22. Keeping a grocery at which persons are in the habit of assembling on the Sabbath and other days, and tipping and drinking, may properly be denominated a public nuisance. *Ibid.*

It is only when the act or acts done by a person, or the omission to act by one who ought to act, operate to the annoyance, detriment or disturbance of the public at large, that the offender is liable to indictment at common law. *State v. Debury*, 5 Iredell, N. C. 371.

Where a canal company was compelled as a matter of duty by its charter, to erect and maintain bridges over the canal, wherever any public road crossed the same, and it did erect a bridge, which was decayed and unsafe, where a public road crossed, it was held that this was an indictable offence as a neglect of duty, and that the bridge was in the nature of a common law nuisance. *The State v. The Morris Canal and Banking Co.*, 2 New Jersey, 537.]

houses and the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J., that the indictment could not be sustained, as the annoyance was, if anything, a private nuisance.^(f) But an indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling-houses, has been held sufficient: and the court said, that if a man erects a nuisance near the highway, by which the air thereabouts is corrupted, it must, in its nature, be a nuisance to those who are in the highway; and that, therefore, the indictment was well enough.^(g) And an indictment was held good for a nuisance in erecting building, and making fires which sent forth noisome, offensive, and stinking smokes, and making great quantities of noisome, offensive, and stinking liquors, near to the king's common highway, and near to the dwelling houses of several of the inhabitants, whereby the air was impregnated with *noisome and offensive stinks and smells.^(h) Upon the report of the evidence, it appeared that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-aches; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury.⁽ⁱ⁾ But the carrying on of an offensive trade is not indictable, unless it be destructive of the health of the neighbourhood, or render the houses untenable or uncomfortable.^(k)

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Smells offensive to the senses a nuisance. Other nuisances no defence.

If there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air,^(l) and the presence of other nuisances will not justify any one of them, or the more nuisances there were the more fixed they would be.^(l)

Upon an indictment for a nuisance in carrying on the trade of a varnish-maker, it was proved that the offensive smells proceeded from the defendant's manufactory, to the annoyance of persons travelling along a public road, the defence was, first, that the smells were not injurious to health; and, secondly, that in the immediate neighbourhood there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff, and a blood boiler; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance; but Abbott, C. J., said, "It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c.; but the presence of other nuisances will not justify any one of them; or the more nuisances there were the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question, there-

(f) *Rex v. Lloyd*, 4 Esp. 200.

(g) *Rex v. Pappineau*, 1 Str. 686.

(h) *Rex v. White and Ward*, 1 Burr. 333.

(i) *Rex v. White and Ward*, 1 Burr. 337, where see also the word "noxious" not only means hurtful and offensive to the smell, but includes the complex idea of insalubrity and offensiveness.

(k) *Rex v. Davey and another*, 5 Esp. 217.

(l) *Rex v. Neil*, 2 C. & P. 485. *Abbott, C. J.*, see *Rex v. Watts*, *ibid.* 486.

fore, is this: is the business, as carried on by the defendant, productive of smells offensive to persons passing along the public highway?" (m)

It appears to have been ruled, that a person cannot be indicted for setting up a noxious manufactory in a neighborhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased. (n) Where the business of a horse-boiler, which is one of the most offensive description, had been carried on, on the same premises, for many years before the defendants came to them; but its extent was much greater under them than it had been before; but the neighbourhood, in which it was carried on, was full, at the time when they commenced the business, and long before, of establishments for carrying on trades of the most offensive character, and evidence was given that the *defendants carried on their trade in so improved a manner, that there was very little difference in the nuisance from what it was when they came there; it was held that this trade was, in its nature, a nuisance; but, considering the manner in which this neighborhood had always been occupied, it would not be a nuisance, unless it occasioned more inconvenience as it was carried on by the defendants than it had done before. If in consequence of the alleged improvements in the mode of conducting the business there was no increase of the annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance. (o)

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The 11 Geo. 4 & 1 Wm. 4, c. 27, which provides for the lighting parishes with gas, expressly enacts (s. 42,) that nothing in the act shall prevent any person from proceeding by indictment against any of the officers, servants, or workmen of the body corporate, or other persons supplying any gas, in respect of any works or other means employed by them, as a public nuisance.

A certificate and license, under the 26 Geo. 3, c. 71, s. 1, authorizing a person to keep a house for the slaughtering of horses, is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses at the very place, it would not entitle the defendant to continue the business there one hour after it became a public nuisance to the neighbourhood. (p)

It has been held, that a person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly fifty years. (q) But this seems hardly to be reconcilable to the doctrine, subsequently recognized, that no length of time can legalize a public nuisance, although it may supply an answer to the action of a private individual. (r) It should seem that in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. (s) † With respect to offensive works,

(m) *Rex v. Neil*, *supra*. (n) *Rex v. Bartholomew Neville, Peake*, 91.

(o) *Rex v. Watts, Moo. & M.* 281. Lord Tenterden, C. J. *Rex v. Neville, Peake*, N. P. C. 91, was cited for the defendants.

(p) *Rex v. Cross*, 2 C. & P. 483. Abbott, C. J. (q) *Rex v. Samuel Neville, Peake*, 93.

(r) *Weld v. Hornby*, 7 East, 199. *Rex v. Cross*, 3 Campb. 227, and see *post*.

(s) No authority was referred to in the last edition for this position; and although *Rex v. Russell*, 6 B. & C. 566, 9 B. & R. 566, might have warranted it, *Rex v. Ward*, 4 A. &

† [See Roseoe's Dig. Cr. Ev. 659, 454, and the rail-road cases. *Rex v. Pease*, 4 B. & Ad. 30. Eng. Com. L. Rep. xxiv. 17. *Rex v. Morris*, 1 B. & Ad. 441. Eng. Com. L. Rep. 421.

* Eng. Com. Law Repts. xxii. 307. b *Ib.* xii. 226. c *Ib.* xiii. 254. d *Ib.* xxxi. 92.

though they may have been originally established under circumstances which would *primâ facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements, which would make them less offensive, may be indictable.

If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it, that the carrying on the trade becomes a nuisance to the persons using the road, the party would be entitled to continue his trade, because his trade was legal before the erection of the houses and the making of the road. (ss)

*321
Gunpow-
der and
combusti-
bles.

*It seems, that erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. (t) And the making, keeping, or carrying, of too large a quantity of *gunpowder* at one time, or in one place or vehicle, is prohibited by the 12 Geo. 3, c. 71, under heavy penalties and forfeiture. And it appears, that persons putting on board a ship an article of a combustible and dangerous nature, without giving a due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor. The case did not come before the Court of King's Bench directly upon its criminal nature: but that court, in adverting to the conduct imputed to the defendants, declared it to be criminal; and said, "in order to make the putting on board *wrongful* the defendants must be conusant of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least." (u)

Keeping
grounds for
pigeon and
rifle shoot-
ing, and
thereby
collecting
crowds of
idle per-
sons.

An indictment charged the defendant with keeping certain inclosed lands, near to the king's highway and to certain houses, for the purpose of persons frequenting such grounds, and meeting therein to practise rifle shooting and to shoot at pigeons with guns, and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose, and did unlawfully and injuriously permit and suffer and cause and occasion a great number of idle and disorderly persons armed with

E 484, shows that it is no defence to an indictment for a nuisance by erecting an embankment in a harbour, that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port: and see *Rex v. Morris*,^a 1 B. & Ad. 441. *Rex v. Tindall*,^b 6 A. & E. 143. 1 N. & P. 719. See these cases, *post*.

(ss) Per Abbot, C. J. *Rex v. Cross*,^c 2 C. & P. 483.

(t) *Rex v. Williams*, E. 12, W., an indictment against Roger Williams for keeping 400 barrels of gunpowder near the town of Bradford, and he was convicted. And in *Rex v. Taylor*, 15 Geo. 2, the court granted an information against the defendant as for a nuisance, on affidavits of his keeping great quantities of gunpowder near Maldon in Surrey, to the endangering of the church and houses where he lived. 2 Str. 1167. Burn Just. tit. *Gunpowder*; where it is said, "or rather it should have been expressed to the endangering the lives of his majesty's subjects."

(u) *Williams v. The East India Company*, 3 East, 192, 201.

Rex v. Lord Grosvenor et al., 2 Stark. N. P. C. 511. Eng. Com. L. Rep. iii. 453. See also *Hart v. The Mayor of Albany*, 9 Wend. 582. On the trial of an indictment for establishing a noxious trade near certain dwellings, the defendant may prove in bar of the prosecution under the general issue, that the dwelling house in the vicinity of the place was built after the establishment of the alleged nuisance. *Ellis v. State*, 7 Blackf. 534.]

^a Eng. Com. Law Reps. xx. 421.

^b Ib. xxxiii. 26.

^c Ib. xii. 226.

guns to assemble in the streets and highways and other places near the said premises, discharging fire-arms and making a great noise and disturbance, by means whereof the king's subjects were disturbed and put in peril: the defendant had converted some land, about 100 feet from a public road, into a shooting ground, where persons came to practise with rifles, and to shoot at pigeons; and as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds, and in the neighbouring fields to shoot at the birds as they strayed, by which a great noise and disturbance was created; it was objected that the defendant was not responsible, as he neither committed the nuisance in his own person, nor was it his object to induce others to commit it; nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons being themselves amenable to punishment for it; but it was held that the evidence supported the allegation that the defendant caused such persons to assemble, and that the defendant was liable to be indicted for a nuisance; for if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable; and although *it may not be his object to create a nuisance, yet if it be the probable consequence of his act, he is answerable as if it were his actual object; if the experience of mankind must lead any one to expect the result, he will be answerable for it.(v)

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All *disorderly inns* or *ale-houses*, *bawdy houses*, *gaming houses*, *play-Disorderly dances*, unlicensed or improperly conducted booths and stages for *rope-inns*, &c. *dancers*, *mountebanks*, and the like, are public nuisances, and may therefore be indicted.(w)

It seem to be agreed, that the keeper of an *inn* may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose.(x) And it seems also clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon

Innkeepers are bound to receive travellers.

(v) *Rex v. Moore*, 3 B. & Ad. 184.

(w) 4 Bla. Com. 167.

(x) 1 Hawk. P. C. c. 78, s. 1. And see in Bac. Abr. tit. *Inns*, §c. (A) that as inns from their number and situation may become nuisances, they may be suppressed, and the parties keeping them may at common law be indicted and fined. And see also as to exorbitant prices, id. (C) 2. 21 Jac. 1, c. 21.

† [A bowling alley kept for *gain* or *hire* is a public nuisance at common law, though gambling be expressly prohibited. *Tanner v. The Trustees of Albion*, 5 Hill, 121. *Commonwealth v. Goding*, 3 Metcalf, 130.

The keeping in a public house of "a certain common, ill-governed, and disorderly room" and procuring and suffering for lucre disorderly persons to meet and remain therein by night and by day, "drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls, in and at a game commonly called ten pins," is a public nuisance and is indictable. *Bloomhaff v. The State*, 8 Blackf. 205.

Every act done in furtherance of a misdemeanor is not the subject of an indictment; but to constitute it such, it must tend directly and immediately, if not necessarily, to the commission of the misdemeanor. Hence the renting of a house to a woman of ill-fame with the intent that it shall be kept for purposes of public prostitution is not an offence punishable by indictment, though it be so kept afterward. Cowen, J., dissented, holding that the lessor of a house demised and kept for such purposes, might be indicted as the keeper of it. *Brockway v. The People*, 2 Hill, 558.]

his tendering him a reasonable price for the same, he is not only liable to render damages to the party in an action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town to receive and entertain such a person as his guest; and that it is in no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers.(y) It is no defence to an indictment for not receiving a traveler that he did not tender a reasonable sum for his entertainment, if no objection be made on that ground: nor that the guest was traveling on a Sunday; nor that it was a late hour of the night after the innkeeper and his family were gone to bed, for an innkeeper is bound to admit a traveler at whatever hour of the night he may arrive: nor that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing them: but if the guest be drunk or behave in an indecent or improper manner, the innkeeper is not bound to receive him.(z)

The keeping of an inn is no franchise, but a lawful trade when not exercised to the prejudice of the public: and therefore there is no need of any license or allowance for such erection.(a) But if an inn use the trade of an alehouse, as almost all innkeepers do, it will be within the statutes made concerning ale and beerhouses.(b)†

Bawdy-
houses.

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It is clearly agreed that keeping a *bawdy-house* is a common nuisance, as it endanger the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.(c) And it has been adjudged that this is an offence of which *a feme covert* may be guilty as well as if she were sole, and that she together with her husband may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex.(d) If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house.(e) But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication: the indictment should be for keeping a bawdy house.(f) For the bare

(y) 1 Hawk. P. C. c. 78, s. 2.

(z) *Rex v. Ivens*, 7 C. & P. 213, Coleridge, J., but see *Fell v. Knight*, 8 M. & W. 269, where this case was doubted as respects the tender of a reasonable sum of money for entertainment being unnecessary.

(a) Dalt. c. 56. Blackerby, 170. Burn. Just. tit. *Alehouses*, 1 Bac. Abr. tit. *Inns*, §c. (A).

(b) Burn. Just. tit. *Alehouses*, where those statutes are collected. Before the 5 & 6 Edw. 6, c. 25, it was lawful for any one to keep an *alehouse* without a license, for it was a means of livelihood which any one was free to follow. But if it was so kept as to be disorderly, it was indictable as a nuisance. 1 Salk. 45, 1 Hawk. P. C. c. 78, s. 52, *in marg.*

(c) 3 Inst. c. 98, p. 204. 1 Hawk. P. C. c. 74, and c. 75, s. 6. Bac. Abr. tit. *Nuisance*, (A). Burn. Just. tit. *Lewdness and Nuisance*.

(d) *Reg. v. Williams*, 1 Salk. 383, *ante*, 20.

(e) *Rex v. Pierson*, 2 Lord Raym. 1197. 1 Salk. 382.

(f) *Id. ibid.*

† [*Hunter v. The Commonwealth*, 2 Serg. & R. 298. *Com. v. Stewart*, 1 Serg. & R. 342. *Darling v. Hubbell*, 9 Comm. 350.]

^a Eng. Com. Law Reps. Ib. xxxii. 493.

solicitation of chastity is not indictable, but cognizable only in the Ecclesiastical Courts.(g)†‡

It is clearly agreed, that all common *gaming-houses* are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community.(h) And the keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "*rouge et noir*," and permitting the said idle and evil-disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law.(i) It has also been adjudged, that it is an offence for which a *feme covert* may be indicted; for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose.(j) As an indictment for keeping a gaming-house is an indictment for a public nuisance, and not for any matter in the nature of a private injury, if the prosecutor forbears bringing the case to trial, another person may proceed with the indictment.(k) In a similar case where a prosecution had been discontinued, the court directed the attorney-general to proceed.(l) There are certain penalties imposed by statutes upon the offence of keeping a common gaming-house;(m) and by 3 Geo. 4, c. 114, hard labour may be added to any imprisonment which the court may award.(n)§

*An indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for his lucre,

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Disorderly
houses.

(g) 1 Hawk. P. C. c. 74. Burn. Just. tit. *Lewdness*.

(h) Bac. Abr. tit. *Nuisances*, (A). 1 Hawk. P. C. c. 16, s. 6. *Rex v. Dixon*, 10 Mod. 336. See the 2 & 3 Vict. c. 47, s. 48, as to the power of the police within the metropolitan district to enter into gaming houses, and the penalties to which the owner, keeper, or manager thereof are liable, and that no person shall be proceeded against both by indictment, and also under that act.

(i) *Rex v. Rogier*,^a 1 B. & Co. 272. 2 D. & R. 431. And Holroyd, J., said, that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming house. And see *Rex v. Taylor*,^b 3 B. & C. 502.

(j) *Rex v. Dixon*, Trin. 2 Geo. 1. Bac. Abr. tit. *Nuisances* (A). 10 Mod. 335. 1 Hawk. P. C. c. 92, s. 30, and see *ante*, 20.

(k) *Rex v. Wook*,^c 3 B. & Ad. 657.

(l) *Rex v. Oldfield*, *ibid.* note (a). *Rex v. Fielden*, *ibid.* *Rex v. Constable*, *ibid.*

(m) 1 Hawk. P. C. c. 92, s. 14, *et seq.* And see 25 Geo. 2, c. 36, s. 5. 42 Geo. 3, c. 119. And see *post*, p. 328, as to Lotteries and Little-goes. (n) See the section, *ante*, p. 289.

† [But vide *The State v. Avery*, 7 Conn. Rep. 267.]

‡ [See a case of indictment for frequenting houses of ill-fame. *Brooks v. The State*, 2 Yerger, 482. In a prosecution for open and notorious lewdness, it need not be proved to have taken place in the street or under the immediate observation of strangers. It is enough if the parties lived together unmarried, and that fact was generally known throughout the neighbourhood. *Grishan & al. v. The State*, 2 Yerger, 589. Contra, *Commonwealth v. Catlin*, 1 Mass. R. 8.

A woman cannot be indicted for keeping a bawdy house merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit cohabitation with her. *State v. Evans*, 5 Iredell's N. C. Rep. 603.]

§ [A house in which a faro table is kept for the purpose of common gambling, is *per se* a nuisance, and it is not necessary to constitute it such, that there should be proof of frequent affrays and disturbances committed there. *State v. Door & al.*, Charlton, 1.

The keeping of a common gaming-house is indictable at common law on account of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace. *People v. Jackson*, 3 Denio, 101.]

^a Eng. Com. Law Reps. viii. 75.

^b *Ib.* x. 166.

^c *Ib.* xxiii. 154.

&c., certain persons of ill-name, &c., to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks, boxing, playing at cudgels, and misbehaving themselves*, did permit, has been held to be good.⁽ⁿ⁾ And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit is considered as a gaming-house, within the 33 Hen. 8, c. 9, s. 11, which imposes a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the court will measure the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open.^{(o)†}

Play-
houses.

It seems to be the better opinion that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as, where they draw together such numbers of coaches or people, &c., as prove generally inconvenient to the places adjacent; or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colours, to the imitation of the people, and make a jest of things commendable, serious, and useful.^(p) Players and playhouses are now put under salutary regulations by the provisions of several statutes.^(q) And places of public entertainment in the neighbourhood of London, if not properly licensed, are to be deemed *disorderly houses* by the 25 Geo. 2, c. 36, ^(r) which, reciting the multitude of places of entertainment for the lower sort of people as a great cause of thefts and robberies, enacts, "that any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster or within twenty miles thereof," without a license from the last preceding Michaelmas quarter sessions, under the hands and seals of four of the justices "shall be deemed a disorderly house or place." The act then particularizes the mode of granting the license, makes it lawful for a constable or other person, authorized by warrant of a justice, to enter such house or place, and to seize every person found therein; and makes every person keeping such house, &c., without a license liable to a penalty of 100*l.*, and otherwise punishable as the law directs in cases of disorderly houses.^{(s) *A}

Places of
public
entertain-
ment un-
licensed to
be deemed
disorderly
houses.

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⁽ⁿ⁾ *Rex v. Higginson*, 2 Burr. 1233.

^(o) *Rex v. Howell*, 3 Keb. 510. 1 Hawk. P. C. c. 92, s. 29. See the 2 & 3 Vict. c. 47, s. 47, which subjects persons keeping houses, &c., for baiting lions, bears, badgers, cocks, dogs, or other animals to 5*l.* penalty, or a month's imprisonment. The act extends to the metropolitan police district.

^(p) *Bac. Abr. tit. Nuisances (A)*. 1 Hawk. P. C. c. 75, s. 7. And as to the performance of an obscene play, see *ante*, 233, note ^(x).

^(q) The 10 Geo. 2, c. 28, enacts that persons performing any entertainment of the stage without authority or license, shall be deemed rogues and vagabonds, and liable to the penalties of 12 Ann. stat. 2, c. 23, (an act repealed, but re-enacted by 17 Geo. 2, c. 5), and also to a penalty of 50*l.* See *Rex v. Neville*,* 1 B. & Ad. 489, as to the construction of 10 Geo. 2, c. 28. See also the 28 Geo. 3, c. 30, by which justices of the peace at their quarter sessions may license theatrical representations occasionally, under certain restrictions. The words "entertainment of the stage," in 10 Geo. 2, c. 28, have been held not to extend to an exhibition of *tumbling*. *Rex v. Handy*, 6 T. R. 286. By special acts of parliament playhouses are permitted to be erected in particular places.

^(r) Made perpetual by the 28 Geo. 2, c. 19.

^(s) See also the 2 & 3 Vict. c. 47, s. 46, which gives power to enter unlicensed theatres,

† [Exhibiting stud horses in a town is a nuisance. *Nolin v. The Mayor of Franklin*, 4 Yerger, 163.]

mere temporary or occasional use of a room for music and dancing is not a keeping it within this act, but the room need not be kept exclusively for those purposes, nor need money be taken at the door. Where, therefore, the defendant kept a public house, and on repeated occasions, during a space of three or four months, the tap-room was frequented at night by numbers of sailors, soldiers, boys, and prostitutes, who danced there to a violin played by a person on an elevated platform, but no money was taken for admission, it was held that the case was within the act. (t)

It seems also to be the better opinion, that all common stages for rope-dancers, &c., are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. (tt)

The proceedings in respect of prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, are facilitated by the 25 Geo. 2, c. 36, by which it is enacted, that if two inhabitants of any parish or place, paying scot and lot, give notice in writing to the constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice; and shall upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. And provision is also made for the payment by the overseers of the charges of prosecution to the constable, and ten pounds on conviction to each of the two inhabitants. (u) The person keeping such bawdy-house, &c., is also to be bound over to appear at the sessions or assizes. (a)

Sec. 8, reciting that by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, &c., it is difficult to prove who is the real owner or keeper, enacts, "that any person who shall appear, act, or behave as master or mistress, or as the person having the care, government or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact, be the real owner or keeper thereof." By sec. 9, any person may give evidence, though an inhabitant of the parish or place, and though he may have entered into the before-mentioned

Stages for rope-dancers.

Proceedings in prosecutions against persons for keeping bawdy-houses, gaming-houses, or other disorderly houses. 25 G. 2, c. 36.

Persons acting as keepers of disorderly houses to be deemed keepers.

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and subjects persons letting houses, &c., for the purpose of being used as unlicensed theatres to a penalty of not more than 20*l.*, or two months' imprisonment; and subjects persons performing or being therein without lawful excuse, to a penalty of 40*s.*; and a conviction under the act is not to exempt the owner, keeper, or manager of any such house from any penalty for keeping a disorderly house, or for the nuisance thereby occasioned. The act extends to the metropolitan police district. By sec. 3 of 25 Geo. 2, c. 36, the act is not to extend to the theatres in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket; nor to performances and public entertainments carried on under letters-patent, or license of the crown, or license of the lord chamberlain.

(t) Gregory v. Tuff's, 6 C. & P. 271. 4 Tyrw. 820. Gregory v. Tavenor, 6 C. & P. 280. (tt) Bac. Abr. tit. Nuisances (A). 1 Hawk. P. C. c. 75, s. 6. And see ante, p. 267, note (g), as to stage-players being indicted for a riot and unlawful assembly.

(u) Sec. 4.

(a) See the 58 Geo. 3, c. 70, s. 7, by which a copy of the notice served on the constable is also to be served on one of the overseers, and the overseers may enter into a recognizance, and prosecute instead of the constable.

* Eng. Com. Law Reps. xxv. 393.

† Id. ibid. 397.

No certiorari. recognizance. By sec. 10, no indictment shall be removed by *certiorari*, but shall be tried at the same sessions or assizes where it shall have been preferred (unless the court shall think proper, upon any cause shown, to adjourn the same,) notwithstanding any such writ or allowance. This last clause has been decided not to restrain the crown from removing the indictment by *certiorari*; there being nothing in the act to show that the legislature intended that the crown should be bound by it.(v)

Indictment and evidence as to disorderly houses. Any number of persons may be included in the same indictment for keeping different disorderly houses, stating that they "severally" kept, &c., such houses.(w) It seems that it is necessary to state where the house is situate, and the time, so as to make a particular statement of the offence which is the *keeping* of the house.(x) But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time, of doing them.(y) It is not necessary to prove who frequents the house, for that may be impossible; but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment.(z) The punishment for keeping a common bawdy-house, a common gambling house, or a common ill-governed and disorderly house, is fine, or imprisonment, or both, and by the 3 Geo. 4, c. 114, hard labour in addition to such imprisonment.(zz)

Punishment.

Open lewdness and indecent exposure. In general, all open lewdness grossly scandalous, is punishable by indictment at the common law; and it appears to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor.(a) In one case it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. M'Donald, C. B., ruled, that whatever place become the habitation of civilized men, there the laws of decency must be enforced.(b) And to show a being of unnatural and monstrous shape for money is a misdemeanor.(c)

(v) *Rex v. Davies and others*, 5 T. R. 626.

(w) 2 Hale, 174, where it said, "It is common experience at this day, that twenty persons may be indicted for keeping disorderly houses or bawdy houses; and they are daily convicted upon such indictments, for the word *separaliter* makes them several indictments." And in *Rex v. Kingston and others*, 8 East, 41, it was held that it is no objection on *demurrer* that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the court to quash the indictment.

(x) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(y) By Lord Hardwicke, in *Clarke v. Periam*, 2 Atk. 339.

(z) *J'Anson v. Stuart*, 1 T. R. 754, by Buller, J. (zz) See the section, *ante*, p. 289.

(a) 1 Hawk. P. C. c. 5, s. 4. Burn. Just. tit. *Lewdness*. 4 Bla. Com. 65, (n) 1 East. P. C. c. 1, s. 1. See 5 Geo. 4, c. 85, s. 4, and 1 & 2 Vict. c. 38, which make persons guilty of the indecent exposure of obscene prints, pictures, wounds, deformities, &c., punishable as rogues and vagabonds.

(b) *Rex v. Crunden*, 2 Campb. 89. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. In *Rex v. Sir Charles Sedley*. Sid. 168, 1 Keb. 620, S. C., the defendant being indicted for showing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment, and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

(c) *Harring v. Walrond*, 2 Cha. Ca. 110, the case of a monstrous child that died, and was embalmed to be kept for a show, but was ordered by the lord chancellor to be buried—(cited in Burn. Just. tit. *Nuisance*.)

**Eaves Droppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour.^(d)

A *common scold*, *communis rixatrix*, (for our law confines it to the feminine gender,) is a public nuisance to her neighborhood, and may be indicted for the offence; and, upon conviction, punished by being placed in a certain engine of correction called the trebucket, or cucking stool.^(e)† And she may be convicted without setting forth the particulars in the indictment;^(f) though the offence must be set forth in technical words, and with convenient certainty: and the indictment must conclude not only against the peace, but to the common nuisance of divers of his majesty's liege subjects.^(g) It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding.^(h)

A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nuisance.⁽ⁱ⁾

The exposing in public places persons infected with contagious disorders, so that the infection may be communicated, is a nuisance, and has been already treated of in a preceding chapter.^(j)

It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his majesty's subjects, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large.^(k)

There are also some offences which are declared to be nuisances by the enactments of particular statutes. And where a statute declares a particular thing to be a common nuisance, it is indictable as such. An act of parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected, it should be deemed a common nuisance. By another clause justices were empowered to convict the proprietor and occupier of such building; it was held that the party who erected a building contrary to the act might be indicted for a nuisance.^(l)

(d) 4 Bla. Com. 167, 168. Burn. Just. tit. *Eaves Droppers*.

(e) 1 Hawk. P. C. c. 75, s. 14. 4 Bla. Com. 168. Burn. Just. tit. *Nuisance*, III. *Cuck* or *guck*, in the Saxon language (according to Lord Coke) signifies to scold or brawl; taken from the bird *cuckow* or *guckhaw*; and *ing* in that language signifies water, because a scolding woman, when placed in this stool, was for her punishment soused in the water. 3 Inst. 219.

(f) 2 Hawk. P. C. c. 25, s. 59. (g) *Rex v. Cooper*, 2 Str. 1246.

(h) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(i) *Rex v. Smith*, 1 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night. 2 Chit. Crim. Law, 647.

(j) *Ante*, Chap. ix. p. 107, *et seq.*

(k) Burn. Just. tit. *Nuisance*, 1. And see a precedent of an indictment for this offence, 3 Chit. Crim. Law, 643. It should be observed, however, that the offence seems to be stated too generally in the authority from which the text is taken. To permit a *furious* mastiff or bull dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, excepting when incited by their owners; and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious.

(l) *Rex v. Gregory*, 5 B. & Ad. 555. See this case as to the meaning of the term "building," in such an act.

† [The offence of being a common scold is indictable, and may be punished by fine and

* Eng. Com. Law Repts. xxvii. 125.

*328 By the 9 & 10 Will. 3, c. 7, it is enacted that it shall not be lawful
 Fireworks, *for any person to make, or cause to be made, or to sell or utter, or offer
 9 & 10 W. to expose to sale, any squibs, rockets, serpents, or other fireworks, or any
 3, c. 7. cases, moulds, or other implements for the making any such squibs, &c.,
 or for any person to permit or suffer any squib, &c., to be cast, thrown,
 or fired from out of or in his house, lodging, or habitation, or any place
 thereunto belonging or adjoining, into any public street, highway, road,
 or passage, or for any person to throw, cast off, or fire, or be aiding or
 assisting in the throwing, casting, or firing of any squibs, &c., in or into
 any public street, house, shop, river, highway, road, or passage, "and
 *that every such offence shall be a common nuisance." The statute also
 imposes pecuniary penalties for these offences, to be inflicted, upon con-
 viction, before a magistrate; but as it declares, the offences to be com-
 mon nuisances, they can clearly be also prosecuted by indictment.(m)

Lotteries.
 10 & 11
 W. 3, c. 17.

By the 10 & 11 Wm. 3, c. 17, all lotteries are declared to be public
 nuisances; and all grants, patents, and licenses, for such lotteries to be
 against law. But for many years past it has been found convenient to
 the government to raise money by the means of them; and accordingly
 different state lottery acts have been passed to license and regulate offices
 for lotteries.(n) But the statute 42 Geo. 3, c. 119, declares all games
 or lotteries called *Little Goes*, to be public nuisances, and provides for
 their suppression; and also imposes heavy penalties upon persons keep-
 ing offices, &c., for lotteries not authorized by parliament.

Of the re-
 moval of
 nuisances.

It is laid down in the books that any one may pull down, or otherwise
 destroy a common nuisance; and it is said that if any one, whose estate
 is, or may be, prejudiced by a private nuisance, may justify the entering
 into another's ground and pulling down and destroying such nuisance,
 surely it cannot but follow *a fortiori* that any one may lawfully destroy
 a common nuisance.(o) And it is also said that it seems that in a plea
 justifying the removal of a nuisance, the party need not show that he
 did as little damage as might be;(p) but this may perhaps, be doubted,
 as, even where there is judgment to abate a nuisance, it is only to abate
 so much of the thing as makes it a nuisance.(q)†

Of the pro-
 hibition of
 them by
 writ from
 the King's
 Bench.

It is also stated as the better opinion, that the Court of King's Bench
 may, by a mandatory writ, *prohibit* a nuisance, and order that it shall be
 abated; and that the party disobeying such writ will be subject to an
 attachment.(r) Such writs appear to have been granted in some cases;
 and the proceeding in one case was that the judges, upon view, ordered
 a record to be made of the nuisance, and sending for the offender, ordered
 him to enter into a recognizance not to proceed; but he refusing to com-
 ply, the court committed him for the contempt, issuing a writ to the

(m) *Ante*, p. 49. The pecuniary penalties are imposed by ss. 2 and 3, of this statute.
 And see Burn. Just. tit. *Fireworks*.

(n) See the acts collected, Burn. Just. tit. *Gaming*, III.

(o) 1 Hawk. P. C. c. 75, s. 12. Bac. Abr. tit. *Nuisance*, (C).

(p) *Id.* *ibid.*

(q) *Post*, 321.

(r) Bac. Abr. tit. *Nuisance*, (C).

imprisonment at the discretion of the court. *James v. The Commonwealth*, 12 Serg. & R.
 220. The punishment by the cucking stool cannot be inflicted in Pennsylvania. *Ibid.*]

† [*Hart & al. v. The Mayor of Albany*, 9 Wend. 571. *Gates v. Blincoe*, 2 Dana, 158. *Acc.*
 If a party in abating a nuisance does more injury to another than is necessary to effect the
 legitimate object, he is liable to an action. *Ibid.*

The destruction of a building in which disorderly persons assemble for unlawful purposes,
 cannot be justified as the abatement of a nuisance; nor can an assault upon one who resists
 the destruction of his property for such a cause be justified; for it is not the house, but the
 disorderly conduct permitted in it, that constitutes the nuisance. *Gray v. Ayres et al.*, 7
 Dana, 375.

sheriff on the record made, to abate the building, and ordered the offender to be indicted for the nuisance.(s)

But the more usual course of proceeding in cases of nuisance is *by ^{*329} indictment, in which the nuisance should be described according to the circumstances; and it should be stated to be continuing, if that be the fact.(t) An indictment for carrying on offensive works may state them to be carried on at such a parish. It is not necessary to state that they were carried on in a town or village;(u) stating them to be carried on near a common king's highway, and near the dwelling houses of several persons, to the common nuisance of passengers and of the inhabitants, is sufficient; it need not be stated how near the highway or houses they were carried on.(v) The offence should be charged to be done *ad commune nocumentum*, "to the common nuisance of all the liege subjects," &c.(w) But an indictment against a common scold, using the words *communis rixatrix*, has been considered to be good, though it was concluded *ad commune nocumentum diversorum* instead of *omnium*, because from the nature of the thing it could not be but a common nuisance. And Hawkins says, that for the same reason it may be argued that an indictment, with such a conclusion, for a nuisance to a river, plainly appearing to be a public navigable river, or to a way, plainly appearing to be a highway, is sufficient; and he says, that perhaps the authorities which seem to contradict this opinion might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty whether the way wherein the nuisance was alleged were a highway, or only a private way; and that therefore it should be intended, from the conclusion of the indictment, that the way was private.(x) The safer mode, however, will be to lay the offence to have been committed "to the common nuisance of all the liege subjects," &c.

In some cases it is no defence to show that the premises, out of which the nuisance arises, are in the occupation of a tenant, for the receipt of the rent is an upholding of the nuisance. Defence.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is if he let a building, which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.(y) If a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew

(s) *Rex v. Hall*, 1 Mod. 76. 1 Vent. 169, S. C. And Hale, C. J., mentioned another case in 8 Car. 1, of a writ to prohibit a bowling-alley erected near St. Dunstan's Church.

(t) *Rex v. Stead*, 8 T. R. 142; otherwise there will not be judgment to abate it.

(u) *Burr*, 333.

(v) *Id. ibid*

(w) *Vin. Abr. tit. Indictment (Q). Nuisance*, 13. *Prat v. Stearn, Cro. Jac.* 382. *Rex v. Hayward, Cro. Eliz.* 148. *Anon.* 1 Ventr. 26. 2 Roll. Abr. 83. 7 Hawk. P. C. c. 75, s. 3, 4, 5, and the authorities there cited. And see *Bac. Abr. tit. Nuisance (B)*. In 6 East, 315, *Rex v. Reynell*, there is an indictment for not repairing the fences of a churchyard "to the nuisance of the inhabitants of the parish." But *qu.*

(x) 1 Hawk. P. C. c. 75, s. 5.

(y) *Rex v. Pedley*,^a A. & E. 822. 3 N. & M. 627.

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the tenancy after the tenant had erected the nuisance, that would make the landlord liable.^(z) Where, therefore, the defendant was in receipt of the rents of some dwelling-houses, let for short periods to *tenants, and two privies and a sink belonging to them were used in common by the occupiers of the houses; it did not appear whether any of the present tenants commenced occupying the houses before the defendant began to receive the rents; but the privies and sink were used by the tenants of those premises before his time; there was no distinct proof of any actual demise of the privies and sink, but they had been regularly cleansed by the persons occupying the houses, until the time of the nuisance, when the cleansing had been neglected; the nuisance had arisen since the defendant began to receive the rents; it was held that the defendant was liable to be indicted for the nuisance.^(zz) It is no defence for a master or employer that a nuisance is caused by the acts of his servants, if such acts are done in the course of their employment; for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants.^(a)

The defendant cannot excuse himself by showing that the nuisance has existed for a long time.

No length of time will legalize a public nuisance.

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time; as, however, twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances though of longer standing.^{(b)†} It has been held that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage of the town, leaving sufficient room for passengers: for it is against law to prescribe for a nuisance.^(c) And Lord Ellenborough, C. J., said, in one case, "It is immaterial how long the practice may have prevailed, for *no length of time will legitimate a nuisance*. The stell fishery across the river at Carlisle had been established for a vast number of years, but Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated."^(d) But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale, Lord Ellenborough, C. J., said, that after twenty years' acquiescence, it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal who came there under the belief that it was such fair, or market, legally instituted.^{(e)‡}

(z) Per Littledale, J. *Rex v. Pedley*,^a A. & E. 822, 3 N. & M. 627.

(zz) *Rex v. Pedley*, *supra*.

(a) *Rex v. Medley*,^b 6 C. & P. 292. Lord Denman, C. J. See *ante*, p. 109, 110.

(b) *Weld v. Hornby*, 7 East, 199, and see *post*, sect. 3.

(c) *Fowler v. Sanders*, Cro. Jac. 446.

(d) *Rex v. Cross*, 3 Camp. 227.

(e) *Rex v. Smith and others*, 4 Esp. 111. See *Bliss v. Hall*,^c 4 B. N. C. 183.

† [*Mills v. Hall et al.*, 9 Wend. 215]

‡ [No length of time renders a nuisance lawful or estops the state from abating it, and punishing the person who creates such a nuisance. *Elkins v. The State*, 3 Humphreys, 543.]

A party cannot defend an indictment for nuisance by showing its continued existence for such a length of time as would establish a prescription against individuals. *The People v. Cunningham*, 1 Denio, 524.

^a Eng. Com. Law Reps. xxviii. 320.

^b *Ib.* xxv. 403.

^c *Ib.* xxxiii. 315.

If the indictment be so general that it does not convey sufficient information to the defendant to enable him to procure his defence, the court will order the prosecutor to give the defendant a particular of the several acts of nuisance he intends to prove. (*f*) And where the indictment is for the obstruction or non-repair of highways which are described generally, a particular of the several highways obstructed or out of repair may be obtained. (*g*)

Particulars
of the
nuisance.

*All common nuisances are regularly punishable by fine and imprisonment; but, as the removal of the nuisance is usually the chief end of the indictment, the court will adapt the judgment to the nature of the case. Where the nuisance, therefore, is stated in the indictment to be continuing, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own costs: (*h*) but only so much of the thing as causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down, and if the indictment were for keeping a dye-house, or carrying on any other stinking trade, the judgment would not be to pull down the building where the trade was carried on. (*i*) So in the case of a glass-house, the judgment was to abate the nuisance, not by pulling the house down, but only by preventing the defendant from using it again as a glass-house. (*j*) But where the indictment does not state the nuisance to be continuing, a judgment to abate it would not be proper. In a case where this point arose, Lord Kenyon, C. J., said, "When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *Rex v. Pappineau, et adhuc existit*; and in such cases the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it." (*k*)

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Of judgment
in
cases of
nuisance.

The 5 Wm. & M. c. 11, s. 3, enacts, that if a defendant prosecuting a writ of *certiorari* (as mentioned in the act) be convicted of the offence for which he is indicted, the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved, or be a justice, &c., or other civil officers, who shall prosecute for any fact that concerned them as officers to prosecute or present. Upon this clause it was determined, that persons dwelling near to a steam-engine, which emitted volumes of smoke affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for such nuisance, are parties grieved entitled to their costs, the defendants having removed the indictment from the sessions by *certiorari*, and been afterwards convicted. (*l*)

Costs upon
an indictment
for a
nuisance,
where the
defendant
had re-
moved it by
certiorari,
and been
convicted.

(*f*) *Rex v. Curwood*, 3 A. & E. 815.

(*g*) *Rex v. Marquis of Downshire*, 4 A. & E. 698. *Reg. v. Inhabitants of Pembridge*, June 26, 1841. *Patteson, J.*, at Chambers; and no affidavit is necessary, as the necessity for particulars appears on the face of the indictment.

(*h*) 2 Roll. Abr. 84. 1 Hawk. P. C. c. 75, s. 14. *Rex v. Pappineau*, 1 Str. 686.

(*i*) *Rex v. Pappineau, supra*, 9 Co. 53. *Godb.* 221.

(*j*) *Co. Ent.* 92 *b*.

(*k*) *Rex v. Stead*, 8 T. R. 142. A strong opinion was intimated upon the point when the same case was previously brought before the court in another shape. *Rex v. The Justices of Yorkshire*, 7 T. R. 468.

(*l*) *Rex v. Dewsnap and another*, 16 East, 194.

* *Eng. Com. Law Reps.* xxx. 228.

^b *Ib.* xxxi. 169.

Costs in cases of nuisances arising from furnaces used for steam-engines.

The 1 & 2 Geo. 4, c. 41, reciting the great inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam, and that though such nuisance, being of a public nature, is abatable as such by indictment, the expense had deterred parties suffering thereby from seeking the remedy given by law, enacts that it shall and may be lawful for the court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid;* such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit.

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An order may be made by the court for the alteration of the furnace.

By sec. 2, if it shall appear to the court by which judgment ought to be pronounced, that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the court, without the consent of the prosecutor, to make such orders as shall be by the court thought expedient for preventing the nuisance in future, before passing final sentence on the defendant.

But these provisions are not to extend to furnaces of engines for working mines, &c.

The statute then enacts, that the provisions contained in it, as far as they relate to the payment of costs and the alteration of furnaces, shall not extend to the owners or occupiers of any furnaces of steam-engines, erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing the produce of ores and minerals, on or immediately adjoining the premises where they are raised.(m)

SECT. II.

Of Nuisance to Public Highways.(A)

IN treating of nuisances to *public highways*, we may consider, in the first place, what is a public highway; secondly, of nuisances to a public highway by obstruction; and, thirdly, of nuisances to a public

Nuisances to public highways.

(m) Sec. 3.

(A) The statutes of this country in the different United States, relative to nuisances to highways, are so numerous, and the provisions of them so various and particular, that they cannot be inserted in these notes. The reader, therefore, must consult them in the statute books, whenever in the course of his practice it may become necessary.

MASSACHUSETTS.—In addition to the case referred to in the preceding note, it has been decided, that when a public way has been unlawfully obstructed, any individual who has occasion to use it in a lawful way, may remove the obstruction; and he may enter upon the land of the party erecting or continuing the obstruction, for the purpose of removing it, doing as little damage as possible to the soil or buildings. *Inhabitants of Arundel v. McCulloch*, 10 Mass. Rep. 70.

If the proprietors of a turnpike road obstruct a former highway by erecting a gate thereon, unless they be specially authorized so to do by the legislature, such gate will be a nuisance, and any individual will have a right to abate it. *Wales v. Stetson*, 2 Mass. Rep. 143.

An indictment lies for a nuisance erected on a town way. *Commonwealth v. Gowen*, 7 Mass. Rep. 378. In an indictment for a nuisance on a public highway, the whole of the way need not be described, but so much only as will include the nuisance. *Ibid.*

NEW YORK.—A copy of the record establishing the road as a highway, is sufficient, without proving all the proceedings preliminary to the laying out of the road. *Sage v. Barnes*, 9 Johns. Rep. 365.

The penalty for obstructing highways, given by the 19th section of the act (2 N. R. L. 277, s. 25), relates only to obstructions in highways or public roads, and not to those in a private road. *Fowler v. Lansing*, 9 Johns. Rep. 349.

highway by the neglect, on the part of those who are liable, to put it in repair.

Highways is said to be the *genus* of all public ways; (n) of which there are three kinds; a footway; a foot and horseway, which is also a pack and prime-way; and a foot, horse and cart-way. (o) Whatever distinctions may exist between these ways, it seems to be clear that any of them, when common to all the king's subjects, whether directly leading to a market-town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a highway; and that the last, or more considerable of them has been usually called the *king's* highway. (p) But a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, is not a highway, because it belongs not to all the king's subjects, but only to some particular persons, each of whom, as it

What is a public highway.

(n) Reg. v. Saintiff, 6 Mod. 255.

(o) Co. Lit. 56 a.

(p) Id. *ibid.* 1 Hawk. P. C. c. 76, s. 1. Bac. Abr. tit. *Highways* (A). And in a case where the *terminus ad quem* was laid to be a public highway, and it appeared in evidence that it was a public footway, it was held that the description was sufficient. *Allen v. Ormond*, 8 East, 4.

It is necessary that the commissioners of highways should deliberate and decide on the alleged encroachment, and give notice to the party to remove his encroachment in sixty days, which notice ought to state specially the breadth of the road originally intended, the extent of the encroachment, and the plan or plans where, &c., so that the party may know how to obey the order for removing his fence. *Spicer v. Slade*, 9 Johns. Rep. 359.

A *certiorari* lies to the judges of a court of common pleas, to remove proceedings on an appeal to them, from the commissioners of highways *Lawson v. Commissioners of Cambridge*, 2 Caines's Rep. 179. And where the commissioners are silent as to the width of the road, the court will intend it to be of the legal width. *Ibid.* See also 15 Johns. Rep. 537.

Where an inquisition for an encroachment on the highway, taken under the 20th section of the act (2 N. R. L. 277, s. 26), is removed into the Supreme Court by *certiorari*, and quashed, the appellant is not entitled to costs. *Lou v. Rogers*, 8 Johns. Rep. 321.

Where a person has been appointed an overseer of the highways under the act (Sess. 36, c. 35, 2 N. R. L. 125), and neglects or refuses to serve, whereby he incurs the penalty imposed by that act, he cannot again be appointed an overseer under the act (Sess. 36, c. 33, 2 N. R. L. 270), and be made liable for a second penalty, for a second refusal to act. *Haywood v. Wheeler*, 11 Johns. Rep. 432.

All the commissioners must confer in regard to making an order for the removal of an encroachment, where the encroachment is not denied. But where the encroachment is denied and the fact is to be inquired into by a jury, one of the commissioners may act alone. *Bronson v. Mann*, 13 Johns. Rep. 460. The certificate of a jury finding an encroachment is conclusive evidence of that fact, in an action for the penalty for not removing the encroachment. *Ibid.* See also 16 Johns. Rep. 61, *The People v. Champion et al.*, relative to appeals from the commissioners to the common pleas, and the power of the common pleas to compel the commissioners to open a road, by *mandamus*.

A road used as a common highway since the year 1777, but not recorded as such, is not a public highway within the meaning of the act relative to highways (Sess. 36, c. 33, s. 24), so as to render the obstruction of it a nuisance. *The People v. Lawson*, 17 Johns. Rep. 277.

VIRGINIA.—In the case of *Dimmett et al. v. Eskridge*, 6 Munf. Rep. 211, it was decided that even a partial obstruction of a public highway is an abatable nuisance.

SOUTH CAROLINA.—To constitute a public street or highway, it is necessary that it should be laid off and used as such, for it is the use that makes it a highway. *Non user*, however, for a great number of years, will forfeit a right to a highway. The proper remedy for obstructing a street or highway, is by indictment, and not by an action to try the title; and where the commissioners of streets or highways bring a private action for obstructing a highway, it is a good ground of demurrer, or in arrest of judgment. *The Commissioners of the Streets of Georgetown v. Taylor*, 2 Bay's Rep. 282.

KENTUCKY.—On the trial of an indictment for an offence relative to a public road, the legality or regularity of the order of the county court establishing the road cannot be inquired into; it is final and conclusive until set aside or reversed by the court of appeals. *Commonwealth by Davis v. Ditto*, Hardin's Rep. 442.

seems, may have an action on the case for a nuisance therein.^(g) But in a late case,^(r) where a public footway was described as leading to a parish church, no objection was made on the ground that there could not be a public way to a church. In one case a very learned judge said, he had great difficulty in conceiving that there can be a public *highway which is not a thoroughfare, because the public at large cannot well be in the use of it.^(s) It has been held, that where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage by a legal order of justices. If the stoppage were legally made, that would not make the remaining passage not public.^(t)

It is not to be understood by the term *cart-way*, that the way is to be used only with the particular vehicle called a *cart*, for if it is a common highway for carriages, it is a highway for all manner of things.^(u) Many public highways, however, as a footway, are to be used only in a particular mode. Thus, though a towing path is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose.^(v) And where a rail-way or tram-road was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of it, such rail-way or tram-road was taken to be a public highway.^(w)

The number of persons using a way or repairing it will not make it a public way if it be not common to all the king's subjects.

The number of persons who may be entitled to use the way, or may be obliged to repair it, will not make it a public way, if it be not common to *all* the king's subjects. Thus, where the commissioners under an inclosure act, set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, it was held that no indictment could be supported against those six parishes for not repairing it, because it did not concern the public. It was argued, amongst other reasons in support of the indictment, that there was no other remedy, for that there were not less than 250 persons who were liable to the repair of the road, and that the difficulty of suing so many persons together was almost insuperable. But the court said, that however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported; that the known rule was that those matters only which concerned the public were the subject of an indictment; 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; and that the question was not varied by the circumstance that many individuals were liable

(g) 1 Hawk. P. C. c. 76, s. 1. So by Hale, C. J., in Austin's case, 1 Vent. 189. A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house or village, or to fields, it is a private way.

(r) Rex v. Marchioness of Downshire, 4 A. & E. 232. 5 N. & M. 662. See Also William's case, 5 Co. 72 b. 2 Roll. 84, pl. 15. Rex v. Reynell, 6 East, 315.

(s) By Abbott, C. J., in Wood v. Veal, 5 B. & A. 454.

(t) Per Patteson, J., Rex v. Marquis of Downshire, 4 A. & E. 698. 6 N. & M. 92.

(u) Rex v. Hatfield, Cas. temp. Hard. 315.

(v) Per Bayley, J., in Rex v. Severn and Wye Railway Company, 2 B. & A. 648.

(w) Rex v. Severn and Wye Railway Company, 2 B. & A. 646.

* Eng. Com Law Reps. xxxi. 58.

b Ib. vii. 158.

c Ib. xxxi. 169.

to repair, or that many others were entitled to the benefit of this road.(x)[1]

Though a highway is said to be the king's, yet this must be understood as meaning that in every highway the king and his subjects may pass and repass at their pleasure; for the freehold and all the profits, as trees, mines, &c., belong to the lord of the soil, or to the owner of the lands on both sides the way.(y) The rights, however, of the owner of the soil will be subject to those of the public as to their exercise of their right of way in its full extent. Thus it seems to be established, that if a common highway is so foundrous and out of repair as to become impassable, or *even dangerous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and that it makes no difference whether such ground be sown with grain or not.(z) But it is a right of passage only which is given up by the owner of the soil, even where the way is dedicated by him to the public. Thus where, in an action of trespass, a case was made that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years ago had built a street upon it, which had ever since been used as a highway, that the defendant had lands contiguous, parted only by a ditch, over which ditch he had laid a bridge, the end of which rested on the highway; and it was insisted, for the defendant, that by the plaintiff's having made this a street, it was a dedication of it to the public, and that he could not therefore sue as for a trespass on his private property; the court held that though it was a dedication to the public, so far as the public had occasion for it, which was only for a right of passage, it never was understood to be a transfer of the absolute property in the soil.(a)

The freehold and the profits (as mines, trees, &c.) of a highway belong to the lord of the soil.

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Right of the public to go out of a highway.

A way may become a public highway by a *dedication* of it, by the *owner* of the soil, to the public use.[2]† Thus where the owners of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment (such as a bar set across the street, and shut at pleasure, which would show the limited right of the public,) it was held a sufficient time for presuming a dedication of the way to the public.(b) So where a street,

A way may become public by a dedication of it by the owner of soil to the public use.

(x) *Rex v. Richards*, 8 T. R. 634.

(y) *Bac. Abr. tit. Highways*, (B) *Com. Dig. Chemin*, (A) 2.

(z) 1 *Roll. Abr.* 390, (A) pl. 1, and (B) pl. 1. *Absor v. French*, 2 *Show.* 28. *Taylor v. Whitehead*, *Dougl.* 749.

(a) *Sir John Lade v. Shepherd*, 2 *Str.* 1004.

(b) *Trustees of the Rugby Charity v. Merryweather*, 11 *East*, 375, in the note. *Lord Ken-*

[1] { It seems that a public town way can be established in Massachusetts, only in the way prescribed by st. 1786, c. 67; viz.: by a laying out by the selectmen, an acceptance by the town, and a record thereof in the town book; and that such record cannot be presumed from a user however long continued. 3 *Pick.* 408, *Commonwealth v. Low*.

A town may acquire a right by way of grant, and twenty years' uninterrupted user by the inhabitants is evidence of a grant. But such way is private, and a nuisance on it not indictable. *Ibid.* See also 2 *Pick.* 51, *Commonwealth v. Newbury*. No user short of twenty years will establish a way so as to render a town indictable for not repairing it. 2 *Greenleaf*, 55, *Todd v. Rome*, 4 *ib.* 270, *Rowell v. Montville*. 5 *ib.* 368, *Estes v. Troy*. Towns are punishable for not opening highways legally laid out, as well as for not keeping them afterwards in repair. 5 *Greenleaf*, 254, *State v. Kittery*. 7 *Pick.* 337. }

[2] { Whether the doctrine of dedication is applicable to town-ways, in Massachusetts, see cases cited in next preceding note, and 2 *Pick.* 162, *Hinkley v. Hastings*. In Vermont, the setting apart of land for public use, by the owner, and the use thereof by the public as a road for fifteen years, prevents the owner from reclaiming the land. It becomes a highway, and a nuisance therein is indictable. 2 *Vermont Rep.* 480, *State v. Wilkinson*. The public under certain circumstances may acquire such right in less than fifteen years. *Ibid.* }

† [*Roscoe's Dig. Cr. Ev.* 450, and *seq.*]

communicating with a public road at each end, had been used as a public road for four or five years, it was held the jury might presume a dedication. (*bb*) And though if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not have bound the landlord, without evidence of his knowledge; (*c*) yet it was held, that where a way had been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public, might be presumed, although he was never in the actual possession of the close himself, and was not proved to have been near the spot. (*d*) And it was also held in this case that where a way had been so used, notice of the fact to the steward is notice to the landlord. (*e*) In a case where it appeared that a passage, leading from one part to another of a public street, (though by a very circuitous route, (made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled, that this must be considered as a way dedicated to the public. (*f*) But the erection of a bar, to prevent the passing of carriages, rebuts the presumption of a dedication to the public; *although the bar may have been long broken down; and though such a bar do not impede the passing of persons on foot, no public right to a footway is acquired, as there can be no partial abandonment to the public. (*g*) [1] And it has been ruled that the owner of the soil may replace the bar after it has been taken away for twelve years. (*gg*) Where land is vested in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. Commissioners for drainage, being authorized by an act to make drains and dispose of the earth in forming banks on the sides thereof, made a drain, and with the earth taken from it made a bank on one side of it, which had been used for twenty-five years as a public highway: it not appearing that the cleansing of the drains or any other purpose of the act had been or was likely to be interfered with by such user of the soil, it was held that a dedication might be made by the commissioners. (*h*) So a canal company may dedicate a way to the public, as other persons or corporate

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Trustees may dedicate.

yon also said, "In a great case, was much contested, six years was held sufficient." But some observations were made upon this doctrine; and it was somewhat shaken in a late case of *Woodyer v. Hadden*, 5 Taunt. 125. *Post*, 235, n. (*k*).

(*bb*) *Jarvis v. Dean*,^a 3 Bing 447, the street was neither paved nor lighted, but highway and paving rates had been paid.

(*c*) *Trustees of the Rugby Charity v. Merryweather*, 11 East, 375. *Wood v. Veal*, note (*l*), p. 336.

(*d*) *Rex v. Barr*, 4 Camp. 16.

(*e*) *Id. ibid.*

(*f*) *Rex v. Lloyd*, 1 Camp. 260.

(*g*) *Roberts v. Karr, cor. Heath, J.* Kingston Lent Ass. 1808. 1 Camp. 261, note (*b*); but see *post*, p. 337.

(*gg*) *Lethbridge v. Winter, Somerset Spring Ass.*, 1808, *cor. Marshall, Serjt.* 1 Camp. 263, in the note.

(*h*) *Reg. v. Leake*,^b 5 B. & Ad. 469. 2 N. & M. 583.

[1] { Where a land owner suffered the public to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a limited dedication of the road to the public, or no dedication at all, but only a license revocable; and that a person carrying coals along the road, after notice not to do so, was a trespasser. It seems that there may be a limited dedication of a highway to the public. 7 B. & C. 257, *Marquis of Stafford v. Cooney*, [Eng. Com. Law Reps. xiv. 39.] }

^a Eng. Com. Law Reps. xiii. 45.

^b lb. xxvii. 107.

bodies may do. They are the masters of their own property; and though they be answerable to the rest of the proprietors for failure of duty, there is no reason why the public may not by user gain a right of way against them as well as against any other individuals. (i) But it seems that there must be some owner who can dedicate the way to the public, otherwise the road will not become a public way. (j) In every case the facts must be such as are sufficient to show that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. Thus in a late case, where the plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways, and half the horseway paved, at the expense of the inhabitants: it was held, that this street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. (k) And nothing done by a lessee without the consent of the owner of the fee will give a right of way to the public. Thus in a case of an action of trespass, and a justification under a public right of way, the facts were, that the place in question, which was not a thoroughfare, had been under lease from 1719 to 1818; but had been used by the public, as *far back as living memory could go; and had been lighted, paved, and watched, under an act of parliament, in which it was mentioned as one of the streets of Westminster; and that the plaintiff, who inclosed it after 1818, had previously lived for twenty-four years in its neighbourhood. But it was held, that even under these circumstances the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for twenty-nine years, nor by any one, except the owner of the fee. (l) There cannot be a public way by dedication, unless there be some evidence to show, that the owner had consented to the use of the way; the consent of the lessee is not sufficient, because it cannot bind the owner of the inheritance. A public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public continued to use the way; it was held that this use was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. (m) If there be an old way running along the side of my land, and, by

Intention
of the
owner to
dedicate.

Acts of
lessees will
not be suffi-
cient.

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There must
be the con-
sent of the
owner in
fee.

(i) *The Surrey Canal Company v. Hall*,^a 1 M. & G. 392. See this case, *post*, p. 337.

(j) *Rex v. Edmonton*, 1 M. & Rob. 24. See the case, *post*, p. 362.

(k) *Woodyer and another v. Hadden*,^b 5 Taunt. 125. *Chambre, J., dissent.* In this case, Mansfield, C. J., said, "No one can respect Lord Kenyon more than I do; but I always thought, as to the Rugby case, (*ante*, note (b),) there was reason to doubt. I never could discover when the dedication began: he says that during the lease there was no dedication, but that eight years' acquiescence afterwards were sufficient: he says that in another case, six years were held to be enough, not naming the case; if six, why not one? Why not half a year? It would then become necessary for every reversioner, coming into possession of his estate after a lease, instantly to put up fences all around his property, to prevent dedication." And see *Rex v. Hudson*, 2 Str. 909.

(l) *Wood v. Veal*,^c 5 B. & A. 454. The case was decided independently of the fact of there not being a thoroughfare.

(m) *Harper v. Charlesworth*,^d 4 B. & C. 574; 6 D. & R. 572. And as the user of a way while the land is in lease, is no evidence against the reversioner, he cannot maintain case against a person claiming a right to use the way. *Baxter v. Taylor*,^e 4 B. & Ad. 72; 1 N. & M. 13.

^a Eng. Com. Law Reps. xxxix. 497. ^b *Ib.* i. 34. ^c *Ib.* vii. 158. ^d *Ib.* x. 412. ^e *Ib.* xxiv. 76.

my fences decaying the public come on my land, that is no dedication.⁽ⁿ⁾

Where there has been a compulsory obligation to permit a qualified passage.

Where the owner of the soil has been under a compulsory obligation to permit a qualified passage having been used by the public for many years will not lead to the conclusion of a dedication to the public. Thus where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for nearly seventeen years, it was held, that it was not sufficient evidence of a dedication to the public.^(o) But where a canal company were required to make and maintain bridges over a canal for the use of the owners and occupiers of adjoining lands, and also where the canal was carried across any highway, bridle-way, or foot-path; and in 1804 the company erected a swivel bridge at a spot where there was a public bridle-way and foot-way, which bridge, as a carriage-way, was intended to be for the exclusive accommodation of the tenants of an adjoining estate. From 1810 to 1822 the public occasionally used the bridge with carriages. In 1822 a bridge was built near to the canal, streets were formed, and the neighbourhood became very populous. From 1822 to 1832 the bridge was used by the public as a carriage-way, without interruption. In 1832 the company began to exact a toll from persons not tenants of the adjoining estate, crossing the bridge with carriages, and in 1834 they removed the swivel bridge, and built a stone bridge in its stead. It was held that the evidence warranted the jury in finding that there had been a dedication. The fact of the public having the uninterrupted use of the way from 1822 to 1832, was a strong ground for inferring an intention on the part of the company to dedicate the way to the public. But if the matter rested on what took place since 1834, it could not be said that there had been a dedication to the public; but the previous *period must be looked at, and if the public had acquired a right of way along the swivel bridge, the circumstance of the company erecting the stone bridge in its place could not have the effect of destroying that right.^(p) In determining whether or not a way has been dedicated to the public, the *intention* of the proprietor must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated a license only resumable in a particular event. Thus where the owner of land agreed with the Thorncliffe Iron Company, and with the inhabitants of a hamlet repairing its own roads, and a way over his land should be open to carriages, that the company should pay him 5*l.* a year, and cinders for the repair of the road, and that the hamlet should lead and spread them, and from that time the road was used as a carriage road without obstruction for nineteen years, when disputes arose, and the passage along the road with carriages was interrupted, and the interruption acquiesced in for five years; it was held that the evidence showed no dedication, but only a license to use the road, resumable on breach of the agreement.^(q) Upon an indictment for encroaching upon a public highway, it appeared that

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Intention of the owner.

⁽ⁿ⁾ The trustees of the British Museum v. Finnis,^a 5 C. & P. 460. Patteson, J.

^(o) Rex v. St. Benedict,^b 4 B. & A. 474.

^(p) Surrey Canal Company v. Hall,^c 1 M. & G. 392.

^(q) Barraclough v. Johnson,^d 8 Ad. & E. 99: 3 N. & P. 233.

Eng. Com. Law Reps. xxiv. 406. ^b Ib. vi. 482. ^c Id. xxxix. 497. ^d Id. xxxv. 337.

in 1771, commissioners under an enclosure act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to "be and remain sixty feet in breadth between the fences." The road in question was described in the award as a private road, and the width of eight yards: but in fact a space of sixty feet was left between the fences till the time of the alleged encroachment. The centre of this space was commonly used by the public as a carriage road, and had been repaired by the township for eighteen years before the encroachment. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award. The commissioners, in their award, directed that the township should repair as well the public as the private ways. Parke, J., in summing up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township; (r) but he left it to the jury to decide, whether the road, though originally meant to be a private one, had not subsequently been dedicated to the public, and they found a verdict of guilty, and it was held, that the case was for the jury, and that they had found a proper verdict. (s)

It seems that there may be a partial dedication of a way, although doubts have been entertained upon the subject. Where the owner of an estate permitted the public to use a road for several years for all purposes except that of carrying coals, Mr. J. Bayley and Mr. J. Holroyd thought there might be such a partial dedication. (t) So where an indictment for non-repair of a bridge used "at all such times as and when it hath been or is dangerous to *pass through the river by the side of the bridge," was objected to because it did not show the bridge to be a public bridge, but only a bridge to be used on particular occasions, which could not be if it were a public highway, for according to the language of Heath, J., in *Roberts v. Karr*, (u) there could not be a partial dedication to the public; Lord Ellenborough, C. J., said, though it must be an absolute dedication to the public, still it might be definite as to time, and the court overruled the objection. (v)

Where an indictment in the ordinary form stated that there was a common highway used by all the subjects, &c., &c., and that a certain part of the said highway called Guavas Quay was out of repair. Guavas Quay was a quay of ancient date, built of considerable height against some houses and fish cellars, which it supported against the sea. It was considerably above high water, and of breadth scarcely sufficient for a small fish cart to pass along it. It had been built by the proprietors of the cellars. The quay was, in fact, a thick wall of solid masonry, and the surface of the quay was composed of large pieces of granite, mortared together, and had been used by persons going on foot and on horseback, and with small fish carts at such times as the sands were impassable, the

(r) *Rex v. Cottingham*, 6 T. R. 20, *post*, p. 361.

(s) *Rex v. Wright*, 3 B. & Ad. 681. See this case, also, *post*, 350.

(t) *Marquis of Stafford v. Coyney*, 7 B. & C. 257. *Littledale, J.*, doubted. And see *Cowling v. Higginson*, 4 M. & W. 245, where the court seems to have been of opinion that there might be a partial dedication.

(u) 1 Campb. N. P. C. 262, *n.*

(v) *Rex v. Inhabitants of Northampton*, 2 M. & S. 262. See *Rex v. Marquis of Buckingham*, 4 Campb. N. P. 189.

surface had never been repaired as a way, and the wall had been several times in living memory washed away, and rebuilt by the owners of the cellars by subscription. Two or three years before the indictment the sea had washed away a considerable portion of the quay, leaving a gap which completely broke off the communication; and the indictment was preferred for not rebuilding that part of the wall, and restoring the communication. Maule, J., held that upon the language of this indictment the defendants were entitled to be acquitted. In ordinary language this could not be said to have been at the time of the default, a highway which the public were prevented from conveniently using for want of due reparation and amendment. It was at one time, at most, a wall or embankment, on the top of which there was a road; and whatever might be the duty of the parish as to a road so in existence and requiring repair, the inhabitants of the parish were not defaulters on this evidence. The interruption of the passage was not from the want of repair, but from the sea having washed away the wall or embankment, and there was no longer any thing for them to repair; and they were not liable to rebuild the wall. (vv)

Roads made public by acts of parliament, continue such only during the existence of the acts.

Public roads are frequently created by acts of parliament, but in these cases the road will only continue to be a public road so long as the act continues in force, and the performance of statute duty upon the road during the continuance of the act is no adoption of the road so as to render the parish liable to repair it after the act has expired. A road was made by the trustees appointed under an act of the 45 Geo. 3, c. 7, which was to continue in force for the term of twenty-one years, and from thence to the end of the then next session of parliament, and which required the inhabitants to do statute duty upon the road; it was held that when the act ceased to be in operation, the road made pursuant to its provisions was no longer a public road, and as during the time the act continued in force, the several parishes through which the road passed, were compelled by the act to do statute duty, there was no adoption of the road by those parishes during that period. As soon as the act expired or was repealed, the several parishes, through which the road passed, could only be liable to repair by reason of the common law obligation. Now a road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public or the parish; and in this case the facts did not furnish any ground for presuming an adoption by the public. (w)†

Where trustees are authorized to make a turnpike road, the making the entire line is a condition precedent to the road becoming

Where, by an act of parliament, trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public. Trustees, being empowered to make a turnpike road to extend twelve miles in length, completed only eleven miles and a half of the road, to a point where the new road intersected another public road, leaving half a mile at the extremity of the intended road unmade; it was held, that the trustees not having completed the road which the act authorized them to make, the burden of repairing it could not be thrown

(vv) Reg. v. Inhabitants of Paul, 2 M. & Rob 307.

(w) Rex v. Mellor, 1 B. & Ad. 32. See Rex v. Winter, 8 B. & C. 785; 3 M. & R. 433.

† [All roads laid out by public authority must be regarded as public roads in the obstruction of which nuisance may be committed. State v. Mobley, 1 M^cMullan, 44.]

* Eng. Com. Law Reps. xx. 337.

^b Ib. xv. 338.

on the public.(x) And in a subsequent case the same decision was made, although the part had been made from twenty to thirty years, and repaired from time to time by the public.(y) And although in one case(z) where trustees were authorized to make a turnpike road and several branch roads from it, two learned judges expressed an opinion that each road, as soon as it was completed, and certified by two justices so to be, became a public highway, because the act required the justices to certify as to each road respectively; yet it has since been held in a similar case(a) that not only the principal *road but all the branch roads must be completed before the public can be liable to repair any part. Acts of this kind are bargains made on behalf of the public, not on the great line of road merely, but on every part of the roads, for the branches may have been the consideration upon which consent was given to the making of the main road.

public. So where there are several branches, all must be made before any become public.

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By the common law an ancient highway cannot be changed without the king's license first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found that such a change will not be prejudicial to the public: and it is said that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seems that the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as in a common highway; but that in an action of trespass, brought by the owner of the land, against those who shall go over it, that they ought to show specially, by way of excuse, how the old way was obstructed, and the new one set out. And it is also said, that the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it.(b)

An ancient highway may be changed by a writ of *ad quod damnum*.

It is certain that a highway may be changed by the act of God; and therefore it has been holden that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel as it previously was in the old.(c)

A highway may be changed by act of God.

By the 13 Geo. 3, c. 78,(d) a power was given to the justices of peace to widen, divert, and change highways as they should judge most convenient. This power was in aid of the common law, and in order to render the changing of highways less troublesome and expensive.

By the 5 & 6 Wm. 4, c. 50, sec. 80, the surveyor shall make every public cartway, leading to any market town, twenty feet wide at the least, and every public horseway eight feet wide at the least, and every public footway by the side of any carriage-way three feet at the least,

How highways may be widened under the 5 & 6 Wm. 4, c. 50, s. 80.

(x) *Rex v. Cumberworth*,^a 3 B. & Ad. 108. *Rex v. Hepworth*, *ibid.* 110. S. P. Hullock, B. York Lent As. 1829.

(y) *Rex v. Edge Lane*,^b 4 Ad. & E. 723.

(z) *Rex v. W. R. Yorkshire*,^c 5 B. & Ad. 1003. *Littledale & Taunton*, Js.

(a) *Rex v. Cumberworth*,^d 4 Ad. & E. 731. See per Lord Eldon in *Blakemore v. The Glamorganshire Canal Company*, 1 M. & K. 162: and *Reg. v. The Eastern Counties Railway Company*,^e 10 A. & E. 531.

(b) 1 Hawk. P. C. 76, s. 3. The writ of *ad quod damnum* is an original writ, issuing out of, and returnable into the chancery, directed to the sheriff, to inquire by a jury whether such change will be detrimental to the public; which inquisition being a proceeding only *ex parte*, is in its own nature traversable; and heretofore the party grieved might be heard against it before the chancellor. Burn. Just. tit. *Highways*, s. 11. The writ of *ad quod damnum*, seems virtually abolished by the new Highway Act, s. 84. See Woolrych's Highway Act, 112.

(c) 1 Hawk. P. C. c. 76, s. 4.

(d) Repealed by the 5 & 6 W. 4, c. 50.

^a Eng. Com. Law Repts. xxiii. 38.

^b *Ib.* xxxi. 170.

^c *Ib.* xxvii. 254.

^d *Ib.* xxi. 170.

^e *Ib.* xxxvii. 174.

if the ground between the fences inclosing the same will admit thereof.(e) And by sec. 82, where it shall appear, upon the view of two justices, that any highway is not of sufficient breadth, and may be widened and enlarged, the said justices shall order such highway to be widened and enlarged in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house or any inclosed *ground set apart for building ground, or as a nursery for trees. The statute then proceeds to empower the surveyor to agree with the owners of the ground wanted for such purposes, for their recompense; and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions: and, after directing the proceedings in such event, it enacts, that "upon payment or tender of the money so to be awarded and assessed, to the person, body politic or corporate, entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such person, &c., cannot be found, or shall refuse to accept the same, for the use of the owner of, or others interested in the said ground, the interest of the said person, &c., in the said ground shall be for ever divested out of them; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway, to all intents and purposes whatsoever."(f)

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Previous to a highway, being stopped up, &c., surveyor to request justices to view the same.

By sec. 84, "when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridle-way or foot-way along the whole or any part or parts thereof,(g) the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view, and the stopping up, diverting or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this act; provided, nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall(h) by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes afore-

(e) 1 Hawk. P. C. c. 76, s. 15. The surveyor has no authority to pare away the bank of a fence by the side of a road under this clause. *Alston v. Scales*,^a 9 Bing. 3. See *Lowen v. Kaye*,^b 4 B. & C. 3; 6 D. & R. 20.

(f) Sec. 83. It was decided that a similar power thus given to two justices by the 13 Geo. 3, c. 78, to order any highway to be widened extended to roads repairable *ratione tenuræ*; and that upon disobedience to such order the party might either be proceeded against summarily under the statute, or by an indictment as for an offence at common law. 1 Hawk. P. C. c. 76, s. 57. *Rex v. Balme*, Cowp. 648. Sec. 84 provides for the costs of the proceedings at the sessions.

(g) This provision seems to have been introduced to get rid of the doubts entertained in *Rex v. Winter*,^c 8 B. & C. 785, as to whether justices could divert a road for carriages and continue it for foot passengers. An order for stopping up half the breadth of a highway under the 55 Geo. 3, c. 68, was bad, although the other half was not within the division of the justices who made the order. *Rex v. Milverton*,^d 5 A. & E. 841; 1 N. & P. 179.

(h) This seems virtually to do away with the writ of *ad quod damnum*, as the clause is imperative on the party desiring to stop up a highway to proceed under this section. C. S. G.

^a Eng. Com. Law Reps. xxiii. 242.

^b Ib. x. 260.

^c Ib. xv. 338.

^d Ib. xxxi. 454.

said; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this act; and the said surveyor is hereby required to make such application as aforesaid."

By sec. 85, "when it shall appear upon such view⁽ⁱ⁾ of such two *341 justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand,^(k) or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form, or to the effect of Schedule (No. 19,) to this act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned, or stopped up, either entirely or subject as aforesaid, (as the case may be,) shall lie, for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfac-

Proceedings for diverting, &c., certain highways, and stopping up unnecessary highways.

(i) Actual inspection being the foundation of the jurisdiction of the justices, an order must have distinctly stated that the justices acted upon view. An order stating the view thus, "we having upon view found," *Rex v. Justices of Cambridgeshire*,^a 4 A. & E. 111, 5 N. & M. 440, or "we having upon view found, and it appearing to us," *Rex v. Milverton*,^b 5 A. & E. 841, 1 N. & P. 179, was good; but an order thus, "we have particularly viewed the public roads and footway hereinafter described, and we not being interested in the repair of the said roads and footway, and being satisfied that the highways," &c., was bad, because the clause containing the original and material allegation of a "view" was separated in a very marked manner from that wherein the *satisfaction* of the justices, and the grounds of it were contained; and the justices might, consistently with a reasonable construction of the order, have been influenced by other proof than the view. *Rex v. Marquis of Downshire*,^c 4 A. & E. 698, 6 N. & M. 92. So an order, "we having upon view found, or it appearing to us," was bad. *Rex v. Justices of Worcestershire*,^d 8 B. & C. 254, and see *Reg. v. Justices of Kent*,^e 10 B. & C. 477, that the order must have shown, on the face of it, that the justices had viewed the new line of road. The view by justices under the 55 Geo. 3, c. 68, s. 2, was not sufficient, unless it was a joint view, and unless the finding that the way was unnecessary was the result of that view; but it was held to be no objection that previously to their view the road had been stopped up *de facto* by the owner of the adjoining land without authority, as they might properly state in their order that they had viewed the old road if they had viewed the ground over which the right of way was. *Rex v. Justices of Cambridgeshire*,^f 4 A. & E. 111. 5 N. & M. 440. Where a person, over whose land a highway led, opened another road over his own land, between the same points, which the public used, and they ceased using the former road, it was held that nine years afterwards an order for stopping up the old road as unnecessary might be made under the 55 Geo. 3, c. 68, and that it was not necessary to proceed as in case of diverting a highway under the 13 Geo. 3, c. 78, s. 16, *ibid.* *Reg. v. Jones*,^g 12 A. & E. 684.

(k) There must be the consent of the person who is the owner of the estate, at the time when the order is made. An order stated that the new road was to pass through the lands of the late T. Jones, Esq., and that the justices received evidence of the consent of the said T. Jones, in his lifetime. But it was held, that this order was bad, because it did not thereby appear that T. Jones was the owner of the estate at the time when the order was made. *Rex v. Kirk*,^h 1 B. & C. 21. And an assent to the turning of a road, given under the hand and seal of the solicitor and agent of the party through whose ground the new road is to pass, is not sufficient. *Rex v. Justices of Kent*,ⁱ 1 B. & C. 622.

^a Eng. Com. Law Repts. xxxi. 42. ^b *Ib.* xxxi. 454. ^c *Ib.* xxxi. 169. ^d *Ib.* xv. 210
^e *Ib.* xxi. 119. ^f *Ib.* xxxi. 42. ^g *Ib.* xl. 163. ^h *Ib.* viii. 14. ⁱ *Ib.* viii. 168.

tion of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway, by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the *certificate shall state the reason why it is unnecessary; and the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall, (at the quarter sessions which shall be holden for the limit within which the highway so diverted and turned, or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid,)(l) be read by the said clerk of the peace in open court; and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be enrolled by the clerk of the peace amongst the records of the said court of quarter sessions; provided always, that any person whatever shall be at liberty, at any time previous to the said quarter sessions, to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace, at the rate of sixpence per folio, and a reasonable compensation for the copy of the plan."

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Stopping highways connected together.

By sec. 86, "in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together, as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate."(m)

Court may confirm order for so doing.

By sec. 87, "in the event of any appeal being brought against the whole or any part or parts of any order of certificate for diverting more highways than one, it shall be lawful for the court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof."

Persons who may think themselves

By sec. 88, "when any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved(n) if any such highway should be or-

(l) See *Rex v. Justices of Kent*,^a 1 B. & C. 622, as to the mode of computing the time from the giving the notices under the 55 Geo. 3, c. 68, s. 2.

(m) Before this act there must have been a separate order for each road. *Rex v. Milverton*,^b 5 A. & E. 841, 1 N. & P. 179. So a road could not be diverted and stopped up by the same order. *Rex v. Justices of Middlesex*,^c 5 A. & E. 626, 1 N. & P. 92. *Rex v. Justices of Kent*,^d 10 B. & C. 477.

(n) The notice of appeal must state that the party is injured or aggrieved. *Rex v. Justices of Essex*,^e 5 B. & C. 431. *Rex v. Justices of West Riding of Yorkshire*,^f 7 B. & C. 678, or state facts from which it can be collected that he is injured or aggrieved. *Rex v. Blackawton*,^g 10 B. & C. 792. *Rex v. Bond*,^h 6 A. & E. 905. It is enough, however, to state

^a Eng. Com. Law Reps. viii. 168.

^b Ib. xxxi. 454.

^c Ib. xxxi. 403.

^d Ib. xxi. 119.

^e Ib. xi. 264.

^f Ib. xiv. 109.

^g Ib. xxi. 173.

^h Ib. xxxiii. 242.

dered to be diverted and turned or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped up as aforesaid, to make his complaint *thereof by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor ten days(*un*) notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required, within forty-eight hours after the receipt of such notice, to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway; provided that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party; provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

aggrieved
if such
highways
should be
ordered to
be stopped,
up, &c.,
may ap-
peal.

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By sec. 89, "in case of such appeal the justices at the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions: and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway either entirely or subject as aforesaid, or for diverting, turning, and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway either entirely or subject as aforesaid, but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, (*no*) or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party ap-

In case of
appeal,
jury at
sessions to
determine
whether
new high-
way is
nearer, &c.

that the appellant and his tenants, occupiers of a farm and lands near the said highway, and who have heretofore used and have a right to use it, and also other persons, and the public will be put to great inconvenience. *Rex v. Justices of the West Riding of Yorkshire*,^a 4 B. & Ad. 685, 1 N. & M. 426. So it is sufficient to state that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their residence, than they would have gone if the road intended to be stopped up were put and kept in repair; and if the notice states that they are aggrieved, it need not add that they are aggrieved by the order. *Rex v. Aldey*,^b 4 N. & M. 365.

(*un*) The days are to be calculated one day inclusive, the other exclusive, notwithstanding a rule of the sessions requiring a different computation. *Rex v. Justices of the West Riding of York*,^c 4 B. & Ad. 685, 1 N. & M. 426. *Rex v. Justices of Cumberland*,^d 4 N. & M. 378; 2 A. & E. 463.^e

(*no*) Where upon an appeal the jury found that the new line, which was stated in the certificate to be "nearer and more commodious," was "not nearer but more commodious," it was held no order could be made for diverting the road. *Reg. v. Shiles*, T. T. 1841.

^a Eng. Com. Law Repts. xxiv. 143.

^b Ib. xxx. 379.

^c Ib. xxiv. 143.

^d Ib. xxx. 380.

^e Ib. xxix. 144.

pealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid. (o)

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If no appeal be made, or if dismissed sessions to make order for diverting, &c., and the old ways may be stopped.

New highway shall afterwards continue a public highway, &c.

Party liable to repair of old high-

By sec. 91, "if no such appeal be made (p) or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order (q) to divert and turn and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this act is mentioned in regard to highways to be widened, and the proceedings thereupon shall be binding and conclusive on all persons whomsoever, and the new highways so to be appropriated and set out shall be and for ever after continue a public highway to all intents and purposes whatsoever, but no old highway (except in the case of stopping up such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made pursuant to the directions hereinbefore contained."

By sec. 92, "in every case in which a highway shall have been turned or diverted under the provisions of this act, the parish or other party which was liable to the repair of the old highway shall be liable to the

(o) Sec. 90, "The court of quarter sessions is hereby authorized and required to award to the party giving or receiving notice of appeal, such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not, and such costs and expenses shall be paid by the surveyor or other party as aforesaid, at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given, and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said court of quarter sessions shall award the costs of the appellants to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this act."

(p) In *Rex v. Justices of Worcestershire*, 8 B. & A. 228, it was held that the sessions had a right to inquire whether the order, though there was no appeal, was made by proper authority before they confirmed it. And *quære* whether the sessions might not now inquire whether all the proceedings were regular, though there was no appeal, before they made an order under this section. C. S. G.

(q) An order for stopping up a footway under the 55 Geo. 3, c. 68, s. 2, must have distinctly stated in what parish or place the footway was situate. *Rex v. Kenyon*,^a 6 B. & C. 640. Where a road was diverted, the order must have shown on the face of it, that the public had the same permanent right over the new line as they had along the old line; where, therefore, the new line passed partly over a road described in the order as a new turnpike road, it was held that as it might have been made a turnpike road, only for a limited period, and if so, would subsist as a public road for that period only (see *ante*, p. 338,) the order was bad; and if a permanent right was given to the public under the turnpike act, that ought to have been shown by the order. *Rex v. Winter*,^b 8 B. & C. 785. An order referring to a plan annexed to the order for the description of the road to be diverted was good; but a notice published pursuant to the 55 Geo. 3, c. 68, s. 2, merely describing the road by *termini*, and the part to be stopped up as so many yards of such road, was held bad. *Rex v. Horner*,^c 2 B. & Ad. 160. If an order for stopping a highway were properly made and enrolled, under 55 Geo. 3, c. 68, it was unnecessary to render it effectual that an actual stoppage of the road should have taken place. *Rex v. Milverton*,^d 5 A. & E. 841, 1 N. & P. 179. A footway might be ordered to be stopped without being ordered to be sold. *Rex v. Glover*,^e 1 B. & Ad. 482. It seems to have been thought that the justices had only jurisdiction over the roads within the division of the county for which they acted, under the 55 Geo. 3, c. 68. *Rex v. Milverton*,^f 5 A. & E. 841, 1 N. & P. 179.

^a Eng. Com. Law Reps. xiii. 290.

^b Ib. xv. 338.

^c Ib. xxii. 49.

^d Ib. xxxi. 454.

^e Ib. xx. 432.

^f Ib. xxxi. 454.

repair or the new highway, without any reference to its parochial locality."

By sec. 93, "the powers and provisions in this act contained with respect to the widening and enlarging, diverting, turning, or stopping up any highway shall be applicable to all highways which any person, bodies politic or corporate, is or are bound to repair by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise, however; and that when such last-mentioned highways are so widened or enlarged, turned or diverted, the same shall and may, by an order of the justices at a special sessions for the *highways, be placed under the control and care of the surveyor of the parish in which such highways may be situate, and shall be from time to time thereafter repaired and kept in repair by the said parish; provided also, that the said highways so widened, enlarged, diverted, or turned, shall be viewed by two justices of the peace, who shall make a report thereof to the justices at a special sessions for the highways, and such last-mentioned justices shall by an order under their hands, fix the proportionate sum which shall be annually paid, or shall fix a certain sum to be paid, by such person, bodies politic or corporate, his or their heirs, successors, or assigns, to the said surveyors of the parish, in lieu of thereafter repairing the said part of the said old highway, and the order of the said last-mentioned justices shall be and continue binding on all such persons, bodies politic or corporate, their heirs, successors, or assigns, and in default of payment thereof the said surveyor shall proceed for the recovery of the same in the manner as any penalties and forfeitures are recoverable under this act."

ways to repair new highways. Provisions as to widening of a highway to extend to all highways which persons are bound to repair *ratione tenuræ*, &c. *345

Justices to fix annual or other amount payable by party previously bound to repair.

It frequently happened that the boundaries of parishes passed through the middle of a highway, one side of the highway being situated in one parish, and the other side of the way being situated in another parish, whereby great inconvenience arose in the parishes in settling the time and manner of repairing such highway; and it was therefore provided by the 5 & 6 Wm. 4, c. 50, s. 58, that the justices, at a special sessions for the highways, upon application by the surveyor, may divide the whole of any such common highway, by a transverse line crossing it, into two equal parts, or into two such unequal parts and proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think just.(r)

5 & 6 W. 4, c. 50, s. 58. Boundaries of parishes divisible by justices by a transverse line.

Besides the methods which have been already mentioned, roads are sometimes changed or stopped, or new ones created by turnpike acts, inclosure acts or other acts of parliament, containing specific enactment for such purposes; but such new roads may or may not be public, according to the provisions of the particular acts; and we have seen that where a road was set out by commissioners under an inclosure act, the number of persons using or repairing it would not make it a public way, it not being common to all the king's subjects.(s)

Highways may be changed, &c. by particular acts of parliament.

The commissioners appointed under the local inclosure acts have power to stop up and divert public ways over lands to be inclosed by the 41 Geo. 3, c. 109, s. 8; but that section contains a proviso, that where such commissioners have power, under any inclosure act, to stop up any old road

(r) The act sets forth particularly the proceedings to be had for the purpose of such division; and afterwards enacts as to the liabilities of the parishes respectively to repair their portions after such division; which provisions as to the repairing, will be further noticed in a subsequent part of this chapter upon nuisances in *not repairing highways*, post p. 354.

(s) *Ante*, p. 336.

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leading through old inclosures, they shall not exercise that power without the concurrence of two justices; it follows as a necessary consequence from the proviso taken with the rest of the clause, that if no such power is given to the commissioners by the particular inclosure act, it cannot exist at all. Where, therefore, an act gave the commissioners no power to stop up roads passing through old inclosures, and they did not mention the way *in question, which ran over some old inclosures and across a few yards of waste, which they allotted; it was held that the way existed as it did before the inclosure act.(*t*)

Under the 41 Geo. 3, c. 109, s. 8, the commissioners are authorized to stop up or divert footways as well as carriage roads; and the proviso at the end of the section is not confined to carriage roads, but extends to every species of ways, and, therefore, where the commissioners were empowered by a local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held that in order effectually to stop up a public footway passing partly over the lands to be inclosed and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held that a footway which the commissioners ordered to be stopped up had not been effectually stopped, but continued a public footway.(*u*)

Where an inclosure act provided that all ways not set out by the commissioners should be extinguished, and also authorized the stopping up of roads through old inclosures, provided that no roads should be stopped up without the order of two justices, and a road through old inclosures opened upon the waste, and at such opening joined another road, which formed a continuation of the first road, and ran entirely over waste land; and no valid order was obtained for stopping up the road which ran through the old inclosures, and the road over the waste land was not set out or continued by the commissioners: it was held that this omission to set out or continue the road, did not extinguish the road through the old inclosures, and create a consequent stoppage of the road over the waste, but that, on the contrary, the road through the old inclosures remaining open for want of an order of justices; as a consequence the road over the waste remained open also.(*v*)

Where an old road is continued under an award of commissioners of inclosure, it must be declared, under s. 9, of 41 Geo. 3, c. 109, by justices in special sessions, to be fully completed and repaired before the inhabitants of the district can be indicted for not repairing.(*w*)

Towing path under the circumstances held not to be affected by an act of parliament.

A statute authorizing the making a new course for a navigable river, and turning the old part into a floating harbour, will not, without words for the purpose, put an end to a public towing-path upon that part; but such towing-path will be liable to be used as such for the purposes of the harbour: and it will make no difference though the river was a tide river, and at low water admitted of no navigation. By the 43 Geo. 3, power was given to carry part of the Bristol river along a new course, and to convert the old part into a floating harbour. There had im-

(*t*) *Thackrah v. Seymore*, 3 Tyrw. 87.

(*u*) *Logan v. Burton*,^a 5 B. & C. 513. See *Harber v. Rand*, 9 Price, 58.

(*v*) *Marquis of Downshire*,^b 4 A. & E. 698, N. & M. 92.

(*w*) *Rex v. Hatfield*,^c 4 A. & E. 156. See this case as to the change of locality of a road under the award of commissioners for enclosure.

^a Eng. Com. Law Reps. xii. 303.

^b *Ib.* xxxi. 169.

^c *Id.* xxxi. 45.

memorially been a towing-path on the north side, and whether that continued a public towing-path along the side of the floating harbour was the question. It was urged that it did not, because this was a tide river, not navigable at low water; and the floating harbour would make it useable *at all times, and therefore increase the burden on the land. But, after taking time to consider, the court held that as there were no words in the act to annihilate the right of the public, that right would continue notwithstanding the improved state of the water within the bank; that such water being still applied to navigation purposes, for the use of the public, was still in a state to derive the benefit from the path for which the path had first been given to the public: and judgment was given for the king.(x)

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In some instances a highway may, it seems, be in some measure changed or confined to a particular course by a private individual; as, where it lies over an open field, and the owner of the field turns it to another part of the field for his own convenience, or incloses the field for his own benefit, leaving a sufficient way.(y) But in such case, as the public had clearly a right before such alteration to go upon the adjacent ground when the way was out of repair, the owner of the field can only make the alteration subject to the onus of making a good and perfect way.(z)

And in some instances by private individuals.

Having thus inquired concerning the different sorts of highways, and the methods by which they may be changed, widened, or stopped up, we may now consider of nuisances to highways, by obstructions.

Of nuisances to highways.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's subjects, are public nuisances at common law.(a) And if the tenant of the land plough the soil, over which another has a way, this is a nuisance to the way, for it is not so easy to him as it was before.(b) If a man with a cart use a common pack and prime a way, so as to plough it up and render it less convenient for riders, that is indictable.(c) If there be a stile across a public footway of a certain height, and a man raises this stile to a greater height, it is a nuisance.(d) And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and open and shut freely, because it interrupts the people in the free and open passage which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road, in which case the people had never any right to a freer passage than what they continue to enjoy.(e)

Obstructions and annoyances in highways by means of trees hanging over, ditches not being scoured, carriages, &c., left in such highways, misconduct of drivers, and the excessive loading of carriages.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and an occupier, as such, though at will only, is indictable for

(x) *Rex v. Tippett*, Mich. T. 1819, MS. Bayley, J. The indictment was for an obstruction of the public path.

(y) 3 Salk. 182.

(z) *Id. ibid.* And see the cases collected in *Rex v. Stroughton*, 2 Saund. 160, a, note (12). And see also *post*, as to the repair of highways.

(a) 1 Hawk. P. C. c. 76, s. 144.

(b) 2 H. 4, II. Vin. Abr. tit. *Nuisance* (G).

(c) *Per Curiam* Reg. v. Leach, 6 Mod. 145.

(d) *Bateman v. Burge*, 6 C. & P. 391. Park, J. J. A.

(e) 1 Hawk. P. C. c. 75, s. 9, and c. 76, s. 146. Com. Dig. tit. *Chemin*, (A 3).

* Eng. Com. Law Reps. xxv. 454.

*348 suffering a house standing upon the highway to be ruinous; and it is said that the owner of the land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the *common law so to do, without a special prescription: *(ee)* and it is also said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance. *(f)* The general highway act also relates to offences of this description, imposing pecuniary penalties upon persons obstructing highways by means of trees or hedges; and penalties are also imposed upon persons laying stones, timber, or other matter, or leaving any carriage, so as to obstruct the passage of any highway; and also upon persons encroaching upon them. *(g)* Provision is also made for the punishment, by similar penalties, of drivers of carriages who may create annoyances in the public ways by their misconduct. *(h)* And with the view of preventing turnpike roads from being destroyed by the narrowness of the wheels of the carriages travelling thereon, and by the excessive burdens which might be carried in them, it is enacted, that if the tire of the wheels of any wagon, &c., shall deviate more than half an inch from a specified breadth, and shall be drawn on any turnpike road, the owner shall forfeit five pounds, and the driver forty shillings, for every such offence. *(i)* With respect to *turnpike-roads*, similar provisions are contained in the general turnpike acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95.

It has been held, that if a carrier carries an unreasonable weight, with an unusual number of horses, it is a nuisance to the highway, by the common law. *(j)* And upon an information for this offence, it was adjudged, though it was stated that the carrier went "with an unusual number of horses," without setting forth what number, yet the information was good, because it was the excessive weight which he carried that made the nuisance. *(k)*

Every unauthorized obstruction of a highway, to the annoyance of the king's sub. It appears to have been holden, that an indictment will not lie for setting a person on the footway in a street to distribute hand-bills, whereby the footway was impeded and obstructed; *(l)* nor for throwing down skins into a public way by which a personal injury is accidentally occasioned: *(m)* but acts of this kind, if improperly performed, might possibly be deemed nuisances, as it seems now to be well established that every

(ee) See *post*, p. 361, note *(y)*.

(f) Bac. Abr. tit. *Highways* (E). 1 Hawk. P. C. c. 76, s. 5, 8, 147. But the building of a house in a larger manner than it was before, whereby the street became *darker*, it has been held not to be a public nuisance by reason of the darkening. *Rex v. Webb*, 1 Lord Raym. 737.

(g) 5 & 6 W. 4, c. 50, ss. 64, 65, 69, 72, &c., which makes provision also for the removal of such annoyances by the surveyor and other persons. The different sections of the statute are in Burn. Just. tit. *Highways*, s. VIII. This statute does not say that every highway shall be thirty feet wide; and in a late case it was held that it did not authorize the surveyor to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth, such fence not being *on* the highway. *Lowen v. Kaye*, 4 B. & C. 3.

(h) 24 G. 2, c. 43, and 1 & 2 W. 4, c. 22, as to drivers in London, Westminster, and the neighbourhood; and 5 & 6 W. 4, c. 50, s. 78, as to drivers in general. See the statutes abstracted, Burn. Just. *ibid.* and for enactments relative to the misconduct of drivers of public coaches, see Burn. Just. *post*, s. 4.

(i) 3 Geo. 4, c. 126, s. 5. And as to furious driving, *post*, Book III., Chap. xi.

(j) Com. Dig. *Chemin*, (A 3).

(k) *Rex v. Egerly*, 3 Salk 183.

(l) *Rex v. Sermon*, 1 Burr. 516.

(m) *Rex v. Gilt*, 1 Str. 190.

unauthorized obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence.⁽ⁿ⁾ Thus, where a *wagoner* occupied one side of a public street in the city of Exeter, before his warehouses, in loading and unloading his *wagons, for several hours at the time, both by day and night, and had one wagon at least usually standing before his warehouses, so that no carriage could pass that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance, although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street.^(o) Upon the same principle it has been held to be an indictable offence for *stage coaches* to stand plying for passengers in the public streets; and Lord Ellenborough, C. J., said, "A stage coach may set down or take up passengers in the street, this being necessary for public convenience: but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another."^(p) In the same case his lordship intimated that there could be no doubt but that, if coaches, on the occasion of a rout, should wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects wishing to pass through it in carriages or on foot, the persons who might cause and permit such coaches so to wait would be guilty of a nuisance.^(q)

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So it has been held indictable for a party to exhibit at the windows of his shop, in a public street, effigies, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, and that it is not at all essential that the effigies should be libellous, for the gravamen of the charge is the causing the footway to be obstructed, and it seems to be immaterial whether the crowd consisted of idle, disorderly, and dissolute persons, or not.^(r)

Laying *logs* of timber in a highway has been already stated as one of the clear instances of nuisance.^(s) And the party will not be excused by showing that he laid them only here and there, so that the people might have a passage through them by windings and turnings.^(t) And though it is not a nuisance for an inhabitant of a town to unlade billets, &c., in the street before the house, by reason of the necessity of the case, yet he must do it promptly, and not suffer them to continue in the street an unreasonable length of time.^(u) From a recent case it appears, also, that an obstruction to a public highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. It was proved that the defendant, who was a *timber merchant*, occupied a small timber-yard close to a street, and that from a narrowness of the street and the construction of his own premises he had, in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter

(n) *Rex v. Cross*, 3 Camp. 227.(o) *Rex v. Russell*, 6 East, 427.(q) *Id. ibid.*(r) *Rex v. Carlisle*, 6 C. & P. 625 Park, J., Bolland, B., and Sir J. Cross.(s) *Ante*, p. 347.

(t) 2 Roll. Abr. 137. 1 Hawk. P. C. c. 76, s. 145.

(u) *Id. ibid.* and Bac. Abr. tit. *Highways*, (E).(p) *Rex v. Cross*, 3 Camp. 224.

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pieces there before they could be carried into his yard : and it was contended on his behalf that he had a right so to do, as it was necessary to the carrying on of his business : and that it could not occasion more inconvenience to the public than draymen *taking hogsheads of beer from their drays, and letting them down into the cellar of the publican. But Lord Ellenborough, C. J., said, "if an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway ; but this must be done with promptness. So as to the *repairing of a house*, the public must submit to the inconvenience occasioned necessarily in repairing the house ; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard ; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."(x) And in repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable. The owner will himself be responsible for any excess, if committed by his servants ; for according to Eyre, C. J., "suppose that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a board in the street (which being for the benefit of the public, they may lawfully do,) and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance."(y)†

Narrowing
a highway.

There can be no doubt that any contracting or narrowing of a public highway is a nuisance : it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public : in these cases it would be for a jury to determine how far the way extended.(z) It seems that in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. In a late case, Lord Tenterden, C. J., said, "I am strongly of opinion that when I see a space of fifty or sixty feet, through which a road passes, between inclosures set out under an act of parliament, that unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy, the

(x) *Rex v. Jones*, 3 Campb. 230.(y) *Bush v. Steinman*, 1 Bos. & Pul. 407, 408. And the learned judge proceeds thus,— "And I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose ; for, in contemplation of law, the erection of the board would be equally his act."(z) See *Brownlow v. Tomlinson*,^a 1 M. & Gr. 484.

† [A temporary occupation of part of a street or highway by persons engaged in building or in receiving or delivering goods from stores or ware-houses or the like, is allowed from the necessity of the case ; but a systematic and continued encroachment upon a street though for the purpose of carrying on a lawful business, is unjustifiable. *The People v. Cunningham*, 1 Denio, 524.

^a Eng. Com. Law Reps. xxxix. 540.

whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound.”(a)

*Where a person laid a railway four hundred yards along the side of a turnpike road, occupying a breadth of between three and four feet, and in several parts not leaving space enough for two carriages to pass each other safely without running upon the bars of the railway, which, however, did not rise an inch above the surface of the road. The passage of coal-wagons along the turnpike was very great, and without the railroad a much larger number must have been employed to perform the same work. There also was a considerable traffic on the turnpike. The jury were told that if they thought the effect of the railway was to obstruct, hinder, and inconvenience the public, they should find a verdict of guilty, and it was held that the direction was right. “The question whether the railway was an obstruction or not was a question of fact, and properly left to the jury. It was urged that if the thing complained of furnishes upon the whole a greater convenience to the public than it takes away, no indictment lies for a nuisance. Supposing that doctrine to be sound, which I am not prepared to say,(b) how does it apply in this case? Here is a road for carts bringing down coals to S., and it is for the convenience of an individual, who sends coal there for sale, to make a railway along the public road for their conveyance in wagons. It is said indeed, that all persons may use this railway who will pay for so doing, but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new description of road, paying him for the liberty of doing so. I think this furnishes no excuse for the obstruction.”(c) And as it has been held that it is no defence to an indictment for a nuisance to a navigable river to prove that, although the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the river;(d) so, it should seem, that it is no defence to an indictment for a nuisance to a highway, that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away.

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It is no defence to an indictment for an alteration in a road that the alteration is advantageous in a greater degree to other uses of the road.

But where an act authorized the making of a railroad near a highway, and the locomotive engines frightened the horses travelling on the highway, it was held that an indictment could not be sustained, for the legislature must be presumed to have known that travellers upon the highway would, in all probability, be incommoded by the engines using

But a statute may authorize what would otherwise be a nuisance.

(a) *Rex v. Wright*,^a 3 B. & Ad. 681. *Ante*, p. 337. The space at the sides of roads is also particularly useful for cattle to travel upon, as they get foot-sore on the stoned roads. This was much relied upon in the *Pinner* case, where a mandamus was granted to the London and Birmingham Railway Company to make the approaches to a bridge as wide as the stoned road and the sides had previously been. *Reg. v. The London and Birmingham Railway Company*, 1 Car. N. & H. Railway cases, 317.

(b) See *Rex v. Russell*,^b 6 B. & C. 566.

(c) *Rex v. Morris*,^c 1 B. & Ad. 441, *per* Lord Tenterden, C. J. It was also held that the railway was not authorized either by 45 G. 3, c. lxxiv., or 44 G. 3, c. lv.

(d) *Rex v. Ward*,^d 4 Ad. & E. 384, *overruling* *Rex v. Russell*,^e 6 B. & C. 566.

^a Eng. Com. Law Repts. xxiii. 159.

^b Ib. xiii. 254.

^c Ib. xx. 421.

^d Ib. xxxi. 92.

^e Ib. xiii. 254.

the railroad and therefore there was nothing unreasonable in supposing the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other part of the public travelling along the railway.(e)

Of nuisances to highways by repairing them.

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The parish is of common right bound to repair highways within it.

As a nuisance in *not repairing* highways is an offence in the nature of a non-feasance, the principal inquiry upon this subject will be as to the persons who are liable to be called upon to keep them in repair.

*The inhabitants of the parish at large are *primâ facie*, and of common right, bound to repair all highways lying within it, unless by prescription, or otherwise, they can throw the burden upon particular persons.(e) And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish.(f) And upon the same principle it was holden, that if particular persons were made chargeable to the repair of such highways by a statute lately made, and became insolvent, the justices of peace might put that charge upon the rest of the inhabitants.(g) And where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners.(h) And where a local turnpike act, empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of that act, it was holden that this only made the tolls an auxiliary fund in the hands of the trustees; and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for the non-repair of the road.(i) No *agreement* can exonerate a parish from the common law liability to repair; and a count in an indictment against the corporation of Liverpool, stating that they were liable to repair a highway, *by virtue, of a certain agreement* with the owners of the houses alongside of it, was held to be bad, on the ground that the inhabitants of the parish who are *primâ facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any *agreement* with others.(j)

No agreement can exonerate a parish.

(e) *Rex v. Pease*,^a 4 B. & Ad. 30.

(e) 1 Hawk. P. C. c. 76, s. 5, 6, 7, 8. *Austin's case*, 1 Vent. 189. *Anon.* 1 Lord Raym. 725.

(f) *Rex v. The Inhabitants of Sheffield*, 8 T. R. 106. (g) *Anon.* 1 Lord Raym. 725.

(h) *Rex v. The Inhabitants of St. George Hanover Square*, 3 Campb. 222.

(i) *Rex v. The Inhabitants of Netherthong*, 2 B. & A. 179. It was also holden that such inhabitants might, after conviction, apply by motion for relief against the trustees under the 13 Geo. 3, c. 84, s. 33. And it was holden also that the 13 Geo. 3, c. 84, s. 63, only referred to diversions under writs of *ad quod damnum*, and under 13 Geo. 3, c. 70, s. 16. As to the liability to repair, notwithstanding the act of parliament, see also *Rex v. The Inhabitants of Oxfordshire*,^b 4 B. & C. 194, *post*, s. 5, *Bridges*.

(j) *Rex v. The Mayor, &c., of Liverpool*, 3 East, 86. And see *Bac. Abr. tit. Highways (F)*.

^a Eng. Com. Law Reps. xxiv. 17.

^b *Ib.* x. 310.

Upon an indictment against the township of S., for not repairing a road within it, on a custom alleged and proved that all the townships in the parish repaired their own roads, it was proved that the township was adjacent to the township of N. M. in another parish, and that an agreement had been made, two hundred and fifty years before, between the then owner of the whole of S., and the then owners of the whole *of N. M., whereby the boundary between the properties was marked out, and the owner of S. agreed to allow the owners of N. M., and the rest of the inhabitants of N. M., a road through S., of which the owner of S. was to repair half, and the owners of N. M. the other half, (which was the part indicted,) and that a sufficient lawyer should make further assurance for the performance of the agreement. The owner of S. afterwards filed a bill for the specific performance, but it did not appear what the result of the suit was. As far back as living memory went, the inhabitants of N. M. had repaired the road from the boundary of the townships for the distance mentioned in the agreement within about twenty yards; it was held that this was not evidence for a jury of an instrument binding the owners of N. M., and all claiming through them.^(k)

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With respect to the repair of roads dedicated to the public by the owner of the soil, although it has been considered that, notwithstanding the use by the public, the parish will not be liable to repair, unless there has been on their part some act of acquiescence or adoption;^(l) it has since been expressly decided that the inhabitants of a parish are bound to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.^(m)

But now by the 5 & 6 Wm. 4, c. 50, s. 23, it is enacted that "no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horse-path in any award of commissioners under an inclosure act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this act, and to the situation of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall

When new highways are to be kept in repair by parishes.

^(k) *Rex v. Scarisbrick*,^a 6 A. & E. 509. 2 N. & M. 683.

^(l) *Rex v. St. Benedict*,^b 4 B. & A. 450. Per Bayley, J.

^(m) *Rex v. Leake*,^c 5 B. & A. 469.

^a Eng. Com. Law Repts. xxxiii. 132.

^b 1b. vi. 482.

^c 1b. xxvii. 107.

Proviso. for ever thereafter be kept in repair by the parish in which it is situate :
 Provided, nevertheless, that on receipt of such notice as aforesaid the inhabitants of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, *any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate ; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices.(n)

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The 5 & 6 Wm. 4, c. 50, s. 23, which provides that no road "made or hereafter to be made" shall be deemed a highway, which a parish shall be liable to repair unless certain proceedings shall have been taken, must have a reasonable construction, and cannot be considered to extinguish roads already public by dedication ; otherwise, almost all roads not being immemorial, however important and public, would become extinguished ; the term "made" as used in the act, therefore, applies to a road formed or made, but not completely dedicated by use or otherwise at the passing of the act ; but roads dedicated at that time, are out of the operation of the act It does not therefore apply to a road, which had been extinguished by an award under an inclosure act in 1784, but subsequently used by the public and repaired by a tithing.(nm)

Formerly it was held that if a parish lay in two counties, the inhabitants of *that part* of the parish in which the road charged to be out of repair lay were bound to repair it, and not the inhabitants of the whole parish.(o) But it has more recently decided that if part of a parish be situate in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad ; and that in such case the indictment must be against the whole parish.(p) And it appears to have been always considered

(n) Mr. Woolrych (Highway Act, p. 28) observes, "Is the obligation to repair, as fixed by the new section, commensurate with public rights of way, or may there be a public way without the obligation to repair? Will trespass lie by the owner of the soil of an occupation or other way used by the public without interruption, or will the plea of a public right of way suffice to repel the action, independently of the burden of repair? Will an indictment lie for obstructing such a road so abandoned or dedicated, and so enjoyed by the public? In a word, does the question of repair under this section decide the point of general user with respect to a highway? It is true, on the one hand, that a way of utility would almost with certainty pass the ordeal of the vestry or the bench, and on the other, that any objection or signal of dissent on the part of the owner of the soil would of course be still decisive against a right of passage either under this section or without its aid ; yet it is desirable just to notice the case above alluded to, inasmuch as a right of public user may be questioned hereafter on the ground of there being no responsible person to repair, and, therefore, no public way. Now it seems clear that there may be such a right as that under consideration, if we reflect that evidence of an intention to dedicate, or a presumption arising out of evidence of user, must still be recognized by the courts, notwithstanding the new arrangement. When it becomes manifest that the owner of the soil has abandoned his right, although no repair can be demanded on the part of the parish, yet that owner cannot resume a right he has once relinquished (Cro. Car. 266 ; 1 And. 232). The test of such a dedication is the verdict of a jury, which is in itself almost conclusive evidence of the right." See *Rex v. The Paddington Vestry*,^a 9 B. & C. 456, where a somewhat similar clause in a local act was brought in question.

(nm) *Reg. v. Westmark*, 2 M. & Rob. 305, Maule, J.

(o) *Rex v. The Inhabitants of Weston*, 4 Burr. 2507.

(p) *Rex v. The Inhabitants of Clifton*, 5 T. R. 498.

^a Eng. Com. Law Reps. xvii. 420.

that the indictment under such circumstances must be preferred in that county wherein the ruinous part of the road lies. (q) If the indictment be against that part of the parish only which lies in the county in which the indictment is preferred, it must show on what account such part only is chargeable, otherwise it will be bad in substance; and the objection may be taken, even after an issue on the point, whether the inhabitants of that part were bound to repair, and a verdict for the king. (r)

The 5 & 6 Wm. 4, c. 50, c. 58, which, when the boundaries of parishes are in the middle of highways, gives two justices power to divide such highways by a transverse line, has been already noticed. (s) The object of that statute was to facilitate the *repairing of a highway so situated: and it enacts that the justices may order that the whole of such highway, on both sides, in one of such parts, shall be repaired by one of such parishes; and that the whole of such highway, on both sides, in the other of such parts, shall be repaired by the other of such parishes; and that they shall cause their order and plan of the highway to be filed with the clerk of the peace. Provided, nevertheless, "that in the case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices, and object to such last-mentioned proceedings, in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same."

Repair of highways divided and allotted by justices on account of the boundaries of parishes being in the middle of them. *355
Proviso in case of highway required by party, *ratione tenuræ*, &c.

And by sec. 59, "after such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes, and body politic or corporate, or person aforesaid respectively, shall be bound as of common right to maintain and keep in repair such parts of such highways so allotted to them as aforesaid, and shall be liable to be proceeded against for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties contained in this act, and also shall be discharged from the repair of such part of such highway as shall not be included in their respective allotment." (t) By sec. 61, the statute shall not effect or alter the boundaries of counties, lordships, &c., nor any other division of public or private property, nor the boundaries of parishes, otherwise than for the purpose of repairing such particular portion of the highways. In a case where a road lay in two parishes, and no division and allotment under this statute had been made, it was held that an indictment against one of the parishes for not repairing one side of the road ought to have stated that the parish was liable to repair *ad flum vic*: and it seems that in such case it is not sufficient to aver that a certain part of the road (setting out the length and one half of the

Parishes, &c., bound to repair the part so allotted.

(q) *Rex v. The Inhabitants of Clifton*, 5 T. R. 498; and *Rex v. Weston*, *ante*, note (o). In *Rex v. Clifton*, Lord Kenyon, C. J., in answer to one of the supposed difficulties of this mode of proceeding, said, "On an indictment against a parish for not repairing a road, it is not necessary for the prosecutor to serve every individual in the parish with process; he may compel the appearance of any two, who live within the county, upon whom the whole fine may be levied; and the rest of the inhabitants must reimburse those two under the general highway act." 13 Geo. 3, c. 78, s. 47.

(r) *Rex v. Clifton*, 5 T. R. 498.

(s) *Ante*, p. 345.

(t) Sec. 60 provides for the costs in thus apportioning highways; and sec. 61 provides for the manner in which highways repairable by reason of tenure, or otherwise howsoever, may be made parish highways.

breadth) is out of repair, and that the inhabitants, &c., ought to repair it.(u)

Exceptions to an indictment; that it is no offence for highways to be dirty, and that the parish is not bound to widen a highway.

Exceptions were taken to an indictment for suffering a highway to be very muddy, and so narrow that people could not pass without danger of their lives; first, that it is no offence for a highway to be dirty in winter; and, secondly, that the parish had no power to widen it, as there was a particular power vested by act of parliament in justices of the peace to do so. The indictment was held bad for want of saying that the way was out of repair; and one of the judges observed, that saying that the way was so narrow that the people could not pass, was repugnant to its being "the king's highway;" for that if it had been so narrow, the people could never have passed there time out of mind.(v)

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Where a road indicted led across a small inlet or estuary of a river not far from its mouth, and was not passable at high water, and was *usually a soft sludge at ebb; Mr. J. Patteson directed the jury that if they thought the want of repair arose from the nature of the spot, over which the road passed, and was occasioned by the river flowing over it at every tide, washing away the materials placed there to form the road, and leaving in their place a deposit of mud, it would be absurd to require the parish to do repairs, which, from the nature of things, must always be ineffectual.(w) And in the same case the same learned judge held that where two parishes are separated by a river the presumption is, that the boundary line is the middle line of the channel.(w)

Particular sub-divisions of a parish or particular individuals may be liable to repair highways.

But though the parish is bound *primâ facie* and of common right to repair the highways within it, yet a particular subdivision of a parish, or particular individuals, may be liable to relieve them from that *onus* by reason of prescription, or the inclosure of the land in which the highway lies.

Thus the inhabitants of a district, township, or other division of a parish, and also particular individuals, may be bound to repair a highway by *prescription*; and it is said, that a corporation aggregate may be charged by a general prescription that it ought and hath used to do it, without showing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation never dies, and, therefore, if it were ever bound to such a duty, it must continue to be so; neither is it any plea that the corporation have done it out of charity.(x) But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason: as having lands descended to him holden by such service, &c.(y) And a man cannot be liable to repairs merely as a lord of a manor, though it stated that the lords have repaired it from time whereof, &c.(z) This applies to individual persons only, and not to an aggregate of persons who compose the inhabitants of a district or division in a parish or township in which the road is situate.(a) But it has been holden in a late

(u) *Rex v. The Inhabitants of St. Pancras*, Peake Rep. 219.

(v) *Rex v. The Inhabitants of Stretford*, 2 Lord Raym. 1169. And it is the same as to a bridge; an indictment does not lie for not widening it. *Rex v. The Inhabitants of Devon*,* 4 B. & C. 670.

(w) *Rex v. Landulph*, 1 M. & Rob. 393.

(x) 1 Hawk. P. C. c. 76, s. 8. Bac. Abr. tit. *Highways* (F).

(y) *Id. ibid.*

(z) Lord Raym. 772, 804. It should be laid *ratione tenuræ* by reason of the demense of the manor.

(a) *Rex v. Ecclesfield*, 1 B. & A. 348.

* Eng. Com. Law. Repts. x. 441.

case that where a parish is charged with the reparation of a highway, lying in *alienâ parochiâ*, a consideration must be stated. The point arose upon an indictment against a parish for not repairing a highway lying within it, and a plea which stated that the inhabitants of another parish, "have repaired, and been used and accustomed to repair, and of right ought to have repaired;" and it was held ill, and that the plea ought to have shown a consideration. Holroyd, J., at the conclusion of his judgment, said, "I say nothing as to the form of pleading where the highway lies within a township or division of a parish which is charged with the repairs." (b)

And in a more recent case, where the inhabitants of a county pleaded that the inhabitants of a particular township had immemorially repaired the highway at the end of a county bridge, situate within the township, the court held that it was not necessary to state any consideration for such prescription. (c)

*And where, in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which but for such usage would be repairable by the parish at large; it was holden that this placed the township in the situation of a parish; and that it was necessary for the defendants to show, by evidence, some other persons in certainty who were liable, in order to deliver themselves from their liability to repair. (d) It may be observed that, where the origin of a way is accounted for, the prescription is destroyed. (e)

Where an indictment against a township for not repairing part of a highway situate within the township, averred that, "the inhabitants of the said township from time whereof the memory, &c., have repaired and amended, and been used and accustomed to repair and amend, and still ought to repair and amend all common and public highways situate within the township, used for all the liege subjects of the realm to go, return," &c.; after a verdict of guilty, it was moved in arrest of judgment that it charged the township with a customary liability to repair all roads within it, whereas, it ought to have charged a liability to repair all roads within it, "which but for the custom would be repairable by the parish." But the Court of Queen's Bench held that although those words had of late years been introduced, they were not necessary: where they were introduced they put the township *primâ facie* in the same position as a parish; and if the defendants meant to assert that any individuals were liable to repair the road in question, *ratione tenuræ* or otherwise, (if it could be) they must plead that matter specially; but where those words were omitted and the defendants pleaded not guilty, it became incumbent on the prosecutor to prove that the township was liable to repair all roads within it; which might be if there were none repairable by individuals; but if the defendants could show that there were any so repairable, they would negative the custom as being laid too largely. It was a question of evidence, and not of pleading; and in truth the words in question were introduced within living memory for the very purpose of avoiding a failure which frequently happened by reason of the custom laid being larger than the evidence warranted. Nevertheless

(b) *Rex v. St. Giles, Cambridge*, 5 M. & S. 260. And see *Rex v. Machyllenth, post*, p. 358.

(c) *Rex v. West Riding of Yorkshire*,^a 4 B. & A. 623.

(d) *Rex v. Hatfield*,^b 4 B. & A. 75. The general issue was pleaded. See *post*, p. 331.

(e) *Rex v. Hudson*, 2 Str. 909.

^a Eng. Com. Law Reps. vi. 543.

^b *Ib. v.* 355.

the custom may be laid as in the present indictment, if no roads in the township are repairable by individuals other than the inhabitants at large.^(e)

Extra-parochial place.

The liability of a township to repair by prescription may, as we have seen, be such as to place the township on the same footing as a parish, in respect to the roads within its limits. The liability may be to repair all highways within the township, which but for the prescription and usage would have been repairable by the parish at large; and in such case the township must not only repair immemorial roads, but also any new highway which may have been made within its limits, and which the parish might have been called upon to repair in the absence of any such prescription.^(f) But an *extra-parochial place* is not as such bound of common right to repair its own roads; and some ground for charging it must be stated: at least unless it be shown negatively that it is not parcel of any district bound to repair the district roads. The indictment stated, that part of a common king's highway, in the extra-parochial hamlet of Kingsmoor, was out of repair, and the inhabitants of the hamlet ought to repair it. After judgment for the crown, a writ of error was brought, on the ground that no immemorial obligation, nor any special ground to make them liable was stated. It was urged that they were liable of common right, and that an extra-parochial place stood in this respect on the footing of a parish; but the court thought otherwise; and held that they could not consider a common law obligation as attaching upon the inhabitants of the hamlet from necessity, unless it were shown negatively that the hamlet was not parcel of any other district liable to repair its own roads; and the judgment was reversed.^(g)

Inhabitants cannot be charged *ratione tenuræ*.

The inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot, *qua* inhabitants, hold lands: and a district cannot be charged by prescription alone (without a consideration) to repair what is not within such district. These points were decided in the case of a bridge. The indictment stated that an ancient bridge, in the parishes of M. and P., in the king's highway there was out of repair; and that the inhabitants of the said parish of P. and of the town of M. aforesaid, from time whereof, &c., and by reason of the tenure of certain lands in the said parish and town, had repaired and of right ought to repair it. After judgment for the crown a writ of error was brought; and it was urged that inhabitants as such could not be charged *ratione tenuræ*; and that as it did not appear that any part of the bridge was in the township of M., the indictment against the township, on the ground of memorial obligation, could not be supported; *and the court being of that opinion the judgment was reversed.^(h) Where an indictment alleged that the inhabitants of three townships in a parish were liable to repair a public road, it was objected, but without success, that the indictment was bad for charging three townships conjointly; since, if all were liable, it was the separate neglect of each.⁽ⁱ⁾

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Where lands bound to the repair of a bridge or highway *ratione*

^(e) Reg. v. The Inhabitants of Heage,^a 2 Q. B. R. 128.

^(f) Rex v. Ecclesfield, 1 B. & A. 348. Rex v. Netherthong, 2 B. & A. 179. Rex v. Hatfield, 4 B. & A. 75.

^(g) Rex v. Kingsmoor,^b 2 B. & C. 190.

^(h) Rex v. Machynlleth,^c 2 B. & C. 166.

⁽ⁱ⁾ Rex v. Bishop Auckland,^d 1 A. & E. 744.

^a Eng. Com. Law Reps. xiii. 603.

^b Ib. ix. 60.

^c Ib. ix. 62.

^d Ib. xxviii. 197.

tenuræ are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons, a tenant of any parcel either of the demesnes or services, is liable to the whole repair, and may call upon the tenants of the residue to contribute; and the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the repair; and the grantees must have their remedy against the grantor. And the reason seems to be, because the whole manor or land and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienations to insolvent persons, to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the crown, yet the obligation or duty continues; and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing.(j)

Each of several persons, being grantees of lands bound to repair, is liable to the whole charge.

As an *inclosure* of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair,(jj) it has been holden, that if the owner of lands not inclosed next adjoining to a highway incloses his lands on both sides, he is bound to make a *perfect good way* as long as the inclosure lasts; and is not excused by showing that he has made the way as good as it was at the time of the inclosure; because, if it was then defective, the public might have gone upon the adjoining land.(k) So if a man incloses land on one side, which has been anciently inclosed on the other side, he ought to repair all the way; but if there is no such ancient inclosure on the other side, he ought to repair but half the way. Thus, if there be an old hedge, time out of mind, belonging to A. on the one side of the way, and B. having land lying on the other side, make a new hedge, there B. shall be charged with the whole repair; but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties.(l) But a person having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burden of any further *reparations by throwing it open again.(m) Thus it was ruled that if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases.(n) But it was held, in the same case, that if a person charged *ratione tenuræ* pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant for twenty-five years since the removal of the alleged en-

Of the liability to repair by reason of inclosure.

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(j) Note (9) to *Rex v. Staunton*, 2 Saund. 159, citing *Reg. v. Duchess of Buccleugh*, 1 Salk. 358. 3 Viner, tit. *Apportionment*, 5, pl. 9.

(jj) *Ante*, p. 334.

(k) 1 Roll. Abr. 390 (B), pl. 1. *Duncombe's case*, Cro. Car. 366. *Henn's case*, Sir W. Jones, 296. Sty. 364. 2 Lord Raym. 1170. 1 Hawk. P. C. c. 76, s. 6. Bac. Abr. tit. *Highways*, (F). *Rex v. Stoughton*, 2 Saund. 160, note (12). And see *Steel v. Prickett* and *others*, 2 Stark. R. 469.

(l) Bac. Abr. tit. *Highways*, (F). *Rex v. Stoughton*, 1 Sid. 464. 1 Hawk. P. C. c. 76, s. 7. *Rex v. Stoughton*, 2 Saund. 161, note (12).

(m) Bac. Abr. *Ibid*. *Rex v. Flecknow*, 1 Burr. 465. 1 Hawk. P. C. c. 76, s. 7. But where the party is charged with the repairing *ratione tenuræ*, he will be still bound to repair, though he lay the ground open to the highway. 3 Salk. 392.

(n) *Rex v. Skinner*, 5 Esp. 219.

encroachment; this is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show the time when the encroachment was made. (o) Where a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure, and go over the adjoining land. (p)

Repairs of a road made in pursuance of a writ of *ad quod damnnum*.

Where a new road is made in pursuance of a writ of *ad quod damnnum*, (q) the owner of the land is not obliged to repair the new road, unless the jury impose such a condition upon him, but the parishioners ought to keep it in repair for the future; because, being discharged from repairing the old road, no new burden is laid upon them, but their labour is only transposed from one place to another. But if the new road lie in another parish, then the person who sued out the writ and his heirs ought not only to make it, but to keep it in repair; otherwise the parishioners of such other parish would have a new charge upon them, and no recompense, by the former road being taken away. (r) Where a highway is inclosed under the authority of an act of parliament for dividing and inclosing open common fields, the person who incloses is not bound to repair it. (s)

3 Geo. 4, c. 126, s. 106. Trustees of turnpike roads may agree with persons liable to repair any part of such roads by tenure concerning the future repair of them. And where roads are turned, persons liable to repair old roads are to be liable to repair new roads, or certain proportions of them.
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The general turnpike act, 3 Geo. 4, c. 126, s. 106, enacts, that it shall and may be lawful for the trustees or commissioners of any turnpike road, to contract and agree with any person or persons liable to the repair of any part of the road, under the care and management of such trustees or commissioners, or of any bridges thereon, by tenure, or otherwise for the repair thereof, for such term as they shall think proper, not exceeding three years; and to contribute towards the repair of such road or bridges, such sum or sums of money as they shall think proper out of the tolls arising on such turnpike road. The sixty-third section of the repealed turnpike act, 13 Geo. 3, c. 84, s. 62, enacted, that where parts of highways or turnpike roads were turned by legal authority, to make the same nearer or more commodious, the inhabitants or other persons, who were liable to the repair of the old highway, should be liable to the repair of the new, or so much thereof as should be equal to the burden and expense of repairing such old highway from which they were exonerated by so turning the same. And if the several parties interested could not agree, two justices were empowered in the manner therein mentioned to view and settle the same; and to fix a gross sum or annual sum, to be paid by the inhabitants or other such persons towards the repair of the *new highway. And provisions of a nature nearly similar are contained in the late turnpike act, 4 Geo. 4, c. 95, s. 68.

The 4 Geo. 4, c. 95, s. 68, applies to parishes as well as to individuals. Where, therefore, disputes having arisen between two parishes as to the proportion of a turnpike road, which each was bound to repair after it had been diverted by trustees, two justices made an order determining the proportions each parish was to repair; it was held that each parish was liable to repair the part so determined. (t)

The general statutes, making provision for repairing *highways*, were

(o) *Rex v. Skinner*, 5 Esp. 219.

(p) 3 Salk. 182.

(q) See note (h), *ante*, p. 340.

(r) *Ex parte*, *Vennor*, 3 Atk. 771, 2. 1 Hawk. P. C. c. 76, s. 7, 74, 75.

(s) *Rex v. Flecknow*, 1 Burr. 465.

(t) *Reg. v. Inhabitants of Barton*,^a 11 A. & E. 343. 3 P. & D. 190. *Quære*, whether the act applies where a parish is liable to repair one side of a road, and an individual the other.

repealed and reduced into one act: namely, the 5 and 6 Wm. 4, c. 50, and the general statutes at present existing with respect to turnpike roads, are the 3 Geo. 4, c. 126, and the 4 Geo. 4, c. 95. There are also inclosure acts and other statutes, both of a public and private nature, which relate to the repairs and management of the roads in particular places and districts. But these acts, and especially the general statutes, are of great length, and branch out into a variety of clauses, a detail of which would not be consistent with the proposed limits of this work. It may, however, be useful to notice a few of the decided points which relate to their construction.

It is no excuse for parishioners, being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes, being made in the affirmative, do not abrogate any provision of this kind by the common law. *(u)*

If trustees under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the act to that effect. *(v)* In this case it was considered, that what is meant by a road is the surface over which the king's subjects have a right to pass, and not the fences on each side; and that the owners of the land are bound to repair the fences on each side, unless otherwise provided by the act. *(w)*

Where an indictment alleged in the usual way that the liege subjects could not pass and repass as they were wont and accustomed to do, and it appeared that there were precipices on the sides of the road, and no fences or guards to protect the passengers from such precipices, but there was no evidence of there having been any fences before, except that some had been put up after a former indictment; it was held that evidence of the want of fences was not admissible, for the public were in no worse a situation than they were wont and accustomed to be before, on account of the want of fences. *(x)* It seems that a parish was not liable to cleanse the ditches by the side of a highway, but that the owners of the adjoining lands were liable to cleanse them under the provisions of the old highway act. On an indictment which charged the inhabitants of a parish with neglecting to repair the drains, gutters, and ditches by which the water was accustomed to run off the road, it was objected that the parish were not liable to cleanse the drains, and Tindal, C. J., said, "Does not the common law require the parish to cleanse the ditches? How do you get rid of the highway act?" *(y)*

It has been held that a turnpike act, giving directions for repairing the road to and from a town, excludes the town. *(z)* In the case upon which the decision was made it was stated, that the town had, lately before the act was passed, been paved by the inhabitants, and that it was kept in

(u) 1 Hawk. P. C. c. 76, s. 43. Bac. Abr. tit. *Highways*, (G).

(v) *Rex v. The Com. of the Llandilo District*, 2 T. R. 232.

(w) *Id. ibid.*

(x) *Rex v. Whitney*, 7 C. & P. 208. Park, J. J. A.

(y) *Rex v. Upton on Severn*, MSS. C. S. G. Wur. Sum. Ass. 1833. Tindal, C. J., but see 5 & 6 Wm. 4, c. 50, s. 67, which gives the surveyor power to cleanse all ditches, &c., he deems necessary, in and through any lands or grounds adjoining or lying near to any highway. The 13 Geo. 3, c. 78, s. 8, made the occupiers of such lands liable to cleanse all ditches, &c., for keeping highways dry, under a penalty of ten shillings, but no such provision is contained in the 5 & 6 Wm. 4, c. 50.

(z) *Hammond v. Brewer*, 1 Burr. R. 376.

repairs of a road in a town.

repair by them, and was then so: and in several parts of the act the roads were described as leading from, to, and *through*, particular towns; but when it mentioned the town in question, it only said, *to* and *from* the town, omitting the word "*through*." (a)

So upon an indictment for illegally erecting a turnpike gate across a road leading "from the town of Cheltenham to a place called Hewlett's Hill," it was held that the town was excluded. (b) So where an indictment alleged on a road to lead "from and through the town of Upton," towards the parish of Great Malvern, it was held that the town was thereby excluded. (c)

Where the indictment charged that the defendant erected a gate across a certain road "leading from the township of Detton unto the town of Cleobury Mortimer," and it appeared that the gate was erected across that part of the highway, which was situate in the township of Detton; Coleridge, J., held that it was not supported, as the words "from" and "to" exclude the termini. (cc)

Commissioners under an inclosure act, not empowered to throw the repair of private roads on the parish.

The commissioners appointed by the 6 Geo. 3, c. 78, (an act for dividing and inclosing certain lands in the parish of Cottingham) which enacted that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by *such person or persons* as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the act. (d)

And where under a similar act the commissioners had made an order in 1802, that the private ways set out by them should be repaired by the inhabitants, and one of them had been used by the public in every way, and repaired by the parish up to 1825, when the inhabitants having, as was alleged, found out that they were not bound to obey the order, discontinued the repairs, and evidence was offered to show that the parish had been acting under a mistake; it was held that the inhabitants were not bound to obey the order, but that that was not conclusive of the case. In ordinary cases there was an owner of the land, but here there was none, except as directed by the act; for the presumption that roads are the property of the adjacent owners (which is founded on the supposition that the roads originally passed over the lands of the owners, and therefore they still belong *ad medium filiam viæ*, to the adjacent owners,) does not hold where roads are made under an inclosure act. The case turns on this question only, whether or no the parish repaired under a mistaken notion of liability. If they act on a voluntary disposition on their part to repair a road, which was useful to a large class *of persons, and for the convenience of the public, they ought to be convicted. If it was a mistake, they ought to be acquitted. (e)

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Upon an indictment against the parish of Haslingfield, for not repair-

(a) *Hammond v. Brewer*, 1 Burr. R. 376, and see *Rex v. Gamlingay*, *post*, p. 365, and *Rex v. Harrow*, 4 Burr. 2091.

(b) *Reg. v. Fisher*, 8 C. & P. 618. *Patteson, J.*

(c) *Rex v. Upton on Severn*, 6 C. & P. 132. *Tindal, C. J. MSS. C. S. G. S. C.*

(cc) *Reg. v. Botfield*, 1 C. & Mars, 151.

(d) *Rex v. The Inhabitants of Cottingham*, 6 T. R. 20. See *Rex v. Wright*, 3 B. & Ad. 681. *Ante*, p. 337.

(e) *Rex v. Edmonton*, 1 M. & Rob. 24. *Lord Tenterden, C. J. Quære*, whether in such a case the soil be not in the lord of the manor; it was so before the inclosure, and it would seem so to continue, unless there were an express provision vesting it elsewhere. C. S. G.

^a Eng. Com. Law Reps. xxxiv. 550. ^b *Ib.* xxv. 317. ^c *Ib.* xli. 88. ^d *Ib.* xxxiii. 159.

ing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without showing that the commissioners had given notices which the act required to be given previously to the boundaries having been ascertained by them; it appearing that the usage had not been pursuant to the award; the defendants having since the award, as well as before, repaired the highway. The learned judge who tried this case reported that he should have had no difficulty in admitting the award, and, if the usage had been pursuant to it, presuming that the proper notices had been given. (f)

Award under an inclosure act rejected as evidence of a highway, the usage not having been pursuant to it, nor the proper notices proved.

We may now shortly consider the modes of proceeding by which persons guilty of these nuisances to highways may be prosecuted.

Nuisances or annoyances to highways, whether positive, in the nature of actual obstructions, or negative, by the defect of proper reparations, may be made the subject of indictment, which is the more usual course of proceeding. And formerly justices of assize and of the peace might have presented highways which were out of repair, but now by the 5 & 6 Wm. 4, c. 50, s. 99, it is not lawful "to take or commence any legal proceeding by presentment, against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair." (g)

Proceedings against parties guilty of nuisances in highways by indictment or information.

A new mode of compelling the repairs of highways has been introduced by the 5 & 6 Wm. 4, c. 50, s. 94, which enacts, that "if any highway is out of repair or is not well and sufficiently repaired and amended, and information thereof, on the oath of one credible witness, is given to any justice of the peace, it shall and may be lawful for such justice, and he is hereby authorized and required to issue a summons requiring the surveyor of the parish, or other person or body politic or corporate chargeable with such repairs, to appear before the justices at some special sessions for the highways in the said summons mentioned, to be held within the division in which the said highway may be situate; and the said justices shall either appoint some competent person to view the same, and report thereon to the justices in special sessions assembled, on a certain day and place to be then and there fixed, at which the said surveyor of the highways or other party as aforesaid, shall be directed to attend, or the said justices shall fix a day whereon they or any two of them shall attend to view the said highway; and if to the justices at special sessions, on the day and at the place so fixed as aforesaid, it shall appear, either on the report of the said person so appointed by them to view, or on the view of such justices, that the said highway is not in a state of thorough and effectual repair, they the said justices at such last-mentioned special sessions shall (h) convict the said surveyor or other party liable to the repair of the said highway in any penalty not exceeding five pounds, and shall make an order on the said surveyor, or other person or bodies politic or corporate liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same; and in default of such repairs being effectually made within the time so limited, the said surveyor, or such other person or body politic or corporate as aforesaid, shall forfeit and pay to some person to be named and appointed

Mode of proceedings before justices if highway is out of repair.

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(f) *Rex v. The Inhabitants of Haslingfield*, 2 M. & S. 558.

(g) A presentment and indictment differ, 2 Inst. 789, Comb. 225.

(h) This is not compulsory, but the justice may exercise a discretion whether they will convict. *Reg. v. Lord Radnor*, 8 Dow. P. C. 717.

in a second order, a sum of money to be therein stated, and shall be equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, which money shall be recoverable in the same manner as any forfeiture is recoverable under this act, and such money, when recovered shall be applied to the repair of such highway, and in case more parties than one are bound to repair any such highway, the said justice shall direct in their said order what proportion shall be paid by each of the said parties; provided, that if the said highway so out of repair is a part of the turnpike road, the said justices shall summon the treasurer or surveyor or other officer of such turnpike road, and the order herein directed to be made shall be made on such treasurer or surveyor or other officer as aforesaid, and the money therein stated shall be recoverable as aforesaid; provided, nevertheless, that the said justices shall not have power to make such order as aforesaid in any case where the duty or obligation of repairing the said highway comes in question."

In what cases justices cannot interfere.

Mode of proceeding if obligation to repair is disputed.

By sec. 95, "if on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall⁽ⁱ⁾ be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act in the parish in which such highway shall be situate: provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid to remove such indictment by *certiorari* or otherwise into his majesty's Court of King's Bench."

Information.

Another mode of proceeding is by *information*, which may be granted by the Court of King's Bench at their discretion. But they will not grant an information to compel a parish to repair a highway which is not much used; and when it appears that another highway, equally convenient to the public, is in good repair. And indeed they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of *gross misbehaviour in not finding a bill; and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended.^(j)

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Of the form of indictment.^(k)

Though it is often stated in indictments for nuisances to highways, that "from time whereof the memory of man is not to the contrary," or,

(i) See *post*, p. 374.

(j) Bac. Abr. tit. *Highways*, (II). *Rex v. The Inhabitants of Steyning*, Say. 92.

(k) It is not within the scope of this work to treat particularly of the forms of the pleadings, though some of the prominent points concerning them are occasionally mentioned. For indictments, pleas, &c., relating to nuisances to highways, the reader is referred to the Cro. Circ. Comp. (8th ed.) 301. 6 Wentw. 405, 2 Stark. 664. 3 Chit. Cr. L. 576, 607, and the notes to *Rex v. Stoughton*, 2 Saund. 157, *et seq.*

“from time immemorial,” there was and is a common and ancient king’s highway, yet it is not necessary to do so; for it is sufficient to state in a compendious manner *that it is a highway.*(*l*) [1] And though it is usual to state the *termini* of the highway, it is said not to be necessary; on the ground that a public highway, is intended to go through all the realm, and to lead from sea to sea.(*m*) But if the *termini* are stated, they must be substantially proved, according to the statement:(*n*) and the road must in general, (if described at all,) be described correctly. Thus, where a highway leading from A. to C., not passing through B., though communicating with it by means of a cross road, was described as a road leading from A. to B., and from thence to C., the variance was held to be fatal.(*o*) An indictment describing a footpath as leading from A. towards and unto the parish church, is satisfied by proof of a public highway leading from A. to the parish church, though turning backwards between A. and the church at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to the church be recently dedicated.(*p*)

Of stating the *termini*.

The highway must be alleged in the indictment to lie in the parish indicted, otherwise such parish is not bound to repair it, and if it be not so alleged, the indictment is erroneous, and judgment will be reversed.(*q*) Where an indictment averred that there was a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland, and that certain parts of the same highway, which were set out, and laid to be in the town of Bishop Auckland, were out of repair, and that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew Auckland, were liable to repair the same; it was held that the indictment was bad, because it did not show that the parts out of repair were within the townships indicted.(*r*) Nor will it cure the objection, that the part which is out of repair is expressly stated to be in the parish indicted, if such part be represented as part of the road before described. Thus, where an indictment against the parish of *Gamlingay stated that there was a highway leading from the parish of Hartley St. George towards and unto the parish of Gamlingay, and that a certain part of the said highway situate in the said parish of Gamlingay, was out of repair, it was moved in arrest of judgment that no part of the road, as described, lay in Gamlingay; and the court held the objection fatal.(*s*) So where an indictment against the parish of Upton on Severn stated that there was a highway “from and through the town of Upton on Severn,” and there was no express averment that the part out of repair was in the parish, it

Highway must be stated to be in the parish indicted.

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(*l*) *Aspindall v. Brown*, 3 T. R. 265.

(*m*) *Rex v. Hammond*, Str. 44. 10 Mod. 382. *Halsell’s case*, Noy, 90. Latch. 183. *Rex v. St. Weonards*, 6 C. & P. 582. *Rex v. Neal*, 3 Keb. 89. *Rouse v. Bardin*, 1 H. Blac. 351; but see Lord Loughborough’s judgment, who differed.

(*n*) *Rouse v. Bardin*, 1 H. Blac. 351. *Rex v. St. Weonards*, 6 C. & P. 582.

(*o*) *Rex v. Great Canfield*, cor. *Ellenborough*, C. J., 6 Esp. C. 136.

(*p*) *Rex v. Marchioness of Downshire*, 4 A. & E. 232; 5 N. & M. 662. If the indictment had described it as an immemorial way from A. to the church, it would have been bad. Per Lord Denman and Coleridge, J.

(*q*) *Rex v. Hartford*, Cowp. 111. (*r*) *Rex v. Bishop Auckland*, 1 A. & E. 744.

(*s*) *Rex v. Gamlingay*, 3 T. R. 513. And see *Hammond v. Brewer*, ante, p. 361, and *Rouse v. Bardin*, 1 H. Blac. 356, Lord Loughborough’s judgment.

[1] {In Massachusetts, an averment of a highway from time immemorial is supported by proof of the existence of the way for sixty years, if there be no evidence of the time of its commencement. 5 Pick. 421, *Odiorne v. Wade*.}

a Eng. Com. Law Repts. xxv. 551.

b Ib. xxxi. 58.

c Ib. xxviii. 197.

was held bad. (t) But where an indictment charged that the defendants removed the gravel over a culvert in the parish of Studley opposite to a mill there in a certain king's common highway there leading from Studley to Henley upon Arden, it was objected that it did not distinctly appear that the road obstructed was in the parish of Studley, and *Rex v. Gamlingay* (tt) was relied upon; but it was held that the indictment in that case differed essentially from this indictment, because there was a distinct allegation that the nuisance was committed in the parish of Studley. The words leading from Studley to Henley would *primâ facie* import that it was a highway leading from a vill in the parish, and therefore, must be considered as a highway leading from a vill or town situate in the parish to another place. (u) Where an indictment charged that the defendant at the township of W. upon a highway there leading from a highway leading from the village of W. towards the parish church of C. towards and unto a highway leading from the said village of W. towards and unto the township of L. W. by a certain wall *there* extending into the *said* highway unlawfully encroached, it was held that the words "there" and "said" could only be referred to the first-mentioned highway, and that the indictment was sufficient. (v) Where the indictment is against a particular person, charging him with the repair of a highway in respect of certain lands, it seems that the occupier and not the owner, is the proper person against whom the indictment should be brought; on the ground that the public have no means of knowing who is the *owner* of the lands charged with the repair; and it does not seem to be material what estate the occupier has in the lands liable. (w) The averment of obligation to repair, in an indictment against a person for not repairing *by reason of tenure*, will, it seems, be sufficient, if it state that the defendant ought to repair *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have *immemorially* repaired; a prescription being implied in the estate of inheritance in the land. (x) But it is not sufficient to state that the party is chargeable by being owner and proprietor of the property subject to the charge. (y) But an indictment against a *particular part of a parish*, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that the inhabitants of the district from time **immemorial ought to repair and amend it*, is erroneous, it should state that the inhabitants of such district from time whereof, &c., *have used and been accustomed*, and of right ought to repair and amend it: for the inhabitants of a particular division of a parish, not being bound to repair by common law, and their obligation arising necessarily only from custom or prescription, the indictment ought to show such custom, prescription, or reason of their obligation. (z) So it was decided that a presentment under the 13 Geo. 3, c. 78, s. 24,

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(t) *Rex v. Upton on Severn*,^a 6 C. & P. 132. Tindal, C. J., MSS. C. S. G. (tt) *Supra*.
 (u) *Rex v. Knight*,^b 7 B. & C. 413. 1 M. & R. 217. Lord Tenterden, C. J., doubted the propriety of the decision in *Rex v. Gamlingay*, saying that, in common parlance, the words "leading from a place," include as well as exclude that place.

(v) *Rex v. Wright*,^c 1 A. & E. 434.

(w) *Rex v. Watts*, 1 Salk. 357. *Reg. v. Bucknell*, 7 Mod. 55. *Rex v. Sutton*,^d 3 A. & E. 597.

(x) *Rex v. Stoughton*, 2 Saund. 158 *d.* note (9). 1 Chit. C. L. 475, *et seq.*

(y) *Rex v. Kerrison*, 1 M. & S. 435.

(z) *Ante*, note (x). *Rex v. Broughton*, 5 Burr. 2700. *Freem.* 522. *Rex v. Stoughton*. *R. v. Sheffield*, 2 T. R. 111.

^a Eng. Com. Law Reps. xxv. 317. ^b *Ib.* xiv. 65. ^c *Ib.* xxviii. 117. ^d *Ib.* xxx. 168.

(now repealed,) against a smaller district than a parish, must have stated expressly *how* the inhabitants thereof were liable to the repair of the roads, or that they have been liable immemorially. (a) We have seen that a material variance from the description of the road in the indictment will be fatal; so that a highway leading from A. to B., and communicating with C. by a cross road, cannot be described as a highway leading from A. to C., and from thence to B. (b) In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair; and the third, that it is situated in the parish. (c) A presentment for a nuisance in a highway must have concluded—against the form of the statute. (d)

A highway may be described as a common highway for carts, carriages, &c., although it has always been arched over, provided it be capable of being used by all ordinary carriages, and notwithstanding the archway be not sufficiently high to permit road wagons and other carriages of unusual dimensions to pass under it. (e)

Where an indictment charged the non-repair of a highway for horses, coaches, carts, and carriages, and there was no evidence that any carriages had ever gone the whole length of it, but the road had been repaired by the parish, and persons on horseback had frequently passed along it, it was held that the defendants could not be convicted, as there was no count charging that it was a road for horses. (f) And where an indictment stated that there was a pack and prime way between certain specified places, and it appeared that part of that road was a turnpike road, it was held that this was fatal, for the statement in the indictment was matter of description, and must be proved as laid. (g)

Where an indictment for non-repair of a highway, stated that the inhabitants of a tithing from time immemorial, had been used and accustomed to repair the said highway, and the way in question had been set out as a private road and a drift-way under an inclosure act in 1784, for the use of the adjoining owners, who were directed to repair it; and the award under a power in the act extinguished all ways, both public and private, not set out in it. The way had been publicly used before the inclosure, and since had been repaired occasionally by the tithing, and been used to a great extent by the public. It was objected, that whatever might be the facts as to the use and repair by the tithing before and since the inclosure, the award extinguished the road as a public way for some time at least, and, therefore, the allegation of immemorial user and liability to repair was not supported; and Maule, J. held that the indictment clearly failed on the facts. (gg)

Where an indictment for the non-repair of a highway, in the parish of Wingfield, alleged that the defendant was liable by reason of the tenure of certain lands in the said parish, and it was shown that the defendant occupied a farm called Midway, and that the occupiers of that farm had for a long series of years repaired the road; but Midway farm was

(a) *Rex v. Penderryn*, 2 T. 513. *Rex v. Marton*, Andr. 276.

(b) *Rex v. Great Canfield*, 6 Esp. 136, *ante*, note (o), p. 364.

(c) 2 Stark. Crim. Plead. 667, note (f).

(d) *Rex v. Winter*, 13 East, 258

(e) *Rex v. Lynn*,^a 1 C. & P. 527, *tota curia*, B. R.

(f) *Rex v. St. Weonards*,^b 5 C. & P. 579. Parke, B.

(g) *Rex v. St. Weonards*,^c 6 C. & P. 582. Alderson, B., and Williams, J.

(gg) *Reg. v. Westmark*, 2 M. & Rob. 305.

^a Eng. Com. Law Repts. xi. 457.

^b *Ib.* xxiv. 465.

^c *Ib.* xxv. 551.

made up of lands lying in Wingfield and three other parishes, in two of which there was part of the same road, also repaired by the occupier of the farm; Rolfe, B., left it to the jury to say whether the liability, if proved, was, in respect of the part of the farm which lay in Wingfield, to repair the road in Wingfield; and told them they must be satisfied that the liability was in respect of that part only, in order to convict under this indictment. If the liability was a liability to repair the road passing through the three parishes by reason of one joint occupation of the whole farm, the defendant must be acquitted. (*h*)

Where on an indictment against the inhabitants of a township for not repairing a highway, evidence of reputation was offered on behalf of the defendants, to show that the owners of certain lands adjoining the road were bound to repair *ratione tenuræ* all the road in question, except a small part of it; Maule, J., held that evidence of reputation could not be admitted to establish a liability to repair *ratione tenuræ*, that liability being a matter of a private nature. (*i*)

Where a person who is bound *ratione tenuræ*, to repair a highway lives out of the county in which such highway is situate, he may nevertheless be indicted in such county for not repairing it. (*j*)

Of the defence under the general issue, and of the necessity for a special plea.

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If the description of a highway in an indictment for the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement; and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. (*k*)

Where an indictment or presentment is against the inhabitants *of a parish at large, who, as has been seen, are bound of common right to repair all the highways lying within it, they may upon the general issue, *not guilty*, show that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment and prove on the plea of *not guilty*. (*jj*) But it is settled that they cannot, upon the general issue, throw the burden of repairing on particular persons, by prescription or otherwise; but must set forth their discharge in a special plea. (*kk*) This rule, however, was recently held not to apply to a case where the burden of repairing was transferred from the inhabitants of a parish to other persons by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance. (*l*) Where a person is charged with the repairs of a highway or bridge, *against common right*, he may discharge himself upon *not guilty* to the indictment: and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may throw the burden either on the parish, or even on an individual on the general issue. And the reason seems to be, because upon this issue the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and therefore the defendants may

(*h*) Reg. v. Mizen, 3 M. & Rob. 382.

(*i*) Reg. v. Wavertree, 2 M. & Rob. 353. See the reporter's note, *ibid*.

(*j*) Rex v. Clifton, 5 T. R. 502, 503.

(*k*) Rex v. Hammersmith, 1 Stark. Rep. 357. Particulars of the roads indicted may be obtained. See *ante*, p. 330.

(*jj*) Rex v. The Inhabitants of Norwich, 1 Str. 181, *et seq.* Rex v. Stoughton, 2 Saund. 168, note (3).

(*kk*) Rex v. St. Andrews, 1 Mod. 112. Anon. 1 Vent. 256.

(*l*) Rex v. The Inhabitants of St. George, 3 Campb. 222.

disprove it by opposite evidence; but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought not to repair, but they must go farther and show *who ought*.^(m)

If a parish consisting of several townships be indicted for not repairing a road within it, a plea that each township has immemorially maintained its own roads, must show how much of the road indicted lies in one township, and how much in another; for it is considered that the parish must know the limits of each township, and is bound to show with certainty the parties liable to repair every part of the highway indicted, and in what right they are so liable.⁽ⁿ⁾ Where to an indictment for non-repair of a road the parish plead specially that particular individuals are liable *ratione tenuræ* to repair parts of the road indicted, they must accurately describe the parts such persons are respectively liable to repair, for they can only discharge themselves by showing precisely who are liable, and for what particular parts of the road. To an indictment against a parish for not repairing a road beginning at the confines of the parish of L. and ending at B., containing in length 2390 yards, the parish pleaded as to part commencing at the confines of the parish of L., and continuing thence onwards in length 363 yards *or thereabouts*, that the same adjoined on the north-east side thereof to certain lands in the occupation of V. as tenant to P., and on the south-west side to certain other lands in the occupation of J. as tenant to the said P., and that the said P., by reason of the tenure of such lands ought to *repair such part of the said highway adjoining to the said lands being in length as aforesaid *or thereabouts*, when and as often as there should be occasion, &c., and as to another part commencing at the termination of the said part of the said highway last described, and continuing thence onwards in length 499 yards *or thereabouts*, that the same on each side thereof adjoined to certain other lands in the occupation of B. as tenant to C., and that C., by reason of his tenure of such lands, ought to repair such part of the said highway adjoining to the said last-mentioned lands.^(o) The replication was that P. C., &c., by reason of their several and respective tenures of the said several lands ought not respectively to repair such part of the said highway respectively as adjoins to the lands in the several and respective tenures of the said P. C., &c., *modo et formâ*. It appeared that on entering the road from the parish of L. the land of P. extended on both sides of the road, but about eighteen yards further on the left than on the right hand side. Where P.'s land ended C.'s land began on each side of the road, so that for the eighteen yards P.'s land and C.'s were opposite to each other. It was objected that there was a misdescription, for it was stated that P. was bound to repair the whole road and C. the whole road, but the evidence was that there were about eighteen yards, in which P. and C. would be bound to repair *ad medium filum viæ*. It was answered that the form of the issue as well as the substance, was, whether persons holding lands were bound to repair the road adjoining to their lands—that the statement of so many yards, "*or thereabouts*," left it quite at large, as much as if it had been alleged under a *videlicet*; but it was held

Parish must show with certainty who are liable to repair and what particular parts of the road.

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(m) *Rex v. Yarnton*, 1 Sid. 140. *Rex v. Hornsey*, Carth. 213. *Rex v. City of Norwich*, 1 Str. 180, *et seq.* *Rex v. St. Andrews*, 3 Salk. 183, pl. 3. *Rex v. Stoughton*, 2 Saund. 159, a. note (10).

(n) *Rex v. Bridekirk*, 11 East, 304.

(o) The plea proceeded to aver the liability of the owners of the adjoining lands to repair the residue of the road in a similar manner.

that the plea was not proved; for it was an entire plea which the defendants were bound wholly to prove, and as no part of the plea stated that P. & C. were bound to repair up to the middle of the road, there was a variance. (*p*)

Where a plea to an indictment in the ordinary form against a parish for non-repair of a road, alleged that the road lay within a township, and that the inhabitants of the township had been accustomed from time immemorial to repair all highways within the township, which otherwise would be repairable by the parish at large, and that the inhabitants of the parish at large had not been accustomed to repair the highways within the township, and that by reason of the premises the township ought to repair the said road, and the replication traversed the custom for the township to repair all highways within it as stated in the plea, and a verdict was found for the defendants; judgment was arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party other than the defendants was liable to repair it. (*q*)

Traverse of obligation to repair.

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If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons, indicted for not repairing by prescription, plead (though unnecessarily) to the indictment, and show who ought to repair, as they must do, it is necessary to traverse their obligation to repair: but if a parish be indicted for not repairing a highway, or a county for not repairing a bridge, and *they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law; and such traverse, though very often inserted, is demurrable, and therefore ought always to be omitted. (*r*) Where an indictment charged that the defendant ought to repair *ratione tenuræ*, of certain lands inclosed and encroached by him out of the highway, a plea, traversing the obligation *ratione tenuræ*, was held good; on the ground that it professed to charge the defendant *ratione tenuræ*, and not by reason of the encroachment; and that the obligation *ratione tenuræ* would continue, though the land should be again thrown open to the highway, whereas the obligation by reason of the encroachment would not. (*s*)

Where a parish is indicted, and a subdivision of such parish is liable to the repair,

Where any subdivision of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such subdivision; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the *whole parish* to repair, unless *fraud* can be shown. (*t*)

(*p*) *Rex v. Inhabitants of Rockfield*, Monm. Summer Ass. 1830. Bosanquet, J. There were similar variances in the proof as to other parts of the road. MSS. C. S. G.

(*q*) *Rex v. Eastington*,* 5 A. & E. 765.

(*r*) *Rex v. Stoughton*, 2 Saund. 159, c. note (10). *Bennet v. Filkins*, 1 Saund. 23, note (5). In *Rex v. Ecclesfield*, 1 B. & A. 350, 351, J. Williams *arguendo* denied that such traverse is demurrable: and said that *Rex v. Inhabitants of Glamorgan* contained such a traverse (2 East, 356, *in notis*), and that the better precedents have always inserted it. Supposing such traverse to be necessary, it is sufficiently expressed by a plea concluding thus, "And that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same."

(*s*) *Rex v. Stoughton*, 2 Saund. 160.

(*t*) *Rex v. St. Pancras*, Peake Rep. 219. *Rex v. Whitney*,^b 7 C. & P. 208. Parke, J. J. A., see the same case, 3 A. & E. 69.^c And in a case of a prescription for a public right of way, a verdict against one defendant negating such a right, is evidence against another defendant who justifies under the same right. *Read v. Jackson*, 1 East, Rep. 355.

* Eng. Com. Law Repts. xxxi. 436.

^b Ib. xxxii. 493.

^c Ib. xxx. 33.

Fraud, however, is only put for an example; for if the other districts can show that they had *no notice* of the indictment, and that the defence was made and conducted entirely by the district in which the highway indicted lay, without their knowledge or privity, the court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish.^(u) And in the case of an indictment for not repairing a highway against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, where there was a plea on the part of the township of Burton that each of the three townships had immemorially repaired its own highways separately; it was held that the records of indictments against the parish generally for not repairing highways situate in the township of Eardisland, and the township of Hardwicke, with the general pleas of *not guilty*, and convictions thereupon, were *primâ facie* evidence to disprove the custom for each township, to repair separately; but that evidence was admissible to show that these pleas of *not guilty* were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton.^(v) In a case where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable.^(w) And such a plea will be good although it does not state any *consideration* for the liability of the inhabitants of the district.^(x)

the parish must take care to plead such liability. Evidence of former conviction conclusive unless fraud, &c. be shown.

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It has been held that the record of an *acquittal* upon an indictment for not repairing a highway is not evidence to show that the parish is *not liable*: on the ground that some other parties might have indicted them, and that those parties could not be found by this record.^(y) And a satisfactory reason for rejecting such evidence altogether seems to be that the acquittal might have proceeded upon the want of proof that the road was out of repair.^(z) In the case of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*, it was held that an award made under a submission by a former tenant for years of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*.^(zz)

Record of an acquittal is not evidence to show that the parish is not liable to repair.

The 5 & 6 Wm. 4, c. 50, s. 100, enacts, that "no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason

5 & 6 W. 4, c. 50, s. 100. Inhabitants and officers in parishes may give evidence.

(u) *Rex v. Stoughton*, 2 Saund. 159, c. note (10). *Rex v. Townsend*, Dougl. 421, *post*, 373.

(v) *Rex v. Eardisland*, 2 Camp. 494.

(w) *Rex v. Ecclesfield*, 1 Stark. Rep. 393.

(x) *Rex v. Ecclesfield*, 1 B. & A. 348.

(y) *Rex v. St. Pancras*, Peake Rep. 219.

(z) Mann. Ind. N. P. R 128.

(zz) *Reg. v. Cotton*, 3 Camp. 444, *cor.* Dampier, J., Stafford Sum. Ass. 1813. The learned judge stated that it was a question of considerable importance, and of some novelty; and wished that his opinion upon it could be reviewed; but, from the manner in which the question arose, that was not possible.

of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of this act, nor shall such testimony or evidence for any of the reasons aforesaid be rejected or liable to be questioned or set aside." The inhabitants of a parish indicted for not repairing a highway were not competent to give evidence for the defendants(*a*) under the 13 Geo. 3, c. 78, and it has been held that they were not rendered competent by the 54 Geo. 3, c. 124, s. 9, (*b*); but now they seem clearly to be competent.

The prosecutor may be a witness for the prosecution.

In a late case of an indictment for not repairing a highway, the prosecutor was examined as a witness for the prosecution, and no objection was taken to his competency (*c*) and it seems that the prosecutor was a competent witness, under the 13 Geo. 3, c. 78, for though the court was authorized to award costs against him in case the proceeding was vexatious, (*d*) yet the court would scarcely presume that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency, especially after the finding of *a bill by the grand jury. (*e*) The 5 & 6 Wm. 4, c. 50, does not give any costs against the prosecutor, so that he seems now clearly to be a competent witness.

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Certiorari.

Though the 13 Geo. 3, c. 78, s. 23, declared that no presentments or indictments should be removed by *certiorari* before traverse and judgment, except where the obligation of repairing came in question, yet this clause did not take away the writ at the instance of the prosecutor, for the crown does not traverse; and it was calculated merely to prevent delay on the part of the defendants. (*f*) And it was held to be no objection to a *certiorari* to remove such a presentment, that it was prosecuted by another than the justice presenting, if it were by his consent. (*g*) The 5 Wm. & M. c. 11, s. 6, also provided, that if any indictment or presentment be against any persons for not repairing highways or bridges, and the right or title to repair the same may come in question upon a suggestion and affidavit made of the truth thereof, a *certiorari* may be granted provided that the party prosecuting such *certiorari* enter into the recognizance mentioned in the act. Upon an indictment against a parish for not repairing a highway, the right to repair may come in question so as to entitle the parish to remove it by *certiorari*, though the parish plead not guilty only, it being stated in an affidavit filed by the defendants, that, on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue. (*h*) And the prosecutor may remove an indictment by *certiorari*, though there be no recognizance given according to the statute. (*i*)

(*a*) *Rex v. Wandsworth*, 1 B. & A. 63. See 15 East, 474.

(*b*) *Rex v. Bishop Auckland*,^a 1 A. & E. 744; 1 M. & Rob. 286. This case was decided on the authority of *Oxenden v. Palmer*,^b 2 B. & Ad. 236. In *Doe v. Adderly*,^c 8 A. & E. 502, the court, after taking time to consider, held that rated inhabitants were competent witnesses, under the 54 Geo. 3, c. 124, s. 9, for the parish officers in an ejectment brought by them, and said, "we cannot agree with *Oxenden v. Palmer*, and the decisions to which it has given birth." So that *Rex v. Bishop Auckland*, seems to be overruled. See also *Morrell v. Martin*,^d 6 Bing. N. C. 373, and the 3 & 4 Vict. c. 26, s. *post*, vol. 2.

(*c*) *Rex v. Hammersmith*,^e 1 Starkie R. 357. (*d*) By the 13 Geo. 3, c. 78, s. 64.

(*e*) *Rex v. Hammersmith*,^f 1 Starkie R. 358, note (*a*).

(*f*) *Rex v. Bodenham*, Cowp. 78.

(*g*) *Rex v. Penderryn*, 2 T. R. 260.

(*h*) *Rex v. Taunton*, St. Mary, 3 M. & S. 465.

(*i*) *Rex v. Farewell*, 2 Str. 1209. Leave, however, must be obtained by motion in the same way by the prosecutor as by the defendants, by the 5 & 6 Wm. 4, c. 33.

^a Eng. Com. Law Repts. xxxviii. 197.

^b Ib. xxii. 64.

^c Ib. xxxv. 447.

^d Ib. xxxvii. 414.

^e Ib. ii. 415.

^f Ib. ii. 426.

The general rule of a new trial never being allowed where the defendant is acquitted in a criminal case, has been held to prevail in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying and enforcing a civil liability. (j)† But if the defendants be found guilty, and the justice of the case seem to require it, the court would probably grant a new trial, or stay the judgment upon payment of costs, until another indictment be preferred for the purpose of trying the question of liability to repair. (k)

The object of prosecutions for nuisances to highways is to effect either a removal of the nuisance in cases of obstruction, or the *repair of the highway in cases where the nuisance charged is the want of reparation. The judgment of the court is usually a fine, and an order on the defendant, at his own costs, to abate the nuisance in the one case, (l) and in the other a fine, for the purpose of obliging the defendants to repair the nuisance: for they will not be discharged by submitting to a fine, as a distringas will go *ad infinitum* until they repair. (m) But writs of distringas are the only further remedy on an indictment, upon which the court has already pronounced judgment by imposing a fine. For the fine is the punishment for the neglect and offence of which the defendants are indicted; and, though the court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine. The parish may, however, be again indicted; and a fine may be imposed on such new indictment. (n) And upon this principle an order of a court of quarter sessions by which it was ordered that the fine theretofore imposed for the not repairing a bridge should be increased by a certain sum, was quashed. (o) In order to warrant a judgment for abating the nuisance, it must be stated in the indictment to be *continuing*; as otherwise such a judgment would be absurd. (p) And if the court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And though it was contended, on the authority of several cases, (q) that if the nuisance be of a permanent nature the regular judgment must be to abate it, the court refused to give such judgment

(j) *Rex v. Silverton*, 1 Wils. 398, cited 2 Salk. 646, in the note. *Rex v. Mann*, 4 M. & S. 337. *Rex v. Cohen and Jacob*,^a 1 Starkie R. 516, and see *Rex v. Reynell*, 6 East, 315, and the cases there cited. See *ante*, 370, that the record of acquittal is not evidence to show that the parish is *not liable* to repair. But in a recent case, where the defendants had been acquitted on an indictment for not repairing a road, the court of King's Bench, though they refused a new trial, yet upon very special circumstances suspended the entry of the judgment so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *Rex v. The Inhabitants of Wandsworth*, 1 Barn. & Ald. 63. *Rex v. Sutton*,^b 5 B. & Ad. 52. S. P. as to a bridge.

(k) The judgment was so stayed in a case where the liability to repair a county bridge was in question. *Rex v. The Inhabitants of Oxfordshire*, 16 East, 233. It was said by Lord Kenyon, C. J., in *Rex v. Mawbey and others*, 6 T. R. 619: "In misdemeanors there is no authority to show that we cannot grant a new trial in order that the guilt or innocence of those who have been *convicted* may be again examined into." It may be observed also, that in cases of indictments for misdemeanors, the court will, at its discretion, save the point for consideration, giving the defendant an opportunity, in case he shall be convicted, to move to have an acquittal entered. *Rex v. Gash*, and another, 1 Starkie R. 445.

(l) *Rex v. Pappineau*, 1 Str. 686. 1 Hawk. P. C. c. 75, s. 15.

(m) *Rex v. Cluworth*, 1 Salk. 358. 6 Mod. 163. 1 Hawk. P. C. c. 76, s. 249.

(n) *Rex v. Old Malton*,^c 4 B. & A. 470, note.

(o) *Rex v. Machynlleth*,^d 4 B. & A. 469.

(p) *Rex v. Stead*, 8 T. R. 142.

(q) *Rex v. Pappineau*, *ante*, note (l). *Rex v. The Justices of Yorkshire*, 7 T. R. 467, *Rex v. Stead*, *ante*, note (p), and other cases cited in *Justices*.

† [See the *People v. Comstock*, 8 Wend. 549.]

^a Eng. Com. Law Reps. ii. 491.

^b Il. xxvii. 31.

^c Ib. vi. 491.

^d Ib. vi. 490.

upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public, and the affidavits stated that so much of the old way indicted as was still retained was freed from all obstruction.^(r) But where the existence of a building, &c., is a nuisance, and the indictment imports that it was existing at the time of the bill being found, it seems that if a judgment be pronounced, it can only be a judgment to abate the nuisance.^(s) But where the nuisance arises not from the existence of the thing, but from the use to which it is applied, a judgment to abate, &c., is not necessary;^(t) and, therefore, if a stinking trade is indicted, it does not follow that the house in which it is carried on is to be pulled down.^(u) And if a house is a nuisance from being too high, so much only as is too high shall be pulled down.^(v)

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Fines, penalties, and forfeitures, how to be levied and applied.

*The 5 & 6 Wm. 4, c. 50, s. 96, enacts, that "no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer or other court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or court imposing such fines, issues, penalties or forfeitures shall order and direct, to be applied towards the repair and amendment of such highway: and the person so ordered to receive such fine shall and is hereby required to receive, apply and account for the same according to direction of such justices or court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township or place, then such inhabitant shall and may make his complaint to the justices at a special sessions of the highways; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for payment of the same out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him, pay unto such inhabitant the money therein mentioned."

Application for a rate to reimburse must be made in a reasonable time after the levy.

Upon the latter part of sec. 47 of the 13 Geo. 3, c. 78, which was similar to the preceding provision of the new act, it was held that the application for the rate to reimburse the inhabitants, on whom a fine has been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, and before any material change of inhabitants; and the Court of King's Bench refused a mandamus to the justices to make such rate after an interval of eight years; though application had been made in the interval, from time to time, to the magistrates below, who had declined to make the rate on the ground that the parish at large had been

^(r) *Rex v. Incedon*, 13 East, 164. Judgment was given that the defendant should pay a fine to the king of 6s. 8d. In *Rex v. Sir Joseph Mawbey and others*, 6 T. R. 619, it was held that a certificate by justices of the peace, that a highway indicted is in repair, is a legal instrument recognized by the court of law, and admissible in evidence after conviction when the court are about to impose a fine. In *Rex v. Wingfield*, 1 Blac. R. 602, where a person was convicted upon an indictment for not repairing a road *ratione tenuræ*, it was held that the court would not inflict a small fine, on a certificate of the road being repaired, until the prosecutor's costs were paid.

^(s) 1 Str. 686.

^(t) *Id. ib.*

^(u) By Lord Raymond and Reynolds, J., 1 Str. 688, 9.

^(v) By Lord Raymond, 1 Str. 688.

improperly indicted and convicted, and though, so lately as the year before the application to the Court of King's Bench, the magistrates had ordered an account to be taken of the *quantum* expended upon the repairs out of the money levied.^(w) In a case where although separate parts of a parish were bound to maintain their own roads, there had been an indictment and judgment against the parish generally, but such indictment was only known to and defended by that part of the parish in which the defective road lay, it was held that the justices might make a warrant to reimburse upon that part only; and the Court of King's Bench granted a mandamus to collect to the surveyor of that part only.^(x)

The 3 Geo. 4, c. 126, s. 10, provides for a portion of the fine being paid by the turnpike trustees when the highway shall be a turnpike road; and enacts, that when the inhabitants of any parish, township or place, shall be indicted or presented for not repairing any highway, being turnpike road, and the court, before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges, between such inhabitants and the turnpike *trustees as to the court shall seem just; and the court may order the treasurer of such turnpike road to pay the same out of the money then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the security of the creditors who have advanced their money upon the credit of the tolls. The true construction of a similar provision in the repeal act of 13 Geo. 3, was held to be, that the court which imposed the fine had the power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the Court of King's Bench by *certiorari*, it was held that the Court of King's Bench might apportion the fine.^(y)

Where turnpike roads are indicted, the court may apportion the fine and costs between the inhabitants and the trustees.
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If a turnpike road be out of the repair the inhabitants of the parish are liable to be indicted, although the tolls are appropriated by the act to the repair of the road, and the inhabitants in such case must seek relief under the 3 Geo. 4, c. 126, s. 10.^(z)

Where an indictment was preferred at the assizes under an order of two justices, pursuant to sec. 95 of the 5 & 6 Wm. 4, c. 50, and the defendants were found guilty upon the trial of the traverse at a subsequent assizes, it was held that the judge had no discretion, but was bound to award costs to the prosecutor.^(a) But where an indictment was preferred under a similar order, and tried at *nisi prius* after having been removed by *certiorari*, and the defendants acquitted on the ground that the road was not a highway, it was objected that the prosecutor was not entitled to cost under sec. 95 of 5 & 6 Wm. 4, c. 50: 1st, because that section only applied to cases where the publicity of the road was admitted, but the liability to repair disputed; 2dly, that the section did not apply to cases where the indictment was removed by *certiorari*;

(w) *Rex v. The Justices of Lancashire, East*, 366.

(x) *Rex v. Townsend, Dougl.* 421. The mandamus was special, stating the obligation to repair, and the situation of the road was indicted wholly in one part.

(y) *Rex v. Upper Papworth*, 2 East, R. 413.

(z) *Reg. v. Preston*, 2 Lew. 193. Alderson, B.

(a) *Reg. v. Yarkhill*, 9 C. & P. 218, Williams, J., after consulting the other judges of B. R. See the section, *ante*, p. 363.

3dly, that sec. 95 was to be construed together with sec. 98, and merely meant that where the defence was frivolous the costs were to be paid out of the fund there mentioned; and it was held that the prosecutor was not entitled to costs. (b) It has been held that the prosecutor is not entitled to costs unless the case be tried; if, therefore, the defendants plead guilty, he is not entitled to costs under his section. (c)

Court may
award costs
to the pro-
secutor.
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The 5 & 6 Wm. 4, c. 50, s. 98, enacts, "that it shall and may be lawful for the court before whom any indictment shall be preferred *for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious." (d) It was held under the 13 Geo. 3, c. 78, s. 64, which was similar to the 5 & 6 Wm. 4, c. 50, s. 98, that it was matter to be determined by inquiry, whether a person was or was not the prosecutor within that section; and that a court of quarter sessions, before whom a parish was acquitted upon the trial of an indictment for not repairing a highway, might, by their order, award C. and E. to pay costs to the parish, although the name of C. and E. were not on the back of the indictment, and although the indictment originated in a presentment of A. and B. constables whose names were on the indictment: and it was also held to be enough, if the order was entitled as in the prosecution of C. and E. without showing further that C. and E. were prosecutors; and that it need not appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and also that the order was good in form, if it was for the payment of the costs to the solicitor of the parish. (e) The repealed statute did not direct a certificate to be given in a precise form of words, in order to entitle the party to costs; therefore where the judge, on the trial of an indictment, certified that the defence was frivolous, without also awarding costs in express terms, it was held that the prosecutor was entitled to costs. (f)

Where at the trial the judge certified under the 13 Geo. 3, c. 78, s.

(b) *Reg. v. Chedworth*,^a 9 C. & P. 285. Pattenon, J., after consideration. I am not aware on which ground the costs were refused; his lordship, however, intimated that he thought the last point untenable; it was also objected, that as the order to indict the road did not follow the information, on which it was founded, in the description of the road, it was altogether a nullity, but the learned judge said he was inclined to think that when the justices had the case before them they might make any order respecting it which they thought fit. *Sed quære*, for the information on oath is the foundation of the magistrates' jurisdiction, and if they make an order, as they did in *Reg. v. Chedworth*, including a greater length of road than the information comprehends, *pro tanto* they are acting without any information at all. See *Rex v. Soper*,^b 3 B. & C. 957. C. S. G.

The ground upon which Pattenon, J., refused to order the costs to be paid by the parish, in *Reg. v. Chedworth*, was, that the jury found that the road indicted was not a highway. Per Lord Denman, C. J., in the argument in *Reg. v. Pembridge*, Hil. T. 1843, MSS. C. S. G.

And it has been held in several other cases, that where the parish are acquitted on the ground that the road indicted is not a highway, the court has not jurisdiction to award costs under the 5 & 6 Wm. 4, c. 50, s. 85. *Reg. v. Challicombe*, 2 M. & Rob. 311, note, Maule, J. *Reg. v. Paul*, 2 M. & Rob. 307, Maule, J. *Reg. v. Minstr*, *ibid.* 310, Gurney, B.

So a judge, who tries an indictment for non-repair at *Nisi Prius*, after a removal by *certiorari*, has no jurisdiction to award costs under that section. *Reg. v. Paul*, *supra*.

(c) *Reg. v. Aston*, Ingham, Hereford Summer Assizes, 1840. *Reg. v. Linton*, *ibid.* Williams, J., after consulting some of the other judges. The practice in these cases on the Oxford Circuit has been to put in and prove the information and order of the justices in the beginning of the case. The indictments have all been in the same form as before the passing of the act, without containing any mention of the order of justices. C. S. G.

(d) This section gives no costs in any case to the defendant. The 13 Geo. 3, c. 78, s. 64, gave them to the person indicted, where the prosecution was vexatious. C. S. G.

(e) *Rex v. Commerell*, 4 M. & S. 203.

(f) *Rex v. Clifton*, 6 T. R. 344.

^a Eng. Com. Law Reps. xxxviii. 123.

^b *Ib.* c. 253.

64, that the defence was frivolous, the prosecutor was entitled to costs, although the defendant obtained a rule to arrest the judgment. (g) The 13 Geo. 3, c. 78, s. 64, only applied to cases tried in the ordinary course; where, therefore, an indictment was removed by *certiorari*, and a new trial ordered, and the prosecutor's costs of both sides were to abide the event of the new trial, it was held that this special rule took away the judge's power to certify in favour of the defendant. (h)

Upon an indictment, which had been removed into the Court of King's Bench by *certiorari*, and been sent down for trial to the assizes, where the defendants were acquitted for want of prosecution, it was held, that the Court of King's Bench had no power under the repealed statute to award costs to the defendants on the ground of the prosecution having been vexatious, but that the application ought to have been made to the judge at *Nisi Prius*. (i)

But the judge on the trial of an indictment, preferred by order of two judges under the 5 & 6 Wm. 4, c. 50, s. 95, and removed by *certiorari* and tried at the assizes, has no authority to award costs under sec. 98, as that power is limited to the court, at which the indictment was preferred; (j) but in such a case the Court of Queen's Bench may award the costs to the prosecutor, for "the court before whom any indictment shall be preferred" includes the Queen's Bench. (k)

Where an indictment for the non-repair of a highway was removed by *certiorari*, from the crown side at the assizes by the prosecutor and tried at the assizes on the civil side, it was held that the judge who tried the case might, under the 5 & 6 Wm. 4, c. 50, s. 98, award the costs to the prosecutor, on the ground that the defence was frivolous and vexatious, and that he might also certify for the special jury, that tried the indictment, under the 6 Geo. 4, c. 50, s. 34. (kk)

An attachment may be issued against the defendant for non-payment of costs in such a case, and the prosecutor is not bound to proceed under the 5 & 6 Wm. 4, c. 50, s. 96, for their recovery. (l)

*The 5 Wm. & M. c. 11, s. 3, (which has been already cited) enacts, *376 that if the defendant, prosecuting such writ of *certiorari* as is mentioned in that act, "be convicted of the offence for which he was indicted, that then the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, &c., or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present" to be taxed, &c. Upon this statute it has been held, that a justice of the peace who *indicts* a road for being out of repair is entitled to his costs, after a removal of the indictment by *certiorari*, if the indictment be convicted. (ll) But the prosecutor must show himself to be the party grieved in order to obtain costs under his statute: therefore, in a case where he did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and it was stated, that while the highway was stopped, he had declared that

(g) *Rex v. Margate*, 6 M. & S. 130.

(h) *Rex v. Salwick*, 2 B. & Ad. 136.

(i) *Rex v. Chadderton*, 5 T. R. 272.

(j) *Reg. v. Preston*, 2 Mon & Rob. 137.

(k) *Reg. v. Preston*, 7 Dow. P. C. 593.

See *Rex v. Upper Papworth*, ante, p. 374.

(kk) *Reg. v. Pembridge*, Hil. T. 1843, MSS., C. S. G., overruling *Reg. v. Preston*, 2 M. & Rob. 137.

(l) *Reg. v. Pembridge*, E. T. 1843.

(ll) *Rex v. Kettleworth*, 5 T. R. 33.

he did not care about it, the court held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expense. *(m)* In a case where this statute was considered as a remedial law, *(n)* it was held that several persons were entitled to costs under it as prosecutors of an indictment, removed by *certiorari*, for not repairing a highway; one as constable of the manor within which the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. *(o)*

Expenses of defending prosecutions agreed upon at a vestry meeting, how to be paid.

The 5 & 6 Wm. 4, c. 50, s. 111, enacts, "that if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates authorized to be collected and raised by virtue of this act: provided nevertheless, that if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorized to make, collect, and levy an additional rate in the same manner as the rate by this act is authorized to be made for the repair of the highway."

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*Where two surveyors include in their accounts the expenses of supporting the appointment of one of them for a previous year against an appeal, which was dismissed, and also the expenses of opposing a rule for a *certiorari* to remove their accounts into the Queen's Bench, which rule was discharged, it was held that the justices had jurisdiction to allow these expenses under the 13 Geo. 3, c. 78, s. 48, although these expenses had not been agreed to by the inhabitants under s. 65. *(p)*

Not to extend to turnpike roads, or to roads under local acts.

By sec. 113, "nothing in this act contained shall apply to any turnpike roads, except where expressly mentioned, or to any roads, bridges, carriageways, cartways, horseways, bridleways, footways, causeways, churchways, or pavements, which now are or may hereafter be paved, repaired, or cleansed, or broken up, or diverted, under or by virtue of the provisions of any local or personal act or acts of Parliament."

Interpretation clause.

By sec. 5, "in the construction of this act the word 'surveyor' shall be understood to mean surveyor of the highways, or waywarden; the word 'parish' shall be construed to include parish, township, tithing,

(m) *Rex v. Inledon*, 1 M. & S. 268.

(n) By Lord Ellenborough, C. J., in conformity with the opinion of Lord Kenyon, C. J., in *Rex v. Kettleworth*, 5 T. R. 33, and contrary to the view taken of it by Buller, J., in *Rex v. Sharpness*, 2 T. R. 48, where that learned judge said, that the statute had always been construed as strictly as possible.

(o) *Rex v. Taunton St. Mary*, 3 M. & S. 465.

(p) *Rex v. Fowler*,^a 1 A. & E. 836; 3 N. & M. 826. Sections 48 and 65 of the 13 Geo. 3, c. 78, correspond with sections 45 and 111 of the new act.

^a Eng. Com. Law Reps. xxviii. 224.

rape, vill, wapentake, division, city, borough, liberty, market-town, franchise, hamlet, precinct, chapelry, or any other place or district maintaining its own highways; and wherever any thing in this act is prescribed to be done by the inhabitants of any parish in vestry assembled, the same shall be construed to extend to any meeting of inhabitants contributing to the highway rates in places where there shall be no vestry meeting, provided the same notice shall have been given of the said meeting as would be required by law for the assembling of a meeting in vestry; and that the word 'highways' shall be understood to mean all roads, bridges, (not being county bridges,) carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements; and that the word 'justices' shall be understood to mean justices of the peace for the county, riding, division, shire, city, town, borough, liberty, or place in which the highway may be situate, or in which the offence may be committed; and that the word 'church' shall be understood to include chapel; and that the word 'division' shall be understood to include limit; and that the word 'owner' shall be understood to include occupier; and 'inhabitant' to include any person rated to the highway rate; and the words 'petty session' or 'petty sessions' to mean the petty session or petty sessions held for the division or place; and wherever in this act, in describing or referring to any person or party, animal, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and shall be applied to several persons or parties as well as one person or party, and females as well as males, and several animals, matters or things, as well as one animal, matter, or thing, respectively, unless there be something in the subject or context repugnant to such construction; and all the powers hereby given to, and notices, matters, and things required for, and duties, liabilities, and forfeitures imposed on, surveyors, shall be applicable to all persons, bodies corporate or politic, liable to the repair of any highway."

*SECT. III.

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Of Nuisances to Public Rivers.(A)

IN books of the best authority a *river* common to all men is called a Rivers considered as highway;(a) and if it be considered as a highway, any obstructions, highways. by which its course and the use of it as a highway by the king's sub-

(a) 1 Hawk. P. C. c. 76, s. 1, citing 27 Ass. 23. Fitz. 279. 2 Com. Dig. 397. Williams v. Wilcox,^a 8 A. & E. 314. And see Anon. Loft, 556.

(A) In the case of the *Commonwealth v. Ruggles*, 10 Mass. Rep. 391, it was decided, that the provincial statute of 8 Anne, c. 3, to prevent nuisances by hedges and other incumbrances obstructing the passage of fish in rivers, is still in force; and as the statute declares that all such obstructions are common nuisances, an indictment as for a nuisance will lie against any one who shall erect them, the special remedy provided by the statute for demolishing them being merely cumulative.

The Hudson, even above tide-water, is a public river. *Palmer v. Mulligan*, 3 Caines's Rep. 307.

A public right is acquired by the use of a river (which is not a public highway) for more than twenty-six years; the navigation of which cannot be obstructed by the owners of dams. *Shaw v. Crawford*, 10 Johns. Rep. 235.

The erection of a dam on a river not navigable is not indictable as a public nuisance,

^a Eng. Com. Law Repts. xxxv. 396.

jects are impeded, will fall within the same principles as those which relate to public roads, and which have been considered in the preceding section of this chapter. But it should be observed that a learned judge appears to have considered a river as differing, in some respects, at least, from a highway, where he is reported to have said, "*Callis* compares a navigable river to a highway: but no two cases can be more distinct. In the latter case, if the way be foundrous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands."(*b*) In the same case the court decided, that the public are not entitled at common law to tow on the banks of ancient navigable rivers.(*c*)

Where the course of a river is changed, it is still a highway.

It has been before observed, that a highway may be changed by the act of God; and upon the same principle it has been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old.(*d*) It has been held that the soil of a navigable river *primâ facie*, though not necessarily, belongs to the king; and it is not by presumption of law in the owners of the adjoining lands.(*e*)

How public right to navigate a river may be destroyed.

The public right of navigation in a river or creek may be extinguished either by act of parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea, and the accumulation of mud or sand. Where therefore a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel, at the time when the road was made, cannot be proved, in favor of the existing state of things, it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance of the navigation.(*f*) Every creek or river, into which the tide flows, is not on that account necessarily a public navigable channel, although sufficiently large for that purpose, but the flowing of the tide into such a creek or river is strong *prima facie* evidence that it is a public navigation.(*g*)

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Obstruction in public rivers.

*It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burden as it could before.(*h*) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party,

(*b*) By Buller, J., in *Ball v. Herbert*, 3 T. R. 263. See *Williams v. Wilcox*, 8 A. & E. 314, *post*, p. 382.

(*c*) *Ball v. Herbert*, 3 T. R. 253.

(*d*) 1 Hawk. P. C. c. 76, s. 4. 22 Ass. 93. 1 Roll. Abr. 390. 4 Vin. Ab. *Chemin*, (A).

(*e*) *Rex v. Smith*, Dougl. 441, but this seems not free from doubt. See *Williams v. Wilcox*, *post*, p. 382, Reg. v. Wharton, 12 Mod. 610, as to private rivers.

(*f*) *Rex v. Montague*,* 4 B. & C. 599.

(*g*) *Ibid.*, per Bayley, J., citing the Mayor of Lynn v. Taylor, Cowp. 86, and Miles v. Rose, 5 Taunt. 706.

(*h*) 1 Hawk. P. C. c. 75, s. 11.

either at the common law, or under the statute for the preservation of fish in certain cases, passed the 3d April, 1801. *The People v. Platt*, 17 Johns. Rep. 195. {See also *Commonwealth v. Chapin*, 5 Pick. 199. *Hooker v. Cummings*, 20 Johns. Rep. 90. *Adams v. Pease*, 2 Connect. Rep. 481. *Commonwealth v. Charlestown*, 1 Pick. 180. 4 ib. 460, *Commonwealth v. Breed*. *Carson v. Blazer*, 2 Bin. 495. *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & Rawle, 71. *Commonwealth v. Shaw*, 14 Serg. & Rawle, 9. *Executors of Coates v. Waddington*, 1 M'Cord, 580. *Scott v. Wilson*, 3 N. Hamp. R. 321. *Arnold v. Mundy*, 1 Halstead's Rep. 1.}

* Eng. Com. Law Reps. v. 413.

as if it were not his, if thereby the passage of vessels is obstructed.(i) The placing of floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships;(j) and the bringing a great ship into Billingsgate dock, which, though a common dock, was common only for small ships coming with provisions to the markets in London, appears to have been considered as a nuisance, in the same manner as if a man were so to use a common pack and horseway with his cart, as to plough it up, and thereby render it less convenient to riders.(k) And the erection of *weirs* across rivers was reprobated in the earliest periods of our law. "They were considered as public nuisances. The words of Magna Charta are, that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England, &c." And this was followed up by subsequent acts treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening or enlarging of those which had aforesaid existed.(l) Upon the principle, therefore, which has been before stated(m) that the public have an interest in the suppression of public nuisances, though of long standing, it was held that a right to convert a brushwood into a stone weir (whereby fish would be prevented from passing, except in flood times,) was not evidence by showing that forty years ago two-thirds of it had been so converted without interruption.(n) So in a more recent case it was holden, that twenty years' possession of the water at a given level was not conclusive as to the right. Abbott, C. J., said, "If it be admitted that this is a public navigable river, and that all his majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years, would not have the effect of preventing his majesty's subjects from using it as such."(o) But where there was a grant of wreck from Henry 8, to the Abbey of Cerne by all their lands upon the sea confirmed by *inspeximus* by Henry 8, and also a grant from Henry 8, of the island of Brownsea and the shores thereof, belonging to the late monastery of Cerne, together with wreck, &c.; and there was also evidence that between forty and fifty years ago the proprietor of the island of Brownsea raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil without opposition; it was holden, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in the grants, served to establish such right. If, however, *it had appeared that the public had a right to fish over the place in question, prior to the forty years, and that the raising the bank was an act of usurpation, the exclusive right would not have been established.(p)

At common law every holder of lands adjoining to a river or brook has a right to raise the banks of the river or brook, upon his own lands

(i) Bac. Abr. tit. *Nuisance* (A), where it is also said, "And hence it seems to follow that private stairs from those houses that stand by the Thames into it are common nuisances. But it seems that where there are cuts made in the banks that are not annoyances to the river, the timber lying there is no nuisance."

(j) Anon. Surrey Ass. at Kingston, 1785, cited in the notes to 1 Hawk. P. C. c. 75, s. 11.

(k) Reg. v. Leech, 6 Mod. 145. Bac. Abr. tit. *Nuisance*, (A).

(l) By Lord Ellenborough, C. J., in *Weld v. Hornby*, 7 East, 198, 199.

(m) *Ante*, p. 330.

(n) *Weld v. Hornby*, 7 East, 195.

(o) *Vooght v. Winch*, 2 B. & A. 662.

(p) *Chad v. Tilsed*,^a 5 Moore, 185.

^a Eng. Com. Law Reps. vi. 171,

At common law the holders of lands adjoining a river have right to raise banks on their own lands to confine the flood-water provided they do not thereby injure the lands of others.

so as to confine the flood-water within the banks, provided he does not thereby occasion injury to the lands or property of other persons; and if such right has been exercised before the passing of an act authorizing the making of a public navigable canal, the exercise of such right after the making of the canal will not be a nuisance, although it may be injurious to the canal, as the construction of the canal may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed when the act passed, except so far as the act may have restrained such rights.

Upon an indictment for a nuisance to a public canal navigation established by act of parliament, it was found by a special verdict that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that, except for the nuisance after-mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of the water; that the defendants, occupiers of lands adjoining the river and brook, had for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, created or heightened, certain artificial banks, called fenders, on their respective properties, so as to prevent the flood-water from escaping as aforesaid, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endanger them, and obstruct the navigation: that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation. It was held, by the King's Bench, that the defendants were not justified under these circumstances in altering for their own benefit the course, in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and consequently that an indictment will lay where the act affected the public. (q) But the Court of Exchequer Chamber, although they agreed in the principle that the ancient course and outlet of the flood-water had been obstructed by the wrongful raising from time to time of the fenders by the defendants, upon which the judgment of the King's Bench *proceeded, held that the special verdict ought to have found, 1st, whether the raising fenders was an ancient and rightful usage, or whether it had been commenced since the construction of the canal. For there was no doubt that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing

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(q) *Rex v. Trafford*,^a 1 B. & Ad. 874. The jury also found that the acts creating the nuisance were done by the defendants severally, and it was held, that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several.

^a Eng. Com. Law Reps. xx. 498.

their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction of the aqueduct and embankment might be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the act might have restrained the exercise of such rights. 2ndly. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course. And, 3dly, whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct.(r)

It is no defence to an indictment for a nuisance in a navigable river and port, to prove that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the river. Where, therefore, a causeway had been made in the river Medina, which was an inconvenience to the navigation, as small vessels were much obstructed in making their way up with the tide, but it was a great benefit to the public: first, in launching and landing boats more readily; secondly, steam-boats and other vessels could approach where they could not before; thirdly, vessels obtained shelter from the quay; and the jury found it to be a nuisance, but added the inconvenience was counterbalanced by the public benefit arising from the alteration; it was held that this finding amounted to a verdict of guilty.(s) But there may be cases where the injury to the public is too small to support an indictment. Upon the trial of an indictment for a nuisance to a harbour by erecting and continuing piles and planking in the harbour, and thereby obstructing it and rendering it insecure, it was found by a special verdict, that "by the defendant's works, the harbour is in some extreme cases rendered less secure;" and it was held that the defendant could not be made criminally responsible for consequences so slight, uncertain, and rare, as were stated by this verdict to result from his works.(t)

Where on an indictment for a nuisance, in building a wharf in the navigable river Itchen, it appeared that the wharf was built between high and low water mark, and projected over a portion of the river on which boats formerly passed; and for the defence, it was shown that, before the erection of the wharf, there was no means of unloading trading vessels in the river, except by lightening them in the middle of the stream, and then getting them at high water on to the mud between high and low watermark; but since the erection of the wharf, such vessels had been unloaded at it, and thus the centre of the river was kept clear, and the general navigation was improved. Wightman, J., left it to the jury to say whether the wharf itself occasioned any hindrance or impediment whatever to the navigation of the river by any descriptions of vessels or boats; and told them that they were not to take into consideration the circumstance that a benefit had resulted to the general navigation of the river by the mid-channel being kept clear.(tt)

By the 1 Eliz. c. 17, the taking of fish, except with the particular

(r) *Trafford v. Rex*,^a 8 Bingham R. 204 *Venire de novo* awarded.

(s) *Rex v. Ward*,^b 4 Ad. & E. 384; 6 N. & M. 38, overruling *Rex v. Russell*,^c 6 B. & C. 566; 9 D. & R. 566. See *Rex v. Morris*,^d 1 B. & Ad. 441.

(t) *Rex v. Tindal*,^e 6 A. & E. 143; 1 N. & P. 719. (tt) *Rex v. Randall*,^f 1 C. & Mars. 496.

^a Eng. Com. Law Reps. xxi. 272. ^b Ib. xxxi. 92. ^c Ib. xiii. 254. ^d Ib. xx. 421.

^e Ib. xxxiii. 26.

^f Ib. xli. 272.

Cases held not to be obstructions.

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A weir obstructing the whole or part of a navigable river is legal if granted by the crown before the reign of Edward I.

trammels or nets therein specified, was prohibited, upon pain of the forfeiture of a certain penalty, of the fish taken, and also of the unlawful engines; and upon this act it was contended, that a party laying certain illegal engines called *bucks* in his own fishery, was guilty of a nuisance; but the court held that it could not be considered as a nuisance public or private.^(u) And it has *been ruled that where a vessel has been sunk in a navigable river by accident and misfortune, no indictment can be maintained against the owner for not removing it.^(x) Lord Kenyon, C. J., said, that the grievance had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment for what had proceeded from causes against which he could not guard, or which he could not prevent: and though it was urged that if the defendant was not punishable for having caused the nuisance, yet it was his duty to have removed it, and that he was liable to be indicted for not having done so, the learned judge said, that perhaps the expense of removing the vessel might have amounted to more than the whole value of the property; and that he was therefore of opinion, that the offence charged was not the subject of indictment.^(y)

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward I., and such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to obstruct a part by erecting a weir, except subject to the rights of the public; and, therefore, in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. In an action of trespass for throwing down a weir, the plaintiff established the existence of the weir by a royal grant made at some time prior to the time of Edward I.; but it stood across part of the Severn, a public navigable river—a part, indeed, not required for the purpose of navigation at the date of the grant, but, at the time of the commission of the trespass, necessary for those purposes, by reason of the residue of the channel having become choked up. The plaintiff contended that, at the date of the grant, the crown had the power of making it, even to the disturbance or total prevention of the right of navigation by the subject; or that at all events, it had the power of making such a grant, if, in the then existing state of circumstances, it did not interfere with the rights of the subject: and that such a grant, valid in its inception, would not become invalid by reason of any change of circumstances, which might afterwards affect the residue of the channel. Lord Denman, C. J., in delivering the judgment of the court, said, “If the subject (which this view of the case concedes) had by common law a right of passage in the channel of the river, paramount to the power of the crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The nature of the highway which a navigable river affords, liable to be affected by natural and uncontrollable causes, presenting conveni-

(u) *Bulbrooke v. Sir R. Goodere and others*, 3 Burr. 1768.

(x) *Rex v. Watts*, 2 Esp. R. 675.

(y) *Id. ibid.*

ences in different parts and on different sides according to the changes of wind or direction of the vessel, and attended by the important circumstance that on no one is any duty imposed by *the common law to do that would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel,—all these considerations make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks. It cannot be disputed that the channel of a public navigable river is a king's highway, and is properly so described; and, if the analogy between it and a highway by land were complete, there could be no doubt that the right would be such as we now lay down; for the right of passage in a highway by land extends over every part of it. Now, although it may be conceded that the analogy is not complete, yet the very circumstances pointed out by the counsel for the plaintiff, in which it fails, are strong to show that in this respect at least it holds. The absence of any right to go *extra viam* in case of the channel being choked, and the want of a definite obligation on any one to repair, only render it more important in order to make the highway an effectual one, that the right of passage should extend to all parts of the channel. If, then, *subject to this right*, the crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows, from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case, the subject has not at this moment the right to use that part of the channel on which the weir stands, it is only because of the royal grant; and that grant must then be alleged at its date to have done away for ever, in so much of the channel, the right of the public: but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir subject to the necessities of the public when they should arise; for, the right of the public being supposed to be paramount by law, the grantee must be taken to be cognizant of such right; and the same natural peculiarities, and the same absence of any obligation by law on any one to counteract those peculiarities above-mentioned, would give him full notice of the probability that at some period his grant would be determined. We do not therefore think that the plaintiff can sustain his second point."

With regard to the power of the crown at common law to interfere with the channels of public rivers, Lord Denman, C. J., said, "On the one side the contention is, that prior to Magna Charta, the power of the crown was absolute over them; and that this weir, by the antiquity assigned to it by the finding of the jury, is saved from the operation of that or any succeeding statute; while, on the other, it is alleged that they are and were highways to all intents and purposes, which the crown had no power to limit or interfere with, and that as well the restraints enacted by, as the confirmations implied from, the statutes alluded to have nothing to do with the present question.

"After an attentive examination of the authorities and the statutes referred to in the argument, we cannot see any satisfactory evidence that the power of the crown in this respect was greater at the common law before the passing of Magna Charta than it has been since. *It is clear

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that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was presumably in the crown; and above that point, whether the soil at common law was in the crown or the owners of the adjacent lands (a point perhaps not free from doubt,) there was at least a jurisdiction in the crown, according to Sir Matthew Hale, 'to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats:' *De Jure Maris*, Part I., c. 2.(z) In either case the right of the subject to pass up and down was complete. In the case of the *Bann Fishery*,(a) where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by *the king's permission*, for the ease and commodity of the people; but, if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy, and interior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right existing, and in direct opposition to that duty, which the law casts on the crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been at its inception valid at common law. Nor can we find, in the language of the statute referred to, any thing inconsistent with this conclusion. They speak indeed of acts done in violation of this public right; but they do not refer them to any power legally existing in the crown, which for the future they propose to abridge. We are, therefore, of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the crown in the time of Edward I., which is now taken away. But this does not exhaust the question; because that which was not legal at first may have been subsequently legalized.

"The learned counsel for the defendants is probably correct in saying, that the twenty-third chapter of Magna Charta may be laid out of the case. The *kidelli* there spoken of appear, from the 2 *Inst.* 38, and the *Chester Mill Case*,(b) to have been open weirs erected for the taking of fish; and the evil intended to be remedied by the statute was the unlawful destruction of that important article of consumption. That statute, therefore, being pointed at another mischief, might leave any question of nuisance by obstruction to the passage of boats exactly as it stood at common law. But the same remark does not apply to 4 stat. 25 Edw. 3, c. 4. That begins by reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the inhancing (a mistranslation of the word *lever* for levying or setting up,)(c) of gorges, mills, weirs, stanks, and kiddles, and then provides for the utter destruction of all such as have been levied and set up in the time of Edw. 1. and after. It further directs that writs shall be sent to the sheriffs of the places where need shall be, to survey and inquire, and to do thereof execution: and also the justices shall be thereupon assigned at all times that shall be needful. It is clear, *we think, that, in any criminal proceeding for the demolition of this weir which had been instituted immediately after the passing of this statute, it would have been

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(z) Page 8.

(a) Davies's Reports, 57 a.

(b) 10 Rep. 137 b.

(c) Corrected in the translation of stat. 45 Ed. 3, c. 2, (recital).

a sufficient defence to have shown its erection before the the time of Edw. I. ; and, considering the conciso language of statutes of that early period, we think the statute would equally have been an answer in any civil proceeding at the suit of a party injured. Assuming the weir to have been illegally erected before the date of Magna Charta, it is not unreasonable to suppose that a sort of compromise was come to : similar nuisances were probably very numerous ; but they were probably, many of them, of long standing : it may have been impossible to procure, or it may well have been thought unreasonable to insist on, an act which should direct those to be abated which had acquired the sanction of time : and a line was therefore drawn which, preventing an increase of the nuisance for the future, and abating it in all the instances which commenced within a given period, impliedly legalized those which could be traced to an earlier period. This appears to us the proper effect to be attributed to the statute ; and, if it be, it disposes of any difference between a criminal and a civil proceeding. The earlier weirs were not merely protected against the specific measures mentioned in the act, but rendered absolutely legal. If this would have been a good answer immediately after the act passed, it is at least equally good now ; and therefore, of stat. 45 Edw. 3, c. 2, and stat. 1 H. 4, c. 12, it is unnecessary to say more than that they do not at all weaken the defence which the defendants have under the former statute.”(d)

It is said to have been adjudged that if a river be stopped, to the nuisance of the country, and none appear bound by proscription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it.(e) For nuisances in the nature of obstructions an indictment will of course lie, if the river be such as may be considered a public highway.

Of liability to clear the passage of a river, and of indictment for obstructing it.

SECT. IV.

Of Nuisances to Public Bridges.

THE more ancient cases do not supply any immediate definition or description in terms of what shall be considered “public bridges.” But a distinction between a public and private bridge is taken in one of the books,(f) and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes : and though the words “public bridges” do not occur in the 22 Hen. 8, c. 5, (called the statute of bridges,) yet as the statute empowers the justices of the peace to inquire of “all manner of annoyances of bridges broken in the highways,” and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge in a highway is a public bridge for all purposes of repair connected with that statute. And “if the meaning of the words *public bridge* could properly be derived from any other less authentic source than this *statutable one, they might safely be defined to be such bridges as all his

Of public bridges.

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(d) Williams v. Wilcox, 8 Ad. & D. 314.

(e) 1 Hawk. P. C. c. 75, s. 13. Bac. Abr. tit. Nuisance, (C). 37 Ass. 10. 2 Roll. Abr. 137.

(f) 2 Inst. 701.

* Eng. Com. Law Repts. xxxv. 396.

majesty's subjects had used freely and without interruption, as of right, for a period of time competent to protect themselves, and all who should thereafter use them, from being considered as wrong doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned." (g)

A corporation aggregate, or a railway company, are liable to be indicted for the non-repair of bridges which it is their duty to repair. (gg)

Of private bridges.

But a bridge built for the mere purpose of connecting a private mill with the public highway, or for any other such merely private purpose, would not necessarily become a part of the highway, although the public might occasionally participate with the private proprietor in the use of it; and it is not every sort of bridge, erected possibly for a temporary purpose, during a time of flood, that may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, which can be considered as a *bridge in a highway*, to be repaired, when broken down, according to the provisions of the statute of bridges." (h)

Whether a structure be a bridge is a question of fact.

It is a question of fact, whether a particular structure be a bridge or not: and upon a question whether an arch be a bridge or culvert, the fact that it is built over a stream of water flowing between banks, is not decisive to show that it is a bridge; although there must be such a stream for the structure to be a bridge. Neither is it decisive that it is not a bridge, that there are no parapets to it. (i)

The county is bound to repair such bridges only as are over *flumen vel cursus aque*, i. e. water flowing in a channel between banks more or less defined, not arches over meadow.

The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of *flumen vel cursus aque*, that is, water flowing in a channel between banks, more or less defined, although such channel may be occasionally dry; they are, therefore, not bound to repair arches in a raised causeway more than three hundred feet from the end of a bridge, through which the water passes in flood times only. Where a road in continuation of a bridge over a river, ran through low meadow ground, liable to be flooded by the river, for five hundred and seventy-six feet from the foot of the bridge, and formed a causeway, in which were placed, at different intervals, five arched openings, two of which were within three hundred feet of the bridge, which the county had always repaired, and the other three more than three hundred feet from the foot of the bridge, and the arches were built not over the ordinary stream or course of the river, but over solid meadow ground, which was subject to be much flooded, and there was generally a strong current in winter through the arches, which, by giving vent to the flood water, helped to protect the bridge, which would be in danger from the penning up of the water if the causeway had no arches; it was held that the county was not liable to repair the arches which were more than three hundred feet from the foot of the bridge. The ancient form of indictment, as mentioned in 2 Inst. 701, is *quod pons publicus et communis situs in altâ regiâ via super flumen seu*

(g) By Lord Ellenborough, C. J., in *Rex v. The Inhabitants of Bucks*, 12 East, 204.

(gg) *Reg. v. Birmingham and Gloucester Railway Company*,^a 9 C. & P. 469. Parke, B., and the court of Queen's Bench afterwards decided the same point in the same case upon demurrer.

(h) *Rex v. The Inhabitants of Bucks*, 12 East, 203, 204.

(i) *Rex v. Whitney*,^b 3 A. & E. 69; 7 C. & P. 208.^c The structure in question in this case was an arch of nine feet span, over a stream, which fed a mill, and which was usually about three feet deep, but occasionally shallower, and in flood times much deeper, and it had no battlements at either end; the jury having found a verdict of guilty upon an indictment treating this structure as part of the road, the court refused a rule for a new trial.

^a Eng. Com. Law Repts. xxxviii. 187.

^b Id. xxx. 33.

^c Ib. xxxii. 493.

cursum aquæ, &c., and although *in many indictments in modern times, the words *super flumen, &c.*, are omitted, yet in such indictments they must be considered as virtually included in the true import of the term bridge; for otherwise all such indictments would be bad, there being many structures, bearing the name of bridge, erected across a steep ravine, and in modern times over an ancient road, crossed in a transverse direction by a new road, having no reference to water, and which unquestionably the county is not bound to repair: and no more certain rule can be laid down than that the words *flumen cursum aquæ* are to be considered to denote water, flowing in a channel between banks, more or less defined, although such channel may be occasionally dry. (j)

Where on an indictment for not repairing a highway, next adjoining to each end of West Warmley bridge, in the county of Gloucester, it appeared that the bridge was built before the 43 Geo. 3, c. 59: and it conveyed the turnpike road at a level from Bristol to Marshfield, between parapet walls over a stream of water: which at the place where West Warmley bridge crossed it, was confined between banks, which prevented its overflowing the adjacent land in the winter, when the water averaged two feet and a half in depth; but the stream was never dry at any time of the year; Cresswell, J., told the jury that if they were satisfied that this structure was a bridge, their verdict must be for the crown. If it had been erected for the convenience of the public in passing over the stream of water, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built. (jj)

As there may be a dedication of a road to the public, (k) so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. (l) And though, where there is such a dedication, it must be absolute, (m) yet it may be definite in point of time; so that a bridge may be a public bridge, if it be used by the public at all such times only as are dangerous to pass through the river. (n) A bar across a public bridge, kept locked, except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times;

Dedication of a bridge to the public.

(j) *Rex v. The Inhabitants of Oxfordshire*,^a 1 B. & Ad. 289. The county had previously been indicted for not repairing two of the same arches, which were described in the indictment as bridges, and on a special case it was held that there was not sufficient to show that they were bridges, which the county was liable to repair, as the jury had not found either that they were erected at the same time as the bridge over the river, or for the purpose of enabling the public to pass, and not for the benefit of the owners of the adjoining lands. *Rex v. The Inhabitants of Oxfordshire*, 1 B. & Ad. 297. The indictment of *Rex v. Oxfordshire*, 1 B. & Ad. 289, contained six counts, all of which charged the non-repair of a bridge, varying the description in each count.

(jj) *Reg. v. The Inhabitants of Gloucestershire*,^b 1 C. & Mars. 506.

(k) *Ante*, 334, *et seq.*

(l) *Rex v. The Inhabitants of Glamorgan*, 2 East, 356. *Glusburne Bridge case*, 5 Burr, 2594. 2 Blac. R. 687. *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East, 342. And see *post* 394, *et seq.*

(m) According to the doctrine in *Roberts v. Carr*, 1 Cambp. 362, in the note. And see *ante*, 335.

(n) *Rex v. The Inhabitants of Northampton*, 2 M. & S. 262. In *Rex v. Devonshire*,^c R. & M., N. P. C. 144, Abbott, C. J., held that the county were liable to repair a bridge by the side of a ford, which was only used by the public in times of floods, which made the ford impassable, as the bridge was at all times open to the public.

^a Eng. Com. Law Repts. xx. 389.

^b Ib. xli. 277.

^c Ib. xxi. 401.

and if an indictment for not keeping it in repair, states that it is used by the king's subjects, "at their free will and pleasure," the variance is fatal.(o)

A bridge may be indictable as a nuisance.

But a bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.(p)

Of nuisances to bridges by obstructions.

Where a bridge is, in the sense which has been described, a bridge *in a highway*, it will of course, be as public as the highway itself in which it is situate, and of which, for the purpose of passage, it must be understood to form a part.(q) All actual obstructions, therefore, to such bridges will come within the rules already *stated with respect to nuisances to highways by obstruction,(r) and do not require a repetition in this place. There is, however, one case not previously mentioned, where the defendant was indicted for not repairing a house adjoining to a public bridge, which he was bound to repair *ratione tenuræ*, but permitted it to be so much out of repair that it was ready to fall upon people passing over the bridge. It was found by a special verdict that the defendant was only a tenant at will, of the house: but the court adjudged that he ought to repair, so that the public should not be prejudiced; and though not properly chargeable to repair the house *ratione tenuræ*, yet that the averment should be intended of the possession, and not of the service.(s)

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Of nuisances to bridges by not repairing them.

The nuisances which more frequently arise to the public in respect of bridges are in the nature of *non-feasance*, from the neglect of the parties, upon whom the burden is thrown, to keep them in a proper state of repair.

The county is of common right liable to the repair of all public bridges; but they may show that others are liable.

As parishes are bound to repair the public ways within their district; so the inhabitants of the county at large are *prima facie* and of common right, liable to the repair of the public bridges within its limits, unless they can show a legal obligation on some other persons or public bodies to bear the burden;(t) and this without any distinction as to foot, horse, or carriage bridges.(u) The statute of bridges shows that the burden is *prima facie* on the county; and it is exactly analogous to the liability of the parish to repair a road.(v) But a hundred or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it.(w) And a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any other persons by reason of

(o) *Rex v. The Marquis of Buckingham*, 4 Campb. 189.

(p) *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East, R., 342. But see *post*, p. 396, 43 Geo. 3, c. 59, s. 5, as to the liability of counties to repair bridges thereafter to be erected.

(q) *Rex v. The Inhabitants of Bucks*, 12 East, 202, 208.

(r) *Ante*, 347, *et seq.*

(s) *Reg v. Watson*, 2 Lord Raym. 856.

(t) 2 Inst. 700, 701, in the comment on the statute of bridges, 22 Hen. 8, c. 5. The repair of public bridges was part of the *trinoda necessitas*, to which by the ancient law, every man's estate was liable namely, *expeditio contra hostem, arcium constructio, et pontium reparatio*.

(u) By Lord Ellenborough, C. J., in *Rex v. The Inhabitants of Salop*, 13 East 97. The point was not argued, as it was brought before the court by a special case, reserved upon the trial of an indictment at the sessions, which the court considered as a very great irregularity, and did not pronounce any judgment.

(v) By Bayley, J., in *Rex v. The Inhabitants of Oxfordshire*, 4 B. & C. 196.

(w) *Rex v. Hendon*, 4 B. & Ad. 628. *Rex v. Ecclesfield*, 1 B. & Ad. 359. *Per Cur.*, and this without stating any other ground than immemorial usage.

^a Eng. Com. Law Reps. x. 310.

^b Ib. xxiv. 128.

such special tenure, may be compelled to repair them.(x) And if a part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much : also by a special tenure a person may be charged with the repairs of one part of a bridge, and the inhabitants of the county be liable to repair the rest.(y) A prescription, that the lords of the manor ought to repair a bridge is good, being laid *ratione tenuræ*, by reason of the demesne of the manor.(z) And, as the obligation *is by reason of the demesnes of the manor, if part of the demesnes be granted to an individual, he will be obliged to contribute to the repairs: but the indictment may be against any of the tenants of the demesnes, and it will be no defence of an indictment against one of them that another is also liable.(a) And where an individual is liable to repair a bridge, his tenant for years, being in possession, will be under the same obligation, and liable to an indictment for the neglect.(b) We have seen that the inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot *qua* inhabitants hold lands : and that a district cannot be charged by prescription alone, without a consideration, to repair what is not within such district.(c) As the burden resting upon the county to repair the public bridges is exactly analogous to the liability of a parish to repair a road, it is not removed by an act of parliament directing trustees to lay out the tolls thereby granted in repairing roads, and empowering them to make and repair bridges. To an indictment against a county for not repairing a bridge in a public highway, there was a plea that, by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges ; that the bridge in question was erected by the trustees under and by virtue of that act ; that the trustees had been liable to repairs, and had repaired the bridge from the time it was so erected ; and that they were still liable to keep it in repair : the replication traversed that they were so liable ; and the court held that the bridge having been erected for public purposes, in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built ; and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.(d)

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Liability not removed by an act of parliament.

(x) 1 Hawk. P. C. c. 77, s. 2. Bac. Abr. tit. *Bridges*. A body politic may be bound either *ratione tenuræ sive præscriptionis* : but a private person does not appear to be liable upon a general prescription. 2 Inst. 700. 13 Co. 33. 1 Salk. 358 ; 3 Salk. 77, 381, and see *ante*, 356.

(y) Bac. Abr. tit. *Bridges*. 1 Hawk. P. C. c. 77, s. 1.

(z) Reg v. Sir John Bucknall, 2 Lord Raym. 804. In the first instance, at *Nisi Prius*, (2 Lord Raym. 792,) Holt, C. J., ruled that the prescription was good without saying *ratione tenuræ*, on the ground that the manor might have been granted to be held by the service of repairing the bridge before the statute *quia emptores terrarum*, or that the king might make such a grant, he not being bound by the statute ; but he afterwards changed his opinion.

(a) Id. *ibid.* 792. Reg. v. The Duchess of Buccleugh, 1 Salk. 358. And see *ante*, 358.

(b) Reg v. Sir John Bucknall, 2 Lord Raym. 804. And see Reg v. Watson, 2 Lord Raym. 856, *ante*, 358. See also *ante*, 365.

(c) Rex v. Machynlleth, *ante*, 358.

(d) Rex v. The Inhabitants of Oxfordshire, 4 B. & C. 194. And it seems that even if the fact of adequate funds in the hands of the trustees had been averred and proved, the county would still have been primarily liable, and must have taken their remedy against the trustees. Bayley, J., said, "It was necessary to allege in the plea, and prove at the trial, that the trustees had funds adequate to the repair of the bridge. Even then, I think, a valid defence would not have been made out ; for the public have a right to call upon the

Stratford-upon-Avon case. Immemorial corporation liable in their corporate character to the repair of a bridge.

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In one case a question was made as to the evidence on which a jury might find that the defendants were an immemorial corporation, and liable, in their corporate character, to the repair of a bridge. The evidence was of a charter of Edward 6, granted upon the recited prayer of the *inhabitants* of the borough of *Stratford-upon-Avon*, "that the king would esteem them, the inhabitants, worthy to be *made, reduced and erected*, into a body corporate and politic; and thereupon proceeded to "*grant* (without any word of *confirmation*) unto the *inhabitants* of the borough, that the same borough should be a free borough for ever thereafter; "and then proceeding to incorporate them by the name of the *baliffs* *and *burgesses*, &c.; and this, it was considered, would, without more, imply a new incorporation. But the same charter recited that it was an *ancient borough*, in which a guild was therefore founded, and endowed with lands out of the *rents, revenues and profits*, of which a school and an alms-house were maintained, and *a bridge was from time to time kept up and repaired*; which guild was then dissolved, and its lands lately come into the king's hands; and further recited that *the inhabitants of the borough, from time immemorial*, had enjoyed *franchises, liberties*, free customs, *jurisdictions*, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, and *otherwise*, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the *borough* and its *government* would fall into a worse state without speedy remedy; and that thereupon, *the inhabitants of the borough* had prayed the king's favour (for *bettering the borough and government thereof*, and for *supporting the great charges* which from time to time they were bound to sustain,) to be deemed worthy to be made, &c., a body corporate, &c.: and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough and the jurisdiction thereof from time immemorial* had extended to: and then "willing that the *alms-house* and *school* should be kept up and maintained as theretofore, (without naming the *bridge* and that the great charges to the borough and its inhabitants from time to time *incident* might be thereafter *better sustained and supported*, granted to the corporation the lands of the late guild. There was also evidence by parol testimony, as far back as living memory went, that *the corporation* had always *repaired the bridge*. And the court held that, taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was a *corporation by prescription*, though words of creation only were used in the incorporating part of the charter of Edw. 6; and, secondly, that the burden of repairing the bridge was upon such prescriptive corporation, during the existence of the guild, before that charter; though the guild out of their revenues had, in fact, repaired the bridge, but only in ease of the corporation, and not *ratione tenuræ*; and that the corporation was still bound *by prescription*, and not merely by *tenure*. A verdict therefore against them upon an indictment for the non-repair of the bridge, charging them as *immemorially bound* to the repair of it, was held to be sustainable.(e)

Upon an indictment for the non-repair of Kelham Bridge, charging

inhabitants to repair, and they may look to the trustees under the act." Id. 197. And see the opinions of Holroyd, J., and Littledale, J. And see *Rex v. Netherthong*, and other cases, *ante*, 352.

(e) *Rex v. The Mayor, &c., of Stratford-upon-Avon*, 14 East, 348.

the defendants *ratione tenuræ*, they produced at the trial a record from the treasury of the court of the receipt of the Exchequer, setting forth a presentment in the time of Ed. 3d, against the Bishop of Lincoln, who was thereby charged with the liability to repair the same bridge. The record stated a trial of this presentment at the spring assizes, 20th Ed. 3d; and that the jury found that the bishop was not liable to repair the bridge, and being asked who of right was bound to repair it, said that they were entirely *ignorant; but, that the bridge was built about sixty years before, and then of alms of the men of the country passing that way; and that a former bishop of Lincoln passing through the country, charitably bestowed 40s. on the workmen of the said bridge, and not in any other manner. The defendants also put in a writ of privy seal, dated 28th of June, 20 Ed. 3d, granting to the men of Kelham for three years, customs for things for sale passing the said bridge, in order to repair the said bridge. It was held, that these documents were material to the issue, and good evidence towards proving it. It was argued that the ignorance of the jury of any other liability, and their statement of the origin of the bridge, and the manner in which the bishop had contributed, by way of charity and not upon compulsion, were beyond their province: but the court thought it could not be assumed that at the remote period of this inquiry, the functions of a jury were bounded within the same limits as at present, every lawyer, indeed, knew that the contrary was the fact; with the reasonable presumption, therefore, which must always be made in favour of the regularity of proceedings conducted by proper authority, it might not be too much to hold that this inquest was a public proceeding, in which the jury might properly inquire, not only whether the person charged, but also in general who, and whether any one was liable to the repairs. At the same time there was no necessity for going this length; because, even if there should be some irregularity in setting forth some particulars not inquired of, that could not vitiate what was correctly done. The facts, then, that the bishop was presented as chargeable by the men of Kelham, acting for the public, that such presentment ended with his acquittal on that ground and that it was shortly followed by the grant of pontage to the men of Kelham for the same repairs, were strong to negative any immemorial liability *ratione tenuræ*, because the court must suppose that the presentment would rather have been made against the person so liable than against the bishop; and that the grant of pontage would not have been made at all. (f)

Kelham bridge case.
Presentment and finding of jury *tenure*, Edw. 1. Grant of pontage, 20 Edw. 3.
*391

The 22 Hen. 8, c. 5, called the Statute of Bridges, and made in affirmation of the common law, enacts, that the justices of the peace in every shire, franchise or borough, or four of them, whereof one to be of the quorum, may inquire and determine, in their general sessions, of annoyances of bridges broken in the highways; and make such process and pains on every presentment against the persons charged, &c., as the King's Bench is used to do, or as it shall seem by their discretion to be necessary and convenient. (g) It then enacts, that where it cannot be known what hundred, city, town, &c., ought to make such bridges decayed, they shall, if without city or town corporate, be made by the inhabitants of the shire or riding; and if within any city or town cor-

22 Hen. 8, c. 25 enacts as to the repairing of bridges.

(f) Reg. v. Sutton, 8 Ad. & E. 516. 3 N. & P. 569.

(g) Sec. 1.

* Eng. Com. Law Reps. xxxv. 450.

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And as to
the repair-
ing of 300
feet of the
highways
next ad-
joining to
the bridges.

porate, then by the inhabitants of such city or town corporate; and that if part shall be in one shire, &c., and part in another, the inhabitants of each shall repair and make such part as lies within their respective limits.(h) The statute then proceeds (after making provisions for the taxing of the persons liable to contribute to the *repairs and for the appointment of collectors, &c.) by enacting that such parts of the highways as lie next adjoining to the ends of the bridges, by the space of three hundred feet, shall be amended as often as need shall require;(i) and that the justices, or four of them, whereof one to be of the quorum, within their several limits, may inquire and determine, in their general sessions, all annoyances therein, and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of the act.(j) It has been holden in the construction of this statute that no private bridges are within its purview, but only such as are common in the highways where all the king's liege people have or may have passage.(k) Unless the justices of a town, &c., be four in number, and one of the quorum, they have no jurisdiction under this statute. But the justices of the county in which such town (not being a county of itself, and not having the number of justices,) shall lie, may determine as to the annoyances of bridges within the town, &c., if it be known for a certainty what persons are bound to repair them: but if it be not known, it seems that such annoyances are left to the remedy at common law.(l)

Where the
county of a
city is en-
larged it
may be
liable to
repair a
bridge in
the district
so added.

It appears also to have been holden, that where the king enlarges the boundaries of a city, by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge its inhabitants with the repairs of bridges which were situate, at the time when the 22 Hen. 8, c. 5, was made, within the county at large. The point was put upon the ground that the statute lays no absolute charge till a bridge is in decay; so that though when the statute was made, the bridges in question were within the county of Norfolk, yet, as they were not then in decay, the statute had no operation upon them before they were annexed to the city of Norwich.(m)

No persons
can be com-
pelled to
build new
bridges.

But though the inhabitants of the county, by common right, and other persons, by the obligations, which have been mentioned, are bound to repair existing bridges, no persons can be compelled to build, or contribute to the building any *new bridge*, without an act of parliament; nor can the inhabitants of a county, by their own authority, change a bridge or highway from one place to another.(n) Before the 14 Geo. 2, c. 33, the justices at the sessions had no authority to change the situation of bridges: but by that statute they were empowered, at their quarter sessions, to purchase any piece of land adjoining or near to any county bridge within the limits of their respective commissions, for the more

(h) Sec. 2, 3.

(i) But see now the 5 & 6 Wm. 4, c. 50, s. 21, *post*, p. 400.

(j) Sec. 9.

(k) 1 Hawk. P. C. c. 77, s. 19, and see *ante*, 386.

(l) 1 Hawk. P. C. c. 77, s. 20. 2 Inst. 702.

(m) *Rex v. The Inhabitants of Norwich*, 1 Str. 177. And see also *Rex v. The Inhabitants of St. Peter in York*, 2 Lord Raym. 1249. See *Rex v. Oswestry*, 6 M. & S. 361, *post*, p. 403.

(n) 2 Inst. 700, 701. By Magna Charta it is enacted that *nulla villa nec liber homo distringatur facere pontes aut riparias, nisi qui ab antiquo et de jure facere consueverunt tempore Henrici regis avi nostri*. And see 2 Inst. 29. See *Rex v. Inhabitants of Devon*,^a 4 B. & C. 670, *post*, p. 400.

^a Eng. Com. Law Repts. x. 441.

commodious enlarging or convenient rebuilding the same; but the land was not to exceed an acre for any such bridge.^(o) It was *considered *393 by a very learned judge, that this statute impliedly enabled the magistrates to alter the position of bridges to suit the convenience of the public; ^(p) but a more recent statute expressly gives them that power where bridges are so much in decay as to require to be taken down. The 43 Geo. 3, c. 59, s. 2, enacts, "that where any bridge or bridges, or roads at the ends thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the justices, at any of their general quarter sessions, to order and direct such bridge or bridges and roads to be widened, improved, and made commodious for the public; and that where any bridge, or bridges repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall and may be lawful to and for the said justices, at any of their said general quarter sessions, to order and direct the same to be rebuilt, either on the old site or situation, or in any new one more convenient to the public, contiguous to or within two hundred yards of the former one, as to such justices shall seem meet." And the statute also provides for the purchasing of land necessary for such purposes, not exceeding an acre at any one bridge; and for assessing a compensation for such land, by means of a jury, where the surveyor cannot agree for the price with the owner, in the same manner as was done by the 13 Geo. 3, c. 78,^(q) in relation to highways. By 54 Geo. 3, c. 90, s. 1, these provisions relating to the purchase of land, are extended to such buildings and other erections as may be necessary to be purchased for the purposes of the 43 Geo. 3; and the provisions of the 43 Geo. 3, (except such as relate to bridges thereafter to be erected,^(r) are extended as well to bridges, and the roads at the ends thereof, repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof, repaired by the inhabitants of counties. By the 3 Geo. 4, c. 126, sec. 107, reciting, that "many bridges on turnpike road are, by prescription, liable to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges, from change of times and circumstances, are become no longer sufficiently convenient for the use of the public, without being enlarged or otherwise improved," it is enacted, that it shall be lawful for any such county or counties, parish or parishes, respectively to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates of such county or parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken, and lie upon the county or counties in which such bridge is locally situated; and that all rates made for carrying into effect any such composition, agreement, repairs or improvements, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever.

By the 43 Geo. 3, c. 59, s. 2, power is given to justices at the quarter sessions to order bridges to be widened, &c., or rebuilt either in the old situation, or in one more convenient.

Compositions may be made between parishes and counties for repairs of bridges.

(o) 14 Geo. 2, c. 33, s. 1. It also provides for the payment for the land out of the county rates: and its conveyance to such persons as the justices shall appoint, in trust for the purposes of the bridge.

(p) By Buller, J., in *Rex v. The Justices of Glamorganshire*, 5 T. R. 283.

(q) Repealed by the 5 & 6 Wm. 4, c. 50. This act of the 43 Geo. 3, is not to extend to bridges repaired by reason of tenure, &c., sec. 7.

(r) *Post*, 396.

Pulling down an old bridge before the new one was passable.

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In a case where the justices of the County of Dorset had contracted for the building of a new bridge in a different site, in lieu *of the old one, which was ruinous; and had directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, which were to be used by the contractor in finishing the new bridge; the court refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable; and this, though there were strong affidavits of the inconvenience and loss which would be sustained by the people in the neighbourhood, by being obliged to use a circuitous way in this interval. And they referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances were a nuisance: and did not think there was any occasion to interfere, by applying a prompt remedy of a novel kind in modern practice.(s)

Counties liable to the repair of bridges built by private persons which become of public convenience.

The question, whether the inhabitants of a county, from their common law liability to the repair of public bridges, are liable to repair a bridge not originally built by them, appears to have been formerly a subject of much discussion. But, after able argument and great consideration, the principle was established "that if a man build a bridge, and it *become useful* to the county in general, the county shall repair it."(t) Upon this principle, where the inhabitants of a township took down an ancient foot-bridge which they were bound to repair, and build another, for horses and carriages, in a different and more commodious part of the river, which became afterwards a general public utility, it was held that this bridge should be repaired by the county, and not by the township.(u) And the same principle of the public being obliged to support a bridge of public utility has been acted upon in many subsequent cases. Thus the county was held liable to repair a bridge erected in the king's highway, which, about forty years before, had been erected by an individual for his private benefit and utility, and for making a commodious way to his tin-works, upon proof that the public had constantly used the bridge from the time of its being built.(v) And in a case where an old foot-bridge had been enlarged, in the first instance to a horse-bridge, and afterwards to a carriage bridge, by a township, at their expense, it was recognised as the general law that where a township, or any private individuals, build a new bridge, and dedicate it to the public benefit, and it is used by the public, the *onus* of repairing it falls upon the county at large.(w) In a case also where the doctrine was fully investigated and considered, it was held that the county or riding was liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others.(x)

Datchet bridge case. Bridge built by Queen Anne.

*395

In a case where it appeared that Queen Anne, in the year 1708, for her greater convenience in passing to and from Windsor Castle, built a bridge over the Thames, at Datchet, in the common highway *leading from London to Windsor, in lieu of an ancient ferry, with a toll, which be-

(s) *Rex v. The Justices of Dorset*, 15 East, 594.

(t) *Glusburne Bridge case*, 5 Burr. 2594. 2 Blac. R. 685.

(u) *Id. ibid.*

(v) *Rex v. The Inhabitants of Glamorgan*, 2 East, 356, note (a). *Bac. Abr. Bridges.*

(w) *Rex v. The West Riding of Yorkshire*, 2 East, 353, note (a).

(x) *Id. ibid.* 2 East, 342, and the circumstances of the trustees being enabled to raise tolls for the support of the roads was not considered as taking the case out of the general principle.

longed to the crown : and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before ; it was held that the bridge was a public one, repairable by the inhabitants of the county.(y) And in a more recent case, where the facts were, that a person about forty-five years before had erected a mill, and dam thereto, for his own profit, by which means he deepened the water of a ford through which there was a public highway but the passage through which was, before the deepening very inconvenient at times to the public, and the miller had afterwards built a bridge over it, which the public had ever since used ; it was decided that the county, and not the miller, were chargeable with the reparation.(z) In this last case the court was much pressed by an ancient authority to this effect ; "If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects used to go over this as over a common bridge ; this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit."(a) And as that authority seemed to constitute an anomaly in the law, and to be at variance with all the cases, the court directed a diligent search to be made for the record of the case ; and it was at length found in the chapter-house at Westminster. From this it appeared that the real question was on an obligation to repair by reason of the tenure of certain lands ; and that no such question as was supposed, namely, of a legal obligation resulting from the building of the bridge by the mill owner for his benefit, was ever directly or indirectly decided, or could properly have been argued.(b) Relieved, therefore, from this case, the court considered the authorities from first to last as uniform ; and as establishing the doctrine that if a private person built a private bridge, which afterwards becomes of public convenience, the county is bound to repair it.(c)

In these cases there is always that which is to be considered as an acquiescence by the county. The county is not liable, except for bridges made in *highways* ; and as the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge.(d)

*But though a bridge built by an individual may thus become public, *396 yet it will not become so from the mere circumstance of its being built in a public way, and it appears to have been considered that a bridge built in a public way, without public utility, or built colourably in an imper-

A bridge built without public utility, or

(y) *Rex v. The Inhabitants of Bucks*, 12 East, 192.

(z) *Rex v. The Inhabitants of Kent*, 2 M. & S. 513.

(a) 1 Roll. Abr. 368, citing the 8 Edw. 2, as adjudged in *B. R. for Bow Bridge and Channel Bridge*, against the Prior of Stratford.

(b) See a copy of the record in this case of the *Stratford Bridge*, in 2 M. & S. 520, *et seq* It contains matter of great curiosity.

(c) *Rex v. The Inhabitants of Kent*, 2 M. & S. 520. This doctrine appears to have been laid down long ago in a case cited by Northey, attorney-general, in *Rex v. The Inhabitants of Wilts*, 1 Salk. 359. With respect to the property in the materials of a bridge, when built and dedicated to the public, it appears to have been decided that it still continues in the individual subject to the right of passage by the public, so that, when severed and taken away by a wrong doer, he may maintain trespass for the asportation. *Harrison v. Parker* and another, 6 East, 154.

(d) By Bayley, J., in *Rex v. The Inhabitants of St. Benedict*,^a 4 B. & A. 450. *Ante*, 353.

^a Eng. Com. Law Reps. vi. 482.

colourably
to charge
the county
may be a
nuisance.

And by 43
Geo. 3, c.
59, counties
are not to
be charged
with the
repairs of
bridges
built after
the passing
of that stat-
ute, unless
built in a
substantial
manner, to
the satis-
faction of
the county
surveyor.

A bridge
built before
the 43 Geo.
3, c. 59, but
widened
since, is
not a new
bridge
within that
act.

*397

fect or inconvenient manner, with a view to throw the burden of re-
building or repairing it immediately on the county, may be indicted as a
nuisance. (e) A protection is also given to counties by the 43 Geo. 3,
c. 59, from the burden of repairing certain bridges, erected after the
passing of that statute. The fifth section, for the more clearly ascer-
taining the description of bridges, thereafter (f) to be erected, which in-
habitants of counties shall be liable to repair and maintain, enacts, "that
no bridge hereafter to be erected or built in any county, by or at the
expense of any individual or private person or persons, bodies politic or
corporate, shall be deemed or taken to be a county bridge, or a bridge
which the inhabitants of any county shall be compellable or liable to
maintain or repair, unless such bridge shall be erected in a substantial
and commodious manner, under the direction or to the satisfaction of the
county surveyor or person appointed by the justices of the peace at their
general quarter sessions assembled, or by the justices of the peace of the
county of Lancaster, at their annual general sessions; and which sur-
veyor or person so appointed, is hereby required to superintend and in-
spect the erection of such bridge, when thereunto requested by the party
or parties desirous of erecting the same; and in case the said party or
parties shall be dissatisfied, the matter shall be determined by the said
justices respectively at their next general quarter sessions, or at their
annual general sessions in the county of Lancaster." (g) It has been ob-
served, upon this statute, that as it was passed to limit the liability of
the county to those cases only where the new bridge is substantially
built, it shows sufficiently, that by the common law they would other-
wise be liable to the repair of all the bridges which might be erected
within their district. (h)

Upon an indictment for the non-repair of a bridge, it appeared that
the bridge had been widened subsequently to the 43 Geo. 3, c. 59, by
the trustees of a turnpike road; the bridge had originally been built by
them, but had not before been chargeable to the county. The statutes
under which they had acted gave them a discretionary power to erect
bridges; and the funds of the trust were made applicable to the repairs.
The public had used the bridge in its present state for a number of
years; the jury found that it was necessary to have a bridge or culvert
for the passage of a stream at the place in question; that a bridge was
better for the public; but that a culvert would suffice, and would be
beneficial. It was objected that this was sufficiently a bridge erected
since the 43 Geo. 3, and not having been built under the direction of the
county surveyor, the county was not liable to repair it. But the court
held that the county were liable; the bridge existed *and was used by
the public before the act, and the county were bound to repair it; the
trustees widened it after the act came in to force, but it continued the same
bridge. The case of a bridge widened as in the present instance, ap-
pears not to have occurred to the legislature; at all events, it is not
within the words of the section. As to the finding of the jury, as they

(e) *Rex v. The Inhabitants of the West riding of Yorkshire*, 2 East, 342. *Ante*, 387.

(f) The date of the act is June 24, 1830.

(g) Section 7 provides, that nothing in the act contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

(h) By Abbott, C. J., in *Rex v. Netherthong*, 2 B. & A. 183.

were of opinion that a bridge was better than a culvert, the verdict of guilty was right.(i)

Where before the 43 Geo. 3, c. 59, there had been a bridge used as a carriage bridge, and which the county repaired. The abutments on each side of the river were of stone, but all the rest of the bridge was wood. In 1807 the wooden part of the bridge was, during a flood carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose, together with some new materials, were replaced on the abutments at the expense of the parish, and the bridge was made about two feet wider than it was before, and the bridge had ever since been used by the public; it was held that this was substantially the same bridge as that which existed before 1807, and that the county was liable to repair it.(j)

The words of the 43 Geo. 3, c. 59, s. 5, comprehended every kind of persons, by whom, or at whose expense a bridge is built. Where, therefore, a bridge was erected after the passing of the act, by trustees appointed by a local turnpike act, but not under the direction or to the satisfaction of the county surveyor, &c., it was held that it was not a bridge which the county was bound to repair.(k)

It may be useful shortly to notice a few cases in which counties have been holden not to be liable to repair certain bridges built by companies or trustees under particular acts of parliament.

Where the Medway Navigation Company, being empowered under a local act to make the river navigable, and to take tolls, and "to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room," had, forty years before, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they were bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit.(l)

A case not distinguishable in principle from the foregoing was decided shortly afterwards. A canal company, authorized by an act of parliament to make the river Bain navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, made a navigable cut, and deepened a ford which crossed the highway, for their own benefit, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance: and it was held that the company (who were found to have profitable funds for the purpose) were bound to maintain it.(m)

*The 49 Geo. 3, c. 84, appoints trustees for taking down the old and building a new bridge over the river Tone, and empowers them to take tolls; and enacts, that it shall be lawful for them, out of the moneys received, to build a new bridge, &c., and vests the property in the old and new bridge, during the continuance of the act, in the trustees; and further enacts, that as soon as the purposes of the act shall be executed, then and from thenceforth the tolls shall cease, and the bridge, &c.,

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(i) Rex v. Lancashire, ^a 2 B. & Ad. 813.

(j) Rex v. Devonshire, ^b 5 B. & Ad. 383; 2 N. & M. 212.

(k) Rex v. Derbyshire, ^c 3 B. & Ad. 147.

(l) Rex v. The Inhabitants of Kent, 13 East, 220.

(m) Rex v. The Inhabitants of Lindsey, in Lincolnshire, 14 East, 317.

^a Eng. Com. Law Repts. xxii. 189.

^b lb. xxvii. 97.

^c lb. xxiii. 46

shall be repaired by such persons as are by law liable to repair the old bridge. Upon this statute it was decided that, during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge.⁽ⁿ⁾

The commissioners appointed by the 22 Car. 2, to make the river Waveney navigable, were authorized to cut through any land they thought fit, and make channels. They cut through a highway; and that cut made a bridge over it necessary for the public, though such bridge was of no use to the navigation. A bridge was accordingly made, but by whom did not appear; and the bridge being out of repair, an indictment was preferred against the proprietor of the navigation (who received tolls upon the navigation) for not repairing it. Upon a case reserved, he contended that he was not liable: but the court held clearly that he was; for by the act of his predecessors the bridge was made: they cut, not for public purposes, but for private benefit; and the county could not be called upon, for it could be no advantage to them to have a bridge in lieu of solid ground.^(o)

Of the liability to repair the 300 feet of the roads adjoining to the ends of bridges.

The party liable to repair the bridge is prima facie liable to repair the approaches.

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It has been seen,^(p) that by the 22 Hen. 8, c. 5, it is enacted, that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require; but it does not say by whom they shall be amended. It proceeds, however, to provide that the justices may inquire and determine and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of that act.^(q) As early as the reign of Edw. 3, the judges understood the approaches to a bridge to be, as it were, excrescences of the bridge itself, and that the charge of repairing them was considered as belonging, *prima facie*, to the party charged with the repair of the bridge itself. To an indictment against an abbot, for the non-repair of a bridge, he pleaded that he was only bound to repair two arches of it, and the jury found that he was bound only to the repair of two arches, and the bridge over the stream of the water, *et non fines ejusdem pontis*. This was pleaded by him to a second indictment, and the record read: yet Knivet, J., said, "We intend that you are bound to repair the bridge, and the highway applying to the one end and to the other; although the soil be in another, because the easement shall be preserved for the people."^(r) It has been decided, upon the authority of the preceding case, that by the common law, declared and defined by this *statute, and other subsequent statutes,^(s) the inhabitants of a county liable to the repair of a public bridge, are liable also to repair to the extent of *three hundred feet* of the highway at each end of it; and that, if indicted for not repairing such highway, they can only exonerate themselves by pleading specially that some other is bound to repair it by prescription or tenure.^(t) And it seems that private persons are equally liable.^(u)

(n) *Rex v. The Inhabitants of Somerset*, 16 East, 305. Lord Ellenborough, C. J., intimated an opinion, that if the trustees were dilatory in executing the powers of the act, the court of King's Bench, upon application, would lend its aid to expedite their functions.

(o) *Reg. v. Kerrison*, 3 M. & S. 526.

(p) *Ante*, 392.

(q) *Ante*, *ibid.*

(r) *The Abbott of Combe's case*, 43 Ass. 275, B. pl. 37, as stated in the judgment of the court in *Reg. v. Lincoln*,^a 8 A. & E. 71.

(s) 1 Anne, st. 1, c. 18, s. 3, 5, 13, and 12 Geo. 2, c. 29.

(t) *Rex v. The Inhabitants of the West Riding of Yorkshire*, 7 East, 588, and the judgment was afterwards affirmed in the House of Lords,^b 5 Taunt. 284.

(u) 3 Chit. C. L. 589.

^a Eng. Com. Law Repts. xxxv. 332.

^b *Ib.* i. 111.

Since the case of *Rex v. West Riding of Yorkshire*,^(x) it has been considered settled that where the liability to repair a bridge, attaches by the general law, the liability to repair the approaches to the bridge for the space of three hundred feet, follows the same rule. A corporation, therefore, liable by *prescription*, to repair a bridge, is also, *primâ facie*, liable to repair the highway to the extent of three hundred feet at each end; and such presumption is not rebutted by proof that the corporation have been known only to repair the bridge, and that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road act. The corporation of Lincoln, which is a county of itself, had, from time immemorial, exclusively repaired the fabric of a bridge, and were liable by prescription to repair it, but there was no evidence that any part of the highway at each end of the bridge had ever been repaired by the corporation, or by the parish in which it was situated, but the whole of the highway, including the part of it which passed over the bridge, had, as far back as living memory could go, been repaired by commissioners under a turnpike act of the 29 Geo. 2, c. 84; it was contended, that a prescriptive liability was independent of the common law, and must, in each case, be measured by its own exact limits, which, in the present instance, were confined to the bridge itself. But as nothing appeared, by which the liability to repair the approaches, *as parcel* of the prescriptive liability to repair the bridge, was excluded: and as the non-repair by the parish, or the county, and the non-repair, *de facto*, by the defendants, when explained by the repairs having been done for a great number of years, by a body created by a modern act, were both consistent with a prescriptive charge, *de jure*, having been all the time existing and binding on the defendants; the Court of Queen's Bench held, that in the absence of any evidence to the contrary, the *prescription* to repair the bridge, must be intended to include within it, the repair of the approaches to it, upon the same principle, which has united the approaches of the bridge to the bridge itself, in the case of a *common law* liability, that, namely, of rendering complete the benefit to the public, from the repair of the bridge itself.^(y)

But where a new and substantial bridge, of public utility, was built within the limit of one county, and adopted by the public, it was held that the inhabitants of that county were bound to repair it, although it was built within three hundred feet of an old bridge, repairable by the inhabitants of another county, who were bound as a matter of course under the 22 Hen. 8, c. 5, to maintain three hundred feet of road adjoining to their bridge, though it lay in the other county. The court said, that while the space where the bridge was built continued a road, it was repairable as part of the old bridge; but that when there was a substantial bridge built upon it, such bridge was repairable, as a bridge by the inhabitants of the county in which it was situated, according to the statute.^(z)

But now by the 5 & 6 Wm. 4, c. 50, s. 21, "if any bridge shall hereafter^(a) be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of any county, then and in

(x) *Supra*, note (t).

(y) *Rex v. The Mayor of Lincoln*, 8 Ad. & Ell. 65; 3 N. & P. 273.

(z) *Rex v. The Inhabitants of Devon*, 14 East, 477.

(a) The act passed on the 31st of August, 1835, but came into operation on the 20th March, 1836.

5 & 6 Wm. 4, c. 50, s. 21. As to repair of highways adjoining bridges hereafter to be built. Raised causeways, &c.

Those who are liable to repair must do it effectually.

But are not bound to widen a bridge.

Of the mode of procuring the moneys for the repairs of bridges, and of contribution. *401

55 G. 3, c. 143. Justices, &c. may contract for the repairing of county or

such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

It seems clear that those who are bound to repair public bridges must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs. (b) A case occurred in which the Court of King's Bench strongly intimated an opinion, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not of a sufficient width to meet the present public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge: (c) but, when the same case came before the House of Lords on error, this point appears to have been considered as doubtful. (d) And in a recent case, the Court of King's Bench held, that the obligation upon a county is only to repair a bridge to the extent to which that bridge has been originally given to the public, and that they are not bound to widen it. (e)

The taxing and collecting moneys for the repairing of bridges, and the highways at the ends thereof, were regulated in the first instance by 22 Hen. 8, c. 5, and afterwards by 1 Anne, stat. 1, c. 18, by which the justices at their quarter sessions were empowered, upon presentment of any bridge being out of repair, to make assessments upon every town or place within their commissions *for the charges of the repairs. The 12 Geo. 2, c. 29, s. 1, for the better collection of such moneys, appointed that they should be paid out of the general county rate: but that statute enacted, that no money should be applied to the repair of any bridge, until a *presentment* should be made by the grand jury of its want of reparation. The 43 Geo. 3, c. 59, s. 2, which provides for the amendment and alteration of county bridges, (f) also enacted, that no money should be applied to such purposes until *presentment* made of the insufficiency or want of reparation of such bridges. The 52 Geo. 3, c. 110, and 55 Geo. 3, c. 143, making alterations in this respect and in other matters relating to the proceedings of the justices for the repairing of bridges repairable by counties or hundreds. The last of these statutes

(b) 1 Hawk. P. C. c. 77, s. 1. Bac. Abr. *Bridges*. 43 Ass. pl. 37. Br. tit. *Presentment in Courts*, pl. 22, 29. Dalt. c. 14.

(c) *Rex v. The Inhabitants of Cumberland*, 6 T. R. 194.

(d) *Cumberland Inhabitants v. Rex*, 3 Bos. & Pul. 354. But the judgment of the Court of King's Bench was affirmed upon the ground that, after verdict, it must be presumed that the over-narrowness of the bridge arose from its having been contracted from its ancient width.

(e) *Rex v. The Inhabitants of Devon*,^a 4 B. & C. 670. 7 D. & R. 147. *Rex v. The Inhabitants of Middlesex*,^b 3 B. & Ad. 201: per Lord Tenterden, C. D. But though their obligation is only to this extent, see as to the power to widen by an order at sessions, 43 Geo. 3, c. 59, s. 2, *ante*, 393.

(f) *Ante*, 393.

^a Eng. Com Law Reps. x. 441.

^b Ib. xxiii. 57.

enacts, that "It shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their general quarter sessions respectively, to contract and agree, or to authorize any other person or persons to contract and agree, with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the roads at the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof, by the treasurer of the county out of the county rate or (in cases where the hundred is liable to the repair of the same) by the bridge-master (or other public officer charged with the repair of bridges) of the hundred, by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same, shall have been made, and although no public notice shall have been given by the said justices, at their respective general or quarter sessions, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said act (12 Geo. 2, c. 29,) provided nevertheless that, before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate, or liberty of their intention to contract." (g) By the 22 Hen. 8, c. 5, s. 3, it was provided that where part of a county bridge shall be in one shire, &c., and part in another, the inhabitant of each shire, &c., shall be contributory. (h) And it has been questioned whether a borough, which has no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. (i) Where certain townships had enlarged a bridge to a carriage-bridge, which they were before bound to repair as a foot-bridge, it was held *that they should still be liable to repair *pro rata*. (j) So where a carriage-bridge had been built before 1119, and certain abbey lands had been ordained for its repair, and the proprietors of those lands had always repaired the bridge so built; and in 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brick-work and iron pins, and partly resting on the stone work of the bridge; it was held that this foot-bridge was not parcel of the carriage-bridge, which the proprietors of the abbey lands were bound to repair, but that the county was liable to repair it. (j)

The methods of appointing surveyors, &c., for effecting the repairs or

(g) 55 Geo. 3, c. 143, s. 5.

(h) This provision is alluded to by Lord Mansfield, C. J., in *Rex v. The Inhabitants of Weston*, 4 Burr. 2511, and by counsel, *arguendo* in *Rex v. Clifton*, 5 T. R. 601, 2. The usual proceeding at this time appears to be to indict each county separately, for neglecting to repair its own division.

(i) 1 Hawk. P. C. c. 77, s. 25. 1 Keb. 68.

(j) *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East, 353, note (a); and see *Rex v. The Inhabitants of Surrey*, 2 Campb. 455.

(j) *Rex v. Middlesex*, 3 B. & Ad. 201.

* Eng. Com. Law Repts. xxiii. 57.

rebuilding of bridges, and the powers given to such surveyors, and persons employed under contracts, to procure materials for such purposes, are contained in different acts of parliament, the provisions of which do not fall within the object of this work. *(k)*

Proceedings for nuisance to bridges by information, presentment or indictment.

When those upon whom the liability rests of repairing public bridges, neglect their duty, such nonfeasance is a nuisance to the public, punishable by information, presentment, or indictment. An *information* was held to lie in the Court of King's Bench for the non-repair of a bridge in a case where it was considered that the 22 Hen. 8, c. 5, gave only a concurrent, but not an exclusive, jurisdiction to the sessions: *(l)* but probably it would not be granted, except in some cases of a peculiar nature, in which the court might be satisfied that the purposes of justice would not be effected by an indictment. The more usual course of proceeding is by indictment or presentment. *(m)*

Proceedings of the justices in sessions.

The 22 Hen. 8, c. 5, s. 1, gave power to the justices of the peace to hear and determine, in their general sessions, all annoyances of bridges broken in the highways, and to make process, &c., as the King's Bench used to do. By sec. 5, where any bridge is in one shire, and the persons or lands, which ought to be charged, are in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

Of the indictment.

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Any particular inhabitant or inhabitants of a county, or tenant or tenants of land chargeable with the repairs of a public bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs; and shall be put to their remedy at law for a *contribution from those who are bound to bear a proportionable share in the charge. *(n)* It is sufficient, in an indictment against a parish, to allege that the inhabitants thereof have from time whereof, &c., repaired and amended, and have been used and accustomed, &c., without stating any other ground of liability. *(o)* And so it is against a hundred, although it appears that a township has been annexed to it by statute within time of legal memory, such statute providing that the inhabitants of the township should do every thing the same as the inhabitants of the hundred did, or were bound to do. *(p)* In the case of a corporation, if it were alleged that the mayor, alderman, and burgesses had from time immemorial repaired, and it appeared that there was a period when the corporation was not so constituted, it would

(k) See them collected in Burn's Just. tit. *Bridges*, VI.; and see also 55 Geo. 3, c. 143. By the 43 Geo. 3, c. 59, s. 4, inhabitants of counties may sue for damages done to bridges, in the name of the surveyor.

(l) *Rex v. The Inhabitants of Norwich*, 1 Str. 177.

(m) 2 Inst. 701. It has been held that an action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. *Russel v. The Men of Devon*, 2 T. R. 667. {9 Mass. R. 247, *Mower v. Leicester, acc.*}

(n) 1 Hawk. P. C. c. 77, s. 3. Bac. Abr. tit. *Bridges*, where the reason given is, that cases of this nature require the greatest expedition; and bridges being of the utmost necessity, are not to lie unrepaired till law suits are determined.

(o) *Rex v. Hendon*, 4 B. & Ad. 628.

(p) *Rex v. Oswestry*, 6 M. & S. 361. See *Rex v. Norwich*, 1 Str. 177, *ante*, p. 392.

* Eng. Com. Law Repts. xxiv. 128.

be bad. In such a case, the proper way would be to allege that the corporation had immemorially repaired; and then, however constituted the corporate body might have been at different periods, the allegation would be sustained.(g) The indictment ought to show what sort of bridge it is; whether for cart and carriage, or for horses or footmen only; and if the duty to repair arise by reason of the tenure of certain lands, the indictment must show where those lands lie.(r) It has been holden, that an indictment charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and, if judgment be given thereon, it will be reversed upon a writ of error; and it seems that a count, charging an individual by reason of being owner of navigation under a *private* act of parliament, must set forth the act; and it is not sufficient to state that such party is chargeable, by being owner and proprietor of the property subject to the charge.(s) In presentments by the grand jury, it is said that there is no occasion to show who ought to repair; and that it is insufficient if the defect be shown, and the bridge stated to the public.(t) Where an indictment alleged that the defendant, and those whose estate he had of and in a certain mill, from time whereof the memory of man runneth not to the contrary, had repaired, and it appeared that the mill did not exist before the time of Hen. 8; it was held, that the liability from time out of memory was disproved.(u)

As the occupier of land charged with the repair of a bridge, is undoubtedly liable to the performance of that duty, it is prudent to prefer the indictment against such occupier, and not against the owner, concerning whose liability doubts have arisen.(v)

Where an infant eleven years old, inherited land charged with the repair of a bridge, and his guardian in soccage resided on the land, but the infant did not, except occasionally; it was held, that although the infant was actually seized, yet being so by the possession of his guardian, he was not such an owner or occupier of *the land, as to be chargeable by indictment for the non-repair of the bridge, but that the guardian was such an owner and occupier.(w)

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It seems, that if there were no other person against whom performance of the repairs of a bridge could be enforced, the infancy would not exempt a party, liable in other respects, from an indictment for non-repair.(w)

It is laid down, that it is not sufficient for the defendants in an indictment for not repairing a bridge, to excuse themselves by showing either that they are not bound to repair the whole or any part of the bridge, without showing what other person is bound to repair it, and that in such case the whole charge shall be laid upon the defendants by reason of their ill plea.(x) But it is submitted that from analogy to the case of highways, this doctrine must be understood only of indictments against the county, and not of indictments against individuals, or bodies corporate, who are not of common right bound to repair; because, as it lies

(g) *Per* Holroyd, J. *Rex v. Oswestry*, 6 M. & S. 361. See a form there, note (a).

(r) 1 Hawk. P. C. c. 77, s. 5.

(s) *Rex v. Kerrison*, 1 M. & S. 435.

(t) 3 Chit. Crim. Law, 592, citing Andr. 285

(u) *Rex v. Hayman*,^a Moo. & M. 401. Tindal, C. J.

(v) See *Rex v. Sutton*,^b 3 A. & E. 597.

(w) *Rex v. Sutton*,^c 3 A. & E. 577.

(x) 1 Hawk. P. C. c. 77, s. 4. Bac. Abr. tit. *Bridges*. Burn's Just. tit. *Bridges*, V.

^a Eng. Com. Law Reps. xxii. 341.

^b *Ib.* xxx. 168.

^c *Ib.* xxx. 168.

on the prosecutors specially to state the grounds on which such persons are liable, they may negative these parts of the charge under the general issue. (y) And it has been holden, upon an information for not repairing a bridge, that the defendants if not chargeable of common right, may discharge themselves upon the general issue. (z) But it is clear that the inhabitants of a county, in order to exonerate themselves from the burden of repairing a bridge lying within it, must show by their plea that some other person is liable to repair. (a) It has, however, been recently decided, that it is competent to the inhabitants of a county, upon the general issue, to give evidence of the bridge having been repaired by private individuals. But this evidence appears to have been considered barely admissible as a medium of proof that the bridge was not a public bridge, which undoubtedly the defendants had a right to prove by every species of evidence: and the court seemed to think that it would have but little effect; though in order to ascertain whether a bridge be public, the mode of its construction, and the manner of its continuance, may be circumstances which, as they are connected with others, may have much or little weight. (b)

To an indictment for not repairing a bridge described as lying in two parishes, it is no plea that there has been a verdict and judgment against J. S. finding him liable to repair it *ratione tenuræ*, upon a presentment describing it as lying in one of the parishes; for he may be liable to repair only what is in one parish. The information was against the county of Essex for not repairing Dagenham bridge, in the several parishes of Hornchurch and Dagenham; and the plea was that Knatchbull and Fanshaw had been presented for not repairing it *ratione tenuræ* of lands in Barking, and the verdict and judgment had passed against Fanshaw; and to this there was a demurrer, because the presentment stated in the plea describing the bridge as in Dagenham parish. And the *court said that Fanshaw might be bound to repair what was in Dagenham parish, and the county might be bound to repair the rest; and gave judgment for the king. (c)

It is said, that where the defendants plead that an individual ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney-general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against the individual: and that an issue ought to be taken of such second traverse; and that the attorney-general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury. (d) But where the inhabitants of a county are indicted for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair; as it is a traverse of a matter of law, and might be made the subject of demurrer. (e)

Where to an indictment against a riding for not repairing a public car-

(y) 3 Chit. Crim. L. 592.

(z) *Rex v. The Inhabitants of Norwich*, 1 Str. 177, and see *ante*, 367.

(a) *Rex v. The Inhabitants of Wilts*, 1 Salk. 359. 2 Lord Raym. 1174.

(b) *Rex v. The Inhabitants of Northampton*, 2 M. & S. 262. If a bishop, &c., hath once or twice of alms repaired a bridge, this binds not: but yet it is evidence against him, that he ought to repair, unless he proves the contrary. 2 Inst. 700. See *Reg. v. Sutton*, *ante*, 390.

(c) *Rex v. Essex county*, T. Raym. 384.

(d) 1 Hawk. P. C. c. 77, s. 5. Bac. Abr. tit. *Bridges*.

(e) *Ante*, 468, 469, and the authorities there cited.

riage-bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge, it was held that evidence that the townships had *enlarged* the bridge to a carriage-bridge, which they had before been bound to repair as a foot bridge, would not support the plea. (f) And, upon the same principle, where it was proved that a particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood, and that about forty years ago the trustees of a turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way: it was holden that these facts did not support a plea pleaded by the county that the parish had *immemorially* repaired, and still ought to repair, the said bridge. (g) In a case where the county was indicted for not repairing a bridge, and pleaded that one Marsack was liable to repairs *ratione tenuræ*, it was holden that this plea was not sustained by evidence that the estate of Marsack was part of a larger estate; which part Marsack purchased of the Lord Cadogan, who had retained the rest in his own hands, and had repaired the bridge as well before as after the purchase. (h)

The plea must correspond with the facts.

The 1 Anne, st. 1, c. 18, s. 5, enacts, that all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere; but it seems that objection may be made to the justices where they are all interested, and that in such case the trial shall be had in the next county. (i) And no inhabitant of a county ought to be a juror for the trial of an issue, upon the question whether or not the county be bound to repair. (j) So *that where the matter concerns the whole county, a suggestion may be made of any other county's being next adjacent: (k) and if the bridge lies within the county of a city, and the question is, whether the county of the city, or the county at large, ought to repair, on a suggestion of these facts on the record, the *venire* will be awarded into the county adjacent to the larger district. (l)

Of the trial.

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Inhabitants of counties may be witnesses in prosecutions against private persons or corporate bodies for not repairing bridges. The 1 Anne stat. 1, c. 18, s. 13, reciting that many private persons, or bodies politic or corporate, were of right obliged to repair decayed bridges, and the highways thereunto adjoining, and that the inhabitants of the county, riding, or division, in which such decayed bridges or highways lay, had not been allowed, upon informations or indictments against such persons or bodies for not repairing them, to be legal witnesses; enacts, that in all informations or indictments in the courts of record at Westminster, or at the assizes or quarter sessions, the evidence of the inhabitants of the town, corporation, county, &c., in which such decayed bridge or highway lies shall be taken and admitted. Even before this statute,

Inhabitants of counties to be admitted as witnesses in prosecutions against private persons, &c.

(f) *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East, 353, note (a). *Rex v. The Inhabitants of Middlesex*, 3 B. & Ad. 201.

(g) *Rex v. The Inhabitants of Surrey*, 2 Campb. 455. The fact would not have availed the county if the plea had been framed differently, as the county was clearly liable to the repair of the new bridge. See *ante*, 394.

(h) *Rex v. The Inhabitants of Oxfordshire*, 16 East, 223.

(i) *Rex v. The Inhabitants of Norwich*, 5 Geo. 1, cited in 2 Burr. 859, 860. Burn. Just. tit. *Bridges*, V.

(j) 1 Hawk. P. C. c. 77, s. 6.

(k) *Rex v. The Inhabitants of Wilts*, 6 Mod. 307, and see 1 Salk. 380. 2 Ld. Raym. 1174.

(l) *Rex v. The Inhabitants of Norwich*, 1 Str. 177. 3 Crim. L. 593.

such evidence has been thought admissible from necessity.(m) Upon an indictment for not repairing a bridge and road, under a liability *ratione tenuræ*, inhabitants of the parish, in which the bridge and road lie, have been held competent for the prosecution, under the 54 Geo. 3, c. 170, c. 9.(n)

Reputation
not evi-
dence.

It should seem that where a party is charged with the repair of a bridge *ratione tenuræ*, reputation is not admissible in evidence. In a late case(nn), a very learned judge said, "Suppose a county were indicted for the non-repair of a bridge, and their defence was, that a particular individual was bound to repair it *ratione tenuræ*; is there any instance of reputation being in evidence in such a case?"

Of the
judgment.

As a prosecution for a nuisance to a public bridge has for its object the removal of the obstruction or the effecting of the necessary reparations, the judgment of the court upon a conviction will generally be regulated by the same principles as those which have been mentioned in relation to the judgment for a nuisance to a highway.(o) The 1 Anne, stat. 1, c. 18, s. 4, enacts, that no fine, issue, penalty, or forfeiture, upon presentments or indictments for not repairing bridges, or the highways at the ends of bridges, shall be returned into the Exchequer, but shall be paid to the treasurer, to be applied towards the repairs. But this seems only to relate to county bridges.

Of staying
the judg-
ment.

Where a county indicted for not repairing a bridge had pleaded a plea which their evidence did not support, and were in consequence found guilty, but the evidence seemed strongly to show that they were not liable to repair; the Court of King's Bench, upon a motion for a new trial, or for a stay of judgment against the defendants until another indictment was tried, directed a rule to be drawn up for staying the judgment upon payment of the *costs of the prosecution: and Lord Ellenborough, C. J., added that, if the public exigency required it, the county must repair without prejudice to their case: and Le Blanc, J., said that the county might proceed to indict the parties whom they contended to be liable.(p) So also the judgment has been suspended after a verdict of acquittal in favour of a private individual.(q)

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Of the
certiorari.

The 1 Anne, stat. 1, c. 18, s. 5, enacts, that no presentment or indictment for not repairing bridges, or the highways at the end of bridges, shall be removed by *certiorari* out of the county into any other court. But it has been decided that, notwithstanding these general words of the statute an indictment for not repairing the bridge may be removed by *certiorari*, at the instance of the prosecutor.(r) And it has been resolved that this clause of the act extends only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the 5 W. & M. c. 11, had allowed the granting a *certiorari*.(s) A *certiorari* lies to remove an

(m) *Rex v. Carpenter*, 2 Show. 47.

(n) *Rex v. Hayman*,^a *Moo. & M. Tindal*, C. J.

(nn) *Per Patteson, J.*, in *Rex v. Antrobus*,^b 6 C. & P. 784; but see *Reg. v. Sutton*,^c 8 A. & E. 516, *ante*, p. 391. *Reg. v. Wavertree*, 2 M. & Rob. 353, *supra*.

(o) *Ante*, 371, 372.

(p) *Rex v. The Inhabitants of Oxfordshire*, 16 East, 223.

(q) *Rex v. Sutton*,^d 5 B. & Ad. 52. 2 Nev. & M. 57.

(r) *Rex v. The Inhabitants of Cumberland*, 6 T. R. 195. The case was afterwards brought before the House of Lords by a writ of error: and the judgment was affirmed, 3 Bos. & Pul. 354. And see *ante*, 371, note (i).

(s) *Rex v. The Inhabitants of Hamworth*, 2 Str. 900. 1 Barnard, 445. See as to the stat 5 W. & M. *ante*, 371.

^a Eng. Com. Law Reps. xxii. 311.

^b *Id.* xxv. 651.

^c *Id.* xxxv. 450.

^d *Id.* xxvii. 31.

order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to retain the private act upon which their order is founded. (t)

*CHAPTER THE THIRTY-FIRST.

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OBSTRUCTING PROCESS, AND OF DISOBEDIENCE TO ORDERS OF MAGISTRATES.

SECT. I.

Of obstructing process.(A)

THE obstructing the execution of lawful process is an offence against public justice of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason. (a)

A party opposing an arrest upon criminal process becomes *particeps criminis*.

And it should seem that the giving assistance to a person suspected of felony and pursued by the officers of justice, in order to enable such person to avoid being arrested, is an offence of the degree of misdemeanor as being an obstruction to the course of public justice. Thus, an indictment was preferred against the defendant for a misdemeanor in the obstruction of public justice by rendering assistance to one Olive, who was suspected of forgery and pursued by the officers of justice, in order to enable Olive to avoid being arrested. It appeared in evidence that Olive had committed a forgery, as stated in the indictment; and had afterwards, in a state of desperation, thrown himself from the top of a house, by which he was greatly hurt; and that the defendant, who

(t) Dalt. 504. Burn's Justice, tit. *Bridges*, V.

(a) 4 Bla. Com. 128. 2 Hawk. P. C. c. 17, s. 1, where *Hawkins* submits that it is reasonable to understand the books which seem to contradict this opinion to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance.

(A) UNITED STATES.—The penalty for obstructing or resisting officers of the United States, in serving a mesne process or warrant, or rule or order of the courts of the United States, or any other legal or judicial writ or process; or for assaulting, beating, or wounding, any officer or other person duly authorized, in serving or executing any of the processes before mentioned, is imprisonment not exceeding twelve months, and fine not exceeding three hundred dollars. 1 Story, 88.

{It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office in which he was engaged, or the particular act or circumstances of obstruction. 2 Gallison, 15, *United States v. Batchelder*. In an indictment for a statute offence it is sufficient if the offence is substantially set forth, though not in the exact words of the statute. *Ibid*.

Hence on the act of Congress of 1799, ch. 128, § 71, (1 U. S. Laws, 633, Story's ed.) which enacts that "if any person shall forcibly resist, prevent or impede any officers of the customs, &c., in the execution of their duty," &c., an indictment which alleged that the defendant "did with force and arms, violently and unlawfully resist, prevent and impede N. J. in the execution of his office, as an officer of the customs," &c., was held to be sufficient. *Ibid*.]

[Any obstruction of lawful process, whether it be by active means or the omission of a legal duty is an indictable offence; but the indictment must show what the process was, that it was legal and in the hands of a proper officer, and the mode of obstruction. *The State v. Haily*, 2 Strobb. 73. To constitute the offence of obstructing process in a criminal point of view there must be an active opposition, not merely taking charge of a debtor's property, keeping it out of view, and refusing, when called on by an officer, to place it within his reach. *Crumpton v. Newman*, 12 Alabama, 199.]

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was a relation and commiserated his wretched condition, conveyed him secretly on board a barge from Gloucester to Bristol, and was actively employed at the latter place in endeavouring to enable him to escape from this country in a West India vessel. It also appeared that advertisements had been printed and circulated, stating the charge against Olive, and offering a large reward for his apprehension: but it was not proved that any one of these advertisements had come to the knowledge of the defendant, or that the defendant was acquainted with the particular charges against Olive, or knew that he had been guilty of forgery, as alleged in the indictment. Upon this ground the defendant was acquitted: but no other objection was taken to the indictment. (b)

Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark) under the pretence of their having been ancient palaces of the crown or the like; (c) and it was found necessary to abolish the supposed privileges and protection of these places by several legislative enactments. The 8 & 9 Wm. 3, c. 27, 9 Geo. 1, c. 28, and 11 Geo. 1, c. 22, enact that persons opposing the execution of any process in the pretended privileged places therein mentioned, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing, or for having executed the same, are declared to be felons without benefit of clergy. (d)

In some proceedings, particularly in those relating to the execution of the revenue laws, (e) the legislature has made especial provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party will be only a misdemeanor, punishable by fine and imprisonment. (f)

The arrest must be lawful to make a party guilty of an obstruction.

It should be observed that a party will not be guilty of this offence of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. [1] And in an indictment for this offence it must appear that the arrest was made by proper authority. Thus where an indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of the town and county, &c., of P. issued their writ, directed to T. B., *one of the serjeants at*

(b) *Rex v. Buckle, cor. Garrow, B., Gloucester Spring Ass. 1821.* Oliver had died by suicide soon after the defendant's attempt to prevent his arrest, so that the defendant could not have been effectively prosecuted as an accessory after the fact to the forgery, even if it could have been proved that he knew of Olive's crime at the time that he rendered the assistance.

(c) The White Friars and its environs, the Savoy, and the Mint in Southwark, were of this description.

(d) 4 Bla. Com. 128, 129.

(e) *Ante*, p. 111, *et seq.*

(f) 2 Chit. Cr. L. 145, note (a).

[1] {So if an officer of the customs seize the goods without probable cause, no indictment, on the statute of 1799, ch. 158, § 71, lies for resisting him in the seizure. 2 Gallison, 359, *United States v. Gay*. Nor for resisting an inspector of the customs after the resignation of the collector who appointed him, and before his re-appointment by the succeeding collector—the officer of inspector ceasing with that of the appointing collector. 2 Gallison, 361, *United States v. Wood*.}

mace of the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W. within the jurisdiction of the said court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest; the court held that it was bad, as it did not appear that T. B. was an officer of the court; a serjeant at mace *ex vi termini* meaning no more than a person who carries a mace for some one or other. And the court also held that there could not be judgment, after a *general* verdict on such a count, as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated; and that cause appeared to have been the attempt by the officer to make an illegal arrest. (g) Lord Ellenborough, C. J., said, "process ought always to be directed *to a proper known officer; otherwise, if it may be directed to any stranger, it might be resisted for want of knowledge that the party is an officer of the court. Then, taking the whole count together, the jury in effect find that there was an assault and imprisonment, but committed under circumstances which justified the defendant. For if a man without authority attempt to arrest another illegally, it is a breach of the peace; and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose; (h) and nothing further appears in this case to have been done." (i) †

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But where the process is regular, and executed by the proper officer, it will not be competent even for a peace-officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having a sufficient authority issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. (k) The following case upon an indictment for an assault and rescue proceeded upon this principle. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner

But where the arrest is lawful, though the execution of it be attended with an affray, even a peace-officer must not interpose and obstruct the officer endeavouring to effect

(g) *Rex v. Osmer*, 5 East, 304.(h) *Sed quære*, and see *post*, *Manlaughter in Resisting Officers*.(i) *Rex v. Osmer*, 5 East, 304. Judgment was accordingly arrested.

(k) 1 East, P. C. c. 5, s. 71, p. 304.

† [On the trial of an indictment for resisting a constable while engaged in executing process against the defendant's property, the defendant is not entitled to show that the officer had not taken the oath of office, or given the security required by law; it being sufficient in such a case that the party was an officer *de facto*. *The People v. Nopson*, 1 Denio, 574.

An officer *de facto*, acting *calore officii* is as well qualified to act, while thus in office, as if legally appointed and duly qualified. *Smith v. The State*, 19 Conn. 493. *Aulanus v. Governor*, 1 Texas, 653.

In an indictment for resisting a deputy sheriff in the discharge of his duty, it is unnecessary to set forth the specific acts of resistance complained of. *The State v. Coyp*, 15 New Hampshire, 212.]

was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly. (*l*)

Of obstructing process by the rescue of the party arrested.

In cases where the obstruction of process by the rescue of a party arrested is accompanied as is usually the case, with circumstances of violence and assault upon the officer, the offence may be made the subject of a proceeding by indictment: and as will be shown more fully in a subsequent chapter, (*m*) the rescue or attempt to rescue a party arrested on a criminal charge is usually punished by that mode of proceeding. And the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of rescous, or a general action of trespass *vi et armis*, or an action on the case; in all which damages are recoverable. (*n*) And it has also been the frequent *practice of the courts to grant an attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the court. (*o*)

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Of rescuing goods distrained; and of pound-breach.

It may be mentioned in this place, that the forcibly rescuing goods distrained and the rescuing cattle by the breach of the pound in which they have been placed, have been considered as offences at common law, and made the subject of indictment. (*p*) It has before been stated, that an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (*q*) but, as a mere trespass, without circumstances of violence, is not indictable, (*r*) it has been doubted whether even a pound-breach, which has been considered as a greater offence at common law than a rescue, (*s*) is an indictable offence, if unaccompanied by a breach of the peace. (*t*) But, on the other hand, it has been submitted that, as a pound-breach is an injury and insult to public justice, it is indictable *as such* at common law. (*u*) [1]

Where a hayward had distrained a horse damage feasant on an enclosed piece of pasture, and it was rescued from him on the way to the pound, and before it was impounded; it was held that this was not indictable, for till the horse got to the pound, the hayward was merely acting as the servant of the owner of the land; but it was said that if the hayward had driven cattle, which he had found straying in the lanes, to the pound, they would have been in the custody of the law from the

(*l*) Anon. Exeter Summ. Ass. 1793. 1 East, P. C. c. 5, s. 71, p. 305.

(*m*) *Post*, chap. xxxiv. *Of Rescue, &c.*

(*n*) Bac. Abr. tit. *Rescue*, (C). Com. Dig. tit. *Rescous*, (D).

(*o*) Bac. Abr. *ibid.* Com. Dig. tit. *Rescous*, (D 6). But in order to ground an attachment for a rescue, it seems there must be a *return* of it by the sheriff; at least, if it was on an arrest on mesne process. Bac. Abr. *ibid.* 2 Hawk. P. C. c. 22, s. 34. Anon. 6 Mod. 141. And see, as to the return of the rescue by the sheriff, Com. Dig. tit. *Rescous*, (D 4,) (D 5). Bac. Abr. tit. *Rescue*, (E). *Rex v. Belt*, 2 Salk. 586. *Rex v. Elkins*, 4 Burr. 2129. Anon. 2 Salk. 586. *Rex v. Minify*, 1 Str. 642. *Rex v. Ely*, 1 Lord Raym. 35. Anon. 1 Salk. 586. 1 Lord Raym. 589.

(*p*) Cro. Circ. Comp. 198. 2 Starkie's Crim. pl. 617. 2 Chit. Crim. L. 201, precedents of indictments for rescuing goods distrained for rent: and Cro. Circ. Comp. 199. 2 Chit. Crim. Law, 204, 206, precedents of indictments for pound-breaches.

(*q*) *Ante*, 53. Anon. 3 Salk. 187.

(*r*) *Ante*, 53.

(*s*) *Mirror*, c. 2, s. 26.

(*t*) 2 Chit. Crim. L. 204, note (*b*), referring to 4 Leon. 12.

(*u*) *Ibid.* 204, note (*b*), and the authorities there cited.

[1] {On an indictment for pound-breach, the illegality of the distress cannot be shown in the defence. 5 Pick. 714, *Commonwealth v. Bealé*.}

first, and the rescue of them on the way to the pound would have been indictable. (v)

The civil remedy, however, given by the 2 Wm. & M. c. 5, s. 4, will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts that, upon pound-breach, or rescous of goods distrained for rent, the person grieved shall, in a special action of the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use. (w)

It is laid down in the books, that, if a rescue be made upon a distress, &c., for the king, an indictment lies against the rescuer. (x) And we have seen that a lessee, resisting with force a distress for rent, or forestalling or rescuing the distress, will be guilty of the offence of a forcible detainer. (y) †

*SECT. II.

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Of Disobedience to Orders of Magistrates.

DISOBEDIENCE to an order of the justices of the peace at their sessions, made by them in the due exercise of the powers of their jurisdiction, is an indictable offence. Thus, a party has been holden to be guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren. (z) In this case it was moved in arrest of judgment that, as the 43 Eliz. c. 2, s. 7, had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the act ought to have been adopted, and that there could be no proceeding by indictment; but, after able argument, and great deliberation the court were of opinion that the prosecutor was at liberty to proceed at common law, or in the method prescribed by the statute; and that there could be no doubt but that an indictment would lie, at common law, for disobedience to an order of sessions. (a)

Upon the same principle it was holden that, where an act of parliament gave power to the king in council to make a certain order, and did not annex any specific punishment to the disobeying it, such disobedience was an indictable offence, punishable as a misdemeanor at common law. (b)

Disobeying an order of one or more justices, when duly made, is also

(v) *Rex v. Bradshaw*, 7 C. & P. 233, Coleridge, J. The learned judge seemed to think that if the horse had been rescued after it had been put in the pound, it would have been indictable.

(w) See as to the proceedings upon this statute, *Bradby on Distresses*, 282, *et seq.* Bac. Abr. tit. *Rescue*, (C). See 5 & 6 Wm. 4, c. 50, s. 75, which imposes a penalty on persons breaking the pound to rescue cattle, &c., found trespassing on highways.

(x) F. M. B. 102. (G). Com. Dig. tit. *Rescous*, (D 3).

(y) *Ante*, 310.

(z) *Rex v. Robinson*, 2 Burr. 799, 800.

(a) *Id. ibid.* See the principles upon which this decision proceeded, *ante*, 49, *et seq.*

(b) *Rex v. Harris*, 4 T. R. 202. 2 Leach, 549.

† [In an indictment at common law, charging defendant with rescuing property distrained by the sheriff for public dues, from a bailee to whose custody the sheriff had committed it, it must be averred that the defendant knew in what right the bailee held it. *Com. v. Israel*, 4 Leigh's Rep. 675.]

Disobedi-
ence to an
order of
justices.

a common law offence, and therefore punishable by indictment. (c) Thus, it has been holden to be an indictable offence to disobey an order of justices directing a highway to be widened, under the 13 Geo. 3, c. 78. (d) And it seems that an indictment will lie for disobedience to an order of justices placing out an apprentice pursuant to the statute, when such disobedience is either by not receiving, turning off, or not providing for such apprentice. (e) So a power to remove a pauper being given to two justices by the 13 & 14 Car. 2, c. 12, the not receiving him is a disobedience of that statute for which an indictment will lie. (f) And, by Forster, J., "In all cases where a justice has power given him to make an order, and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable." (g)

A magistrate residing within a poor law union, is only a guardian *ex officio*, under the Poor Law Amendment Act, while he is acting as such guardian. Where, therefore, two magistrates made an order of filiation under the 2 & 3 Vict. c. 85, upon the complaint of the guardians of the Teesdale Union, and both the magistrates resided within the Teesdale Union, and were, therefore, guardians *ex officio* of it, and one of them was a rated inhabitant of a township within the Teesdale Union; but not that in favour of which the order was made; one of the magistrates had on other occasions acted as a guardian *ex officio*, but neither had acted as guardian in any thing respecting this matter; it was held that the order was good. (gg)

Every per-
son requir-
ed by an
order to do
any act,
should lend
his aid to
carry it into
effect.

Where such an order is made, any person mentioned in it, and required to act under it, should, upon its being duly served upon him, lend his aid to carry it into effect. Thus, where, upon a complaint made by an excluded member of a friendly society, two persons, A. and B., the then stewards of the society, were summoned, and an order made by two justices that such stewards and the other members of the society should forthwith reinstate the complainant; it was holden, that though this order was not served upon A. and B. *until they had ceased to be stewards, yet it was still obligatory upon them, as members of the society, to attempt to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part. (h) Lord Ellenborough, C. J., said, that the trial, "The order is not confined to the stewards alone, but is made upon all the members of the society; and the defendants were members of the society independently of their being stewards, and were bound, as members, to see that the order was obeyed; or, at least, to have taken some steps for that purpose. As members, they might have done something; as stewards indeed, they might, with greater facility, have enforced obedience to the order; but each member had it in his power to lend some aid for the attainment of that object." And when in the ensuing term a motion was made that a verdict might be entered for the defendants on the ground that, having ceased to be stewards when the notice was served, they had

(c) *Rex v. Balme*, Cowp. 650. *Rex v. Fearnley*, 1 T. R. 316.

(d) *Id. ibid.*

(e) *Reg. v. Gould*, 1 Salk. 381. 2 Nol. c. 33, s. 3, p. 349.

(f) *Rex v. Davis*, 1 Bott. 361, pl. 378. Say. 163. *Burn's Just. tit. Poor. Sect. XIX., 2 i*

(g) *Burn's Just. ibid.*

(gg) *Reg. v. Cant*,^a 1 C. & Mars. 521. All the judges.

(h) *Rex v. Gash and another*,^b 1 Starkie, 441.

^a Eng. Com. Law Repts. xli. 285.

^b *Ib. ii. 462.*

not been guilty of a criminal default; the court said, that if the defendants had shown that they did every thing in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse.(i)

So an indictment lies against the president and stewards of a friendly society for disobeying an order of justices requiring them and the members of the said society to readmit a member, though it be sworn that the power of doing so is not in the president and stewards, but in a committee.(j)†

There must be personal service of an order on all persons who are charged with a contempt of it: and it was held upon demurrer, to be a decisive objection to an indictment for a disobedience and contempt of an order of sessions, that it charged a contempt by six persons of an order, which was only stated to have been served on four of them.(k)

The entire order of a court to pay the expenses of a prosecution, under the 7 Geo. 4, c. 64, s. 26, must be served on the treasurer of the county. Where, therefore, an order was made to pay an aggregate sum, the details of which were annexed, and the attorney tore off the details, and served the order for the payment of the aggregate sum alone on the treasurer; it was held on the case served, that he was not indictable for refusing to obey the order.(l)

Upon an indictment for disobeying an order commanding the stewards of a friendly society to readmit A. B., it seems to be sufficient to prove that the order was served on one of the defendants, and that the others when A. B. applied to them to be readmitted said they would not, and did not care for the justice's order.(m)

It appears to have been holden not to be necessary, in an *indictment against a public officer for disobedience of orders, to aver that the orders have not been revoked; for the orders, being stated to have been given by those who were empowered by certain statutes to give them, must be taken to remain in force until they were revoked or contradicted.(n) But an indictment for disobeying an order of justices must show explicitly that an order was made; and it is not sufficient to state the order by way of recital.(o) It is said to be more safe to aver that the defendant was requested to comply with the terms of the order.(p) But if the state-

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Of the indictment.

(i) *Rex v. Gash and another*,^a 1 Starkie, 441. The motion was also made on another ground: namely, a defect in the jurisdiction of the magistrates; two magistrates of the county of Middlesex, where the meetings of the society were held, having made the order, though the society had been originally established in London, and its rules enrolled at the sessions for London. But the court decided that the magistrates of Middlesex had jurisdiction. See 33 Geo. 3, c. 54, and 49 Geo. 3, c. 125, s. 1.

(j) *Rex v. Wade*,^b 1 B. & Ad. 861. See this case as to what was a sufficient filing of the rules with the clerk of the peace within the 33 Geo. 3, c. 54, s. 2.

(k) *Rex v. Kingston and others*, 8 East, 41.

(l) *Reg. v. Jones*,^c 2 Moo. C. C. R. 171, 9 C. & P. 401, C. S.

(m) *Rex v. Gilkes*,^d 3 C. & P. 52. Abbott, C. J.

(n) *Rex v. Holland*, 5 T. R. 607, 624, a case of an indictment against the defendant for malversations in office while he was one of the council of Madras.

(o) *Rex v. Crowhurst*, 2 Lord Raym. 1363.

(p) 2 Chit. Crim. L. 279, note (g), citing 1 T. R. 316, which is the case of *Rex v. Fearnley*, where an objection was taken to an indictment that it did not contain such statement; but the court did not find it necessary to give any opinion upon the point.

† [An indictment lies against a corporation for neglecting to perform a duty required by the public good. *Susquehanna and Bath Turnpike Road Co. v. The People*, 15 Wend. 267. *The People v. The Corporation of Albany*, 11 Wend. 539.]

^a Eng. Com. Law Repts. ii. 462.

^b Ib. xx. 497.

^c Ib. xxxviii. 171.

^d Ib. xiv. 207.

ment of the order having been served on all the defendants (which as has been before observed, is a necessary statement) be omitted, the want of such an allegation will not be supplied by averring that they were all requested to perform the duties required by the order. (*g*)

On the trial of an indictment against the stewards of a friendly society for disobeying an order of justices, which recited that the rules of such society had been enrolled, such recital is not evidence of that fact, and it must be proved by other means, in order to show that the justices had jurisdiction to make the order under the 33 Geo. 3, c. 54, s. 2. (*qq*)

Legality of the order cannot be inquired into on the trial or on motion in arrest of judgment.

Upon the trial of such an indictment, the court will not enter into the merits of the original case, nor will they hear objections to the order which do not appear upon the face of it. (*r*) Upon the trial, therefore, of such an indictment it is no defence that the party ordered to be re-admitted was ineligible to a member of the society, as that was matter of defence before the justices. (*s*) So on a motion to arrest the judgment upon an indictment for disobeying an order of justices for the payment of a fine upon a conviction, the Court of King's Bench refused to hear any objections to the conviction which did not appear upon the face of it. (*t*)

But want of jurisdiction may.

But if it appear on the face of the order that the justices had no jurisdiction to make it, the defendant should be acquitted, without being left to bring a writ of error, though the want of jurisdiction be apparent on the face of the indictment. Where, therefore, certain justices acting under the Building Act (14 Geo. 3, c. 78) had made an order that a building should be removed, as an encroachment upon a highway, but the building not stated in the order to extend beyond the general line of the houses, so as to be contrary to the provisions of the act, it was held, upon an indictment for disobeying such order, that the defendant should be acquitted, although the objection appeared on the record. (*u*)

Where an indictment stated that M. had been expelled from a friendly society, and had been deprived of certain relief from it, to which he was entitled, and that finding himself aggrieved thereby, he made complaint thereof to two justices, and deposed before them *to the truth of the *said* complaint, and that the justices ordered that he should be continued a member of the society, and that the stewards of the society unlawfully refused so to continue him as a member of the society, and the order when produced, recited only a complaint that the stewards had refused to pay him the relief, but contained an order to pay the relief, and also that he should be continued as a member of the society; it was held that the defendants were entitled to be acquitted; first, because the allegations of the indictment were not proved, as the defendants were only summoned to answer one ground of complaint and not two; and, secondly, because the adjudication to continue M. a member of the society was had, for the 33 Geo. 3, c. 54, s. 15, confines the jurisdiction of justices to the subject matter of the complaint. (*v*)

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33 Geo. 3, c. 55, s. 1, gives a power to

Before this subject is concluded, it may be proper, shortly, to notice the 33 Geo. 3, c. 55, s. 1, which gives power to justices of the peace assembled at any special or petty sessions, upon complaint upon oath of

(*g*) *Rex v. Kingston*, 8 East, 41, 53.

(*qq*) *Rex v. Gilkes*,^a 8 B. & C. 438.

(*r*) *Rex v. Mitton*, 3 Esp. R. 200, S. C. Cald. 536.

(*s*) *Rex v. Gilkes*,^b 3 C. & P. 52. Abbott, C. J.

(*t*) *Rex v. Mitton*, 3 Esp. R. 200, in the note.

(*u*) *Rex v. Hollis*,^c 2 Star. N. P. C. 536. Abbott, C. J.

(*v*) *Rex v. Soper*,^d 3 B. & C. 857.

Eng. Com. Law Reps. xv. 261.

^b *Ib* xiv. 207.

^c *Ib* iii. 464.

^d *Ib* x. 253.

any neglect of duty, or of any disobedience of any lawful warrant, or order of any justice or justices of the peace, by any constable, overseer of the poor, or other peace or parish officer, (such constable, &c., having been duly summoned) to impose, upon conviction, any reasonable fine or fines, not exceeding forty shillings: and, by warrant under the hands and seals of any two or more of such justices so assembled, to direct the fines to be levied by distress and sale of the offender's goods. And it is provided, that any person aggrieved by such fine, warrant, &c., may appeal to the next quarter sessions; giving, at least, ten days' notice.

*CHAPTER THE THIRTY-SECOND.

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OF ESCAPES.(A)

AN escape is, where one who is arrested gains his liberty before he is delivered by the course of the law.(a) And it may be by the party himself: either without force before he is put in hold, or with force, after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force, by the rescuing the party from custody. Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself with force, it is called *prison breaking*; and where it is effected by others, with force, it is commonly called a *rescue*.(b) In the present chapter it is proposed to consider of those acts without force, which more properly come under the title of *escape*.

There is little worthy of remark in the books respecting an escape effected by the party himself, without force: but the general principle appears to be, that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by an artifice, and elude the vigilance of their keepers, before they are put in hold, are guilty of an offence in the nature of a high contempt, and punishable by fine and imprisonment.(c)† And it is also criminal for a prisoner to escape from lawful

(a) *Terms de la Ley*.

(b) 1 Hale, 590. 2 Hawk. P. C. c. 17, 18, 19, 20, 21.

(c) 2 Hawk. P. C. c. 17, s. 5. 4 Bla. Com. 129.

(A) NEW YORK.—Lying in wait near a gaol, by agreement with a prisoner, and carrying him away, is not an offence against the statute (sess. 24, c. 50, s. 12, 13. 1 N. R. L. 411), but is a misdemeanor at common law. *The People v. Tompkins*, 9 Johns. Rep. 70.

Aiding and assisting a person to escape from gaol, committed on suspicion of having been accessory to the breaking of a house with intent to commit felony, is not indictable under the statute above mentioned, because the prisoner was not committed on any distinct or certain charge of felony. *The People v. Washburn*, 10 Johns. Rep. 160.

A person confined in gaol, who attempts to escape by breaking the prison, in consequence of which a fellow prisoner, confined for felony, escapes from gaol, is guilty of an offence within the 20th section of the statute (sess. 36, c. 29, 1 N. R. L. 412), and may be punished by imprisonment in the state prison. *The People v. Rose*, 12 Johns. Rep. 339. See *post*, chap. xxxiii.

{ See Revised Statutes, Vol. II. 683-685. }

† [*Acc. The State v. Doud*, 7 Conn. Rep. 384. But the court for such offence will not inflict a punishment exceeding that from which the offender escaped. *Ibid*. When an indictment for an escape charged that the defendant, being confined in a jail under conviction and sentence for larceny, escaped therefrom, it was held, that as only a convict can commit the offence charged, it was necessary, in order to support the indictment, to prove that the person charged with the escape was the same who was convicted of Larceny. *The State v. Murphy*, 5 Eng. 74.]

confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of misdemeanor; and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he may be indicted for the escape. (*d*)

Evidence. It is a misdemeanor at common law to aid a person to escape from custody, though he be confined under the remand of the commissioners for the relief of insolvent debtors, and not on any criminal charge. (*dd*)

*417 It was decided, upon an indictment for an escape from the House of Correction, after conviction for a capital offence and conditional pardon, that a certificate from the officer of the former conviction was not evidence, as in the case of being at large after sentence of transportation. The indictment was for an escape from the House of Correction after a pardon, upon condition of being there one year; the certificate of the clerk of assize was produced in evidence: but, upon a case reserved, the judges were of opinion that the certificate was no evidence, there being no act which made it evidence, and that the conviction was wrong. (*e*)

Certificates of conviction evidence. But the 4 Geo. 4, c. 64, s. 44, to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts, (amongst other things) that in case of any prosecution for an escape, attempt to escape, breach of prison or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, or abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced. With respect to the form of such a certificate, a case decided upon the 56 Geo. 3, c. 27, s. 8, [now repealed] may be mentioned, in which it was decided that the certificate of a former conviction, authorized by that statute, should set forth the effect and substance of the conviction; and that stating it to have been for felony only was insufficient. The prisoner was indicted for being at large after a sentence of transportation for seven years: the indictment only stated that he had been convicted of felony, without specifying the nature of that felony; and the certificate to prove the former conviction was in the same form. Upon the point being saved, the judges thought this case decided by a former case of *Rex v. Rutcliffe*, and the prisoner was remitted to his original sentence. (*f*)

Persons escaping from Great Britain to Ireland, It may be here mentioned that, by the 44 Geo. 3, c. 92, s. 3, offenders, against whom any warrant shall be issued, escaping from Ireland into England or Scotland, may be apprehended by an indorsed warrant, and conveyed to Ireland; the fourth section makes the same provision as to

(*d*) 1 Hale, 611. 2 Inst. 589, 590. Summ. 108. Staund. P. C. 30, 31. 2 Hawk. P. C. c. 18, s. 9, 10.

(*dd*) *Reg. v. Allan*, 1 C. & Mars. 295, Erskine, J., and Wightman, J.

(*e*) *Rex v. Smith*, East. T. 1788. MS. Bayley, J.

(*f*) *Rex v. Watson*, Mich. T. 1821. MS. Bayley, J., and Russ. & Ry. 468. The 56 Geo. 3, c. 27, s. 3, authorized a certificate containing the effect and substance only, omitting the formal part, of every indictment, conviction, &c.

offenders escaping from England or Scotland into Ireland, being apprehended and conveyed back again to England or Scotland. (y) &c., to be brought back.

Escapes effected, or, perhaps more properly, suffered by others than the party himself, without force, by permission or negligence, may be either I. by officers; or II. by private persons.

*SECT. I.

*418

Of Escapes suffered by Officers.(A)

An escape of this kind must be from a justifiable imprisonment for a criminal matter, after an *actual arrest*. Escape after actual arrest.

As there must be an *actual arrest*, it has been holden, that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. (h)

The arrest and imprisonment must be justifiable; for, if a party be arrested for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large. (i) But it seems that if a warrant of commitment plainly and expressly charge the party with treason or felony, though it be not strictly formal, the gaoler, suffering an escape, is punishable; and that where commitments are good in substance, the gaoler is as much bound to observe them as if they were made ever so exactly. (j) It is stated as a good general rule upon this subject that, whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (k) And the arrest and imprisonment must be justifiable.

The imprisonment must not only be justifiable, but also for some criminal matter. But the escape of one committed for petit larceny only was criminal: and it seems most agreeable to the general reason of the law that the escape of a person committed for any other crime what- The imprisonment must be for a criminal matter, and

(g) And see as to the apprehension of persons escaping from England into Scotland, and from Scotland into England, 13 Geo. 3, c. 31. And as to the admitting persons apprehended in England, Scotland and Ireland, respectively, to bail, for bailable offences, see 45 Geo. 3, c. 186.

(h) 2 Hawk. P. C. c. 19, s. 1.

(i) Id. *ibid.* s. 2.

(j) 3 Hawk. P. C. c. 19, s. 24. A commitment to a *prison*, and not to a *person*, was held good in *Rex v. Fell*, 1 Lord Raym. 424.

(k) Id. *ibid.* s. 2. And see *post*, chap. xxxiii.

(l) The distinction between grand and petit larceny was abolished by the 7 & 8 Geo. 4, c. 29, s. 2.

(A) In most of the states, the punishment for escapes and prison breach is provided for by particular statutes, to which the reader must be referred. A principle which in these cases appears to be perfectly just, is adopted in—

MASSACHUSETTS.—By the 3d section of the statute “for providing and regulating prisons,” (statute 1784, ch. 41), it is enacted that “every gaoler or prison keeper, that shall voluntarily allow any prisoner, so escaping, would by law have been liable to, for the crime or crimes for which he stood charged, if he had been convicted thereof; and if any gaoler or prison keeper shall, through negligence, suffer any prisoner accused of any crime to escape, he shall pay such fine as the justices of the court, before whom he is convicted, shall in their discretion inflict, according to the nature of the offence for which the escaped prisoner stood committed.”

UNITED STATES.—See 1 Story, 58, for the law of the United States against rescue and prison breach.

continuing
at the time
of the
escape.

soever should also be criminal. (m) The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he should be discharged, "paying his fees;" he being in such case detained only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also "until he pays his fees," it is said, that perhaps an escape of such person, after the time of his imprisonment is elapsed, without paying his fees, may be criminal; as it was part of the punishment that the imprisonment should be continued till the fees should be paid. (n)

*419

Escapes
may be
voluntary
or negli-
gent.

Of volunta-
ry escapes.

*The next important inquiry upon this subject will be, whether the escape be *voluntary* or *negligent*, as the former is an offence of a much more serious nature than that which may have been committed by negligence.

Whenever an officer, having the custody of a prisoner charged with, and guilty of, a capital offence, knowingly gives him his liberty with an intent to save him either from his trial or execution, such officer is guilty of a *voluntary escape*; and thereby involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. (o) Hawkins says, that it seems to be the opinion of Sir Matthew Hale, (p) that in some cases an officer may be adjudged guilty of a voluntary escape who had no such intent to save the prisoner, but meant only to give him a liberty which, by law, he had no colour of right to give; as if a gaoler should bail a prisoner who is not bailable: but he withholds his assent to that opinion, on the ground that it is not sufficiently supported by the authorities, and does not seem to accord with the purview of the 5 Edw. 3, c. 8, relating to the improper bailing of persons by the marshals of the King's Bench. (q) He says also, that it seems to be agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; and that there are some cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had, (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he suspected to have been stolen,) and yet seems to have been only adjudged guilty of a negligent escape. (r) And he concludes by saying, that, if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without any security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that from thence it seems reasonable to infer that it cannot be, in all cases, a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment to

(m) 2 Hawk. P. C. c. 19, s. 3. 1 Hale, 592.

(n) 2 Hawk. P. C. c. 19, s. 4. This seems to be a good reason: but Hawkins says that it is to be intended only where the fees are due to others as well as to the gaoler; for, otherwise, the gaoler would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only in the non-payment of a debt in his power to release.

(o) Staund. P. C. 33. 2 Hawk. P. C. c. 19, s. 10. 4 Bla. Com. 129.

(p) Sum. 113. 1 Hale, 506, 507.

(q) Post, 424.

(r) Hawkins says, however, that it must be confessed that, in these cases, the prisoner was only accused of larceny, and that it does not appear whether he were bailable or not; and that, generally, the old cases concerning this subject are so very briefly reported, that it is very difficult to make an exact state of the matter from them.

be made of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted.(s)

It appears to have been holden, that it is an escape in a constable to discharge a person committed to his custody by a watchman as a loose and disorderly woman, and a street-walker, although no positive charge was made.(t)

A negligent escape is where the party arrested or imprisoned escapes ^{Negligent} against the will of him that arrests or imprisons him, and is not freshly ^{escapes.} pursued and taken again before he has been lost *sight of.(u) And, *420 from the instances of this offence mentioned in the books, it seems that where a party so escapes, the law will presume negligence in the officer. Thus, if a person in custody on a charge of larceny, suddenly, and without the consent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable.(v) And if a prisoner charged with felony break a gaol, it is said that this seems to be a negligent escape: because there wanted either the due strength in the gaol that should have secured him, or the due vigilance in the gaoler or his officers that should have prevented it.(w) But it is submitted that it would be competent to a person charged with a negligent escape under such circumstances, to show in his defence that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. Undoubtedly an escape happening from defect in these particulars would come within the principle of guilty negligence in those concerned in the proper custody of the criminal: and neglect in not keeping goals in a proper state of repair, by those who are liable to the burden of repairing them, appears in many instances to have been treated as an indictable offence, tending to the great hindrance and obstruction of justice.(x)

A person who has power to bail is guilty only of a negligent escape ^{Negligent} by bailing one who is not bailable. Thus if a justice of peace bails a ^{escape by} person not bailable by law, it excuses the gaoler, and is not felony in ^{admitting} the justice; but a negligent escape, for which he is finable at common ^{to bail.} law, and by the justices of gaol delivery.(y) It is laid down as clear law, that whoever *de facto* occupies the office of gaoler is liable to answer for a negligent escape, and that it is in no way material whether

(s) 2 Hawk. P. C. c. 19, s. 10.

(t) *Rex v. Bootie*, 2 Burr. 864.

(u) Dalt. c. 159. Burn. Just. tit. *Escape*, IV.

(v) Dalt. c. 159.

(w) 1 Hale, 600, where it is said that "therefore it is lawful for the gaoler to hamper them with irons, to prevent their escape." But see the note (a) *ibid.*, where it is said that this liberty can only be intended where the officer has just reason to fear an escape, as where the prisoner is unruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbid to put their prisoners to any pain or torment; Co P. C. 34, 35. *Custodes gaolarum pœnam sibi commissis non augeant, nec eos torqueant vel redimunt, sed omni servitio remotu pietateque adhibita judicium debite exequantur.* And the *Mirror of Justices*, ch. 5, s. 1, n. 54, says that it is an abuse that prisoners should be charged with irons, or put to any pain, before they be attainted of felony: and Lord Coke, in his comment on the statute of Westm. 2, c. 11, is express that by the common law it might not be done. 2 Inst. 381.

(x) See the precedents of indictments for this offence, 4 Wentw. 363. Cro. Circ. Comp. 189. Cro. Circ. Ass. 398. 3 Chit. Crim. L. 668, 669.

(y) At common law, according to 25 Edw. 3, 39, (in the last edition of the year books mispaged 25 Ed. 3, 82 a.) and by the justices of gaol delivery, by the 1 & 2 Ph. & M. c. 13. See 1 Hale, 586, and as to escapes by admitting bail or to improper liberty, *ante*, 419.

or not his title to the office be legal.^(z) But it seems that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody, and will not lie against the mere servants of such officer. Thus were the indictment was against one of the yeoman wardens of the Tower and the gentleman gaoler, for permitting Colonel Parker, who was committed for high treason, to escape, it appeared that the constable of the Tower had committed the colonel to their special care: but the court held that *defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape; and they were acquitted.^(a) And upon the same principle another warden of the Tower appears also to have been acquitted of a negligent escape.^(b) It appears, however, that a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself: that the court may charge either the sheriff or bailiff for such an escape; and that, if a deputy gaoler be not sufficient to answer for a negligent escape, his principal must answer for him.^(c)[1]

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Of retaking a prisoner.

The difference between a voluntary and negligent escape will also require to be attended to in considering the effect of the *re-taking* of a prisoner after he has been suffered to escape.

After a voluntary escape.

When an officer has *voluntarily* suffered a prisoner to escape, it is said that he can no more justify the re taking him than if he had never had him in custody before; because, by his own free consent, he hath admitted that he had nothing to do with him: but if the party return, and put himself again under the custody of the officer, it seems that it may probably be argued that the officer may lawfully detain him, and bring him before a justice in pursuance of a warrant.^(d)

After a negligent escape.

It seems to be clearly agreed by all the books, that an officer making fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he finds him in the same, or a different county; [2] and it is said generally in some books, that an officer who has negligently suffered a prisoner to escape, may retake him, wherever he finds him, without mentioning any fresh pursuit; and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it.^(e) If the officer pursue a prisoner, who flies from him, so closely as to retake him without losing sight of him, the law regards the prisoner as being so much in his power all the time as not to adjudge such flight to amount to an escape: but if

(z) 2 Hawk. P. C. c. 19, s. 28.

(a) *Rex v. Hill and Dod*, Old Bailey, Jan. 1694. Burn's Just. tit. *Escape*, III.(b) *Rex v. Rich*, Old Bailey, Jan. 1694, MS. Bayley, J.(c) 2 Hawk. P. C. c. 19, s. 29, and *Rex v. Fell*, 1 Lord Raym. 424. 2 Salk. 272. Hawkins says, "But if the gaoler who suffers an escape have an estate for life or years in the office, I do not find it agreed how far he in reversion is liable to be punished."(d) 2 Hawk. P. C. c. 19, s. 12, c. 13, s. 9. Dalt. c. 169. Burn. Just. tit. *Escape*. {1 Wend. 398, Littlefield v. Brown.}

(e) 2 Hawk. P. C. c. 19, s. 12.

[1] {The marshal is not liable for the escape of a prisoner committed to a state jail under process from the courts of the United States. 9 Cranch, 76, *Randolph v. Donaldson*.}[2] {If a person, legally committed or arrested, escape by force or otherwise, against the will of the officer having the custody of him, and flee into another state, the officer may lawfully pursue and retake him in that state. 5 Day, 244, *Pearl v. Rawdin*. But the officer thus pursuing cannot, it seems, take the prisoner from the custody of an officer of another state, acting under process warranted by the laws of that state; nor resist such officer in the execution of such process. 2 Pick. 304, *Griffin v. Brown*.}

the officer once lose sight of the prisoner, it seems to be the better opinion that he will be guilty of a negligent escape, though he should retake him immediately afterwards. *(f)* And if he has been fined for the offence it is clear that he will not avoid the judgment of his fine by retaking the prisoner. *(g)* And it is also clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him: but must, in such case, be content to submit to such fine as his negligence shall appear to deserve *(h)*

The proceedings against persons charged with having suffered escapes must in general be by presentment or indictment, or they may be by information. *(i)*

*But where persons present in a court of record are committed to prison by such court, the keeper of the gaol, as he is bound to have them always ready to produce when called for, if he fail to produce them, will be adjudged guilty of an escape, without further inquiry; unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broken open by enemies, &c., for he will be concluded by the record of the commitment from denying that the prisoners were in his custody. *(j)* And some have holden *(k)* that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary: but it seems difficult to maintain that where it stands indifferent whether an escape be negligent or voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial. *(l)* With respect to other prisoners not committed in such manner, but in the custody of a gaoler or other person by any other means whatsoever, it seems to be agreed that the person who had them in custody is in no case punishable for an escape, until it be presented. *(m)* But it is laid down as a rule, that though, where an escape is fineable, the presentment of it is traversable; yet that where the offence is amerciable only, there the presentment is of itself conclusive; such amerciements being reckoned amongst those *minimo de quibus non curat lex*: *(n)* and this distinction is said to be well warranted by the old books. *(o)*

It should be observed, that it is laid down in the books, that a person who has suffered another to escape cannot be arraigned for such escape as for felony, until the principal be attained: on the ground that he is only punishable in this degree as an accessory to the felony, and that the general rule is, that no accessory ought to be tried until the principal be attained; *(p)* but that he may be indicted and tried for a misprision before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape.

Proceedings by presentment or indictment, or by a more summary course. *422

Trial.

(f) Staundf. P. C. 33. 1 Hale, 602. 2 Hawk. P. C. c. 19, s. 6, 13.

(g) 2 Hawk. P. C. c. 19, s. 12, 13.

(h) Staundf. P. C. 33. 1 Hawk. P. C. c. 28, s. 11, 12. 2 Hawk. P. C. c. 19, s. 6, 13.

(i) Rex v. The Gaoler of Shrewsbury, 1 Str. 533, where the court refused to grant an attachment against the gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to show cause why there should not be an information.

(j) 2 Hawk. P. C. c. 19, s. 15.

(k) Staundf. P. C. 34. 1 Hale, 599, 603.

(l) 2 Hawk. P. C. c. 19, s. 15.

(m) Id. ibid. s. 16.

(n) Staundf. P. C. c. 32, p. 36.

(o) 2 Hawk. P. C. c. 19, s. 21, and see *post*, 425, as to escapes fineable or amerciable.

(p) See *ante*, 38, *et seq.* In Cro. Circ. Ass. 338, is an indictment as for a misdemeanor against a gaoler, for wilfully permitting a prisoner to escape who was under imprisonment for the term of six months, after a conviction of grand larceny; but it seems that it ought to have been laid as a felony. See 2 Starkie, Crim. Plead. 600, *(b)*, referring to Rex v. Burridge, 3 P. Wms. 497.

If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is, that there are no accessories in high treason.(g)

Of the indictment for an escape.

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Every indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion;(r) and judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and *charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge.(s) But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was holden upon an indictment against the constable for discharging her, that by an allegation of his being charged with her, "*so being* such loose," &c., it was sufficiently averred that he was charged with her, "*as* such loose," &c., and it was also holden not to be necessary to aver that the defendant knew the woman to be a street-walker.(t) And every indictment should also show that the prisoner went at large:(u) and also the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon.(v) If the indictment be for a voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large;(w) and must also show the species of crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c.(x) But it is questionable whether such certainty as to the nature of the crime be necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not.(y)†

By the statute of Westminster 1, c. 3, the proceedings and trial for the offence of an escape were to be had before the justices in eyre: but it was adjudged that the jurisdiction of the Court of King's Bench was not restrained by that statute, that court being itself the highest court of eyre.(z) The 31 Edw. 3, c. 14, enacts, that the escape of thieves and felons, and the chattels of felons, &c., from thenceforth to be judged be-

(g) 2 Hawk. P. C. c. 19, s. 26.

(r) Id. ibid. s. 14.

(s) Rex v. Fell, 1 Lord Raym. 424. 2 Salk. 272.

(t) Rex v. Bootie, 2 Burr 864; {2 Kenyon's Rep. 576, S. C.}; and see as to the sufficiency of such averments, Rex v. Boyall, 2 Burr. 832.

(u) 2 Hawk. P. C. c. 19, s. 14, where it is said that this is most perfectly expressed by the words *exiit ad largum*.

(v) 2 Hawk. P. C. c. 19, s. 14. But upon an indictment for an escape the court will not intend a pardon; it must be shown by the defendant by way of excuse. Rex v. Fell, 1 Lord Raym. 424.

(w) *Felonice et voluntarie A. B. ad largum ire permisit*.

(x) 2 Hawk. P. C. c. 19, s. 14.

(y) Id. ibid.

(z) Staundf. P. C. c. 32, p. 35. *Eo que le banke le roy est un eire, & plus haut que un eire, car si le eire sea in un county, et le banke le roy veigne la le eire cessera.*

† [In an indictment against a constable for an escape, it is sufficient to allege that the defendant permitted the prisoner to escape and go at large without alleging in addition that he did escape and go at large. *The State v. Maberry*, 3 Strobb. 144.

It is not a valid objection to an indictment for an escape, that the defendant, who was charged therein with negligence as a lawful constable, had not been formally appointed and qualified as a constable, he having assumed to act as such. *Ibid.*]

fore any of the king's justices, shall be levied from time to time, &c., by which it seems to be implied that other justices, as well as those in eyre, may take cognizance of escapes: and it is certain that justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are notailable. (a)

The enactment of the 4 Geo. 4, c. 64, s. 44, as to the evidence by the certificate of the clerk of assize, or clerk of the court in which the offender was convicted has been already mentioned. (b)

In considering of the punishment for this offence, it will be necessary again to attend to the distinction between a voluntary and negligent escape. Evidence. Punishment.

It seems to be generally agreed that a voluntary escape amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted or appealed. (c) But the voluntary escape of a felon was within the benefit of clergy, though the felony for which the party was in custody were ousted. (d) An escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he were rightfully entitled to the custody; for the crime is in both cases of the same ill consequence to the public. (e)

But no one is punishable in this degree for a voluntary escape but the person who is guilty of it; therefore, the principal gaoler is only fineable for a voluntary escape suffered by his deputy. (f) One voluntary escape is said to amount to a forfeiture of a gaoler's office. (g)

No escape will amount to a capital offence unless the cause for which the party was committed were actually such at the time of the escape: its becoming a capital offence afterwards, as by the death of a party wounded at the time of the escape, but not then dead, will not be sufficient. (h)

Whenever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum, to be paid to the king as a fine. (i) And it seems that, by the common law, the penalty of suffering the negligent escape of a person attainted was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds: and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper: And it seems also, that if the party had escaped twice, these penalties were of course to be doubled: but that the forfeiture was no greater for suffering a prisoner to escape who had been committed but on two several accusations, than if he had been

(a) 2 Hawk. P. C. c. 19, s. 19, ante, 420.

(b) Ante, 417.

(c) 2 Hawk. P. C. c. 19, s. 22. And it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year and day should be passed, to give the widow or heir an opportunity of bringing their appeal. Id. ibid.

(d) 1 Hale, 599.

(e) 2 Hawk. P. C. c. 19, s. 23.

(f) Rex v. Fell, 1 Lord Raym. 424. 2 Salk. 272. 1 Hale, 597, 598.

(g) 2 Hawk. P. C. c. 19, s. 30.

(h) 2 Hawk. P. C. c. 19, s. 25.

(i) 2 Hawk. P. C. c. 19, s. 31, where the author says, "It seems most properly to be called a fine. But this does not clearly appear from the old books; for in some of them it seems to be taken as a fine, in others as an amercement; and in others it is spoken of generally as the imposition of a certain sum, and without any mention of either fine or amercement."

committed but on one. (*j*) It is the better opinion that one negligent escape will not amount to a forfeiture of a gaoler's office: yet if a gaoler suffer many negligent escapes, it is said, that he puts it in the power of the court to oust him of his office at discretion. (*k*)

Punish-
ment of
negligent
escapes by
statutes.
5 Ed. 3, c.
8, as to the
marshals of
the King's
Bench.
*425

Some regulations by statutes respecting the punishment of negligent escapes should also be noticed.

The 5 Ed. 3, c. 8, recites, that persons indicted of felonies had removed the indictments before the king, and there yielded themselves, and had been incontinently let to bail by the marshals of the King's Bench; and enacts that such persons shall be safely *and surely kept in prison; and (after providing for the manner of such confinement, &c.) further enacts, that if any such prisoner be found wandering out of prison by bail or without bail, the marshal being found guilty, shall have a year's imprisonment, and be ransomed at the king's will.

56 G. 3, c.
63, as to
persons
having the
custody of
convicts in
the general
peniten-
tiary.

The 56 Geo. 3, c. 63, which was passed for regulating the general penitentiary for convicts at Millbank, enacts, that if any person having custody of any convict, or being employed by the person having such custody in the manner mentioned in the act, shall negligently permit any such convict to escape; such person so permitting shall be guilty of a misdemeanor; and being lawfully convicted, shall be liable to fine or imprisonment, or to both at the discretion of the court. (*l*)

It has been holden, that a negligent escape may be pardoned by the king before it happens, but that a voluntary one cannot be so pardoned. (*m*) Upon an indictment for an escape, the court will not intend a pardon; but it must be shown by the defendant by way of excuse. (*n*)

SECT. II.

Of Escapes suffered by Private Persons.

THE LAW with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers; it will be sufficient, therefore, to mention shortly the circumstances under which it is considered that a private person may be guilty of an escape, and the punishment to which he will be liable.

In what
cases a pri-
vate per-
son will be
guilty of an
escape.

It seems to be a good general rule, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffer him to go at large before he has discharged himself, by delivering him over to some other who by law ought to have the custody of him. And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the

(*j*) 2 Hawk. P. C. s. 33.

(*k*) *Id.* *ibid.* s. 30.

(*l*) 56 Geo. 3, c. 63, s. 44. And by s. 45, in any prosecution against any person concerned in the escape, &c., or aiding, &c., a copy properly attested of the order of commitment to the penitentiary is made evidence that the person in question was so ordered to confinement, after proof that such person is the same that was delivered with the order.

(*m*) 2 Hawk. P. C. c. 18, s. 32, and more fully, *id.* c. 37, s. 28.

(*n*) *Rex v. Fell*, 1 Lord Raym. 424.

custody of a prisoner, he ought, at his peril, to have taken care of him.(o)

But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody the prisoner escapes, he will not be chargeable. He cannot, however, excuse himself from the escape by alleging that he delivered the prisoner over to an officer, without showing to whom, in particular, *by name, he so delivered him, *426 that the court may certainly know who is answerable.(p)

If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offence;(q) and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court.(r)

Punishment of private persons for escapes.

*CHAPTER THE THIRTY-THIRD.

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OF PRISON-BREAKING BY THE PARTY CONFINED.

WHERE a party effects his own escape *by force*, the offence is usually called *prison breaking*; and as such breach of prison, or even the conspiring to break it, was felony at the common law, for whatever cause, criminal or civil, the party was lawfully imprisoned:(a) and whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him.(b) But the severity of the common law is mitigated by the statute *De frangentibus prisonam*, 1 Ed. 2, stat. 2, which enacts, "That none, from henceforth, that breaketh prison, shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such a judgment, if he had been convicted thereupon, according to the law and custom of the realm." Thus, though felony remains still felony as at common law; to break prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor, by fine and imprisonment.(c)

Offences at common law, whether imprisonment were for a criminal or civil cause.

It will be proper to consider some of the points which have been holden in the construction of this statute.

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks or the street, or in the common gaol, or in the house of a constable or private person, or the prison of the ordinary, is properly a *prison* within the

Construction 1 Ed. 2, st. 2. What is a prison within the statute.

(o) 2 Hawk. P. C. c. 20, s. 1, 2. 1 Hale, 595. Sum. 112.

(p) 2 Hawk. P. C. c. 20, s. 3, 4. 1 Hale, 594, 595. Staund. P. C. 34. Sum. 112, 114 Hawkins id. s. 4, says, that if no officer will receive such prisoner into his custody, it seems to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol delivery: but he says, "If such township refuse also to receive him, I do not see how the person who made the arrest can discharge himself of him before the next gaol delivery; unless he can in the meantime procure him to be bailed." The proper course, I apprehend, for a private person, who arrested a person on suspicion of felony, is to take him as soon as he reasonably can before a magistrate, who will examine into the case, and either commit, bail, or discharge the party, as the circumstances may require. C. S. G. See *Reed v. Cowmeadow*, 7 C. & P. 821, per Parke, B.; and *Edwards v. Ferris*, 7 C. & P. 542, Patteson, J.

(q) *Ante*, 423, 424.

(r) 2 Hawk. P. C. c. 20, s. 6.

(a) 4 Bla. Com. 129. 1 Hale, 607. Bract. I. 3, c. 9. 2 Inst. 588. See Arch. 2 B. P. 2d Vol. 647, 3rd ed.

(b) 2 Hawk. P. C. c. 18, s. 1.

(c) 4 Bla. Com. 130.

meaning of the statute; for imprisonment is nothing else but a restraint of liberty.^(d) The statute, therefore, extends as well to a prison in law as to a prison in deed.^(e)

Of the regularity of the imprisonment.

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With respect to the regularity of the imprisonment, it is clear, that if a person be taken upon a *capias* awarded, on an indictment or appeal against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record, which makes his commitment *lawful, however he may be innocent, or the prosecution groundless. And if an innocent person be committed by a lawful *mittimus*, on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted or appealed, he is within the statute if he break the prison: for he was legally in custody, and ought to have submitted to it until he had been discharged by due course of law.^(f)

But if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute, by breaking the prison; his imprisonment being unjustifiable. And though a felony were done, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*: but, if the party were taken up for such strong causes of suspicion as will be a good justification of his arrest and commitment, it seems that it will be a felony in him to break the prison, though he may happen to have been committed by an informal warrant.^(g)†

Of the nature of the crime for which the party is imprisoned.

The next inquiry will be as to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute. It is clear that the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent.^(h) Though an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment.⁽ⁱ⁾ But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or were made so by subsequent statutes; for, since all breaches of prison were felonies by the common law, which is restrained by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so.^(k)

If the crime for which the party is arrested, and with which he is charged in the *mittimus*, do not require judgment of life or member,

^(d) 2 Hawk. P. C. c. 18, s. 4.

^(e) 2 Inst. 588.

^(f) 2 Hawk. P. C. c. 18, s. 5, 6. 2 Inst. 590. Sum. 109. 1 Hale, 610, 611.

^(g) 2 Hawk. P. C. c. 18, s. 7, 15, c. 16, s. 13, *et seq.* 2 Inst. 590, 591. Sum. 109. 1 Hale, 610, 611.

^(h) *Ante*, 424.

⁽ⁱ⁾ 2 Hawk. P. C. c. 18, s. 14.

^(k) 2 Hawk. P. C. 18, s. 13.

† [A person confined in a gaol, by virtue of a void warrant, may lawfully liberate himself by breaking the prison, using no more force than is necessary to accomplish this object; nor is it a crime or misdemeanor in such person that while his sole object was to liberate himself, other persons lawfully confined for atrocious crimes in the same room with him, in consequence of such prison breach, made their escape. *The State v. Leach*, 7 Conn. 752.]

and the offence be not in fact greater than the *mittimus* supposes it to be, it is clear, from the express words of the statute, that his breaking the prison will not amount to felony. (l) And though the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment; yet if, in the event, it be found to be of an inferior nature, and to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, "except the cause for which he was taken and imprisoned required such a judgment." (m) And on the other hand, if the offence which was the cause of the *commitment be in truth of such a nature as requires a capital judgment, but be supposed in the *mittimus* to be of an inferior degree, it may probably be argued that the breaking of the prison by the party is felony within the meaning of the statute; for the fact for which he was arrested and committed does, in truth, require judgment of life, though the nature of it be mistaken in the *mittimus*. (n) It is not material whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted breaking prison, are as much within the exception of the statute as any others. (o)

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A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison were to favour their escape as well as his own, he seems to be guilty of high treason in respect to their escape, because there are no accessories in high treason; and such assistance given to persons committed for felony will make him who gives it an accessory to the felony, and by the same reason a principal in the case of high treason. (p)

The breach of the prison within the meaning of the statute must be an *actual breaking*, and not such force and violence only as may be implied by construction of law; therefore, if the party go out of a prison without any obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, it is said that he is guilty of a misdemeanor only. (q) But the breaking need not be intentional; as where a prisoner made his escape from a house of correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top, (so as to give way upon being laid hold of,) the judges were unanimously of opinion that this was a prison-breach. (r) And such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others without his procurement

Of the nature of the breaking.

(l) See the statute, *ante*, 427.(m) *Ante*, *ibid*.

(n) 2 Hawk. P. C. c. 18, s. 15. It should be observed, however, that Hawkins, after giving his reasons for these conclusions, says, that no express resolution of the points appearing, and the authors who have expounded this statute (See 2 Inst. 590, 591. Sum. 109, 110. 1 Hale, 609) seeming rather to incline to a different opinion, he shall leave these matters to the judgment of the reader.

(o) Staundf. P. C. c. 32. 2 Hawk. P. C. c. 18, s. 16.

(p) 2 Hawk. P. C. c. 18, s. 17. Benstead's case, Cro. Car. 583. Limerick's case, Kel. 77.

(q) 1 Hale, 611. 2 Inst. 590. *Ante*, 417, 427.(r) *Rex v. Haswell*, East. T. 1821. Russ. & Ry. 458. Richardson, J, thought that if this had been an escape only, it would not have been felony. See *ante*, 417, 427.

or consent, and he escape through the breach so made, it seems to be the better opinion that he cannot be indicted for the breaking, but only for the escape.^(s) And the breaking must not be from the *necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life.^(t) It seems also that no breach of prison will amount to felony, unless the prisoner escape ^(u)

Escape of the party.

Of the proceedings.

A party may be arraigned for prison-breaking before he is convicted of the crime for which he was imprisoned, (the proceeding differing in this respect from cases of escape or rescue, on the ground that it is not material whether he be guilty of such crime or not, and that he is punishable as a principal offender in respect to the breach of prison itself ^(v)) But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though while the principal felony was untried, it was indifferent whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offence, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony.^(w)

Of the indictment.

The indictment for a breach of prison, in order to bring the offender within the intention of the statute, must especially set forth his case in such a manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member: and it is not sufficient to say in general "that he feloniously broke prison;"^(x) as there must be an actual breaking to constitute the offence.^(y) So it is held in all the books to be necessary that such breaking be stated in the indictment,^(z)

Evidence.

By the 4 Geo. 4, c. 64, s. 44, the certificate of the clerk of assize or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, is made evidence of the nature and fact of the conviction; and of the species and period of confinement to which such person was sentenced.^(a)

Of the punishment.

The offence of prison breaking and escape, by a party lawfully committed for any treason or felony, is, as we have seen, of the degree of felony,^(b) and will of course be punishable as such:^(c) but it should be observed, that it was a felony within clergy, though the principal *felony

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(s) 2 Hawk. P. C. c. 18, s. 10. Pult. de Pac. 1476, pl. 2, where it is said, that if a stranger breaks the prison, in order to help a prisoner committed for a felony to escape accordingly, this is felony; not only in the stranger that broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(t) 1 Hale, 611. 2 Inst. 590. Summ. 108.

(u) 2 Hawk. P. C. c. 18, s. 18.

(v) 2 Inst. 592. 1 Hale, 611. 2 Hawk. P. C. c. 18, s. 18.

(w) 1 Hale, 612, where the learned writer also says, that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony, in bar to the indictment for the breach of prison.

(x) 2 Hawk. P. C. c. 18, s. 20.

(y) *Ante*, 429.

(z) *Rex v. Burrigge*, 3 P. Wm. 488. *Staundf.* 31 a. 2 Inst. 589, *et seq.*

(a) *Ante*, 417.

(b) *Ante*, 427.

(c) As this is a felony, for which no punishment is specially provided, it is punishable under the 7 & 8 G. 4, c. 28, s. 8 (*ante*, p. 38), and s. 9, and 1 Vict. c. 90, s. 6 (*ante*, p. 65), with transportation for seven years, or imprisonment for not exceeding two years, with or without hard labour, in the common gaol or house of correction, and solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, and the offender, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment.

for which the party was committed were ousted of clergy, as in case of robbery or murder. *(d)* And in this it differs from the offence of a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody. *(e)* Where the prison-breaking is by a party lawfully confined upon any inferior charge, it is punishable as a high misprision, by fine and imprisonment *(f)*

As prison-breach is a common law felony, if the person breaking prison is a convicted felon, it is punishable as such. The prisoner was found guilty upon an indictment which charged, that he had been tried and convicted of horse-stealing, and sentenced to suffer death; and that his majesty extended his mercy to him, on condition of being imprisoned and kept to hard labour, in the House of Correction at Brixton-hill, for two years: that he was committed to, and lodged and confined in the said House of Correction; and that he being so convicted and committed, before the expiration of the two years, *viz.* on the 4th of December, 1820, at, &c., with force and arms did wilfully and feloniously break the said House of Correction, and make his escape from and out of it, and go at large, contrary to the statute, &c., and against the peace, &c. The judges, upon a case reserved, were unanimously of opinion, that this was punishable as a common law felony by imprisonment not exceeding a year, to begin from the passing of the sentence; and that, if thought right, the prisoner might be whipped three times in addition to the imprisonment. *(g)*

The 59 Geo. 3, c. 186, s. 17, being an act for the better regulation of the general Penitentiary at Millbank enacts, that any convict ordered to be confined in the said Penitentiary, who shall at any time during the term of such confinement break prison, or escape from the place of confinement, or in the conveyance to such place of confinement, or from the person or persons having such convict in lawful custody, shall be punished by an addition, not exceeding three years, to the term for which such convict at the time of the breach of prison or escape was subject to be confined; and if such convict so punished by such addition to the term of confinement shall afterwards be convicted of a second escape, or breach of prison, then that such convict shall be adjudged guilty of felony, without benefit of clergy. *(h)* And it further enacts, that if any convict, who shall be ordered to be confined in the said Penitentiary, shall at any time during the term of such confinement attempt to break prison, or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape therefrom, such offender, being convicted thereof, shall be punished by an addition, not exceeding six calendar months, to the term for which he or *she at the time of committing any such offence was subject to be confined *(i)*

59 Geo. 3, c. 136. Convicts ordered to be confined in the Penitentiary at Millbank, breaking prison, or escaping, or attempting so to do.

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(d) 1 Hale, 612.

(e) *Ante*, 423.

(f) 2 Hawk. P. C. 18, s. 21.

(g) *Rex v. Haswell*, East. T. 1821. Russ. & Ry. 458. It does not appear that the 31 Geo. 3, c. 46, was alluded to as applicable to this case. The statute, however, (except s. 7) has been repealed by 4 Geo. 4, 64. See note *(c)* *supra*.

(h) This punishment is repealed by the 1 Vict. c. 91, s. 1, by which and sec. 2, the present punishment is regulated. See *ante*, p. 92. The 59 Geo. 3, c. 136, contains no express provision for the punishment of principals in the second degree and accessories, they are punishable therefore in the manner pointed out in note *(b)* *ante*, p. 123. C. S. G.

(i) By the 56 Geo. 3, c. 63, s. 45, any convict escaping, &c., may be tried before the justices of oyer and terminer on gaol delivery, either for the county where he is apprehended and retaken, or for the county in which the said offence is committed; and by sec. 20 of the 59 Geo. 3, c. 136, this provision is extended to that act. See Lonsdale's Stat. Crim. Law, 44. See also the 7 & 8 Geo. 4, c. 33, s. 3.

Prison-breaking, by statutes relating to particular offences.

Before this Chapter is concluded it should be observed, that by statutes which relate only to particular crimes, the offence of prison-breaking is, in certain cases, made the subject of special enactment, and will be mentioned in the course of the work, in the order in which the crimes are treated of, to which those statutes relate.

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*CHAPTER THE THIRTY-FOURTH.

OF RESCUE; AND OF ACTIVELY AIDING IN AN ESCAPE, OR IN AN ATTEMPT TO ESCAPE.(A).

Of rescue. RESCUE, or the offence of forcibly and knowingly freeing another from arrest or imprisonment, is, in most instances, of the same nature as the offence of *prison-breaking*, which has been treated of in the preceding chapter.

Of the sort of prison, and of the imprisonment and breaking.

Thus it is laid down, that whatever is such a prison that the party himself would, by the common law, be guilty of felony in breaking from it, in every such case a stranger would be guilty of as high a crime at least in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person, or of an officer; yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony.(a) In cases where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c. that the party himself breaking the prison, is, either by the common law, or by the statute 1 Edw. 2, st. 2, *De frangentibus prisonam*, saved from the penalty of a capital offender; a stranger who rescues him from such an imprisonment is, in like manner, also excused.(b)

A rescuer may be guilty of high treason.

It has been stated in the preceding chapter, that, where a person committed for high treason breaks the prison and escapes, letting out other persons committed also for high treason, he seems to be guilty of high treason, in case his intention in breaking the prison were to favour the escape of such other person as well as his own:(c) and it is clear that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so committed, is, in all cases, guilty of high treason.(d) It has been holden also, that he will be thus guilty whether he knew that the party rescued were committed for high treason or not: and that he would, in like manner, be guilty of felony by rescuing a felon though he knew not that the party was imprisoned for felony.(e)

(a) 1 Hale, 606.

(b) 2 Hawk. P. C. c. 21, s. 1, 2. 2 Inst. 589. Staundf. P. C. 30, 31. *Ante*, 427, *et seq.*(c) *Ante*, 429.

(d) 2 Hawk. P. C. c. 21, s. 7. Staundf. P. C. 11, 32. Sum. 109. 1 Hale, 237.

(e) *Rex v. Benstead*, Cro. Car. 583, where it is said that it was resolved by ten of the judges, (on a special commission,) *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the parties did not know that there were any traitors there: and that, in like manner, to break a prison whereby felons escape, is felony, without knowledge of their being imprisoned for such offence. And see 1 Hale, 606. But Hawkins, (P. C. c. 21, s. 7) says, that this opinion is not proved by the authority of the case, (1 Hen. 6, 5) on which it seems to be grounded. It should be mentioned, however, that *Benstead's* case is spoken of in *Rex v. Burridge*, 3 P. Wms. 468, as

(A) UNITED STATES.—For the law of the United States against rescue, &c., see 1 Story, 88.

*As the party himself seems not to be guilty of felony by breaking the prison, unless he *actually* go out of it; (*f*) so the breaking of a prison by a stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoners actually by that means get out of prison. (*g*)

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A breaking of the prison is not felony, unless a prisoner escape. Of the proceedings in cases of rescue.

The sheriff's return of a rescue is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment. (*h*) And it is the better opinion that he who rescues one imprisoned for felony cannot be arraigned for such offence as a felony, until the principal offender be first attainted; unless the person rescued were imprisoned for high treason, in which case the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprision only if the king please: (*i*) and if the principal be discharged, or found guilty only of an offence not capital, such as petit larceny, &c., though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. (*k*)

The indictment for a rescue, like that for an escape, (*l*) or for breaking prison, (*m*) must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. (*n*) And the word *rescussit*, or something equivalent to it, must be used to show that it was forcible and against the will of the officer who had the prisoner in his custody. (*o*)

Of the indictment for a rescue.

The rescue of one apprehended for treason is itself treason: and the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer was entitled to his clergy, though the crime of the prisoner rescued were not within clergy. (*p*) Accordingly it was held, that rescuing a prisoner under commitment for burglary was not a transportable offence, but was punishable only as a felony, within clergy, at common law. (*q*) Subsequently, however, to this decision, the 1 & 2 Geo. 4, c. 88, s. 1, has enacted, "that if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be

Of the punishment for a rescue.

1 & 2 Geo. 4, c. 88, s. 1.

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having been cited and allowed to be law at an assembly of all the judges of England, except the Chief Justice of the Common Pleas, (that place being at the time vacated,) in Limerick's case, Kel. 77.

- (*f*) *Ante*, 429.
- (*g*) 2 Hawk. P. C. c. 18, s. 12; c. 21, s. 3.
- (*h*) 1 Hale, 606.
- (*i*) 2 Hawk. P. C. c. 21, s. 8.
- (*k*) 1 Hale, 598, 599.
- (*l*) *Ante*, 422.
- (*m*) *Ante*, 430.
- (*n*) 2 Hawk. P. C. c. 21, s. 5. In *Rex v. Westbury*, 8 Mod. 357, it was holden that an indictment for a rescue of goods levied must set forth the *feri facias* at large; and that setting forth *quod cum virtute brevis*, &c., *de feri facias*, and a warrant thereon be levied, &c., and that the defendant rescued them, is not sufficient.

- (*o*) *Rex v. Burrridge*, 3 P. Wms. 483.
- (*p*) 1 Hale, 607. {See 2 Gallison, 313, *U. States v. Dodge*.}
- (*q*) *Rex v. Stanley*, Russ. & Ry. 432.

imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one, and not exceeding three years."

In cases of misdemeanor.

Where the party rescued was in custody for a misdemeanor only, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are punishable for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death by the 1 Edw. 2, stat. 2, *De frangentibus prisonam*; so also are those who rescue such prisoners, in the like cases, punishable in the same manner.(r) Where a prisoner was indicted for a misdemeanor in aiding and assisting in the rescue of a person, who was apprehended and was in custody under the warrant of a justice of peace, which had been granted upon the certificate of a clerk of the peace of the county, reciting that a true bill for a misdemeanor had been found against the party apprehended; and it was objected that the warrant was illegal, as justices of peace had only authority to issue warrants upon oath made of the facts, which authorized the issuing such warrants: it was held that the warrant was legal, and that the prisoner was guilty of a high misdemeanor, in assisting in the rescue of the person apprehended under it.(s)†

The rescue of a prisoner, in any of the superior courts, committed by the justices, is a great misprision: for which the party, and the prisoner, (if assenting,) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels; though no stroke or blow were given.(t)

Of aiding a prisoner to escape.

The aiding and assisting a prisoner to escape out of prison by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction of the course of justice: and the assisting a *felon* in making an actual escape, is an offence of the degree of felony.(u) In a case which underwent elaborate discussion, the Court of King's Bench held, that where a person assisted a prisoner who had been convicted of felony within clergy, and having been sentenced to be transported for seven years, was in custody under such sentence, to escape out of prison, the person so assisting was an accessory to the felony after the fact.(v) The court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service pursuant to the sentence; and that the assistance given in this case amounted, in law, to a receiving, harbouring, or comforting, such felon.(w) But they held the indictment to be defective, in not charging that the defendant

(r) 2 Hawk. P. C. c. 21, s. 6. 4 Bla. Com. 130.

(s) *Rex v. Stokes*, Stafford Sum. Ass. 1831, MSS. C. S. G. S. C. & P. 148. Park, J. J. A., and Patteson, J.

(t) 1 East, P. C. c. 8, s, 3, p. 408, 410. Bac. Abr. tit. *Rescue*, (C). 3 Inst. 141. 22 Edw. 3, 31.

(u) *Rex v. Tilley*, 2 Leach, 672.

(v) *Rex v. Burridge*, 3 P. Wms. 439.

(w) The assistance, as stated in the special verdict in this case, was not particularly specified: the statement was, that the defendant (who was confined in the same gaol with the party whom he assisted to escape,) "did wilfully aid and assist the said W. P., so being in custody as aforesaid, to make his escape out of the said gaol." But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, p. 46.

† [It is a misdemeanour at common law to aid a person to escape from custody, though he be confined on civil process, and not under any criminal charge. *Reg. v. Allen*, 1 C. & M. 295. Eng. C. L. xli. 164.]

^a Eng. Com. Law Reps. xxiv. 249.

knew that the principal was guilty, or convicted of *felony.(x) The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in case of piracy. On a return to a *habeas corpus*, in the case of one Scadding, who had been committed to the Marshalsea by the Court of Admiralty, the cause appeared to be for aiding and abetting one Exon, who was indicted for piracy to escape out of prison: whereupon, all the court held that, though the fact were committed by Scadding, within the body of the county, yet, because it depended upon the piracy committed by Exon, of which the temporal judges had no cognizance, and was as it were an accessorial offence to the first piracy, which was determinable by the admiral, they must remand the prisoner.(y)

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Aiding the escape of a clergyable felon, who had had his clergy and been burnt in the hand, but ordered, under 18 Eliz. to be imprisoned, would not, it should seem, have subjected the party to punishment as for aiding the escape of a felon.(z)

Several statutes, some of which have been already mentioned, and others will be referred to in the course of the work, especially provide for the punishment of those who rescue or aid in the escape of persons apprehended or committed for the particular offences enumerated in those acts. There are also some special provisions by statutes, upon this subject, which may be noticed shortly in this place.

Statute respecting the rescuing of prisoners, or aiding them to escape.

By the 25 Geo. 2, c. 38, s. 9,(a) "If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person, out of prison, who shall be committed for or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death without benefit of clergy."(b) By sec. 10, if any person, after execution, shall, by force, rescue, or attempt to rescue, the body of such offender, out of the custody of the sheriff or his officers, during its conveyance to any of the places directed by the act, or from the company of surgeons, or their servants, or from the house of any surgeon where the same shall have been deposited in pursuance of the act, such offender shall be guilty of felony, and be liable to be transported for the term of seven years.(c)

25 Geo. 2, c. 37, s. 9. Rescuing person in custody for murder.

Section 10. Rescuing the body of a murderer after execution.

The Mutiny Act, 4 & 5 Vict. c. 2, s. 18, (among other things), *provides, that from the time when an order of transportation shall be made, as provided by that act, "every act in force touching the escape of felons, or their afterwards returning or being at large without leave, shall apply to such offender, and to all persons aiding and abetting, contriving, or

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Escape of offenders sentenced by a court martial, and as to

(x) 3 P. Wms. 492. The prisoner was charged upon a second indictment as an accessory, knowing the principal to have been under sentence of transportation; and was tried upon this second indictment, convicted, and sentenced to be transported, id. 499, 503. But such sentence was not warranted by law. See *Rex v. Stanley*, Russ. & Ry. Cro. Ca. 432.

(y) *Rex v. Scadding*, Yelv. 134. 1 East, P. C. c. 17, s. 14, p. 810.

(z) See the judgment of Treby, C. J., in the Earl of Warwick's case, 13 St. Tr. 1018, as to the commitment under this statute being a collateral and new thing.

(a) Repealed by the 9 Geo. 4, c. 31, s. 1, "except so far as relates to rescues and attempts to rescue."

(b) This punishment is abolished, and another substituted by the 1 Vict. c. 91, s. 1 & 2, see *ante*, p. 92. The act contains no provisions as to principals in the second degree or accessories. See, therefore, *ante*, p. 123, note (b) as to their punishment.

(c) By the alteration of the mode of the disposal of the bodies of murderers by the 2 & 3 Wm. 4, c. 75, s. 16, and the 4 & 5 Wm. 4, c. 26, s. 1, this section seems to be virtually repealed. C. S. G.

those sentenced by a naval court martial.
52 G. 3. c. 156. Persons aiding the escape of prisoners of war made liable to transportation.

assisting in any escape, intended escape, or the returning without leave of any such offender." A similar provision is contained in the 4 & 5 Vict. c. 3, s. 18, for regulating the marine forces while on shore.

The 52 Geo. 3, c. 156 provides against the aiding of the escape of prisoners of war; and enacts, that "every person who shall knowingly and wilfully aid or assist any alien enemy of his majesty, being a prisoner of war in his majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prisoner or other place of confinement, or shall be suffered to be at large in his majesty's dominions or any part thereof, on his parole, to escape from such prison or other place of confinement, or from his majesty's dominions, if at large upon parol," shall, upon conviction, be adjudged guilty of felony, and be liable to be transported for life, or for fourteen or seven years.^(d) The act also declares, that every person who shall knowingly and wilfully aid and assist any such prisoner at large on parol in quitting any part of his majesty's dominions where he may be on his parol, although he shall not aid or assist such person in quitting the coast of any part of his majesty's dominions, shall be deemed guilty of aiding the escape of such person within the act.^(e) There is a further provision as to assisting such prisoners in their escape after they have got upon the high seas. By sec. 3, "if any person or persons owing allegiance to his majesty, after any such prisoner as aforesaid hath quitted the coast of any part of his majesty's dominions, in such his escape as aforesaid, shall, knowingly and wilfully, upon the high seas, aid or assist such prisoner in his escape to or towards any other dominions or place, such person shall also be adjudged guilty of felony, and be liable to be transported as aforesaid." It is also provided that offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm.^(f) Previously to the passing of this act, upon an indictment for a misdemeanor in unlawfully aiding and assisting a prisoner at war to escape, where it appeared that such prisoner was acting in concert with those under whose charge he was placed, in order to effect the detection of the defendant, who was supposed to have been instrumental in the escapes of other prisoners, and the prisoner in question neither escaped nor intended to escape: it was held that the offence was not complete, and that a conviction for such offence was therefore wrong.^(g)

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16 Geo. 2, c. 31. Aiding a pri-

The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by *the 16 Geo. 2, c. 31, s. 1,^(h) which enacts, that "if any person shall, by any means

^(d) The act contains no provisions as to principals in the second degree or accessories; see, therefore, *ante*, p. 123, note ^(b) for their punishment.

^(e) Sect. 2.

^(f) Sect. 3. By sect. 4, the act is not to prevent offenders from being prosecuted, as they might have been if the act had not been passed: but no person prosecuted otherwise than under the provisions of the act is to be liable to be prosecuted for the same offence under the act; and no person prosecuted under the act is, for the same offence, to be otherwise prosecuted.

^(g) *Rex v. Martin*, Trin. T. 1811, Russ. & Ry. 196.

^(h) This act is repealed by the 4 Geo. 4, c. 64, s. 1, as far "as relates to the *escape* of any gaol or prison to which this act shall extend;" and by sec. 2 there is to be in every county in England and Wales one common gaol, and in every county not divided into ridings or divisions, and in every riding or division of a county (having distinct commissions of the peace, or distinct rates in the nature of county rates, applicable to the maintenance of a prison for such division) in England and Wales, at least one house of correction; and one gaol and house of correction in the several cities, towns, and places mentioned in schedule A. annexed to the act, and the provisions of the act are to extend in the manner thereinafter mentioned, to every such gaol and house of correction maintained at the expense of such

whatever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any gaol, for treason or any felony, except petty larceny, expressed in the warrant of commitment or detainer;” every person so offending shall, on conviction, be adjudged guilty of felony, and be transported for seven years. And, “in case such prisoner then was convicted or committed to or detained in any gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds;” every person so offending, and being convicted, shall be deemed guilty of a misdemeanor, and be liable to a fine and imprisonment. (i)

By sect. 2, “That if any person shall convey, or cause to be conveyed, into any gaol or prison, any vizor, or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper, of any such gaol or prison: every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor or other disguise, instrument or arms, with an intent to aid or assist such prisoner to escape, or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer;” every person so offending, and being convicted, shall, in like manner, be deemed guilty of felony, and be transported for seven years. And “in case the prisoner to whom, or for whose use such vizor or disguise, instrument at arms, shall be so delivered, then was convicted, committed, or detained for petty larceny, or any other crime, *not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds;” every person so offending, and being convicted, shall be deemed guilty of a misdemeanor, and be liable to a fine and imprisonment.

By sec. 3, “If any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to goal, by virtue of a warrant of commitment for treason or any felony, (except petty larceny,) expressed in such warrant; or if any person shall be

county, riding, division, city, town, or place, and to the several gaols and houses of correction in the cities of London and Westminster: by sec. 76, and 5 Geo. 4, c. 85, s. 27, the act does not extend to the hospital of Bethlehem and prison of Bridewell, not to the King’s Bench or Fleet prison, nor to the prison of the Marshalsea, or Palace Courts, the Millbank Penitentiary, or Gloucester Penitentiary, nor to any ships or vessels provided for the reception and employment of convicts sentenced to transportation, and by the 5 Geo. 4, c. 85, s. 9, so much of the 4 Geo. 4, as relates to Canterbury, Lichfield, and Lincoln is repealed. It is very difficult, therefore, to say how far the 16 Geo. 2, c. 31, is now repealed. C. S. G.

(i) The act contains no provisions for principals in the second degree or accessories. See, therefore, ante, p. 123, note (b), for their punishment.

soner convicted of treason or felony, or committed for those offences, in an attempt to escape.

Aiding, &c., a prisoner convicted or committed for petty larceny, &c.

16 Geo. 2, c. 31, s. 2.

Conveying any disguise or instruments into any prison, to facilitate the escape of prisoners, convicted of or committed for treason or felony.

Or to facilitate the escape of prisoners convicted or committed for petty larceny, &c.

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any boat,
&c., carry-
ing felons,
&c.

aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carry felons for transportations, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation ;” every person so offending, and being convicted, shall be deemed guilty of felony, and be transported for seven years.

Limitation
of prosecu-
tions.

By sec. 4, there shall be no prosecution for any of these offences unless it be commenced within a year after the offence is committed.

Persons
ordered for
transporta-
tion by this
act, and re-
turning,
&c.

And it is also enacted, that if any person, ordered for transportation in pursuance of this act, shall return from transportation, or be at large in any part of Great Britain, without some lawful cause, before the expiration of the term for which such person shall have been ordered to be transported, such person shall be liable to the same punishment, and methods of prosecution, trial and conviction, for so returning or being at large, as other felons transported, or ordered to be transported, were liable to by the laws then in force.

Cases upon
the 16 Geo.
2, c. 31.

A commit-
ment on
suspicion
only, not
within the
act.

The second section of this statute, relating to the conveying of instruments, &c., into any prison, in order to facilitate the escape of the prisoners, makes the offender guilty, in cases where the prisoner is committed to or detained in any gaol for treason or felony *expressed* in the warrant or commitment. (*j*) This has been holden to mean that the offence should be “*clearly and plainly expressed* ;” so that in a case where the commitment is *on suspicion* only is not within the act, for these are two kinds of commitments, which essentially differ from each other: as a prisoner may be admitted to bail on a commitment for suspicion only, but not on a commitment for treason or felony clearly and plainly expressed in the warrant. (*k*) And this doctrine was recognised and acted upon in a subsequent case of an indictment upon the third section of the statute, which relates to the aiding a prisoner to escape from the custody of a constable having charge of him by virtue of a warrant of commitment for felony “*expressed*” in such warrant. The indictment stated that the commitment was on “*suspicion*” of burglary, and the warrant produced in evidence at the trial corresponded with this statement: the point being reserved for the opinion of the judges, they were unanimously of the opinion that a commitment *on suspicion* was not within the statute. (*l*)

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The statute
does not
extend
where an
actual
escape is
made.

*A majority of the judges decided a point of great importance in the construction of this statute, namely that it does not extend to cases where an *actual escape* is made, but must be confined to cases of an attempt, without effecting the escape itself. They said, “the statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony: it creates a new felony: but the offence of assisting a felon in making an actual escape was felony before; and therefore does not seem to fall within the view or intention of the legislature when they made this statute.” (*m*) In this case it was also holden that an indictment charging the defendant with aiding and assisting a prisoner to attempt to make an escape, need not state that the party aided did attempt to make the es-

An indict-
ment on the
statute
need not
state that

(*j*) *Ante*, 438.

(*k*) *Rex v. Walker*, 1 Leach, 97, but see the 6 Geo. 4, c. 54, s. 1.

(*l*) *Rex v. Greeniff*, 1 Leach, 363; and *Rex v. Gibbon*, 1 Leach, 98, note (*a*), S. P.

(*m*) *Rex v. Tilley and others*, 2 Leach, 662. But see now 4 Geo. 4, c. 64, s. 43.

cape; for he could not have aided if no such attempt had been made. *(n)* It has been decided that the delivering instruments to a prisoner, to facilitate his escape from prison, is within this statute, though the prisoner have been pardoned for the offence of which he was convicted, on condition of transportation. *(o)* And a party is within the act, though there be no evidence that he knew of what specific offence the person he assisted had been convicted. *(p)*

(n) the party aided did attempt to make the escape.

In the same case it was also decided that the record of the conviction of the prisoner, whose escape was to have been effected, having been produced by the proper officer, no evidence was admissible to contradict what it stated; or to show that it had never been filed among the records of the county; notwithstanding the indictment referred to it with a *procurator* as remaining amongst those records. *(q)*

The statute 4 Geo. 4, c. 64, s. 43, entitled, "An act for the consolidating and amending the laws relating to the building, repairing, and regulating of certain gaols and houses of correction in England and Wales," enacts, that "if any person shall convey or cause to be conveyed into any prison to which the act shall extend, any mask, vizard, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such prison, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizard or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony; and being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years." *(r)*

4. Geo. 4, c. 64, s. 43. Conveying any disguise, arms, &c. proper for an escape, made a sufficient intent to aid, &c., an escape.

Assisting any prisoner to escape, felony.

The same statute, (sec. 44) to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts, "that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken." And it also enacts, that a *certificate* of the clerk of assize, or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, shall be sufficient evidence of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced. *(s)*

Trial and evidence. *441

The 5 Geo. 4, c. 84, which was passed for the purpose of revising and consolidating the laws for regulating the transportation of offenders from Great Britain, and which will be more particularly noticed in the next chapter, by sec. 22, provides, that if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any offender sen-

5 Geo. 4, c. 84, s. 22. Persons rescuing or aiding the escape of offend-

(n) Rex v. Tilley and others, 2 Leach, 662. But see now 4 Geo. 4, c. 64, s. 43.
(o) Rex v. Shaw and others, Mich. T. 1823. Russ. & Ry. 526.
(p) Rex v. Shaw and others, ante, note *(o)*. An indictment at common law for aiding a prisoner's escape should state that the party knew of his offence. Rex v. Young, Trin. T. 1801, MS. Bayley, J.
(q) Rex v. Shaw and others, ante, note *(o)*.
(r) This act contains no express provision for the punishment of principals in the second degree, and accessories; see, therefore, ante, p. 123, note *(b)*.
(s) See this provision more at large, ante, p. 417.

ers, ordered to be transported, &c., made punishable, &c. tenced or ordered to be transported or banished, from the custody of the superintendent or overseer, or of any sheriff or gaoler, or other person, conveying, removing, &c., such offender, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as the sheriff or gaoler, for the crime of which such offender shall have been convicted.

The two following sections relate to the indictment and the evidence, and will be found in the next chapter.

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*CHAPTER THE THIRTY-FIFTH.

ON RETURNING, OR BEING AT LARGE, AFTER SENTENCE OF TRANSPORTATION; AND OF RESCUING OR AIDING THE ESCAPE OF A PERSON UNDER SUCH SENTENCE.

Offences by statutes. But assisting a felon sentenced to be transported to escape, makes the party an accessory after the fact at common law.

As *exile* or *transportation* is a species of punishment unknown to the common law of England, and inflicted only under the sanction of enactments of the legislature, offences committed by not submitting to that punishment are principally dependent upon the provisions of particular statutes. (a) But as a party convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continued a felon, till actual transportation and service, pursuant to the sentence; and as it is a felony at common law to assist a felon to escape out of lawful custody; it has been holden that independently of any statuabie enactments, a person assisting such felon convict, being in custody under sentence of transportation, to escape out of prison, is an accessory to the felony after the fact; provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting such felon. (b)

5 Geo. 4, c. 84. By s. 1, all persons, sentenced or ordered for transportation are to be placed under the provisions of this act.

The 5 Geo. 4, c. 84, s. 1, recites, that the several laws in force for regulating the transportation of offenders from Great Britain, would expire at the end of the then present session of parliament; and that it was expedient that the laws relative to that subject should be revised and consolidated into one act; and then enacts, that the act shall take effect on the last day of that present session of parliament; and that on and from that day, all things remaining to be done, touching the punishment, imprisonment, correction, removal, transportation, discipline, employment, diet, and clothing of persons sentenced or ordered to transportation or banishment from any part of Great Britain, under any acts theretofore or then in force, or pardoned on condition of being transported under any such acts, shall be continued, done and completed, under the provisions of that act; and that all sentences and orders for transportation, all orders in council and other orders, warrants, instructions, *directions, appointments, authorities, contracts and securities,

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(a) In 6 Ev. Col. Stat., Part V., Cl. xxv. (G), p. 852, 853, the learned editor says, that the earliest act which imposed the punishment of transportation was 39 Eliz. c. 4, which enacted that rogues, vagabonds, &c., might, by the justices in sessions, be banished out of the realm, and conveyed at the charges of the county to such parts beyond the seas as should be assigned by the privy council, or otherwise adjudged perpetually to the galleys of this realm; and any rogue so banished, and returning again into the realm, was to be guilty of felony. And he says that the earliest statute then subsisting which notices the power of transportation was 22 Car. 2, c. 5.

(b) *Rex v. Berridge*, M. T. 1735. 3 P. Wms. 439.

made, issued or given under any of the said acts, and in force at the time of the commencement of that act, should continue in force under and by virtue of that act, unless and until they should be revoked or superseded.

By sec. 2, "from and after the commencement of this act, every person convicted before any court of competent jurisdiction in Great Britain, of any offence for which he or she shall be liable to be transported or banished, shall be adjudged and ordered to be transported or banished beyond the seas, for the term of life or years for which such offender shall be liable by any law to be transported or banished; and every sentence of transportation or banishment passed or to be passed on any offender, in any court of competent jurisdiction in Great Britain, and every order for transportation or banishment made or to be made in pursuance of the sentence of any such court or other competent authority, shall subject the offender to be conveyed beyond the seas, under the provisions of this act; and whenever his majesty shall be pleased to extend mercy to any offender convicted of any crime for which he or she is or shall be excluded from the benefit of clergy, upon condition of transportation beyond the seas, either for the term of life, or any number of years, and such intention of mercy shall be signified by one of his majesty's principal secretaries of state to the court before which such offender hath been or shall be convicted, or any subsequent court with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of his majesty's Court of King's Bench or Common Pleas, or to any baron of the Exchequer of the degree of the coif in England, such judge, justice or baron shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted; and such allowance or order shall be considered as an allowance and order made by the court before which such offender was convicted, and shall be entered on the records of the same court by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same court during the continuance thereof; and every such order, and also every order made by the Court of Justiciary in Scotland for the transportation of any offender, whose sentence of death shall be remitted by his majesty, shall subject the offender to be conveyed beyond the seas, under the provisions of this act."

By sec. 3, "it shall be lawful for his majesty, by and with the advice of his privy council, from time to time, to appoint any place or places beyond the seas, either within or without his majesty's dominions, to which felons or other offenders under sentence or order of transportation or banishment shall be conveyed; and that when any offenders shall be about to be transported or banished from Great Britain, one of his majesty's principal secretaries of state shall give orders for their removal to the ship to be employed for their transportation, and shall authorize and empower some person to make a contract for their effectual transportation, to some of the places so appointed, and shall direct secu-

Sec. 2. Offenders adjudged for transportation are to be transported under the provisions of the act. And also offenders receiving a conditional pardon concerning whom an allowance and order may be made by a subsequent court.

Sec. 3. Places of transportation to be appointed by his majesty. And a secretary of state may authorize persons to make con- *444

tracts for transportation.

rity to be given for their effectual transportation, in the manner herein-after mentioned."

Provision is then made for the delivery of offenders ordered to be transported to the contractors by the sheriff or gaoler, and for the giving of proper security by the contractors for their effectual transportation, (except when such offenders are transported in king's ships.)(c) Authority is then given to punish such offenders misbehaving themselves upon the voyage;(d) and a property in their services during the term of transportation is vested in the governor of the colony, &c., and his assignees.(e)

Sec. 10. Places of confinement in England may be appointed by his majesty.

By sec. 10, "it shall be lawful for his majesty from time to time, by warrant under his royal sign manual, to appoint places of confinement within England or Wales, either at land, or on board vessels to be provided by his majesty in the river Thames, or some other river, or within the limits of some port or harbor of England or Wales, for the confinement of male offenders under sentence or order of transportation, which shall be under the management of a superintendent and overseer, to be appointed by his majesty: and that it shall be lawful for one of his majesty's principal secretaries of state to direct the removal of any male offender who shall be under sentence of death, but who shall be reprieved, or whose sentence shall be respited during his majesty's pleasure, or who shall be under sentence or order of transportation, and who have been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol or prison in which such offender shall be confined, to any of the places of confinement so appointed: and every offender who shall be so removed shall continue in the said place of confinement, or be removed to and confined in some other such place or places as aforesaid, as one of his majesty's principal secretaries of state shall from time to time direct, until such offender shall be transported according to law, or shall become entitled to his liberty, or until one of his majesty's principal secretaries of state shall direct the return of such offender to the gaol or prison from which he shall have been removed; and the sheriff or gaoler having the custody of any offender whose removal shall be ordered in manner aforesaid, shall with all convenient speed, after the receipt of any such order, convey or cause to be conveyed every such offender to the place appointed, and there deliver him to such superintendent or overseer, together with a true copy, attested by such sheriff or gaoler, of the caption and order of the court by which such offender was sentenced or ordered for transportation, containing the sentence or order of transportation of each such offender, by virtue whereof he shall be in the custody of such sheriff or gaoler; and also a certificate, specifying concisely the description of his crime, his age, whether married or unmarried, his trade or profession, and an account of his behaviour in prison before and after his trial, and the *gaoler's observations on his temper and disposition, and such information concerning his connexions and former course of life as may have come to the gaoler's knowledge; and such superintendent or overseer shall give a receipt in writing to the sheriff or gaoler for the discharge of such sheriff or gaoler."

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The act then authorizes his majesty to appoint a superintendent, an assistant to the superintendent, and an overseer for such places of con-

(c) Sec. 4, 5, 7.

(d) Sec. 6.

(e) Sec. 8.

finement; specifies the duties of the superintendent; and contains regulations for the cleansing, purifying and clothing the offenders brought to such places. (f)

By sec. 13, "it shall be lawful for his majesty, by any order or orders in council, to declare his royal will and pleasure, that male offenders convicted in Great Britain, and being under sentence or order of transportation, shall be kept to hard labour in any part of his majesty's dominions out of England, to be named in such order or orders in council; and that whenever his majesty's will and pleasure shall be so declared in council, it shall be lawful for one of his majesty's principal secretaries of state to direct the removal and confinement of any such male offender, either at land or on board any vessel to be provided by his majesty, within the limits of any port or harbour in that part of his majesty's dominions which shall be named in such order in council, under the management of the said superintendent, and of an overseer to be appointed by his majesty for each such vessel or other place of confinement; and that every offender who shall be so removed shall continue on board the vessel or other place of confinement to be so provided, or any similar vessel or other place of confinement to be from time to time provided by his majesty, until his majesty shall otherwise direct, or until the offender shall be entitled to his liberty."

Sec. 13. His majesty in council may direct convicts to be employed in any part of his dominions out of England, under the management of a superintendent, &c.

By sec. 15, "after the removal of any offender under this act, the superintendent and overseer, who shall have the custody of him, shall, during the term of such custody, have the same powers over him as are incident to the office of a sheriff or gaoler, and shall in like manner be answerable for any escape of such offender; and if any offender shall during such custody be guilty of any misbehaviour or disorderly conduct, the superintendent or overseer shall be authorized to inflict or cause to be inflicted on him such moderate punishment or correction as shall be allowed by one of his majesty's principal secretaries of state; and such superintendent or overseer shall also, during such custody, see every offender fed and clothed according to a scale of diet and clothing to be fixed on and notified in writing by one of his majesty's principal secretaries of state to the superintendent; and shall keep such offender to labour at such places, and under such regulations, directions, limitations and restrictions, as by such secretary of state shall from time to time be prescribed; and in case of the absence of any such superintendent or overseer, or of the vacancy of his office, his duties or powers shall be discharged and exercised in all respects by the officer or person on whom the command of the place of confinement shall devolve." The superintendent is also empowered to act as a justice of the peace. (g)

Sec. 15. Declares the power and duties of the superintendent and overseer.

*By sec. 17, "whenever any convict adjudged to transportation by any court or judge, in any part of his majesty's dominions not within the United Kingdom, or any convict adjudged to suffer death by any such court or judge, and pardoned on condition of transportation, has been or shall be brought to England in order to be transported, it shall and may be lawful to imprison any such offender in any place of confinement provided under the authority of this act, until such convict shall be transported, or shall become entitled to his liberty; and that so soon as every such convict shall be so imprisoned, all the provisions, rules, regulations, clauses, authorities, powers, penalties, matters and things aforesaid, concerning the safe custody, confinement, treatment, and trans-

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Section 17. Convicts adjudged by courts out of the United Kingdom to transportation, and convicts pardoned on condition of trans-

portation, may, when brought to England, be imprisoned and transported.

portation of any offender convicted in Great Britain, shall extend and be construed to extend to every convict who may have been or may be hereafter adjudged to transportation, by any court or judge in any part of his majesty's dominions not within the United Kingdom, and to every convict adjudged by any such court or judge to suffer death, and pardoned on condition of transportation, and brought to England in order to be transported, as fully and effectually to all intents and purposes, as if such convict had been convicted and sentenced at any session of gaol delivery holden for any county within England."

It is then provided that it shall be lawful to keep to hard labour every offender under sentence or order of transportation, while he or she shall remain in the common gaol, if his or her health will permit; and if one or more of the visiting justices shall give a written order to that effect; and that it shall be lawful for one of his majesty's principal secretaries of state, if he shall think fit, to order that any such offender be removed from the common gaol to the house of correction, and there kept to hard labour. (*h*) And the time during which any offender shall continue in any gaol or house of correction, or in any such place of confinement as aforesaid, under sentence or order of transportation, is to be reckoned in discharge or part discharge of the term of transportation, or banishment. (*i*) Provision is then made for the secure removal of offenders through any county to the seaports or places of confinement, and for the payment of the expenses of removal by the county in which the conviction took place. (*j*)

Section 22. Offenders ordered to be transported, being afterwards at large, without lawful cause, guilty of felony; and may be tried where apprehended or where they were ordered to be transported. Persons rescuing or attempting to rescue, punishable as if such offenders had been confined in prison.

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By sec. 22, "if any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of the clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she *was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting, or reconveying him or her, shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted."

The judge before whom a prisoner is tried for returning from transportation, has power to order the county treasurer to pay the prosecutor the reward under the 5 Geo. 4, c. 84, s. 22 (*jj*)

(*h*) Sec. 10.

(*i*) Sec. 19.

(*j*) Sec. 20, 21.

(*jj*) Reg. v. Emmons, 2 M. & Rob. 279, Coleridge, J.

The 4 & 5 Wm. 4, c. 67, recites the preceding section, and enacts, ^{4 & 5 W. 4, c. 67.} that "so much of the recited act as inflicts the punishment of death upon persons convicted of any offence therein and thereinbefore specified, shall be, and the same is hereby repealed: and that from and after the passing of this act, any person convicted of any offence above specified in the said act of 5 Geo. 4, c. 84, or of aiding or abetting, counseling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years." (k)

By sec. 23 of the 5 Geo. 4, c. 64, "in any indictment against any ^{5 Geo. 4, c. 64, s. 23.} offender for being found at large, contrary to the provisions of this or of ^{Form of indictment} any other act now made, or hereafter to be made; and also in any indictment against any person who shall rescue, or attempt to rescue, or ^{against offenders found at large, and} assist in rescuing, any such offender from such custody, or who shall ^{against persons rescuing, &c.} convey; or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other act now made, or hereafter to be made, whether such offender shall have been tried before any court or judge, within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy or signification thereof, of or against, or in any manner relating to such offender."

By sec. 24, "the clerk of the court or other officer having the custody ^{Sec. 24.} of the records of the court where such sentence or order of transportation ^{Evidence by certificate of the clerk of the court, &c., of the conviction and sentence.} or banishment shall have been passed or made, shall, at the request of any person on his majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (l) (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment, (not taking for the same more than six shillings and eight pence,) which certificate shall be sufficient ^{*evidence of the conviction and sentence,} or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any Court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without proof." *448

The 56 Geo. 3, c. 63, and the 59 Geo. 3, c. 136, were passed for the ^{56 Geo. 3, c. 63, and 59 Geo. 3, c. 136, as to convicts sentenced to transportation, &c.} purpose of regulating the general penitentiary for convicts, erected (m) at Millbank, in the county of Middlesex, and authorize the confinement of certain convicts sentenced to transportation in that place; and contain certain provisions respecting such convicts breaking prison or escaping, or attempting to break prison, &c., and respecting persons rescuing, or attempting to rescue them, or supplying means of escape.

(k) Neither the 5 Geo. 4, c. 64, nor the 4 & 5 Wm. 4, c. 69, provide for the punishment of accessories after the fact; see, therefore, *ante*, p. 123, note (b).

(l) See *Rex v. Watson*, *ante*, p. 417.

(m) It was erected under the provisions of the 52 Geo. 3, c. 41.

59 Geo. 3, c. 113, s. 17. Convicts confined in penitentiary, shall, at any time during the term of such confinement, break prison, or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from the person or persons having the lawful custody of such convict, he or she so breaking prison or escaping shall be punished by an addition not exceeding three years to the term for which he or she, at the time of his or her breach of prison or escape, was subject to be confined; and if such convict so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of prison, he or she shall be adjudged guilty of felony, without benefit of clergy."⁽ⁿ⁾ And it further enacts, "that if any convict who shall be ordered to be confined in the said penitentiary, shall at any time during the term of such confinement attempt to break prison, or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein, with intent to escape therefrom; he or she, so offending, being convicted thereof, shall be punished by an addition not exceeding six calendar months to the term for which he or she at the time of committing any such offence was subject to be confined."

56 Geo. 3, c. 63, s. 44. Persons rescuing convicts, or aiding in such rescue, guilty of felony, and to be confined. *449

The 56 Geo. 3, c. 63, s. 44, enacts, "that if any person shall rescue any convict who shall be ordered to be confined within the said penitentiary, either during the time of his or her conveyance to the said penitentiary, or whilst such convict shall be in the custody of the person or persons under whose care and charge he or she will be confined; or if any person shall be aiding or assisting in any such rescue, every such person so rescuing, aiding or assisting, shall be guilty of felony, and may be ordered to be confined in the said penitentiary, for any term not less than one year, nor exceeding *five years; and if any person having the custody of any such convict as aforesaid, or being employed by the person having such custody as a keeper, under-keeper, turnkey, assistant, or guard, shall voluntarily permit such convict to escape; or if any person whatsoever shall, by supplying arms, tools, or instruments of disguise, or otherwise be in any manner aiding and assisting to any such convict in any escape, or in any attempt to make an escape, though no escape be actually made, or shall attempt to rescue any such convict, or be aiding or assisting in any such attempt, though no rescue be actually made, every such person so permitting, attempting, aiding, or assisting, shall be guilty of felony;(o) and if any person having such custody, or being so employed by the person having such custody as aforesaid, shall negligently permit any such convict to escape, such person so permitting shall be guilty of a misdemeanor; and, being lawfully convicted of the same, shall be liable to fine or imprisonment, or to both, at the discretion of the court."

And persons having the custody of such convicts, and voluntarily permitting an escape, and other persons aiding or attempting an escape or rescue, to be guilty of felony.

56 Geo. 3, c. 63, s. 45. Trial for such offences. The 45th section relates to the more ready and effectual trial and conviction of persons committing offences within the act; and provides that any convict so escaping, breaking prison, or being rescued, may be tried

(n) This punishment was abolished, and a new one substituted by the 1 Vict. c. 91, s. 1 & 2; see the present punishment, *ante*, p. 92. The act contains no provisions as to principals in the second degree and accessories; see, therefore, *ante*, p. 123, note (b) for their punishment.

(o) As no punishment is specially provided by this act for this offence, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 and 9, and 1 Vict. c. 90, s. 5, and so are the principals in the second degree and accessories; see *ante*, p. 123, note (b).

either in the county where he shall be apprehended and retaken, or in the county in which the said offence shall have been committed; and that, in case of any prosecution for such escape, attempt to escape, breach of prison, or rescue, either against the convict escaping, or attempting to escape, or having broken prison, or being rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a copy properly attested, of the order of commitment to such penitentiary, shall, (after proof made that the person then in question before the court is the same that was delivered with such order,) be sufficient evidence to the court and jury that the person then in question, was so ordered to such confinement.

Evidence of the order of commitment to such penitentiary.

The 1 & 2 Vict. c. 82, which provides for the establishment of a prison for juvenile offenders at Parkhurst, in the Isle of Wight, enacts, by s. 12, "that if any offender who shall be ordered to be confined in Parkhurst prison shall at any time during the term of such confinement break prison or escape from the place of his or her confinement, or in his or her conveyance, to such place of confinement, or from any lands belonging to the prison, or from the person or persons having the lawful custody of such offender, he or she breaking prison or escaping shall be punished, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he or she at the time of his or her breach of prison or escape was subject to be confined, and if under sentence of transportation, in such manner as persons under sentence of transportation escaping from or breaking out of any other prison or place of confinement are liable to be punished; and if an offender so be convicted of a second escape or breach of prison, he or she shall be adjudged guilty of felony; (oo) and if any offender who shall be ordered to be confined in the said prison shall, at any time during the term of such confinement, *attempt to break prison or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape, he or she so offending being convicted thereof, shall be punished by imprisonment for a term not exceeding twelve calendar months, in addition to the punishment to which he or she at the time of committing any such offence was subject."

1 & 2 Vict. c. 82. Offenders breaking prison, &c., at Parkhurst.

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The *mutiny acts* also make provision for the punishment of persons returning from transportation after sentence by a *court-martial*. By the 4 & 5 Vict. c. 2, s. 1, persons committing the offences therein specified shall suffer death or such other punishment as by a court-martial shall be awarded. By sec. 7, "whenever any general court-martial, by which any soldier shall have been tried and convicted of any offence punishable with death, shall not think the offence deserving of capital punishment, such court-martial may, instead of awarding a corporal punishment or imprisonment, adjudge the offender according to the degree of the offence, to be transported as a felon for life, or for a certain term of years, or may sentence him to general service as a soldier in any corps, and in any county or place which her majesty shall thereupon direct. And in all cases where a capital punishment shall have been awarded by a general court-martial, it shall be lawful for her majesty, or, if in the East Indies, for the officer commanding in chief the forces at the presidency,

Mutiny act provides for the punishment of persons returning from transportation after sentence by a court-martial.

(oo) As no punishment is specially provided by this act for this offence, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 and 9, and 1 Vict. c. 90, s. 5, and so are the principals in the second degree and accessories; see *ante*, p. 123, note (b).

to which the offender shall belong, instead of causing such sentence to be carried into execution, to order the offender to be transported as a felon, either for life or for a certain term of years, as shall seem meet to her majesty, or, if in the East Indies, to the officer commanding as aforesaid." By sec. 18, whenever her majesty shall intend that any sentence passed by any court-martial shall be carried into effect for the term specified in such sentence, or for any shorter term, or shall be pleased to commute any sentence of death to transportation, the same shall be notified in writing to any judge of the Queen's Bench, Common Pleas, or Exchequer, in England or Ireland; and thereupon such judge shall make an order for the transportation of such offender, in conformity with such notification; "and every person so ordered to be transported shall be subject to every provision made by law and in force concerning persons convicted of any crime, and under sentence of transportation; and from the time when such order of transportation shall be made, every act in force touching the escape of felons, or their afterwards returning, or their being at large without leave, shall apply to such offender, and to all persons aiding and abetting, contriving, or assisting in any escape and intended escape, or the returning without leave of any such offender." The judge, who makes any such order of transportation, is to direct the said notification and order to be filed of record in the office of the clerk of the crown of the Queen's Bench, who is, on application, to deliver a certificate in writing to such offender, or to any person applying in his or her majesty's behalf, "showing the Christian and surname of such offender, his offence, the place where the court was held, before whom he was convicted, and the conditions on which the order of transportation was given; which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his transportation *was given, in any court, and in any proceeding wherein it may be necessary to inquire into the same." (p)

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Provisions of a nature nearly similar are usually contained in the acts relating to the regulating of the *royal marine forces*, while on shore. (q)

By the 30 Geo. 3, c. 47, his majesty may authorize the governor of New South Wales, &c., by writing under the seal of that government to remit, either absolutely or conditionally, the whole or any part of the term of transportation: and such instrument is to be of the same force and effect as a signification of the royal mercy under a sign manual. The 6 Geo. 4, c. 69, regulates the punishment of offences committed by transports sent to labour in the colonies.

Points on former statutes. Indictment and certificate of former conviction.

It may be useful to mention some of the points decided upon the statutes which formerly related to the offences treated of in this chapter.

Where a capital convict had a conditional pardon and escaped, and the indictment against him stated, that the king's pleasure was notified to the *court*, and the *court* thereupon ordered, &c., according to the terms of the pardon, and it appeared that the notification was to the judge after the assizes were over, and that he made the order; the judges, upon a case reserved, were unanimous that the notification to the judge, and the order by him, was not a notification to the *court*, or

(p) Sec. 19 provides for the orders for transportation from the colonies. Sec. 20 provides that all crimes and offences against any former mutiny acts may be punished under this act.

(q) See the last act 4 & 5 Vict. c. 3, s. 1, *et seq.*

any order by the *court*, and that the indictment was not proved. (r) But the 5 Geo. 4, c. 84, enacts, that it shall be sufficient to allege in the indictment the order for transportation, without alleging any indictment, trial, &c., or any pardon or intention of mercy, or signification thereof. (s) The statute, however, requires, that the *certificate* to be given in evidence shall contain *the effect and substance* of the indictment and conviction; and in a case which arose upon the 6 Geo. 1, c. 23, (now repealed) which required that the certificate should contain the effect and tenor of the indictment and conviction, and of the order and contract for transportation, and also upon the 24 Geo. 3, c. 56, s. 5, (now repealed) which required a certificate containing the effect and substance only, omitting the formal part of the indictment and conviction, the indictment stated, that the prisoner was convicted of grand larceny within benefit of clergy, and the certificate was in the same form; and the judges, upon the point being reserved, held that both were insufficient. (t) So also in another case, upon the 56 Geo. 3, c. 27, s. 8, which required the certificate to contain the effects and substance only (omitting the formal part) of the indictment and conviction, and order for transportation, it was held, that an indictment which stated that the prisoner had been convicted of felony, without stating the nature of that felony, and a certificate which stated only that the prisoner had been convicted of felony, were insufficient; and the prisoner was remitted to his former sentence. (u)

*Where an indictment stated the condition upon which the royal mercy was extended to have been general, whereas it appeared not to have been general but specific, *viz.*, that the prisoner should be transported to places specified, the variance was held to be fatal. (v)

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Where the prisoner had received a pardon on condition of transporting himself *beyond the seas*, within fourteen days from the day of his *discharge*, and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged, it was holden that the daily book of the prison, containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the prisoner's discharge. (w) And it was held, that though, if a convict on his trial for returning from transportation before his time was expired, should confess the fact, and acknowledge that he is the man, the court would record such confession; yet no such confession being made, it was necessary to produce the record of conviction, and give evidence of the prisoner's identity. (x)

Evidence of the day of the prisoner's discharge.

Where a convict was sentenced to transportation for seven years, and received a *sign manual*, promising him a pardon, "on condition of his giving a security to transport himself for that period within fourteen days," and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days; it was

Evidence of a sign manual.

(r) *Rex v. Treadwell*, Mich. Term, 1781, MS. Bayley, J. The statute then in force upon the subject was 19 Geo. 3, c. 74, s. 28.

(s) Sec. 23, *ante*, 447; and see also, *ante*, 443.

(t) *Rex v. Sutcliffe*, East T. 1788, MS. Bayley, J. Russ. & Ry. 469, 470.

(u) *Rex v. Watson*, Mich. T. 1821. Russ. & Ry. 468.

(v) *Rex v. Fitzpatrick*, Russ. & Ry. 468.

(w) Aicle's case, 1 Leach, 391, 392.

(x) 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 21. The 5 Geo. 4, c. 84, s. 24, makes a certificate of the conviction, &c., sufficient evidence. *Ante*, 447.

holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence of transportation had expired, on the ground that such sign manual, and the recognizance entered into in consequence of it, were good evidence that he was *lawfully* at large; although he had not substantially performed the condition on which the promise of pardon was granted. (y)

As to the offender being referred to his original sentence of transportation.

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In the last case, the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days. (z) And in another case it was holden, that a prisoner convicted of a capital crime, *whose sentence was respited during the king's pleasure, and who, having received a pardon on condition of transportation of life, was afterwards found at large in Great Britain without lawful cause, should be referred to his original sentence. (a) In a subsequent case, where the prisoner, having been convicted of simple grand larceny, had received judgment of transportation to America for seven years, but had afterwards been pardoned, "on condition of transporting himself *beyond the seas* for the same term of years, within fourteen days from the day of his discharge, and of giving security so to do," and, upon giving the security required, had been discharged, but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large, *without any lawful cause*, before the expiration of the term, or whether he ought to be remitted to his former sentence. The former cases were cited as authorities that the prisoner's discharge was a *lawful cause* for his being at large, notwithstanding he had forfeited the recognizance of himself and

(y) Miller's case, 1 Hawk. P. C. c. 47, tit. *Return from Transportation* s. 22, Cas. C. L. 69. 1 Leach 74, 2 Blac. R. 676. It appears that the judges considered that the sign manual was improperly worded by mistake of the officer; that it should have been, "upon condition of the said Miller transporting himself, &c., and of his giving security to the satisfaction, &c.," and not merely "upon condition of his giving security, &c.," and that though the king might revoke his intended grace on account of this apparent fraud, yet, as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon an indictment for being found at large, *without any lawful cause*, before the expiration of his term. With respect, however, to a condition being considered *precedent* or *subsequent*, it has been holden that no precise technical words are requisite for that purpose; that it does not depend upon its being *prior* or *posterior* in the deed, but that it depends upon the nature of the contract, and the acts to be performed by the parties. *Robinson v. Comyns*, Cas. temp. Talb. 166. *Hotham v. The East India Company*, 1 T. R. 645.

(z) Miller's case, 1 Leach, 76.

(a) Madan's case, Old Bailey, 1780. 1 Leach, 223. In 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 23, (referring to Cas. C. L. 197,) this case is cited as having decided that the prisoner was so referred back to his original sentence, on his being indicted for returning from transportation, and acquitted. But in the report in Leach, it is said that no indictment was ever preferred against the prisoner for the new felony; but that, being in custody, a notice was served upon him to show cause why execution should not be awarded against him on his former sentence; that after this notice he was put to the bar, and his indemnity and the record of his former conviction proved; and he not being prepared to prove the truth of certain facts alleged in his defence, the court gave their opinion that, as he had broken the condition of the pardon, he remained in the same state in which he was at the time the pardon was granted, *viz.*, under sentence of death, with a respite of that sentence during his majesty's pleasure. The report further states, that afterwards it was submitted to the judges, whether the prisoner would not have been liable to suffer death without benefit of clergy, if he had been indicted and convicted under a statute then existing, namely, the 8 Geo. 3, c. 15, or whether he had been properly referred to his original sentence. No opinion of the judges is stated; but it appears, that at the old Bailey, April Sess., 1782, the prisoner was informed by the court that it was his majesty's pleasure that he should be transported to Africa for life.

his bail, by breaking the other part of the condition, in not transporting himself within the fourteen days; but one of the judges thought that, as the prisoner had not complied with the terms of which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired. Another judge considered it as a doubtful question whether the non-performance of the condition had not rendered the whole pardon null and void: and he also thought that the offence with which the prisoner was charged was not within one of the statutes then relied upon, namely, the 16 Geo. 2, c. 15, because he had not agreed to transport himself to America; and that it was not within another statute, namely, 19 Geo. 3, c. 74, because that act related only to pardons granted to offenders who had been convicted of felonies by which they were excluded from clergy. (b)

*In the last mentioned case, one point was clearly agreed upon, namely, that as the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill health, these impediments amounted to a *lawful excuse*. (c)

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Poverty and ill health an excuse for not quitting the kingdom.

*CHAPTER THE THIRTY-SIXTH.

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OF GAMING.

It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any sort of offence: but a person guilty of cheating, as by playing with false cards, dice, &c., may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case and heinousness of the offence. (a) †

(b) Aickle's case, Old Bailey, 1785, *cor.* Gould, J., Hotham, B., and Adair, Recorder. The Recorder thought, that the indictment was perfectly supported under the clause of the 16 Geo. 2, c. 15, adopted by 19 Geo. 3, c. 74, which made it a capital felony to be found at large in Great Britain within the term for which a convict who was liable to be transported to America, had received sentence to be transported *beyond the seas*. But he thought, that when the condition of the king's pardon was broken, the pardon was gone. There being, however, a difference of opinion, it was intended to have submitted the case to the opinion of the twelve judges, if the prisoner had been found guilty.

(c) Aickle's case, 1 Leach, 396; and see Thorpe's case, *id.* *ibid.* note (a).

(a) Bac. Abr. tit. *Gaming*, (A), 2 Roll. Ab. 78.

† [It is not necessary that there should be gaming or betting, in order to render the game of bowls or nine pins an unlawful game. *Commonwealth v. Stowell*, 9 Metcalf. 572.

If a party plays at a game knowing that others are betting, he is guilty of gaming under statutes passed to prohibit gaming. *Smith v. The State*, 5 Humphreys, 163.

Bowling alleys connected with taverns, where the players risk the price of the game, are unlawful. *The State v. Records*, 4 Harring, 554.

The actual keeping of a building furnished with bowling alleys, and suffering persons to resort there for hire, gain, or reward is an offence within the statute of Massachusetts whether the person keeping the same does so of his own will, or by the procurement, or as the agent or hired man of another, and whether for his own emolument or that of another, *The Commonwealth v. Drew*, 3 Cush. 279.

Under the laws of North Carolina the keeping of a gaming table called "a shuffle-board" is not indictable as the game is not one of chance but of skill. *The State v. Bishop*, 8 Iredell, 266. Neither is the game of "ten pins" included among games of chance.

A steamboat is a public place within the meaning of the statute of Alabama against unlawful gaming. *Coleman v. The State*, 13 Alab. 602. When a physician and a few friends present by invitation, played cards or dice at night with closed doors in his office, where he exhibited his medicines, received professional calls at all times, and, being unmarried, ate and slept,

But otherwise as to gaming.

We have seen that common gaming-houses are considered as nuisances in the eye of the law; (b) and that lotteries have been declared to be public nuisances, except as they may have been authorized by parliament. (c) And when the playing is, from the magnitude of the stakes excessive, and such as is now commonly understood by the term *gaming*, it is considered by the law as an offence, being in its consequences most mischievous to society. In most cases, however, the party is subjected only to pecuniary penalties, recoverable by information, or by summary or civil proceedings: but some offences may be mentioned, which, by statutable enactments, may be prosecuted by indictment. (d)

9 Anne, c. 14, s. 5. Persons losing 10*l.* at a sitting may sue for it again.

The 9 Anne, c. 14, s. 5, enacts, that any person who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of these games, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay the same or any part thereof, he may sue for it again within three months, and recover it with costs, by action of debt: and in case the loser shall not *bona fide* sue, any other person may sue for and recover the same, and treble the value thereof, with costs of suit, against the winner. (e)

Any person by deceit, &c., winning any moneys, &c., or at any one sitting winning above 10*l.*, shall *456

The statute then further enacts, that "if any person or persons whatsoever do or shall, by any fraud or shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, *wages, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain or acquire to him, or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any

(b) *Ante*, 323.

(c) *Ante*, 328, and the statute, 42 Geo. 3, c. 119, declares all games or lotteries, called *Little Gocs*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c., not authorized by parliament. See 6 & 7 Wm. 4, c. 66, as to advertising foreign and other illegal lotteries.

(d) As to the penalties imposed upon persons gaming, or keeping gaming-houses, &c., and the proceedings for the recovery of them, see 1 Hawk. P. C. c. 92. Bac. Abr. tit. *Gaming*. Burn's Just. tit. *Gaming*. 2 Bla. Com. 172, 173, 174, and the notes (10), (11), and the statutes 2 Geo. 2, c. 28. 12 Geo. 2, c. 28. 25 Geo. 2, c. 36, s. 5, and the 16 Car. 2, c. 2.

(e) Sec. 2.

it was held that the office was not a public place within the statute of Alabama against gaming. *Clarke v. The State*, 12 Alab. 492. Persons concealed in bushes and briers on land owned by a county for supporting its poor, and there gaming will not be liable in Virginia to indictment for gaming in a public place. *The Commonwealth v. Vandine*, 6 Gratt. 689.

Statutes against gaming are remedial, and are not to be construed strictly: therefore it is not necessary to allege, in an indictment for betting on an election, that the election was held, since the law requiring the election is presumed to be obeyed. *Cain v. The State*, 13 Smedes & Marsh. 456.

Where two persons agreed to make the gainer of the bet a present of a coat, it was held to be an attempt to evade the law, and a verdict of conviction was sustained. *Ibid.*

On an indictment, under the statute of Mississippi, for betting on an election, it will not relieve him from the penalty imposed by the act, to show that he did not himself make the bet, but procured another to make it for him. *Williams v. The State*, 12 Smedes & Marsh. 58. *Iseley v. The State*, 8 Blackf. 403.

An indictment charging that the defendant "did unlawfully gamble by playing at a game of cards, and then and there unlawfully did bet and wager on the sides and hands of those that then and there did play," is not objectionable for duplicity. *The Commonwealth v. Tiernan*, 4 Gratt. 545.

An indictment for gaming, charging the defendant with "gaming, by then and there wagering and betting money on a certain unlawful game of cards" was held sufficient, without setting out the game played, the person with whom the bet was made, or the amount which was bet on the game. *State v. McBride*, 8 Humph. 66.

one time or sitting win of any one or more person or persons whatsoever, above the sum or value of ten pounds, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money or other things so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid.”

By the 18 Geo. 2, c. 34, s. 8, “if any person shall win or lose at play, or by betting at any one time, the sum or value of ten pounds, or within the space of twenty-four hours, the sum or value of twenty pounds, such person shall be liable to be indicted for such offence within six months after it is committed, either before the justices of the King’s Bench, assize, gaol delivery, or great sessions; and being thereof legally convicted, shall be fined five times the value of the sum so won or lost; which fine (after such charges as the court shall judge reasonable allowed to the prosecutors and evidence out of the same) shall go to the poor of the parish, or place where such offence shall be committed.” There is then a provision, that if any person so offending shall discover any other person so offending, so that such person be thereupon convicted, the person so discovering shall be discharged and indemnified from all penalties, if such person so discovering has not been before convicted thereof, and shall be admitted as an evidence to prove the same. (f)

It has been decided that a *foot race*, whether the race be upon a given distance, or against a certain time, is a game prohibited by 9 Anne, c. 14. (g) And a wager that a person did not find within such a time a man who should carry on foot twenty-four stone weight ten miles in fifteen hours has been holden to be within the same principle. (h) But where A. betted B. that one C. would not run four miles in twenty-one minutes, it was adjudged not to be within the statute, because as C. was not playing at such game, there could be no betting on his side within the statute; for C. might be running for his amusement, not to win any bet. (i) It has, however, been holden, that laying above ten pounds on a *horse race*, is an illegal bet within the statute of Anne, on the ground that the statute ought to be extended to all *sports* as well as games, in order to prevent excessive betting. (k) And it has been deter-

(f) 18 Geo. 2, c. 34, s. 9. And by sec. 10 the act is not to repeal or invalidate the 9 Anne, c. 14.

(g) *Lynall v. Longbottom*, 2 Wils. 36.

(h) *Brown v. Beckley*, Cowp. 282.

(i) *Lynall v. Longbottom*, 2 Wils. 36.

(k) 1 Hawk. P. C. c. 92, s. 52, *Goodburn v. Marley*, 2 Str. 1159. *Blaxton v. Pye*, 2 Wils. 309. And it has been holden that a wager on a horse race for less than 50*l.* cannot be recovered in an action: the 13 Geo. 2, c. 19, s. 2, having prohibited such races. *Johnson v. Bann*, 4 T. R. 1, and see *Bidmead v. Gale*, 4 Barr. 2432. And that a wager, though for more than 50*l.* that the plaintiff could perform a certain journey in a post chaise and pair of horses in a given time, cannot be so recovered. *Nimnes v. Jaques*, 6 T. R. 499. Nor a like wager, that a single horse should go from A. to B. on the high road sooner than one or two other horses to be placed at any distance their owner should please; these being transactions prohibited by 16 Car. 1, c. 7, s. 2, and 9 Anne, c. 14, and not legalized by 13 Geo. 2, c. 19, or 18 Geo. 2, c. 34, which relates to *bona fide* horse racing only. *Whaley v. Pajot*, 2 Bos. & Pul. 51. So it has been held that an innocent indorsee for valuable consideration could not recover on a bill given in payment of a bet above 10*l.*, lost at a legal horse-race. *Shillito v. Theed*, 7 Bing. 405. See *post*, p. 459, note (cc). So an agreement by which the defendant sold the plaintiff a horse for 200*l.*, if he trotted eighteen miles within an hour, but

forfeit five times the value, &c.

18 Geo. 2, c. 34, s. 8. Any person winning or losing at any one time 10*l.*, or within 24 hours 20*l.*, may be indicted and fined 5 times the value. Offender discovering any other offender to be discharged.

Cases upon the construction of the 9 Anne, c. 14.

*457 mined, that *a wager of ten pounds upon a horse race is within this statute, also the race was for a legal plate. (l) *Cricket* also has been held an unlawful game within this statute. (m) It has been determined, also, that if two persons play at cards from *Monday* evening to *Tuesday* evening, without any interruption, except for an hour or two at dinner, and one of them win a balance of seventeen guineas, this is won at one sitting within the statute. (n)

It seems that if a loser prefer an indictment against a winner on this statute of Anne, and the grand jury find the bill, the court will not permit an information to be filed against the defendant although the indictment was quashed, and, of course the defendant never tried upon it; for the grand jury may find another bill for the same offence. (o)

It is also settled, that if a defendant be convicted on an information on this statute, the court can only give judgment *quod convictus est*, and cannot set a fine on the offender of five times the value, but that an action must be brought on the judgment to recover the penalty. (p) Upon the ground that the judgment of the court is only *quod convictus est*, and is to be the foundation of an action to recover the penalty, it was urged in a recent case, that it is necessary to prove the sum precisely as laid in the indictment, but Lord Ellenborough, C. J., was of opinion that although, if the prosecutor had averred in the indictment that the defendant had won any bills of the exchange of a specified amount, the allegation must have been proved as laid; yet that since the sum only was averred, and that under a *videlicet*, the prosecutor was entitled to prove the winning of a smaller sum. (q)

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*CHAPTER THE THIRTY-SEVENTH.

OF USURY AND ILLEGAL BROKERAGE. (A)

Usury is a contract for exorbitant interest for It was anciently holden that the taking of any kind of consideration for the loan of forbearance of money, was an offence of ecclesiastical cognizance, punishable by severe censures and forfeitures: (a) but this

for one shilling, if he failed, is illegal. *Brogden v. Marriott*,* 3 Bing. N. C. 88. So money lent for the purpose of playing at an illegal game, such as hazard, cannot be recovered back. *M'Kinnell v. Robinson*, 3 M. & W. 434. And it was ruled that no action can be maintained on a wager, on a cock-fight. *Squires v. Whisken*, 3 Camp. 140. And see as to the offence of keeping a cock-pit, *ante*, p. 324.

(l) *Clayton v. Jenning*, 2 Bla. R. 706.

(m) *Jeffreys v. Walter*, 1 Wils. 220. *Hodgson v. Terrill*, 3 Tyrw. 929, 1 C. & M. 797.

(n) *Bones v. Booth*, 2 Blac. R. 1226. *Hodgson v. Terrill*, *supra*.

(o) 1 Hawk. P. C. c. 92, s. 56. *Anon.* 3 Mod. 187.

(p) *Rex v. Lookup*, 2 Str. 1048. The defendant was accordingly discharged without any fine or costs.

(q) *Rex v. Hill, Darley and others*, 1 Starkie R. 359. And see *Rex v. Gilham*, 6 T. R. 265. *Rex v. Burdett*, 1 Lord Raym. 149, *ante*, 144. *Rex v. Baynes*, 2 Lord Raym. 1265.

(a) 1 Hawk. P. C. c. 82, s. 4.

(A) Most of the cases of usury which occur in the American reports, are civil actions, in which the law of usury is applied to the validity of the contracts upon which the actions are founded; they are very numerous. Those only are referred to in this note, which relate to the forfeitures created by the statutes, for which prosecutions either by indictment, or actions *qui tam*, are maintainable.

MASSACHUSETTS.—The statute of 1783, chap. 55, “to restrain the taking of excessive usury,” is in substance, and (as it respects the description of the offence) nearly in the words

* Eng. Com. Law Reps. xxxii. 52.

notion, which appears to have proceeded from a mistaken construction of some passages in the Mosaic law, (b) has long given way to the more reasonable doctrine that there is nothing improper in taking a moderate interest for the use of money. Any large and immoderate consideration for such use, has, however, been justly deemed prejudicial to the welfare of society; and the contract to receive any such exorbitant increase is that which is now generally understood by the odious appellation of *usury*.

It seems that, at common law, no indictment for usury could be supported, unless it were of such an exorbitant kind as that taken by the Jews. Accordingly, it is laid down in the books, that usury, such as the Jews took, namely, forty per cent. per annum, or more, was an offence at common law; and that, upon conviction, the usurer forfeited

(b) Exod. c. 22, v. 25. Levit. c. 25, v. 36, 37. Deuter, c. 23, v. 19, 20; and see 1 Hawk. P. C. c. 82, s. 7. 2 Bla. Com. 455.

of the 12 Anne, st. 2, c. 16, s. 1. Prosecutions for the penalties created by this statute, are limited to one year, if the suit be by action *qui tam*, and to two years, if it be by indictment. Statute 1788, chap. 12.

The penalty for taking excessive usury is not incurred, unless the lender in fact corruptly receive the usurious interest, although he has received security for the payment of the money loaned, with usurious interest. *Thomas qui tam v. Cleaves*, 7 Mass. Rep. 121. *Chadburn v. Watts*, 10 Mass. Rep. 121.

But if, at the time of making the loan, the borrower advance a sum of money exceeding the lawful interest, by way of compensation for forbearance, the offence of usury is *eo instanti* committed, and the lender will be liable to the penalty, whether the principal sum be ever paid or not. *Commonwealth v. Frost*, 5 Mass. Rep. 53.

Upon a prosecution to recover the penalty for taking excessive usury, it will be no excuse for the defendant, that he acted as agent for another person, especially if he professed at the time to act on his own account, and not as agent. *Ibid*.

A receiver of usurious interest may be liable to the penalty imposed by the statute, although the security upon which the usurious interest was taken, be not void. So the security may be void, although he be not liable to the penalty. *Gordon v. Flagg*, 8 Mass. Rep. 101. *Thompson, adm'r., v. Woodbridge*, 8 Mass. Rep. 256. *Thomas v. Cleaves*, 7 Mass. Rep. 256. *Chadburn v. Watts*, 10 Mass. Rep. 121.

A deed purporting an absolute conveyance of land, cannot be avoided or controlled in its construction, by an averment, or by parol evidence of usury, or of any condition or trust not expressed in the deed. *Flint v. Sheldon*, 13 Mass. Rep. 443. *Quare*, would an indictment or action *qui tam* lie for the penalty in such a case, although the deed was not void?

CONNECTICUT.—In an action *qui tam* for taking excessive usury, the declaration stating the taking to have been in pursuance of a loan of two hundred dollars, by means of a promissory note, and the evidence was of a loan or forbearance of two hundred dollars, and the interest thereon for more than six months, it was held, that this was a material variance. *Drake v. Watson*, 4 Day's Rep. 37.

In an action *qui tam* for taking excessive usury, the plaintiff offered to prove that subsequently to the date of the contract, the defendant paid unlawful interest on a balance due on the contract; but it was held, that such evidence was irrelevant and inadmissible. *Hutchinson v. Hosmer*, 2 Connect. Rep. 341.

NEW YORK.—In an action *qui tam* by a common informer, under the 2d section of the statute, the declaration must state, that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. *Morrell v. Fuller*, 7 Johns. Rep. 402. The general form of declaring mentioned in the act, is given to the borrower only; but the common informer must set forth his cause of action specially, and state the usury. S. C. 8 Johns. Rep. 218.

PENNSYLVANIA.—Where a partial payment has been made on account of a note for a sum of money borrowed on usurious interest, it was ruled, that the usury was complete. *Musgrove qui tam v. Gibbs*, 1 Dall. 216.

A fair purchase may be made of a bond or note, even at 20 or 30 per cent. discount, without incurring the penalties of usury. *Ibid*. *Wycoff v. Longhead*, 2 Dall. 92. If usurious interest be taken; the forfeiture is incurred; but in an action brought to recover the amount of the loan, the plaintiff is nevertheless entitled to a verdict. *Ibid*.

VIRGINIA.—The question, whether a contract is usurious or not, is to be decided with reference to the time when it was entered into; for a contract legal at that time, cannot be made usurious by subsequent events. An usurious agreement is one to pay originally a greater premium than the law allows. *Pollard v. Bayers et al.*, 6 Munf. Rep. 433-439.

his goods to the king, and his lands to the lord of the fee, but that no other usury was so prohibited.(c)

Offence by statutes.

Different rates of interest have been established by different nations. In this country also they have been regulated by the legislature; and have varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. By the 37 Hen. 8, c. 9, the rate of interest was fixed at 10*l.* per cent. per annum, which the 13 Eliz. c. 8, confirmed; and ordained that all brokers should be guilty of a *præmunire* who transacted any contracts for more, and that the securities themselves should be void. The 21 Jac. 1, c. 17, reduced interest to eight per cent.; and it having been lowered in 1650, during the usurpation, to six per cent., the same reduction was re-enacted after the restoration, by the 12 Car. 2, c. 13: and now by the 12 Anne, st. 2, c. 16, it is reduced to five per cent. A contract, therefore, to take more than five per cent. is at this time usurious, and by the statute of Anne totally void; besides which, the lender is made liable to the forfeiture of treble the money borrowed.

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12 Anne, st. 2, c. 16 s. 1 no person shall take above 5*l.* per cent. interest.

And all bonds, &c., for a greater interest shall be void.

Persons taking above 5*l.* for the forbearance of 100*l.* for a year shall forfeit treble the value, &c.

Sec. 2, no scrivener, &c. shall take above 5*s.* for 100*l.* for a year for brokerage, &c.; nor above 12*d.* besides stamp

The statute of Anne enacts, "that no person or persons whatsoever, upon any contract, take, directly or indirectly, for loan of any moneys, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time;" and that all bonds, contracts, &c., whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void;(cc) "and that all and every person or persons whatsoever, which shall, upon any contract, take, accept and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandizes, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

By sec. 2, "all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains and contracts, who shall take or receive, directly or indirectly, any sum or sums of money, or other reward or thing for brokerage, soliciting, driving, or procuring the loan, or forbearing of any sum or sums of money, over and above the rate or value of five shillings for the loan or forbearing of one hundred pounds for a year, and so rateably, or above twelve pence, over and above the stamp duties, for making or renewing of the bond or bill for loan, or

(c) 2 Roll. 800. 3 Inst. 151, 152. 6 Com. Dig. tit. *Usury*, (A). Anon. Hardr. 410. It is, however, stated that a very eminent barrister, in the year 1814, advised that, in a case of clear and palpable usury, a party may be indicted at common law. 2 Chit. Crim. L. 549, note (a).

(cc) The 5 & 6 Wm. 4, c. 41, s. 1, repeals so much of this act "as enacts that any note, bill, or mortgage shall be absolutely void," and provides that every note, bill, or mortgage that would have been void by virtue of the 12 Anne, shall be deemed to have been executed for an illegal consideration. See *Vallance v. Siddell*,^a 6 A. & E. 932. *Hitchcock v. Way*,^b *ibid.* 943.

^a Eng. Com. Law Reps. xxxiii. 249.

^b *Ib.* xxxiii. 249.

forbearing thereof, or for any counterbond or bill concerning the same, shall forfeit for every such offence twenty pounds, with costs of suit, and suffer imprisonment for half a year; the one moiety of all which forfeitures to be the queen's most excellent majesty, her heirs and successors, and the other moiety to him or them that will sue for the same in the same county where the several offences are committed, and not elsewhere, by action of debt, bill, plaint or information, in which no essoign, wager of law, or protection shall be allowed."

duties for making or renewing any bond, &c.

By the 3 & 4 Wm. 4, c. 98, s. 7, certain bills of exchange and promissory notes were accepted from the statutes for the prevention of usury, and that act was extended by the 7 Wm. 4, and 1 Vict. c. 80, which is also extended by the 2 & 3 Vict. 37, which enacts, that no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of ten pounds sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding; provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein."(d)

Bills of Exchange and contracts for loans or forbearance of money above 10l. not to be affected by usury laws, 2 & 3 Vict. c. 37.

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By sec. 2, "nothing in this act contained shall be construed to enable any person or persons to claim, in any court of law or equity, more than five per cent. interest on any account or any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the court that any different rate of interest was agreed to between the parties."

Five per cent. the legal rate of interest, except, &c.

By sec. 3, the act does not repeal or affect any statute relating to pawnbrokers.

By sec. 4, the act was continued in force till the 1st of January, 1842, and by the 3 & 4 Vict. 83, till the first of January, 1843, and by the 4 & 5 Vict. c. 54, till the 1st of January, 1844.

The provisions of the 12 Car. 2, c. 13, were similar to those of the statute of Anne, which have been just cited, except that the rate of interest was fixed by them at six per cent.; and it is reported to have been decided that no indictment would lie upon the statute of Car. 2, and that it was necessary for the party prosecuting to sue for the penal-

As to an indictment being sustainable upon the statute of Annie.

(d) See *Connops v. Meaks*,^a 2 A. & E. 326. *Vallance v. Siddell*,^b 6 A. & E. 932. *Holt v. Miers*, 5 M. & W. 168; and *Berrington v. Collis*,^c 5 Bing. N. C. 332, as to the construction of these acts.

^a Eng. Com. Law Reps. xxix. 107.

^b Ib. xxiii. 249.

^c Ib. xxxv. 128.

ties in a penal action : as being the method of proceeding *prescribed* by the statute. (*dd*) But upon the principles which have been stated in a former part of this work, as to an indictment being sustainable where there is a general prohibitory clause in a statute, though there be afterwards a particular provision and a particular remedy given, it should seem that an indictment will lie upon the statute where an usurious transaction has been carried into effect. (*e*) An indictment for usury has not, however, been a frequent mode of proceeding, as the party prosecuting has, in general, been contented to sue for the heavy penalties given by the statute : and it is clear that an indictment cannot be maintained for a corrupt agreement only ; as where such *an agreement was stated in an indictment for usury, without any loan, or taking excessive interest in pursuance of it, judgment was arrested. (*f*)

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The sessions have no jurisdiction on an indictment for usury.

Information in the Court of K. B.

Form of indictment.

Evidence.

It was holden that justices of the peace at their quarter sessions had no jurisdiction upon an indictment on the 12 Car. 2. (*g*) And with respect to an information on the 15 Anne, it has been holden that the Court of King's Bench will not grant it after the time has elapsed within which the common informer should institute his proceedings ; on the ground that where a penalty has vested in the crown only, the court have no power to grant an information, but must leave it to the attorney-general to file one if he shall think proper. (*h*)

It is said that an indictment for usury, (supposing it to be sustainable,) must contain all the requisites of a declaration for usury. (*i*)

If the transaction were effected by means of some device, or colourable pretence, it must be left to the jury to say whether the sum taken, though ostensibly for another purpose, was not in reality taken as usurious interest. (*k*)

53 Geo. 3, c. 141. Endeavouring to induce infants to grant annuities a misdemeanor.

The 53 Geo. 3, c. 141, repeals the 17 Geo. 3, c. 26, except as to annuities or rent-charges granted before the passing of the act ; and after providing for the due enrolment of the deeds, &c., whereby any annuity or rent-charge, shall be granted, makes all contracts for the purchase of any annuity or rent-charge, with any person being under the age of twenty-one years, utterly void ; and then enacts, (s. 8,) " that if any person shall either in person, or by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person being under the age of twenty-one years, to grant or attempt to grant, any annuity or rent-

(*dd*) Reg. v. Dye, (7 Anne,) 11 Mod. 174. The case is very shortly reported, and does not state upon which section of the statute the question was raised ; but the editor of the reports, ed. 1796,) has cited many authorities in support of the decision, as to the applicability of some of which *qu.* Reg. v. Dye is, however, cited as law in Bac. Abr. tit. *Usury*, (1).

(*e*) *Ante*, 49, *et seq.* And see 2 Chit. Crim. L. 549, note (*a*).

(*f*) Rex v. Upton, 2 Str. 816. See note (*n*) *post*, p. 463.

(*g*) Reg. v. Smith, (4 Anne,) 2 Salk. 680. 2 Lord Raym. 1144, S. C.

(*h*) Rex v. Hendricks, 2 Str. 1234. By the 31 Eliz. c. 5, s. 5, the common informer is limited to a year after the offence committed ; and, if no such suit is brought within a year, then the crown may sue at any time within two years after the end of the first year.

(*i*) 2 Chit. Crim. Law, 549, note (*a*) In an action for usury, the averment of the *quantum* of the excess taken is material. But some of the reasons for that accuracy, namely, that the penalty is apportioned to the value, and that the judgment depends upon the *quantum* taken, do not apply to the proceedings by indictment. It may, however, be said, on the other hand, that, as the contract must be set forth in the indictment, the general rule of pleading will apply ; namely, that in setting forth a contract it is necessary to set it forth correctly, and prove it as set forth. See *ante*, p. 86.

(*k*) Per Grose, J., in Rex v. Gilham, 6 T. R. 268. See further as to the points decided concerning usury, and the proceedings for the recovery of the penalties, 1 Hawk. P. C. c. 82. Com. Dig. tit. *Usury*. Bac. Abr. tit. *Usury*, 2 Bla. Com. 455, *et seq.* 4 Bla. Com. 156, 157.

charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance or procure, or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent-charge to be secured or granted by such infant, after he or she shall have attained his or her age of twenty-one years; or shall induce, solicit, or procure, any infant upon any treaty or transaction for money advanced or to be advanced, to make oath, or to give his or her word of honour or solemn promise, that he or she will not plead infaney, or make any other defence against the demand of any such annuity or rent-charge, or the re-payment of the money advanced *to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or any way substantiate such annuity or rent-charge, every such person shall be guilty of a misdemeanor; and being thereof lawfully convicted in any court of assize, oyer and terminer, or general gaol delivery, shall and may be punished for the said offence by fine, imprisonment, or other corporal punishment, as the court shall think fit to award."

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By sec. 8, "all and every solicitors and solicitor, scrivener and scrivener, brokers and broker, and other persons or person, who shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and *bonâ fide* advanced and paid as and for the price or consideration of any such annuity or rent-charge, over and above the sum of ten shilling for every hundred pounds so actually and *bonâ fide* advanced and paid, shall be deemed and adjudged guilty of a misdemeanor; and being lawfully convicted of such offence in any court of assize, oyer and terminer, or general gaol delivery, shall and may for every such offence, be punished by fine and imprisonment, or one of them at the discretion of the court: and that the person or persons who shall have paid or given any sum or sums of money, gratuity or reward, shall be deemed a competent witness or witnesses to prove the same."

Acting as solicitors, &c., in such cases a misdemeanor.

Competency of witnesses.

This act is not to extend to Scotland or Ireland, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child, nor secured upon freehold or copyhold or customary lands, of equal or greater annual value than the said annuity, (over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant) whereof the grantor is seized in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament. (l)

Proviso for Scotland or Ireland, and annuities granted by will, &c.

It may be here mentioned that in a case of an indictment upon the repealed statute 17 Geo. 3, c. 26, s. 7, for taking more than ten shillings in the 100*l.* for brokerage, &c., it was objected at the trial that the evidence did not sustain the indictment; the charge being that 322*l.* 10*s.* was paid for brokerage of the sum of 2450*l.*, and the evidence being

On an indictment on the 17 Geo. 3, c. 26, it was not necessary to

prove the exact sum laid, and the jury were to consider whether the moneys were taken as a fair charge, or as a device to avoid the statute. *463

that the defendant, at the time of the money being paid, said that 100*l.* was for the writings, (he being an attorney and having produced them,) 100*l.* by way of present, and 5*l.* per cent. on the whole sum, viz., 122*l.* 10*s.* Lord Kenyon, C. J., overruled the objection; and, upon the whole case, directed the jury to consider whether the transaction were not a mere *device and colour to receive the sum stated under different pretences, but in truth for the brokerage and soliciting of the loan, in fraud of the act of parliament. This decision was confirmed by the court, who were of opinion that the material question was, whether more than ten shillings in the 100*l.* was taken by the defendant; and that it was not necessary to prove that he took the exact sum laid in the indictment, though it was not laid with a *scilicet.* (m) The venue in an action for usury upon the 12 Anne c. 16, must be laid in the county where the usurious interest was received (n)

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*CHAPTER THE THIRTY-EIGHTH.

OF OFFENCES RELATING TO DEAD BODIES. (A)

Taking up dead bodies, even for the purposes of dissection, is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence it was moved, in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of Stamford, Hale and Hawkins,

(m) *Rex v. Gilham*, 6 T. R. 265, and at N. P. 1 Esp. Rep. 285, As to the point of the proof of the exact sum not being necessary, see *Rex v. Burdett*, 1 Ld. Raym. 149. *Ante*, 144, and *Rex v. Hill* and others, 1 Stark. Rep. 359. *Ante*, p. 457. But see *ante*, p. 86.

(n) *Pearson v. M'Gowran*, 3 B. & C. 700, 5 D. & R. 616. The act makes the offence to consist in the taking and receipt of the usurious interest, and not in the corrupt contract for it. It should seem also, that an indictment for usury must be preferred in the county where the usurious interest is received, as *Rex v. Buttery*, cited by Abbott, C. J., in *Rex v. Burdett*, 4 B. & Ald. 179, was relied upon as the nearest case: and there it was held, that an indictment for false pretences must be preferred in the county where the money was received, and not in that where the false pretences were made. C. S. G.

(A) The offence of violating the sepulchres of the dead, is severely punished by statutes enacted for that purpose, in New Hampshire, Massachusetts, and Vermont. I have examined the Statute Books of most of the other states, but do not find in them any provisions relative to this crime.

IN MASSACHUSETTS, the punishment is by fine not more than one thousand dollars, or imprisonment not more than one year. Statute 1814, chap. 175.

IN NEW HAMPSHIRE, the punishment is by fine, not exceeding two thousand dollars, whipping, not exceeding thirty-nine stripes, or imprisonment, not exceeding two years; or one or all these punishments, at the discretion of the court. Laws of New Hampshire, 339, 340.

IN VERMONT, the punishment is by fine, not exceeding one thousand dollars, whipping, not exceeding thirty-nine stripes, or imprisonment, not exceeding one year; all or any of these punishments to be inflicted at the discretion of the court. 1 Laws of Vermont, 368, chap. 361.

In those states where there is no statute provision, this offence is punishable at common law. Several cases of this nature were brought before the Supreme Court of Massachusetts, prior to the passing of the statute of that state; in all of which, where there was a conviction, the party was punished. Where it appeared that the exhumation of the dead bodies was for the purpose of dissection, a small fine was imposed. These cases occurred at *nisi prius*, and are not reported. {See 8 Pick. 370, *Commonwealth v. Loring*.}

{By the Revised Statutes of New York, vol. ii. 688, the removing of a dead body from the grave or other place of interment, for the purpose of selling or dissection, or from mere wantonness, subjects the offender to imprisonment in a state prison or county gaol, or to a fine not more than \$500, or to both fine and imprisonment. So of the offence of purchasing or receiving a dead body, known to have been illegally disinterred.}

^a Eng. Com. Law Reps. ii. 426.

^b Ib. x. 215.

^c Ib. vi. 394.

upon this subject, afforded a very strong argument to show that there was no such offence cognizable in the criminal courts. But the court said, "that common decency required that the practice should be put a stop to: that the offence was cognizable in a criminal court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence: and that, as it had been the regular practice of the old Bailey, in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to show cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged. (a) To sell the dead body of a capital convict for the purpose of dissection, where dissection is no part of the sentence, is a misdemeanor, and indictable at common law. (b)

It is an offence against decency to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown lately before deceased, wilfully, unlawfully, and indecently, did take and carry away, with intent to sell and dispose of the same for gain and profit: and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offence, that no case was reserved. (c)

*The refusal or neglect to bury dead bodies by those whose duty it is to perform the office, appears also to have been considered as a misdemeanor. Thus, Abney, J., in delivering the opinion of the Court of Common Pleas, said, "The burial of the dead is, (as I apprehend,) the duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may by the express words of Canon 86, be suspended by the Ordinary for three months. And if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal courts, by indictment or information." (d)

It has recently been determined, after elaborate argument, that a child who has received the outward and visible form of baptism by a dissenting minister, not being a lawful minister of the Church of England, nor

(a) *Rex v. Lynn*, 2 T. Rep. 733. 1 Leach, 497. 2 East, P. C. c. 16, s. 89, p. 652. The defendant was only fined five marks, on the ground that he might possibly have committed the crime merely from ignorance, as no person had been before punished for the offence in that court. In 4 Bla. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned, (as in *Montesqu. Sp. L. b. 30, ch. 19*), which directed, that a person who had dug a corpse out of the ground, in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his re-admission.

(b) *Rex v. Cundick*, D. & R., N. P. C. 13, Graham, B.

(c) *Rex v. Gilles, cor. Bayley, J.* Northumberland Spring Ass. 1820. MS. Bayley, J. Russ. & Ry. 366, note (b). And see *Rex v. Duffin*, Russ. & Ry. 365.

(d) *Andrews v. Cawthorne*, Willes, 537, note (a). Abney, J., cited a case, H. 7 G. 1, B. R., where that court made a rule upon the rector of Daventry, in Northamptonshire, to show cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish. See this case as stated in *Martin v. Escott*, reported by Dr. Curteis, p. 268, and the affidavits used in it, in the Appendix to that case, p. 291, *et seq.*

episcopally ordained, is to be considered as baptized, and is entitled to have the burial service read at its interment by the clergyman of the parish in which it dies; and that the refusal to read the service over a child so baptized brings the party so refusing within the provisions of the 86th Canon, and the court is *bound* to pronounce that the party is subject to suspension for three months, and also to the costs of the proceeding.^(e)

2 & 3 Wm.
4, c. 75.
Secretary
of State
may grant
licenses to
practise
anatomy.

The 2 & 3 Wm. 4, c. 75, "an act for regulating schools of anatomy," authorizes the Secretary of State for the Home Department to grant "a license to practise anatomy to any fellow or any member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, on application from such party for such purpose, countersigned by two of his majesty's justices of the peace acting for the county, city, borough, or place wherein such party resides, certifying that, to their knowledge or belief, such party so applying is about to carry on the practice of anatomy."

By sec. 2, the Secretary of State may appoint inspectors of places where anatomy is carried on; and by sec. 3, may direct what district such inspectors shall superintend. By sec. 4, every inspector is to make a quarterly return to the Secretary of State of every body that, during the preceding quarter, has been removed for examination to every separate place in his district where anatomy is carried on, distinguishing the sex, and as far as is known at the time, the name and age of each person whose body was so removed.

By sec. 5, inspectors may visit and inspect, at any time, any place within their district, notice of which place has been given, that it is therein intended to practise anatomy.

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Persons
having law-
ful custody
of bodies
may permit
them to
undergo
anatomical
examina-
tions in cer-
tain cases.

By sec. 7, "it shall be lawful for any executor or other party having *lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

Provisions
in case of
persons
directing
anatomical
examina-
tions after
their death.

By sec. 8, "if any person, either in writing at any time during his life, or verbally in his presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this act authorized to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall

(e) *Mastin v. Escott*, decided in the Arches Court of Canterbury, May 8, 1841, by Sir H. Jenner, and reported by Dr. Curteis. The ground of this decision was that a child baptized by a layman was validly baptized, and a Wesleyan minister, by whom the child was baptized, could be considered, with reference to this question, in no other light than as a layman. In *Kemp v. Wickes*, 3 Phill. Rep. 264, a similar decision had been made with reference to a person baptized by a minister of the Calvinistic Independents.

* Eng. Eccl. Law Reps. i. 403.

be made known to the party having lawful possession of the dead body, then such last mentioned party shall direct such examination to be made, and, in case of any such examination as aforesaid, shall request and permit any party so authorized and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination."

By sec. 9, no body is to be removed for anatomical examination from the place where such person died until after forty-eight hours from the death, nor unless a certificate, stating in what manner such person came by his death, shall have been given by the medical man who attended such person, or who examined the body after death.

The body not to be removed without a certificate.

By sec. 10, "it shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any person lawfully qualified to practice medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine or surgery, having a license from his majesty's principal secretary of state or chief secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had power, in pursuance of the provisions of this act, to permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party together with the body."

Professors, surgeons, and others may receive bodies for anatomical examinations.

By sec. 11, such persons are to receive a certificate with the body, and transmit it and a return of the time the body was received, and other matters, to the inspectors of the district.

By sec. 12, notice is to be given to the secretary of state of places where anatomy is intended to be practised.

By sec. 13, bodies are to be removed in a decent coffin or shell, and after undergoing anatomical examination are to be decently interred in consecrated ground, or in some public burial ground in use for persons of that religious persuasion to which the person whose body was so removed belonged.

*By sec. 14, "no member or fellow of any college of physicians or surgeons, nor any graduate or licentiate in medicine, nor any person lawfully qualified to practise medicine in any part of the United Kingdom, nor any professor, teacher or student of anatomy, medicine or surgery, having a license from his majesty's principal secretary of state or chief secretary as aforesaid, shall be liable to any prosecution, penalty, forfeiture, or punishment for receiving or having in his possession for anatomical examination, or for examining anatomically, any dead human body according to the provisions of this act."

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Persons described in this act not to be liable to punishment for having in their possession human bodies.

By sec. 15, the act is not to prohibit any *post-mortem* examination directed by competent authority.

By sec. 18, "any person offending against the provisions of this act in England or Ireland shall be deemed and taken to be guilty of a misdemeanor, and being duly convicted thereof, shall be punished by imprisonment for any term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the court before which he shall be tried; and any person offending against the provisions of this act in Scotland, shall upon being duly convicted of such offence, be punished

Offences against this act.

by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the court before which he shall be tried."

Interpretation of certain words in this act.

By sec. 19, "the words, 'person and party,' shall be respectively deemed to include any number of persons, or any society, whether by charter or otherwise; and that the meaning of the aforesaid words shall not be restricted although the same may be subsequently referred to in the singular number and masculine gender only."

48 G. 3, c. 75, provides for the interment of dead bodies cast on shore from the sea.

Provision has been made by statute for the suitable interment of such dead bodies as may be cast on shore from the sea. The 48 Geo. 3, c. 75, enacts, that the churchwardens and overseers of parishes in England, in which any dead body shall be found thrown in, or cast on shore from the sea, shall upon notice of the body lying within their parishes, cause the same to be forthwith removed to some convenient place; and with all convenient speed to be decently interred in the church-yard or burial-ground of such parishes: and if the body be thrown in, or cast on shore in any extra-parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place. (e)

It is further enacted that every minister, parish-clerk, and sexton of the respective parishes, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time; receiving such sums as in cases of burials made at the expense of the parishes. (f) The statute provides also as to the expenses of such burials, and the raising of money to defray them; gives a reward of five shillings to the person first giving notice to the parish officers, or to the constable or head borough of an extra-parochial place, of any dead body being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and on parish officers neglecting to execute the act. (g) An appeal to the quarter sessions is also given to any person thinking himself aggrieved by any thing done in pursuance of the act. (h)

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The preventing a dead body from being interred is an indictable offence.

The preventing a dead body from being interred has been considered as an indictable offence. Thus, the master of a work-house, a surgeon, and another person were indicted for a conspiracy to prevent the burial of a person who had died in a work-house. (i) And though Hyde, C. J., upon a question how far the forbearance to sue one who fears to be sued, is a good consideration for a promise, (j) cited a case where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix or administratrix; (k) yet the other judges are said to have doubted of this: (l) and in a recent case, Lord Ellenborough, C. J., said, it would be impossible to contend that such a forbearance could be a good consideration for an assumption. (m) Lord Ellenborough, C. J., continued, "to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion upon the relatives." And in a subsequent part of the clause, his

(e) 48 Geo. 3, c. 75, s. 1.

(f) Id. ibid. s. 2.

(g) Ibid. ss. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(h) Id. sec. 10.

(i) Rex v. Young and others, cited in Rex v. Lynn, 2 T. R. 734.

(j) Quick v. Coppleton, 1 Vent. 161.

(k) The name of the case is not mentioned; but it is said that Hyde, C. J., cited it as a case that occurred in the Court of Common Pleas when he sat there.

(l) Quick v. Coppleton, 1 Vent. 161.

(m) Jones v. Ashburnham, 4 East, 460.

lordship said, "As to the case cited by Hyde, C. J., of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling: such an act is revolting to humanity, and illegal."(A)

A gaoler has no right to detain the body of a person who died in prison for any debts due to himself. Where, therefore, a gaoler refused to deliver up the body of a person, who had died while a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy certain claims made against the deceased by the gaoler, the Court of Queen's Bench issued a mandamus, peremptory in the first instance commanding that the body should be delivered up to the executors.(mm)

And a gaoler is indictable at common law for detaining the body of a person who has died in gaol in order to compel the payment of certain claims made by the gaoler. An indictment stated that a prisoner had died in gaol, and that the body remained in gaol in the possession of the defendant, then being gaoler; that the executor requested him to deliver up the body to them, and suffer them to take it away, in order that they might bury it: that it thereupon became the defendant's duty to deliver up the body; but that he refused to do so; that defendant unlawfully, and in abuse of the office, without legal authority or excuse, and against the will of the executors, detained the body a long time in gaol, to wit, from, &c., until, &c., when defendant unlawfully and indecently, &c., buried the body without any right of Christian burial, or any funeral ceremony or observance, in a place not being a consecrated burial ground, or a customary or fit place for burial, (to wit) a yard of, and within the precincts of, the gaol. The second count alleged a refusal to deliver up, &c., unless the executors would account with the defendant concerning certain claims of money which he pretended to have against the deceased's estate, and pay the defendant what should appear due; that the defendant wrongfully detained, &c., under pretext of such claims, the executors not accounting, &c., until, &c., when he buried, &c., Maule, J., said, at the close of the case, that the notion of a gaoler being authorized to detain a dead body on account of pecuniary claims was a mistake, and that a gaoler doing so was guilty of a misconduct in his public character, for which he was liable to prosecution.(nn) It is said that it was contended that some necessary allegations were wanting in the indictment, but the report did not state what they were; nor does it state that my opinion was pronounced upon them; but it was agreed that the defendant should enter into recognizances to appear for judgment when called upon.

An indictment will lie for wilfully obstructing and interrupting a clergyman in reading the burial service, and interring a corpse: but such

So also is the pre-

(mm) Reg. v. Fox,^a 2 Q. B. R. 247.

(nn) Reg. v. Scott,^b 2 Q. B. R. 248.

(A) A case of this nature was brought by indictment before the Supreme Court of Massachusetts, in the county of Barnstable. It was tried at *nisi prius*, before the late Chief Justice Parsons; the defendants were convicted, and a small fine imposed upon them, upon the ground that they were ignorant that it was an offence. In this case the corpse was arrested upon a civil process for debt, on its way to the grave, in the public highway, in the presence of the friends of the deceased, and of a procession which attended the funeral.

^a Eng. Com. Law Repts. xlii. 658.

^b *Ib.* xlii. 658.

venting a minister performing the burial service.

an indictment must allege that the person obstructed was a clergyman, and that he was in the execution of his office, and lawfully burying the corpse; and it must also show how the party was obstructed, as by setting out the threats and menaces used. And it is not sufficient to allege that the party did unlawfully, by threats and menaces, prevent the burial.(n)

The interment of the body of a person who has died a violent death before the coroner is sent for is a misdemeanor.

There is one case in which the too speedy interment of a dead body may be an indictable offence: namely, where it is the body of a person who has died of a violent death. In such case, by Holt, C. J., the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor (o)[1] It is also laid down that if a dead body in prison or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced.(p)

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*CHAPTER THE THIRTY-NINTH.

OF GOING ARMED IN THE NIGHT TIME FOR THE DESTRUCTION OF GAME, AND OF ASSAULTING GAME-KEEPERS.

Recited act repealed. Persons destroying game by night committed, for the first offence, three months, and kept to

THE 9 Geo. 4, c. 69, s. 1, reciting the 57 Geo. 3, c. 90, and that "the practice of going out by night for the purpose of destroying game has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to repeal the said recited act, and to make more effectual provisions than now by law exist for the repressing of such practice," enacts "that the said recited act shall be, and the same is hereby repealed, except so far as the same repeals any other acts; and if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed shall by night unlawfully enter or be in any land, whether open or inclosed,(a) with any gun, net, engine, or other instrument, for the purpose of taking or destroying game,(b) such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period

(n) *Rex v. Cheere*, 4 B. & C. 902. 7 D. & R. 461. See *Rex v. How*, 2 Str. 699.

(o) *Reg. v. Clark*, 1 Salk. 377. Anon. 7 Mod. 10. 2 Hawk. P. C. c. 9, s. 23, note (4).

(p) 2 Hawk. P. C. c. 9, s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, 2 Chit. Cr. L. 256.

(a) See *Tapsell v. Croskey*, 7 M. & W. 441, as to this word in the Turnpike Act, 3 Geo. 4, c. 126.

(b) It is to be observed that the word "rabbits" is here omitted; so that if poachers enter for the purpose of taking rabbits, but have not either taken or destroyed any, they have committed no offence within sect. 1, and therefore sect. 2 gives no authority to apprehend them. Section 9 extends to poachers entering with intent to take both game and rabbits, and is, therefore, in this respect, more extensive than sect. 1. See *Rex v. Ball*, R. & M. C. C. R. 330, *post*, 473.

[1] {In *Rex v. Proby & al.*, 1 Kenyon's Rep. 250, the Court of King's Bench refused a rule to show cause, why an information should not go against the defendant, for burying a dead body found in the river Medway, without sending for the coroner, saying that the prosecutor might proceed by indictment.}

not exceeding three calendar months, there to be kept to hard labour, ^{hard labour, and} and at the expiration of such period shall find sureties by recognizance, ^{to find} or in Scotland by bond of caution, himself in ten pounds, and two sure-^{sureties;} ties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following: and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second ^{second} time, and shall be thereof convicted before two justices of the peace, he ^{offence, six} shall be committed to the common gaol or house of correction for any ^{months,} period not exceeding six calendar months, there to be kept to hard ^{and kept to} labour, and at the expiration of such period shall find sureties by recog- ^{hard} nizance, or bond as aforesaid, himself in twenty pounds, and two sure- ^{labour,} ties in ten pounds each, or one surety in twenty pounds, for his not so ^{and to find} offending again for the space of two years next following; and in case ^{sureties;} of not finding such sureties, shall be further imprisoned ^{*and kept to} hard labour for the space of one year, unless such sureties are sooner ^{*170} found; and in case such person shall so offend a third time, he shall be guilty of misdemeanor, and being convicted thereof, shall be liable, at ^{third} the discretion of the court, to be transported beyond seas for seven years, ^{offence to} or to be imprisoned and kept to hard labour in the common gaol, or ^{be liable to} house of correction, for any term not exceeding two years; and in Scot- ^{transporta-} land, if any person shall so offend a first, second, or third time, he shall ^{tion.} be liable to be punished in like manner as is hereby provided in each case."

By sec. 2, "where any person shall be found upon any land commit- ^{Owners or} ting any such offence as hereinbefore mentioned, it shall be lawful for ^{occupiers} the owner or occupier of such land, or for any person having a right or ^{of land-} reputed of free warren or free chase thereon, or for the lord of the ^{lords of} manor or reputed manor wherein such land may be situate, and also for ^{manors, or} any person assisting such gamekeeper or servant, to seize and apprehend ^{their ser-} such offender upon such land, or in case of pursuit being made, in ^{vants, may} any other place to which he may have escaped therefrom, and to deliver ^{apprehend} him as soon as may be into the custody of a peace officer, in order to ^{offenders.} his being conveyed before two justices of the peace; and in case such ^{Offenders} offender shall assault or offer any violence with any gun, crossbow, ^{assaulting} firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, ^{or offering} towards any person hereby authorized to seize and apprehend him, he ^{violence} shall, whether it be his first, second, or any other offence, be guilty of a ^{guilty of a} misdemeanor, and being convicted thereof, shall be liable, at the discre- ^{misdemeanor.} tion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner."(b)

By sec. 4, "the prosecution for every offence punishable upon sum- ^{Limitation} mary conviction by virtue of this act shall be commenced within six ^{of time for} calendar months after the commission of the offence; and the prosecu- ^{proceed-} tion for every offence punishable upon indictment, or otherwise than ^{ings under} upon summary conviction, by virtue of this act, shall be commenced ^{this act.}

(b) By sec. 3, a justice may issue his warrant to apprehend any person charged on the oath of any credible witness with any offence punishable under the act upon summary conviction.

within twelve calendar months after the commission of such offence.”(c)

Convictions to be returned to the quarter sessions and registered, and may be given in evidence.

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By sec. 8, “on every conviction under this act for a first or second offence the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register, to be kept by him of the names and places of abode of *the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.”

Persons to the number of three, being armed, entering any land by night for the purpose of destroying game, &c., are guilty of a misdemeanor.

By sec. 9, “if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland, any person so offending shall be liable to be punished in like manner.”(d)

What time considered night.

By sec. 12, “for the purposes of this act the night shall be considered, as is hereby declared, to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.”

What shall be deemed game.

By sec. 13, “for the purposes of this act, the word ‘game,’ shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.”

Commencement of the prosecution.

Where a bill of indictment had been preferred within a year after the commission of an offence under this act, against the prisoner and Robins, and ignored as to the prisoner, but found against Robins, who was convicted, and four years afterwards a fresh bill was found against the prisoner; it was considered to be clear that preferring the first bill was the commencement of a prosecution, but it was doubted whether the condition in section 4, requiring a prosecution by indictment to be commenced within twelve calendar months, had been complied with by preferring the bill, which was ignored. And *Adam v. The Inhabitants of Bristol*(e) was referred to: where in an action for an injury to property

(c) Sec. 5 gives the form of conviction for offences under the act: as to which see *Rex v. Mellor*, 2 Dowl. P. R. 173. Sec. 6 gives an appeal to any person aggrieved by any summary conviction; and sec. 7 takes away the *certiorari*. See *Rex v. Mellor*, *supra*, and *Rex v. Hester*, 4 Dowl. P. R. 589.

(d) By sec. 10, in Scotland, the sheriff of the county within which the offence shall have been committed shall have cumulative jurisdiction with the justices of the peace in regard to the same: and the conviction in Scotland may be proved in the same manner as a conviction in any other case according to the law of Scotland; and by sec. 11, in all cases in Scotland of a third offence, or in other cases in Scotland where a sentence of transportation may, by the provisions of this act, be pronounced, the offender shall be tried before the High Court or Circuit Court of Justiciary.

(e) 2 A. & E. 389, 4 N. & M. 144.

by rioters on the 7 & 8 Geo. 4, c. 31, which requires the action to be commenced within three months, the party had commenced an action within three months, and died, and her executor brought an action within forty days after her death, but more than three months after the damage was done, and it was contended that the condition having been once complied with, the executor had a right to bring an action within a reasonable time; but the court held that the action was not brought in time. (*f*)

*Although three or more poachers are out by night armed, and are guilty of an offence within sec. 9, still they are liable to be apprehended under sec. 2, as they are guilty of an offence under sec. 9. (*g*) If persons are found actually in the commission of an offence against sec. 1, they may be apprehended by the person authorized to apprehend by sec. 2, although no notice be given to them of the cause for which they are apprehended; for the circumstances constitute sufficient notice. (*h*) And it is not necessary that there should be written authority; it is sufficient if the party were employed as watcher of game preserves by the lord of the manor. (*i*) And although the persons mentioned in sec. 2 have no authority to apprehend unless the poachers are found upon the manor or land of the persons therein specified; (*j*) yet if a poacher be found on the manor by a servant of the lord, and run off it, but being pursued return upon it again, the servant may apprehend him, for it is the same as if he had never been off the manor. (*k*) Where a wood was neither the property of the master of an assistant game-keeper, nor in his occupation, nor within any manor which belonged to him and he had only the permission of the owner to preserve the game there, it was held that the assistant game-keeper had no authority to apprehend poachers in the wood. (*l*) Unless a poacher be found in the pursuit of game between the expiration of the first hour after sunset and the beginning of the first hour before sunrise, there is no power to apprehend him under sec. 2. (*m*)

(*f*) *Rex v. Killminster*, 7 C. & P. 228, Coleridge, J. The prisoner was acquitted, otherwise the point would have been reserved for the opinion of the judges. See *Rex v. Willace*, 1 East, P. C. 186, where in a case of coining it was held that the information and proceedings before the magistrate, and not the preferring the bill, was the commencement of the proceedings, and that a variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference. See also *Rex v. Phillips*, R. & R. 369, where it was held that proof by parol that the prisoner was apprehended for treason respecting the coin, within the three months limited by the 8 & 9 Wm. 3, c. 26, was not sufficient if the indictment was after the three months, and the warrant to apprehend or commit, or depositions were not produced to show on what transactions, or for what offence, or at what time the prisoners were committed.

(*g*) *Rex v. Ball*, R. & M. C. C. R. 330. See note (*a*) *ante*, p. 469.

(*h*) *Rex v. Payne*, R. & M. C. C. R. 378. *Rex v. Davis*, 7 C. & P. 785, Parke, B. *Rex v. Taylor*, 7 C. & P. 266, Vaughan, B. See these and other similar cases, *post*, tit. *Manslaughter, Resisting Officers*.

(*i*) *Rex v. Price*, 7 C. & P. 178, Park, J. J. A. & Coleridge, J.

(*j*) *Rex v. Addis*, 6 C. & P. 388, Patteson, J. *Rex v. Davis*, 7 C. & P. 785, Parke, B.

(*k*) *Rex v. Price*, *supra*, note (*i*). The authority given by sec. 2 to apprehend "in case of pursuit in any other place to which he may have escaped," seems not to have been adverted to in this case.

(*l*) *Rex v. Addis*, *supra*, note (*j*).

(*m*) *Rex v. Tomlinson*, 7 C. & P. 183, Coleridge, J. See the case, *post*, tit. *Manslaughter, Resisting Officers*. By the 7 & 8 Geo. 4, c. 29, s. 30, which will be found in vol. 2, any person in the day time taking or killing any hare or coney in any warren, or ground lawfully used for the breeding or keeping of hares or conies, or at any time setting or using therein any snare or engine for the taking of hares and conies, is subjected to a penalty of not exceeding

^a Eng. Com. Law Reps. xxxii. 499.

^b Ib. xxxii. 736.

^c Ib. xxxii. 505.

^d Ib. xxxii. 486.

^e Ib. xxv. 452.

^f Ib. xxxii. 487.

- *473 *An indictment for assaulting a game-keeper must either state expressly that the defendant was "found committing" offence within section 1, or after stating that the defendant entered by night for the purpose of taking game, so as to show that he had committed an offence within that section, must in the subsequent part so refer to the previous part as to show that he was found committing such offence; and it is not sufficient to state that the defendant entered by night into land for the purpose of taking game, and that he was then and there by night as aforesaid found. A count alleged that the defendants by night did unlawfully enter certain land armed with guns for the purpose of taking game, and that they "were then and there in the said land by night as aforesaid by one W. R., the servant of Earl B. found, and that the defendants with the guns aforesaid did then and there assault, &c., the said W. R., the said W. R. being then and there authorized to apprehend the defendants:" it was objected that the count was bad, as it neither stated, in the words of the act, that the defendants were found committing the offence, nor sufficiently referred to the previous averments to incorporate them in the latter part of it, and the judgment was arrested upon this objection.⁽ⁿ⁾
- Sec. 9, creates two offences. The 9th section creates two distinct offences, namely, first *entering on land*, one of the party being armed, and secondly, *being in the land armed*.^(o)
- Of the being armed. By the express words of sec. 9, if several are together, and any one of them is armed, all of them are liable to be convicted; and it was so held on the 57 Geo. 3, c. 90, the words of which were "if any person or persons," &c., "shall be found," &c., "armed with any gun," &c. O'Flannagan and two others were in a park at night, and two of them had guns: O'Flannagan had one, but which of the other two persons had the other
- One being armed is sufficient.

57.; and by sec. 63 may, if found committing the offence, be immediately apprehended without a warrant by any peace officer, or by the owner of the property, on or with respect to which the offence is committed, or by his servant, or any person authorized by him. This power only applies to hares and conies, and to the places specified. By the Game Act, 1 & 2 Wm. 4, c. 32, s. 31, any person found on any land, &c., in search or pursuit of game, woodcocks, snipes, quails, landrails, or conies, may be required by any person having the right of killing game upon such land, or by the occupier or gamekeeper, or servant of either of them, or by the warden, &c., of the forests, &c., forthwith to quit the land whereon he is found, and to tell his Christian and surname, and place of abode; and if such person, after being so required, refuse to tell his real name or place of abode, or give such a general description of his place of abode as shall be illusory for the purpose of discovery, or wilfully continue or return upon the land, he may be apprehended by the party so requiring, or by any person acting by his order and in his aid, and conveyed as soon as conveniently may be before a magistrate. In order to justify the apprehension of an offender under this section he must have been required both to quit the land, and also to tell his name; and the return must be upon the same land as the party was found upon, and for the same purpose, that is, in search or pursuit of game, &c.; for otherwise a man going along a public path over the same land would come within the section. *Rex v. Long*,^a 7 C. & P. 314, Williams, J. The same point was decided in *Reg. v. Lawrence*, Gloucester Spr. Ass., 1843, by Wightman, J.

⁽ⁿ⁾ *Reg. v. Curnock*,^b 9 C. & P. 730. Gurney, B., after taking time to consider, and I believe, consulting Coleridge, J. Two other objections were intended to be made: first, that the assault was not alleged to have been upon the land where the defendants were found; secondly, that there was no averment to show that the keeper was in the execution of his duty when the assault was committed, and unless that were the case, the assault was not within this act. See *Rex v. Cheere*,^c 4 B. & C. 902, *ante*, p. 468. C. S. G.

^(o) Per Coleridge, J., *Rex v. Kendrick*,^d 7 C. & P. 184, and MSS. C. S. G. See also *Davis v. Rex*,^e 10 B. & C. 89, *post*, p. 481. In *Rex v. Mellor*, 2 D. P. C. 173. Taunton, J., held that the words "entering and being," in the 1 & 2 Wm. 4, c. 32, s. 30, only constituted one offence; *sed qu.* for a person may enter land with an innocent intent, and afterwards begin poaching.

^a Eng. Com. Law Reps. xxxii. 523.

^b *Ib.* xxxviii. 310.

^c *Id.* x. 466.

^d *Id.* xxxii. 487.

^e *Id.* xxi. 29.

gun could not be ascertained; the point was therefore saved, whether either of these two could be found guilty; but, upon a case reserved, the judges were clear that, if any one of the party was armed, every one of the party was within the act. (p) But it was held, on the same repealed statute, that if several were out together, and one had arms without the knowledge of the others, the others were not liable to be convicted. Johnson and Southern went into a close in the night to kill game; Johnson had a loaded pistol, but Southern did not know it: and, upon a case reserved the judges thought Southern not liable to be convicted under the act. (q)

A constructive arming is not sufficient within the new statute; if therefore an indictment allege that two defendants, together with another person, entered a close, the two defendants being armed, *and it appear that the two defendants were unarmed, they must be acquitted. An indictment stated that Davis and Griffiths, together with another person, entered certain land, "the said Davis and Griffiths, then and there being armed:" it was proved that the third person had a gun, but Davis and Griffiths were unarmed; it was held that Davis and Griffiths must be acquitted; for under the 9 Geo. 4, c. 69, s. 9, a constructive arming is not sufficient, and as the indictment stated that these two men were armed, and the proof was that neither of them were so, the allegation was not proved, and the case therefore failed. (r)

Large stones are offensive weapons, if they are of a description capable of occasioning serious injury, and if they are brought and used for that purpose. The defendants had brought with them from a distance some large heavy smooth stones, and had thrown them at a gamekeeper and his assistants, whereby they had been struck and knocked down; it was left to the jury to say, whether the stones had been brought by the defendants to the place or found upon the spot; whether they were of such a description as to be capable of occasioning serious injury to the person if used offensively; and whether they were brought and used for that purpose; for that, if they were satisfied of the affirmative of all those questions, these stones were offensive weapons within the statute. (s) Where a stick or other instrument, ordinarily used for the purpose of walking, is found in the possession of poachers, it is a question for the jury, whether such stick or other instrument was taken out for the purpose of being used as an offensive weapon, for if it was taken out for such purpose it is an offensive weapon within the statute. The prisoner had taken with him when poaching a thick stick, large enough to be called a bludgeon, but which, being lame, he was in the habit of using as a crutch; it was held to be a question for the jury, whether he took it out with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it. (t) So where the only weapons proved to have been used by the prisoners were sticks, and one, with which a gamekeeper had been knocked down, when produced, proved to be a very small one, fairly answering the description of a common walking stick; and on its being objected that this stick could not be considered an offensive weapon, it was answered that the use made of it by

(p) *Rex v. Smith*, Mich. T. 1810, MSS. Bayley, J., and Russ. & Ry. 368.

(q) *Rex v. Southern*, Easter T. 1821, MSS. Bayley, J., and Russ. & Ry. 444.

(r) *Reg. v. Davis*, 8 C. & P. 759, Patteson, J.

(s) *Rex v. Grice*, 7 C. & P. 803. Ludlow, Serjt., after consulting Parker and Bolland, Bs.

(t) *Rex v. Palmer*, 1 M. & Rob. 70, Taunton, J. See the cases collected, ante, p. 118 and 120.

* Eng. Com. Law Reps. xxxiv. 623.

^b Ib xxxii. 745.

the prisoner showed his intention, and the nature of the stick; Mr. B. Gurney said, that if a man went out with a common walking stick, and there were circumstances to show that he intended to use it for purposes of offence, it might perhaps be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some unexpected attack or collision he was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon within the meaning of the act. (*u*)

What is sufficient evidence that the defendants were in the land laid in indictment.
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Under the repealed statute it was held that perceiving a person fire was finding him armed, though his person was not seen at the time: and it was no answer to a charge under that act that the parties *put down their arms, and left them before they were seen, if it was perceived that some one was there armed before they were seen. A keeper heard a gun fired in a wood, and called to his man to watch; the persons in the wood immediately abandoned their guns, and had crept away two hundred yards from them, when the keeper and his man discovered and seized them. A case was reserved upon the question, whether they could be considered as found armed when they had got to so great a distance from their guns before they were discovered: and the judges (eleven) held that they were, and that they were rightly convicted. (*v*)

So it was sufficient under the repealed statute, if the evidence satisfied the jury that the prisoner had been in the place named in the indictment for the purpose of destroying game. Upon an indictment, which charged the prisoner in every count with having entered a wood, called Kingshoe Spinney, it was proved that a gamekeeper heard nine reports, and saw three flashes in the wood; the prisoner was not seen in the wood, but was soon afterwards seen in a close, which adjoined the wood; upon this evidence it was left to the jury to say, whether the prisoner was one of the party in the wood; and they having found that he was, the judges, upon a case reserved, held that, as there was evidence to satisfy the jury that he had been in the wood armed, or as one of a party who had been so, it was sufficient. (*w*)

So it is not necessary under the new act that the defendants should be actually seen in the close laid in the indictment; it is sufficient if there be evidence to satisfy the jury that they were in fact in the close for the purpose alleged. Thus where the prisoners had been seen in a close, which lay between two woods, going in a direction from one of the woods, in which shots had been previously heard, towards the other wood, it was left to the jury to say whether they had not been in the wood in which the shots had been heard. (*x*)

As to whether three must enter the land, or whether an entry by

A difference of opinion exists as to whether all the three defendants must be proved to have been in the close laid in the indictment, or whether it is sufficient to prove that all were out for the common purpose of taking game, and that one entered the close, two more being near enough to the close to aid and assist. Where it appeared that

(*u*) *Rex v. Fry*, 2 M. & Rob. 42.

(*v*) *Rex v. Nash*, Easter T. 1819, MS. Bayley, J., and Russ. & Ry. 386.

(*w*) *Rex v. Worker*, R. & M. C. C. R. 165. The 2d and 3d counts stated the prisoner to have been found in Kingshoe Close, which adjoined the wood, and a question was raised upon these counts, but not decided, *viz.*, whether it was necessary that the prisoner should be found armed in the same close, into which he entered for the purpose of killing game.

(*x*) *Rex v. Capewell*, 5 C. & P. 549. MSS. C. S. G. Parke, B.

Dowsell alone was seen in Rodborough Hill Brake, the place laid in the indictment, between which and Rodborough Wood a turnpike road ran, and at that time no one was in company with Dowsell, and he escaped out of the brake into the road, where he was seized by a keeper, and whistled loudly, upon which four more men came out of Rodborough Wood, and rescued Dowsell; shots had been heard in the direction of the brake and the wood, but the witnesses were unable to speak as to which place the shots were fired in: it was objected, that there was no evidence to show that any one except Dowsell was in the brake; and unless it appeared that three were *together* in the place specified, no offence *was proved: and Mr. J. Patteson held that in order to support this indictment under the 9 Geo. 4, c. 69, s. 9, it must be proved that the prisoners were altogether in the place laid in the indictment, and as that was not shown, that the prisoners must be acquitted. (y) But where an accomplice proved that all the four defendants went to a preserve called Norton Hill Wood for the purpose of killing pheasants, and that all of them, except himself and Meadows, went into the wood, they remaining outside; and on the approach of the gamekeepers, the witness and Meadows went into the wood, and informed the others of it, when they all ran away together; Alderson, B., said, "the entering on the land by one is to be considered as the entering of all, if the others are at the place and assisting: exactly in the same way that would fix them in a case of burglary: they all are guilty, as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property; it is enough if all these persons were at the place, each of them acting his part, and conducting to one common intent, although some only of the party were bodily in the wood." (z) And in another case, where one or two out of four poachers were not actually in the wood laid in the indictment, but were waiting outside to watch, the same very learned judge said, "if two persons were in the wood, and the other two outside were of the same party, and there for the same person, it would be an offence within the act. Suppose that some of the party were to go down one side of the hedge, and some down the other, beating the same fence, that would be no offence within the statute, according to *Rex v. Dowsell*; (a) and the same consequence would follow if two went into the wood, and a number of others surrounded the outside: surely the statute meant to include such cases: I have a strong opinion on the point; but out of respect for my brother Patteson's opinion, if the question arises, I will reserve the point." (b)

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(y) *Rex v. Dowsell & Bridgewater*, MSS. C. S. G. S. C. 6 C. & P. 398.^a There was no doubt in this case that all the party went for the common purpose of killing game both in the brake and in the wood. C. S. G.

(z) *Rex v. Passey*,^b 7 C. & P. 282.

(a) *Supra*, note (y).

(b) *Rex v. Lockett*,^c 7 C. & P. 300, Alderson, B. The jury having found that all the defendants had entered the wood, the question was not reserved. In *Rex v. Andrews*, 2 M. & Rob. 37, Gurney, B., is reported to have expressed a similar opinion, though it was not necessary for the decision of the case; but as the learned Baron, in a case at Stafford Spring Assizes, 1841, in which the same point arose, expressed great doubts on it, and would have reserved the point if the jury had convicted, the opinion expressed in *Rex v. Andrews* cannot be considered as being the deliberate opinion of the learned Baron. This question may be considered under two states of facts: first, where less than three enter the land, the others being near enough to aid and assist; secondly, where three enter and others are near enough to aid and assist. First, as to the case where less than three enter, this is quite as much a question of whether an offence within sec. 9 has been committed, as whe-

^a Eng. Com. Law Repts. xxv. 457.

^b *Ib.* xxxii. 511.

^c *Ib.* xxxii. 516.

*177 *Where three poachers go out with a common purpose, but afterwards separate in pursuit of game in different fields, they are not guilty of an offence within sec. 9. The three defendants went out for the pur-

ther those who have not entered the field are guilty of such offence; and it is submitted that, whether we look at the object or the words of the clause, there must be an actual bodily entry of three persons into the close to bring the case within sec. 9. The object of the clause was to protect keepers from violence; now it is obvious that if less than three be in the close, there is less danger of violence than if three be in it; if three be in the close, they are ready to assist each other in committing violence; if some be out of the close, they must get into the close before they are in a position to commit it, and in some cases this might be impracticable; thus in the case put, by the very learned Baron, of part going down one side of a hedge, and part down the other, the hedge might be so strong that the one part could not get through it to assist the other in an attack upon keepers; and many similar cases might be put. As to the words, they seem strongly to indicate that there must be an entry by all three, and all three "together:" the word "together" is very important: if three poachers went to a wood of very large size, and each entered it separately at far distant points, they would have been within the clause if the word "together" had been omitted. Again, the words are, "any of such persons being armed." Suppose that the one that entered was not armed, but that one of the others was, then if it were held that the offence was complete, it would be so holding, although no person armed had entered the land; if it were held necessary that the one who entered should be armed, it would be limiting the arming to one particular individual, instead of leaving it indefinite, which was armed. Difficulties would also arise from holding the entry of one to be the entry of all. Suppose three poachers went out with the common design of taking game in a narrow plantation, and the fields on each side, and that one went up the plantation, and one up each adjacent field, all being near enough to assist in killing game; according to such a construction each would be guilty of three distinct offences; in other words, all three would be together in three different closes *uno eodemque tempore*. The instance of burglary is not analogous, because that offence does not consist in an entry by "three or more together," but by one person; as soon, therefore, as an entry by one is shown, *the crime* is proved, and the question is, whether others engaged in the same transaction were principals in the second degree or accessories. Here the question is whether the crime has been committed. In burglary, and indeed in most, if not all, common law offences, where several persons are present at the commission of a crime, the indictment may either state the facts according to their legal effect, *i. e.* that all committed the act; or as they occurred, *i. e.* that one did the act, and that the others were present aiding and assisting. If, therefore, the case of burglary were analogous, an indictment alleging that one entered the field, and that the others were present aiding and assisting, ought to be good, and yet it is conceived no such indictment could be so framed as to give effect either to the word "together," or to the indefiniteness of the words "any of such persons being armed." It is to be observed, also, that sec. 2 only authorizes the apprehension of those who are "found upon any land;" so that the persons not in the field could not be apprehended under that section. The Game Act, 1 & 2 Wm. 4, c. 32, which applies to "any persons to the number of five or more together, found upon any land," may also be referred to as showing that there must be an entry by all; for how could it be said that finding one person in a field, with four in the adjoining field, was finding five together in the field where the one was found? On the whole it is submitted, that unless there has been a bodily entry by three together, the offence is not complete.

Secondly, where three have bodily entered into the close, and others are near aiding and assisting; here the crime is assumed to be complete, and the question is, whether those near are guilty of it within sec. 9. If the common law rule, by which all are principals in misdemeanors (see note (b) *ante*, p. 82) prevailed, not only those near enough to assist, but all who were parties to the transaction, although absent, would be guilty; but it seems admitted on all hands that the common law rule does not apply; indeed Mr. B. Alderson could only have referred to the analogy of burglary in *Rex v. Passey*, because he thought the common law rule did not apply. Some limit, then, must be put upon the clause, and it is submitted that the correct limit is to confine it to the persons who actually enter the close. The intent with which the parties enter being the same (with the *slight difference* pointed out in note (a), *ante*, p. 469) in both sec. 1 and sec. 9; sec. 9 rather authorizes a heavier punishment than introduces a new offence, and the two sections may well be read together thus: if any persons, whether one or more, enter, &c., they shall be liable to the punishment in sec. 1, but if three or more enter together armed, they shall be liable to the punishment in sec. 9, and the heavier punishment of that section may well be confined to those who actually enter the close. The clause requires both an entry and an arming; and as an entry by any number, however large, if unarmed, will not be sufficient, so it is but reasonable that a presence without an entry should not be sufficient; and as the statute has made an arming by one sufficient, if it had been intended that an entry by part should ensure as an entry by all, probably it would have been made so by express words.

With regard to the entry, it is submitted that the statute intended an actual bodily entry

pose of night-poaching: Powell and Owen were seen setting *nets in the hedge-row of the yew tree piece, they being on the other side in a turnpike road, and Nickless went into another field; Powell and Owen sent a dog into the yew tree piece, which drove a hare into one of the nets; it was held that the case was not within the statute, as Nickless was independently engaged in poaching in the field, he having left the others poaching in the road.(c) *478

A difference of opinion also exists as to what constitutes an entry within the meaning of this statute. It has been held that if persons standing in a road hang nets on the twigs of a hedge within a close, it is an entry within sec. 9. Some poachers standing in a lane, spread their nets upon the twigs of a hedge, which separated the lane from the close; Alderson, B., said, "I shall tell the jury that if they are satisfied that, in effecting a common purpose by all the defendants, the nets were hung upon the twigs of the hedge so as to be within the field, it was an entry. Lord Ellenborough, C. J., in *Pickering v. Rudd*,(d) stated that he had once held that firing a gun loaded with shot into a field was a breaking of the close, and I am of opinion, that if these defendants so placed the nets within the field it was an entry by them all."(e) But in a similar case it was held that if persons standing in a road set nets in the hedge-row of an adjoining field, and send a dog into the field to drive game into the nets, this is not an entering of land within sec. 9. Poachers were seen setting nets in the hedge-row of a field, they being on the other side of the hedge in a turnpike-road, they also sent a dog into the field, which drove a hare into one of the nets; it was contended that the sending of the dog into the field to drive the hares into the nets was in point of law, an entering into the field; but it was held that it would be straining the words too much in a criminal case to hold that this was within the statute.(f) What is an entry within the statute.

If the indictment state that the defendants entered into a close with intent, *then and there*, to kill game, it must be proved that the defendants had the intent to kill game in the particular close named. Thus, where upon an indictment under the repealed statute so laying the intent, the jury found that the defendant was still in pursuit of game, but they could not say whether in the close specified or elsewhere; the judges held that the entry, with intent to kill game, was confined by Of the intent to kill game in the close laid in the indictment.

into the close, and not such an entry as would amount to a trespass at common law. The doctrine in burglary, that if any part of the person be introduced into the house, it is a sufficient entry, has long been considered as going a great length, and it would be carrying it much further to apply it to this offence. Sec. 2 also seems to show that an entry of the whole person was intended; it provides that "where any person shall be found upon any land, he may be apprehended upon such land," or in case of escape "therefrom;" now, how can it be said that a person who merely introduces his hand into one field while standing in another comes within this clause? The Game Act, 1 & 2 Wm. 4, c. 32, ss. 31, 32, affords a similar argument. Suppose three poachers went, with intent to take game, to a park wall, too high for them to get over, and one, in the presence of the others, introduced his hand through a hole left for hares at the bottom of the wall, and set a snare within the park, could it be fairly contended that this was an entry by all armed into the park within sec. 9?

On the whole it is submitted that Mr. J. Patteson's construction of the statute is correct, and that there must be an entry of the whole person by three persons into the close to bring the case within sec. 9, and that none are within that section except those who actually enter the close. C. S. G.

(c) *Reg. v. Nickless*, 8 C. & P. 757, Patteson, J.

(d) 1 Stark. N. P. C. 56. 4 Camp. 219.

(e) *Athea's case*, 2 Lewin, 191.

(f) *Reg. v. Nickless*, *supra*, note (c), see note (b), *ante*, p. 476.

the indictment to the close specified, it was necessary to prove the intent as to the close. (g) And upon a similar indictment under the new act, where it appeared that the prisoners were seen in the field laid in the two first counts, but it was not shown that they were doing any act tending to the destruction of game in it; and it rather seemed that they were merely crossing it in their way from one wood to another; Park, B., held *479 *that the first two counts made it necessary to show that the prisoners were in the field laid for the purpose of killing game there. (h) So where in a similar indictment for entering Breadstone plantation, it appeared that a gun was heard about a quarter of a mile from the plantation, and the prisoners were seen in the plantation with a gun, and there were many pheasants roosting in the plantation, which the prisoners must have seen, but they did not fire at any of them. Coleridge, J., said, in summing up, "You must say whether these persons were in this particular cover with an intent to kill game there. If you can suppose that they had gone out on that night poaching in every other covert in the county, that will not be sufficient to support the charge contained in this indictment, if they were not in this particular covert with intent to destroy game there. It lies on the prosecutor to make out to your satisfaction that the prisoners had the intent to kill game in this particular covert; the intent can in this case only be inferred from the conduct of the parties, and it is here shown that there was game which the defendants must have seen, but did not make the slightest attempt to destroy." (i)

A doubt is stated in the marginal note of *Rex v. Barham*, (ii) whether it is necessary that the defendant should have such an intent in the place in which he is found armed, unless it be so stated in the indictment, and *Rex v. Worker* (k) is referred to, but in that case, although the indictment was general, no such question arose; and should it seem that whether the words "then and there" be in the indictment or not, the entry into the close must be proved to be with intent to kill game in such close, for unless such be the case the entry was made into that close, not with intent to kill game, but with some different intent, as, for instance, to pass over it. And where it appeared that the prisoners were in Shutt Leasowe, a place named in the indictment, and which adjoined Short Wood, and were apparently going to the wood, Mr. J. Patteson said, "the intent was evidently to kill game in the wood, into which none of the party ever got for that purpose; it is true that they are charged with being in Shutt Loasowe, but they had no intention of killing game there; they must be acquitted." (l)

The indictment must particularize the close.

The indictment must in some way or other particularize the place; for the defendant has a right to know to what specific place the evidence is to be directed: and stating that in the parish of A. the party entered into a certain close there, was held not sufficient under the repealed statute. The first count of an indictment stated, that the defendant at the parish of Whiteford, in the county of Northumberland, having entered

(g) *Rex v. Barham*, R. & M. C. C. R. 151.

(h) *Rex v. Capewell*,^a 5 C. & P. 549.

(ii) R. & M. C. C. R. 151.

(l) *Reg. v. Davis*,^c 8 C. & P. 759.

(i) *Rex v. Gainer*,^b 7 C. & P. 231.

(k) R. & M. C. C. R. 165.

It does not appear whether the indictment had the words "then and there" in it; but whether it had or not, the observations of the very learned judge appear to have been made generally, and without any reference to the form of the indictment.

^a Eng. Com. Law Repts. xxiv. 452.

^b Ib. xxxii. 500.

^c Ib. xxxiv. 223.

into a certain close there situate, with intent there illegally to kill game, was there found at night armed with a certain gun; and the second count charged him in like manner with having entered into a certain inclosed ground; but neither the close nor the inclosed ground were described by name, ownership, occupation, or abuttals. And upon a case reserved, Abbott, C. J., Holroyd, J., and Parke, J., thought any such description unnecessary; *but Burrough, J., Garrow, Best, J., Hullock, B., and Bayley, J., thought otherwise, because this was substantially a local offence, and the defendant was entitled to know to what specific place the evidence was to be directed; and the judgment was arrested. (m) So it has been held under the new statute that an indictment for entering "a covert in the parish of A." is too general. (n) But it has been held sufficient to allege that the defendants entered certain land in the occupation of a person named, without stating the land was inclosed or not. (o)

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If the name of the close be stated in the indictment, and the name be misstated, it is fatal. An indictment alleged that the defendants entered a certain wood called "The Old Walk," in the occupation of the Earl of Waldegrave; it appeared that the wood had always been called "The Long Walk;" and, upon a case reserved, the judges held the variance was fatal. (p)

A variance in the name stated is fatal.

The indictment must allege not only an entry by night, but an arming by night. An indictment alleged that the defendants did by night unlawfully enter divers closes and inclosed lands, and were then and there taking and destroying game; it was objected that the words "then and there" did not mean that the defendants were there by night, but only on the day, and at the place aforesaid; and it was held by night.

The indictment must allege not only an entry by night, but an arming by night.

(m) *Rex v. Ridley*, T. T. 1823. Russ. & Ry. 515.

(n) *Rex v. Crick*, 5 C. & P. 508. Vaughan, B. It is very usual to describe the close simply as belonging to A. B., especially after describing it by name and occupation in previous counts. In some cases this may lead to inconvenience to the prisoner, and as it applies to every close belonging to A. B., who may be the owner of a large number of closes, it admits of doubt whether such description be not insufficient, and the more so, as it is very possible that the grand jury may have found the bill, because they considered the offence proved as to one close. The first count charged the entry into the Nineteen Acres, the second into the same close in the occupation of a person named, the third into inclosed land belonging to Sir R. Peel. The prisoners were seen crossing the Nineteen Acres in the direction from a wood, in which shots had been previously heard, towards a wood on the other side of the Nineteen Acres. The whole belonging to Sir R. Peel. There was no evidence that the prisoners were in pursuit of game in the Nineteen Acres; and as the case had been conducted on the part of the prosecution, as if the charge related to the Nineteen Acres only, in addressing the jury I only adverted to the evidence applicable to that close, and contended, that the prisoners were entitled to be acquitted; as they were not proved to have entered that close for the purpose of poaching; and Mr. B. Parke held that was so as to the two first counts, but that the third was applicable to the wood, from which the prisoners were coming, and on this count the prisoners were convicted. *Rex v. Capewell*, 5 C. & P. 549. Now, there can be little doubt that the third count was inserted to prevent an acquittal, on the ground of variance in the description in the two first counts, and was intended to apply to the Nineteen Acres, and equally little doubt that the grand jury found the bill with reference to the Nineteen Acres only. In all cases where the close is described in general terms, it would be prudent to apply for a particular of the close in which the offence is intended to be proved, which I apprehend the court would order to be delivered, as it is the usual course in all cases, where an indictment is so general as not to afford the defendant sufficient information. See *ante*, p. 230. C. S. G.

(o) *Rex v. Andrews*, 2 M. & Rob 37. Gurney, B. *Sed quare*.

(p) *Rex v. Owen*, R. & M. C. C. R. 118, decided upon the 57 Geo. 3, c. 90. The marginal note adds that "it is not necessary where the name of the owner or occupier of the close is stated, to state the name of the close also." The case itself, however, contains no such point. C. S. G.

*181 that the indictment was bad. If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence they might have referred to the whole; but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The *two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states, that they were in the closes armed, for the purpose of destroying game, but does not state that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct the indictment is bad.(q)

The indictment need not contain any specific allegation that the defendants entered the close between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, the period which, by the 12th section of the statute, it is provided, shall be considered night.(r)

The indictment may contain counts not only on the 9th section, but also on the 2nd, for assaulting a gamekeeper authorized to apprehend, for assaulting a gamekeeper in the execution of his duty, and for a common assault,(s) and if there be any doubt as to the number of persons not amounting to three, or the proof of their being out in pursuit of game, it certainly would be prudent to add such counts in all cases where an assault has been committed. Where an indictment, after stating the entry into the land by night, proceeded thus, the defendants "being then and there by night as aforesaid armed with a gun;" and it was objected that this averment was not sufficient, because "then" meant only the day and year aforesaid, and not the time of the entry; Mr. B. Parke, said, he would leave the defendants to their writ of error, but advised the insertion of the words, "at the time when they so entered," in such indictments in future.(t) Where an indictment alleged, that the defendants did enter, and were in certain land, they "being then and there by night as aforesaid armed with guns, and other offensive weapons," and it was objected that the indictment did not contain any sufficient allegation that the defendants were armed when they entered the land; it was held, that the indictment was sufficient, as all the requisites of the statute had been complied with.(u) Where there was one indictment for shooting at a gamekeeper with intent to murder him, and another indictment for night poaching, both founded on the same transaction, it was held that the prosecutor was not bound to elect which he would proceed upon, as the offences were quite distinct, and one of them could not possibly merge in the other.(v)

(q) *Davies v. Rex*,^a 10 B. & C. 89. The following objections were also taken, but not adverted to by the court: 1st, that the hour of the night ought to have been stated; 2ndly, that it was not stated that the defendants unlawfully were in the close for destroying game; 3rdly, that it was not stated that the defendants were there for the purpose of destroying game; and 4thly, that the indictment stated that they entered "divers closes," without specifying any in particular.

(r) *Riley's case*, 1 Lewin, 149, Parke, B. *Pearson's case*, *ibid.* 145, Gurney, B.

(s) *Rex v. Finucane*,^b 5 C. & P. 551, and MSS. C. S. G. Parke, B. *Rex v. Simpson*, Stafford Spring Ass. 1830, Bolland, B. MSS. C. S. G.

(t) *Rex v. Wilks*,^c 7 C. & P. 811.

(u) *Rex v. Kendrick*,^d 7 C. & P. 184, and MSS. C. S. G., Coleridge, J.

(v) *Rex v. Handley*,^e 5 C. & P. 565, Parke, B.

^a Eng. Com. Law Reps. xxi. 29.

^b *Ib.* xxix. 453.

^c *Ib.* xxxii. 487.

^d *Ib.* xxxii. 487.

^e *Ib.* xxiv. 457.

* BOOK THE THIRD.

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OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

CHAPTER THE FIRST.

OF MURDER.(A)

MURDER is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law.^(a) Of this description the malice prepense, *malitia præcognitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide :^(b) and it will therefore be necessary to inquire concerning the causes in which such malice has been held

Definition
Of the
crime.
*Malitia
præcogni-
tata*, or
malice
prepense.

(a) 3 Inst. 47, 51. 1 Hale, 424, 449. 1 Hawk. P. C. c. 31, s. 3. Kely, 127. Fost. 257. 2 Lord Raym. 1847. 4 Bla. Com. 198. 1 East, P. C. c. 5, s. 2, p. 214.
(b) Bla. Com. 198. Castineaux's case, 1 Leach, 417.

(A) MASSACHUSETTS.—If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown : for the law infers, that the natural or probable effects of any act deliberately done, were intended by the agent.

Where a trespass is committed against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon ; and if he kill the trespasser with such a weapon, it will be murder, because it is an act of violence beyond the degree of provocation. *Commonwealth v. Drew & al.*, 4 Mass. Rep. 391.

But if the beating be with an instrument not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter.

If a man under colour or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and he resist, and in the resistance kill the aggressor, it will be manslaughter. And any person aiding the injured party, by endeavouring to rescue him, or to prevent an unlawful arrest, actually attempted, is guilty of manslaughter, if he kill the aggressor in opposing him, unless the party aiding be a stranger to him whom he endeavours to assist. *Ibid.*

If a person assume to act as a physician, whether he be regularly bred to the profession, or a quack, however ignorant of medical science, and prescribe for a person, with an honest intention and expectation of curing the patient, but through his ignorance of the properties of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the party prescribing, he is not guilty of murder or manslaughter. *Commonwealth v. Thompson*, 6 Mass. Rep. 134. But if one give another medicine which kills him, and the party prescribing have so much knowledge or information of the probable fatal tendency of the prescription, that it may be reasonably presumed by the jury, that he administered the medicine from wilful rashness and fool-hardy presumption, and not with the honest intention and expectation of effecting a cure, he will be guilty of manslaughter at least, though he may not have intended any bodily harm to the patient. *Ibid.*

Where a person was committed to the house of correction as a dangerous madman, pursuant to the statute of 1797, c. 61, s. 3, and he was afterwards tried on an indictment for murder, and acquitted by reason of insanity, he was ordered to be remanded to the house of correction, there to remain until he should be discharged by due course of law. *Commonwealth v. Merriam*, 7 Mass. Rep. 168.

If one counsel another to commit suicide, and the other by reason of the advice kills himself, the adviser is guilty of murder, as a principal. A case of this nature was decided in Hampshire, September term, 1816. The prisoner, George Bowen, was indicted for the murder of Jonathan Jewett. The indictment contained two counts ; the first charged him with feloniously, wilfully, and of his malice aforethought counselling, hiring, persuading and procuring Jewett to murder himself ; the other alleged that the prisoner murdered Jewett by hanging him. Jewett was confined in the same gaol with the prisoner, and in the night preceding the day on which he was to be executed, he hung himself. The evidence proved that the prisoner repeatedly and frequently advised and urged Jewett to destroy himself, and

to exist. It should, however, be observed, that when the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence

thus disappoint the sheriff, and the people who might assemble to see him executed. The chief justice in charging the jury, stated, "that the important fact to be inquired into, was whether the prisoner was instrumental in the death of Jewett, by advice or otherwise; and that if they found the facts as alleged in the indictment, they might safely pronounce the prisoner guilty. The government is not bound to prove that Jewett would have hung himself if Bowen's counsel had not reached his ear. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise. Where a man is determined upon the commission of suicide, the reasonable admonition of a discreet friend might overthrow his determination; on the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might encourage, induce, and fix the intention, and ultimately procure the perpetration of the dreadful deed. The inducements of Jewett might have been insufficient to procure the commission of the act, and one word of additional advice might have turned the scale. If you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly. It may be thought unjust that the life of a man should be forfeited merely because he has been influential in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offence. Further, there is no period of a man's life, which is not precious to him as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence; and you are not to consider the atrocity of this offence in the least degree diminished by the consideration that justice was thirsting for a sacrifice." The jury found the prisoner not guilty: probably from a doubt whether the advice given by him was, in any measure, the procuring cause of Jewett's death. *Commonwealth v. Bowen*, 13 Mass. Rep. 356.

PENNSYLVANIA.—Every act which apparently must do harm, which is done with intent to do harm, and without provocation, and of which death is the consequence, is murder. *Pennsylvania v. Honeyman*, Addis. 148.

Unlawfully killing, with a design to kill, is murder in the first degree: if with a design only to hurt, it is murder in the second degree. *Pennsylvania v. Lewis*, Addis. 288.

Premeditation, is an essential ingredient to constitute murder in the first degree under the act of 1794, (1 Penn. Laws, 599, 600), but the intention still remains the true criterion of the crime; and the intention of the party can only be collected from his words and actions. *Respublica v. Mulatto Bob*, 4 Dall. 146. "Let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a *premeditated* violence." Per M'Kean, Chief Justice, in the case last referred to.

In the case of the *Commonwealth v. Dougherty*, before Rush, President, I Browne, Appendix xviii., the following principles are laid down. "The intoxication of the prisoner, at the time he killed the deceased, and the subsequent expressions of sorrow for his conduct, are not, in the eye of the law, the slightest excuse or palliation of his crime. It would seem, indeed, as if all nations and ages concurred in this sentiment." "The frame of the human mind is very different. In some, the passion of anger tears up reason by the roots; in others it is seen scarcely to impede the cool and regular operations of the understanding. If, in the act of killing, the party discovers so much reflection as to know what he is doing, it will be murder in the first degree. It is to thoughtless violence, to rash and unreflecting rage, the law extends its benignity, so far as to extenuate the killing to the offence of manslaughter."

"The act of 1794 declares, 'that all murder which shall be perpetrated by means of poison, or by laying in wait, or by any other kind of wilful, deliberate and premeditated killing; or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder in the first degree; and all other kinds of murder, shall be deemed murder in the second degree.' In the last mode of killing enumerated in this law, viz., where a man kill another in the perpetration or attempt to perpetrate the crimes there mentioned, the *intention* is excluded, as not necessary to constitute the crime of murder in the first degree; but with respect to the three other modes of killing, the *intention* is still the essence of the crime, and its guilt, (as well before as since the passing of this act,) consists in taking away the life of a human creature, with circumstances which show a cool depravity of heart, or a mind fully conscious of its own designs. Whenever this is the case, whenever it appears from the whole evidence, that the crime was at the *moment*, deliberately or intentionally executed, the killing is murder in the first degree. It is sufficient to constitute the crime, if the circumstances of a wicked and depraved disposition of mind, or as it is expressed in the law, of *wilfulness and deliberation*, are proved, though they arose and were generated at the *period* of the transaction."

"Under murder in the *second* degree, mentioned in our act of assembly, may be included

to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent

those cases of constructive murder, which are often stated in the English law books, and which in that country are followed by capital punishments. A man shooting at a tame fowl, with intention to steal it, kills a person; that in England is punished with death; but in Pennsylvania it would be murder in the second degree. An officer of justice, or a private man, is killed in endeavouring to part two persons whom he sees fighting; a person throws a large stone or piece of timber, from a house into a street where he knows many persons are passing, and kills another; a man riding in a road a dangerous horse, apt to strike, happens to kill a person, all these cases are murder in England; but in Pennsylvania, they would be murder in the second degree." *Ibid.* xxii. See also *Pennsylvania v. M'Fall*, Addis. 257.

If the party killing had time to think, and did for a minute, as well as for an hour or a day, intend to kill, it is a deliberate, wilful, and premeditated killing, constituting murder in the first degree, within the act of assembly. *Commonwealth v. Richard Smith*, quoted in Wharton's Digest, 148.

The common law implied malice in every unlawful killing, and the burden of proof of extenuating circumstances, lay on the defendant. Addis. 148, 161, 257, 282. But since the act of 1794, the burden of proof lies on the Commonwealth; and unless the circumstances of malice are proved, it is murder only of the second degree. *Commonwealth v. O'Hara*, cited in Wharton's Dig. 148.

Under the act of assembly, though an unlawful killing may be presumed murder, it will not be presumed murder in the first degree. *Pennsylvania v. Lewis*, Addis. 282.

Drunkenness does not incapacitate a man from forming a premeditated design of murder; but as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design. *Pennsylvania v. M'Fall*, Addis. 257. {*Ante*, 8 *Rex v. Grindley*.}

Passion arising from sufficient provocation, is evidence of the absence of malice, and reduces homicide to manslaughter; but passion without provocation, or provocation without passion, is not sufficient; and where there is both provocation and passion, the provocation must be sufficient. *Pennsylvania v. Honeyman*, Addis. 149. *Same v. Bill*, Id. 162. See also the cases, *Pennsylvania v. Robertson*, Addis. 248; and *Same v. M'Fall*, Addis. 256.

[To constitute murder in the first degree, the unlawful killing must be accompanied with a clear intent to take life; which is the distinguishing feature between murder in the first and murder in the second degree, and nothing affords more conclusive evidence of the bloody intent than the instrument used in the killing. *Commonwealth v. Green*, 1 Ashmead, 289.

In Pennsylvania, except in the cases enumerated in the act of assembly, the malice in any act of homicide, must be directed against the life of a human being. *Ibid.*

Every intentional act is necessarily a wilful one; and as the one implies the other, deliberation and premeditation mean that the act was done with reflection, and was conceived beforehand. *Ibid.*

If a man have time to deliberate and think for a minute, as well as an hour or a day, it is sufficient. *Ibid.*

TENNESSEE.—In the third section of the act of 1829, (1 Tennessee Laws, Dig. 244,) murder is distinguished into murder in the first, and murder in the second degree, in the very words of the law of Pennsylvania of 1794, before referred to.

An indictment in the common law form for murder, is good, and will support a conviction for murder in the first degree, under the statute of 1829. *Mitchell v. The State*, 5 Yeager, 340.

To constitute murder in the first degree under the statute of 1829, the killing must be done with a formed design to kill, with deliberation and premeditation, before the mortal blow is given. The fact that it was malicious and wilful, in the common law sense, is not sufficient. *Ibid.*

If a design to kill be formed upon the sudden impulse of passion, disconnected with any previous design to kill, though it be executed wilfully and maliciously, it will not constitute murder in the first, but murder in the second degree only. *Ibid.*

When malice is a necessary ingredient in constituting the crime charged, the government must prove the malicious intent with which the act was done. *Coffee & al. v. The State*, 3 Yerger, 283.

In such a case, if the jury have a reasonable doubt of the malicious intent with which the act was done, that doubt must weigh in favour of the prisoner, and unless removed by the government, they must acquit him. *Ibid.*

In order to constitute murder in the first degree, a design must be formed to kill wilfully, that is of purpose, with the intent that the act by which the life of a party is taken should have that effect—deliberately, that is, with cool purpose—maliciously, that is, with malice aforethought—and with premeditation, that is, the design must be formed before the act by which the death is produced is performed. *Dale v. The State*, 10 Yerger, 551. *Dains v. The State*, 3 Humphreys, 439. The characteristic ingredient in the offence of murder in the

on mischief.(c) And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder.(d)

Malice
may be
either
express
or implied

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Malice may be either *express* or *implied* by law. Express malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evinced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges and concerted schemes to do the party some bodily harm.(e) And malice is implied by law from any deliberate cruel act committed by one person *against another, however sudden:(f) thus where a man kills another suddenly without any, or without a considerable provocation; the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause.(g) So if a man wilfully poison another; in such a deliberate act the law presuming malice, though no particular enmity can be proved.(h) And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief.(i) And it should be observed as a general rule, that

(c) Fost. 256, 262.

(d) 1 Hawk. P. C. c. 31, s. 18. Fost. 257. 1 Hale, 451 to 454.

(e) 1 Hale, 451. 4 Bla. Com. 199.

(f) 1 East, P. C. c. 5, s. 2, p. 215.

(g) 4 Bla. Com. 200.

(h) 1 Hale, 455. 4 Bla. Com. 200.

(i) 1 Hall, 474. 1 Hawk. P. C. c. 29, s. 12. 4 Bla. Com. 200. 1 East, P. C. c. 5, s. 18.

Malitia, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J., says upon this subject, "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the fact; and of that which is opposite to simplicity and honesty. Cicero speaks of it (De Nat. Deor. Lib. 3, s. 30), as "*versuta et fallax nocendi ratio*;" and in another work (De Offic. Lib. 2, s. 18,) he says, "*mihi quidem etiam vere hereditates non honestæ videntur si sint malitiosas* (i. e. according to Pearce, a *malò animo profectis*) *blanditiis officiarum; non veritate sed simulatione quæsitæ*." And see Dig. Lib. 2, Tit. 13, Lex 8, where, in speaking of a banker or cashier giving his accounts, it is said, "*Ubi exigitur argentarius rationes edere, tunc punitur curi dolo malo non exhibet * * * Dolo malo autem non edit, et qui malitiosæ didit, et qui intotum non edit*." Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, "if one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a *just cause*." 2 Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where

first degree, is the existence of a specific intention to take life; and if that intention be deliberately and coolly formed and acted upon, and death ensue, the intervention of provocation between the formation of the purpose to take life, and the slaying will not reduce the offence to manslaughter. *Clark v. The State*, 8 Humph. 671.

Drunkenness is no excuse for crime, and is not admissible as mitigation in a case of murder in the second degree; although it seems that evidence of drunkenness would be admissible to show that the prisoner was incapable of the premeditation necessary to constitute murder in the first degree. *Pirtle v. The State*, 9 Hump. 663.

VIRGINIA.—In this state there is the same distinction between murder in the first and second degree, and it has there been held that to constitute murder in the first degree, it is not necessary that the premeditated design to kill should have existed for any particular length of time. *Whiteford's case*, 6 Rand. 721.]

all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification: (k) and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. (l)† It

All homicide presumed malicious till the contrary is shown. *184

the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing "mute of malice or froward mind," or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parvis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but "*immo militiam suam prosecuendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters), whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J., MS. Sum.), that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse." Per Littledale, J. *M'Pherson v. Daniels*,^a 10 B. & C. 272. "We must settle what is meant by the term malice. The legal import of this term differs from its acceptance in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause." Per Best, J. *Rex v. Harvey*,^b 2 B. & C. 268.

(k) 4 Bla. Com. 201. In *Rex v. Greenacre*,^c 8 C. & P. 35. Tindal, C. J., said, "where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, or does not amount to the crime of murder." Coleridge and Coltman, Js., *presentibus*.

(l) Fost. 255. 4 Bla. Com. 201. 1 East, P. C. c. 5, s. 12 p. 224.

† [Presumption of a malicious intent may arise from the weapon used in the perpetration of the deed. *Woodsides v. The State*, 2 Howard, 656.

When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder, and proof of matter of excuse or extenuation lies on the defendant. *Commonwealth v. York*, 9 Metcalf, 93.

The rule of law is: that a man shall be taken to intend that which he does; or which is the immediate or necessary consequence of his act. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any or upon very slight provocation, is, *prima facie*, wilful, deliberate, and premeditated killing; and throws upon the prisoner the necessity of proving extenuating circumstances. *Hill's case*, 2 Grattan, 594. If the act of a person which produces the death of another be attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, the law from these circumstances will imply malice, without reference to what was passing in the person's mind at the time he committed the act. *State v. Smith*, 2 Strobb, 77.

Where the prisoner fired a loaded pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person and produced his death, it was held that the crime was murder. *Ibid*.

A blow with a dangerous weapon calculated to produce, and actually producing death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder. *United States v. M'Glue*, 1 Curtis, C. C. 1.

Where death is caused by a wound received, the person who inflicts it is responsible for its consequences, although the deceased might have recovered by the exercise of more care and prudence. *M'Allister v. The State*, 17 Alabama, 434.

If a wound is inflicted, not dangerous in itself, and the death which ensues were evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable. *Parsons v. The State*, 21 Alabama, 300.

It is sufficient to constitute murder, that it appear that malice existed at the time of the killing, without regard to the time which it had before existed. *Green v. The State*, 13 Missouri, 382.

Homicide with intent to kill is murder, though the intent be formed but an instant before striking the blow. *The People v. Clark*, 3 Selden, 385.]

^a Eng. Com. Law Reps. xxi. 73.

^b *Ib.* ix. 82.

^c *Ib.* xxxiv. 280.

should also be remarked that, where the offence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express malice*; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. (*m*) But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B., and they are reconciled again, and then, upon a new and sudden falling out, A. kills B., this is not murder. (*n*) It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact: (*o*) but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing would be murder. (*p*)

Where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. If A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant if he knew not of A.'s malice is guilty of manslaughter only. (*pp*)

The party
killing.

The person committing the crime must be a free agent, and not subject to actual force at the time the fact is 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. (*q*) If, however, A. procures B., an idiot or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. (*r*) So if A. lay a trap or pitfall for B., whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instrument of death. (*s*) If one persuade another to kill himself, the adviser is guilty of murder; (*ss*) and if the party takes poison himself by the persuasion of another, in the absence of the *persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. (*t*) And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (*u*)

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(*m*) 1 East, P. C. s. 12, p. 224.

(*n*) 1 Hale, 451.

(*o*) 1 Hawk. P. C. c. 31, s. 30.

(*p*) 1 Hale, 451.

(*pp*) 1 Hale, 446. Plowd. 100, *post*, p. 510.

(*q*) 1 Hale, 433. Dalt. c. 145, p. 473. 1 East, P. C. c. 5, s. 12, p. 225.

(*r*) 1 East, P. C. c. 5, s. 14, p. 228. 1 Hawk. P. C. c. 31, s. 7.

(*s*) 4 Bla. Com. 35.

(*ss*) If present when he kills himself; but if absent he is an accessory before the fact. See *Rex v. Russel*, R. & M. C. C. R. 356, *ante*, p. 40. C. S. G.

(*t*) 1 Hale, 431. *Vaux's case*, 4 Rep. 44, b. Provided the party taking knew not that it was poison. C. S. G.

(*u*) 1 Hawk. P. C. 27, s. 6. *Sawyer's case*, Old Bailey, May, 1815. MS. S. P. And see *Rex v. Dyson*, *post*, p. 509.

Murder may be committed upon any person within the king's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, (w) or to kill a Jew, an outlaw, one attainted of felony, or one in a *pæmunire*, (x) is as much murder as to kill the most regular born Englishman. (y)

The party killed.

An infant in its mother's womb, not being *in rerum naturâ*, is not considered as a person who can be killed within the description of murder: and therefore if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter. (z) But by a recent statute any person unlawfully administering poison, or other noxious thing, to procure the miscarriage of any woman, or unlawfully using any instrument or other means whatsoever with the like intent, is guilty of felony. (a)

Children in the mother's womb.

Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them. (b) [1] Giving a child, whilst in the act of being born, a mortal wound in the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive, and dies thereof, and there is malice, be murder, but if there is not malice, manslaughter. The prisoner was indicted for the manslaughter of an infant child, the prisoner, who practised midwifery, was called in to attend a woman who was taken in labour, and when the head of the child became visible, the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born; it was submitted that the indictment was misconceived, though the facts would warrant an indictment in another form; and that the child being *en ventre sa mere* at the time the wound was given, the prisoner could not be guilty of manslaughter; but the prisoner having been found guilty, the judges, upon a case reserved, were unanimously of opinion, that the conviction was right. (c)

Where the death is after the birth of an injury inflicted before the birth.

The murder of *bastard children* by the mother was considered as a *Bastard crime* so difficult to be proved, that a special legislative *provision was made for its detection by the 21 Jac. I. c. 27, which required that any such mother endeavouring to conceal the death of the child, should

Bastard children. *486

(w) 1 Hale, 433.

(x) Id. *ibid.* Formerly, to kill one attaint in a *pæmunire* was held not homicide, 24 Hen. 8 B. Coron. 197: but the 6 Eliz. c. 1, declared it to be unlawful.

(y) 4 Bla. Com. 198.

(z) 1 Hale, 433.

(a) 1 Vict. c. 85, s. 6, *post*.
(b) 3 Inst. 50. 1 Hawk. P. C. c. 31, s. 16. 4 Bla. Com. 173. 1 East, P. C. c. 5, s. 14. p. 228; *contra*, 1 Hale, 432, and Staundf. 21, but the reasons on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

(c) *Rex v. Senior*, R. & M. C. C. R. 346.

(1) {In Gouldsb. 176, pl. 110, Coke, Fenner, and Popham, Js., are reported to have said that if one "beats a woman great with child, and after the child is born living, but hath signs and bruises in his body, received by the said battery, and after die thereof, this is murder; and the difference is where the child is born dead, and where it is born living; for if it be dead born, it is no murder, for *non constat* whether the child were living at the time of the battery or not, or if the battery was the cause of the death."} See *Rez v. Senior*, M. C. C. 344. Lew. C. C. 183, n. 1 Harrison's Dig. 737.

Causing premature delivery, whereby the child dies after birth, is murder. *Reg. v. West*, 2 C. & K. 754. Eng. C. L. lxi. 782.]

prove, by one witness at least, that the child was actually born dead. But this law, which made the concealment of the death almost conclusive evidence of the child's being murdered by the mother, was accounted to savour strongly of severity, and always construed most favourably for the unfortunate object of accusation; and at length it was repealed, together with an Irish act upon the same subject, by the 43 Geo. 3, c. 58.

A child must be actually born to be the subject of murder

Questions of considerable nicety sometimes arise on trials for infanticide, as to whether the death took place after the child was actually born, or whilst it was in the progress of being born; and although the law be clear that a child must be actually born to be the subject of murder, perhaps it is not clearly settled what constitutes actual birth for this purpose. Where on an indictment alleging that the prisoner was delivered of a child, and that she afterwards strangled it, it appeared that the child, which was found concealed, had breathed, but the medical men could not say when it had breathed, whether during the birth or afterwards; Littledale, J., told the jury "the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respire in the progress of the birth."^(d)

Breathing not sufficient, as it may be before the child is actually born.

So where, upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child's skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed. Parke, J., said, "the child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."^(e)

Independent circulation.

Seemle, that if a child be wholly produced, and then destroyed, it is murder, although the umbilical cord be not severed.

So where the first count of an indictment charged that the prisoner, being big with a female child, did bring forth the said child alive, and did afterwards strangle it, and other counts varied the statement of the mode of death, but all of them stated the birth of the child as above-mentioned; and it appeared that the dead body of the child was found concealed under the prisoner's bed, with a ribbon tied tightly round the neck and the evidence of the medical witnesses left it in doubt whether the ribbon was tied round the neck, and the child strangled by it, during the progress of birth, or after the child was fully born, but before the umbilical cord was severed: and it was submitted that a child could not be the subject of murder till it had a completely independent circulation, and had been wholly detached from the mother; that the term "born alive" meant the being completely separated from the mother, and having a completely independent circulation; and a child would not have an independent circulation for some time after it was completely brought forth, unless the umbilical cord was divided. Parke, B., said, "it has been frequently so said in cases where the death has been caused by suffocation, or other injuries, which might have occurred in the *course of unassisted delivery, but I should like to know whether there is any case where it has been so held where a wilful wound has been inflicted during the birth of a child.^(f) At all events, this indictment will not be supported, unless it be shown that the child was com-

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^(d) Rex v. Paulton, ^a 5 C. & P. 329.

^(e) Rex v. Enoch, ^b 5 C. & P. 539. Reg. v. Wright, ^c 9 C. & P. 754, Gurney, B., S. P.

^(f) See Rex v. Sellis, *post*, note ⁽ⁱ⁾.

^a Eng. Com. Law Reps. xxiv. 344.

^b *Ib.* xxiv. 446.

^c *Ib.* xxxviii. 322.

pletely born, as it is distinctly averred that the child was brought forth before it was strangled." And in summing up the very learned baron said, "whether there might be any question on a count differently framed, it is not necessary to say; perhaps there might not; but in order to convict on the first count you must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. If you think that the child was not killed after it came forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally, while it was connected by the umbilical cord to the mother, and after it was wholly produced, in that case I should put the matter into a course of further inquiry, directing you to convict the prisoner, and preserving the point for a higher tribunal; my present impression being, that it would be murder, if those were the facts of the case."(*g*) And in a subsequent case, where this case was mentioned, and the prisoner's counsel admitted, that it did not go to the length of deciding that the child must have a separate independent existence from that of the mother, in order to make the killing of it murder; Vaughan, J., said, "I should have been very much surprised if it had, because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder."(*h*) Where the prisoner was indicted for the murder of her child by cutting off its head, and a surgeon stated that he was enabled to say decidedly that the child had breathed, but he could not swear that the whole body of the child was born when the act of breathing took place; Coltman, J., said, "in order to justify a conviction for murder, you must be satisfied that the entire child was actually born into the world in a living state. The fact of its having breathed is not a decisive proof that it was born alive: it may have breathed, and yet died before birth."(*i*) But if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed; Park, J. A. J., said, "A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after their birth."(*j*)

If the child
be born
alive,
breathing
is not
necessary.

When one count charged that the prisoner, being big with a female child, "*did bring forth the same alive,*" and then in the usual manner alleged the murder of the child by choking it with a handkerchief; and another count charged the murder in the same way of a certain illegitimate child, "then lately before born of the body" of M. T., and there was strong evidence to prove that the child had been wholly produced alive from the prisoner's body, and that she had strangled it, but it was also clearly proved by the surgeon, who examined the body of the child, that it must have been strangled before it had been separated from the mother by the severance of the umbilical cord, and the surgeon further

(*g*) *Rex v. Crutchley*,^a 7 C. & P. 814. The prisoner was acquitted of murder.

(*h*) *Reg. v. Reeves*,^b 9 C. & P. 25.

(*i*) *Rex v. Sellis*,^c 7 C. & P. 850.

(*j*) *Rex v. Brain*,^d 6 C. & P. 349.

^a Eng. Com. Law Repts. xxxii. 749. ^b *Id.* xxxviii. 21. ^c *Id.* xxxii. 767. ^d *Id.* xxv. 433.

stated that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord, and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of its own before and at the time it was strangled, and was then in a state to carry on a separate existence; Erskine, J., directed the jury, that if they were satisfied the child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully strangled the child after it had been so produced, and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, he was of opinion that the charge in the said counts were made out, although the child, at the time it was so strangled, still remained attached to the mother by the naval string. The jury found the prisoner guilty; and, upon a case reserved, the judges held the conviction right. (*j*)

Of the means of killing.

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Where the probable consequence of an act is death, and death ensues, it is murder.

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. (*k*) But there must be some external *violence, or *corporal* damage to the party; and therefore where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (*l*) If a man, however, does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended: (*m*) as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died; (*n*) or where a harlot, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite; (*o*) or where a child was placed in a hogstye, where it was devoured. (*p*) In these cases, and also where a child was shifted by parish officers from parish to parish, till it died for want of care and sustenance, (*q*) it was considered that the acts so done, wilfully and deliberately, were of malice prepense.†

Exposing a child without clothing in a public road.

In a case where the prisoner had delivered herself by night upon a turnpike road, and after carrying her child more than a mile along the road, had left it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, and she had wholly concealed the birth of the child till she was apprehended; Coltman, J., in summing up, said, "if a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death, the crime would be man-

(*j*) Reg. v. Trilloe, 1 C. & Mars. 650.

(*k*) 4 Bla. Com. 196, *moriendi mille figure*, 1 Hale, 432. 1 Hawk. P. C. c. 31, s. 4.

(*l*) 1 Hale, 427, 429. 1 East, P. C. c. 5, s. 13, p. 225.

(*m*) 4 Bla. Com. 197.

(*n*) 1 Hawk. P. C. c. 31, s. 5. 1 Hale, 431, 432.

(*o*) 1 Hale, 431. 1 Hawk. P. C. c. 31, s. 6.

(*p*) 1 East, P. C. c. 5, s. 13, p. 226.

(*q*) Palm. 545.

† [A prisoner who determines to take the life of another and seizes a musket to carry his intention into effect, not knowing whether it is loaded or otherwise, but with the expectation and desire that it is, is guilty of murder in any killing consequent upon its discharge. *Commonwealth v. Green*, 1 Ashmead. 289.]

* Eng. Com. Law Reps. xli. 352.

slaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by some one else, and preserved, because then it would only be the crime of manslaughter. If a person were to leave a child at the door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died: if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved." (qq) †

Forcing a person to do an act which is likely to produce his *death, *489 and which does produce it, is murder; and threats may constitute such force. The indictment charged first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly, and fourthly, that he beat her and threatened to throw her out of the window and to murder her: and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall: but Heath, J., Gibbs, J., and Bayley, J., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner however was acquitted; the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. (r)

Where an indictment for manslaughter alleged that the deceased was riding on horseback, and that the prisoner assaulted and struck him with a stick, and that the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, spurred his horse, whereby it became frightened, and threw the deceased, &c., and it was proved that the prisoner struck the deceased with a small stick, and that he rode away, the prisoner riding after him, and on the deceased spurring his horse, it wined and threw him; it was held on the authority of the preceding case, that the case was proved. (s)

Where upon an indictment for murder by drowning, by the deceased slipping into the water in endeavouring to escape from an assault made

(qq) Reg. v. Walters, Hereford Summ. Ass. 1841. MSS. C. S. G. S. C. 1 C. & Mars. 164. See Stockdale's case, 2 Lewin, 220; see the indictment there.

(r) Rex v. Evans, O. B. Sept. 1812. MSS. Bayley, J.

(s) Rex v. Hickman, 5 C. & P. 151, Park, J. A. J.

† [Murder by suffering a person to freeze to death by neglect. *Nixon v. The People*, 2 Scammon, 269.]

* Eng. Com. Law Reps. xxiv. 250.

Forcing a person to do an act which is likely to produce, and does produce death, is murder.

with intent to murder or rob, it appeared that the body was found in a river, and it bore marks of violence, but not sufficient to occasion death, which appeared to have been caused by drowning, and there was marks of a struggle on the bank of the river; Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased was surrounded, not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take. (ss)

The act must be done to avoid the violence of the prisoner.

But the act done by the deceased which occasions his death must be done in order to avoid the violence of the prisoner. Upon a trial for manslaughter, it appeared that the prisoner and the deceased had some dispute about paying for some spirits, and the first witness swore that the deceased's boat being alongside the schooner in which the prisoner was, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat, to lay hold of a barge, to prevent the boat drifting away, and losing his balance, fell overboard and was drowned, Park, J. A. J., after consulting with Patteson, J., said, that they were of opinion that, if the case had rested on the evidence of the first witness, it would not have amounted to a case of manslaughter. (t)

Negligence and harsh usage towards an apprentice.

Upon the same principles, where there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences, as if a master, by premeditated negligence or harsh usage, cause the death of his apprentice, it will be murder. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did *not take that care of him which his situation required, and which he might have done; not having suffered him to lie in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice in the opinion of the medical persons who were examined was most probably occasioned by the ill treatment in Bridewell, and the want of care when he went home; and the medical persons inclined to think that, if he had been properly treated! when he came home, he might have recovered; the court under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill treatment he received from his master after returning from Bridewell, and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of murder. (u) And in a more modern case a prisoner was found guilty of murder in causing the death of his apprentice, by not providing him with sufficient food and nourishment. The prisoner, Charles Squire, and his wife, were both indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared upon the trial that both the prisoners had used the apprentice

(ss) Reg. v. Pitts, 1 C. & Mars, 284.

(t) Rex v. Waters, 6 C. & P. 328, Park, J. A. J., and Patteson, J. It afterwards appeared that the prisoner was not the man who pushed the boat away.

(u) Self's case, 1 East, P. C. c. 5, s. 13, p. 226, 7. 1 Leach, 187, and see the case more fully stated in the chapter on *Manslaughter*.

* Eng. Com. Law Repts. xli. 159.

b Ib. xxv. 422.

in a most cruel and barbarous manner, and has not provided him with sufficient food and nourishment: but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. (v) [1]

A master is not bound by the common law to find medical advice for a servant, but a master is bound during the illness of an apprentice to provide him with proper medicines, and if he neglect so to do, he is criminally responsible. The prisoner was indicted for the manslaughter of his apprentice, by neglecting to provide him sufficient meat and drink, &c. The deceased was bound to the prisoner by indenture, by which he covenanted to find him clothes and victuals: his death was produced, according to the evidence of some medical men, by uncleanness and want of food; Patteson, J., told the jury *that "by the general law a master was not bound to provide medical advice for his servant; (v) yet that the case was different with respect to an apprentice, and that a master is bound during the illness of his apprentice, to provide him with proper medicines; and that if they thought that if the death of the deceased was occasioned, not by the want of food, &c., but by want of medicines, then, in the absence of any charge to the effect in the indictment, the prisoner would be entitled to be acquitted." (x) Where a master has treated a person, bound to him by an invalid indenture of apprenticeship, as his servant, and such person dies through the neglect of the master to provide him with food, the master cannot defend himself against the indictment of manslaughter on the ground that he was not legally bound to provide such person with food. An indictment for manslaughter in one count alleged that the deceased was the apprentice of the prisoner, and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; in another count it alleged that the deceased was the servant of the prisoner, and that it was his duty to provide her

A master is bound by the common law to provide medicine for an apprentice, but not for a servant.

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A master having treated a person as servant, is not permitted to say that he was not bound to support him as such.

(v) *Rex v. Squire and his wife*, Stafford Lent Assizes, 1799, MSS.; and as to the principles upon which the wife was acquitted, see the case more fully stated, *ante*, 19. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received, the learned judge was proceeding to inquire of him whether, in his judgment, the series of cruel usage the boy had received and in which the wife had been as active as her husband, might not have so far broken his constitution as to promote the debility, and co-operate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing, that upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c., inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be inquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

(v) See *Sellen v. Norman*,^a 4 C. & P. 80.

(x) *Reg. v. Smith*,^b 8 C. & P. 153.

[1] {If a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels him, by moral or physical force, to go aloft, and the seaman falls from the mast and is drowned thereby, and his death is caused by such misconduct of the master; it is murder in the master if he was malicious—if he had no malice, it is manslaughter. 4 Mason, 505, *United States v. Freeman*.}

^a Eng. Com. Law Reps. xix. 284.

^b *Ib.* xxxiv.

with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner and had performed such duties as an apprentice would have performed, but the prisoner being a farmer, these duties were the same as those performed by ordinary farmer's servants: it was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service; that the foundation of this indictment was that the prisoner was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant: but it was held that the prisoner having treated the deceased as his servant, could not turn round and say she was not his servant at all. (y)

Where the first count stated that the deceased was the apprentice of the prisoner, and it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect, &c. And the second count charged that the deceased "so being such apprentice as aforesaid," was killed by the prisoner, by over-work and beating; and the only evidence given to show that the deceased was an apprentice was, that the prisoner had stated that he was an apprentice; Patteson, J., held that there was sufficient evidence to support the second count, but not the first (yy)

Where a bastard dies through the omission to supply it with food, the omission is the omission of the man who has married the mother since the new poor law act.

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The mother is only responsible if she wilfully omits to give it food provided by her husband.

Where the mother of a bastard child marries after the passing of the 4 & 5 Wm. 4, c. 76, the new poor law act, and such child afterwards dies (after it has been weaned) (z) through neglect to provide it with sufficient food, the omission to provide food is the omission of the husband, and in order to render the wife criminally responsible, it must be shown that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. The prisoner, who was the wife of J. S., was charged with the murder of her illegitimate child, aged three years, by omitting to give it proper food. The prisoner had, in December, 1834, married J. S.; the deceased was her illegitimate child, and was born before her marriage; in the judgment of medical witnesses the death had proceeded from *the want of proper food. For the prosecution *Rex v. Squire*, (zz) and the 4 & 4 Wm. 4, c. 76, s. 71, were referred to; and it was submitted that the mother of an illegitimate child was bound to take care of her child, and might be guilty of murder if its death arose from neglect. Alderson, B., "The prisoner is indicted as a married woman: if her husband supplied her with food for this child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her. In these cases the wife is in the nature of the servant of the husband: it does not at all turn upon the na-

(y) *Rex v. Davies*, Hereford Sum. Ass 1831, Patteson, J. J. MSS. C. S. G. In support of this decision it may be observed that although a son could not be punished for the murder of his father as for petit treason, under the 25 Edw. 3, st. 5, c. 2, unless by a reasonable construction he came under the word servant; yet if he were bound apprentice to his father or mother, or was maintained by them, or did any necessary service for them, though he did not receive wages, he might have been indicted by the description of servant. 1 Hawk. P. C. c. 32, s. 2. 1 East, P. C. c. 5, s. 99, p. 336; and a near relation, as a sister, might be a servant within the statute, if she acted as such. *Rex v. Edwards*, Stafford Ass. MSS. *coram*, Laurence, J. C. S. G.

(yy) *Reg. v. Crumpton*, 1 C. & Mars, 597.

(z) See *Reg. v. Edwards*, *post*, p. 493, note (c).

(zz) *Supra*, note (v).

tural relation of mother: to charge her you must show that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and according to the case before Mr. Justice Laurence, (a) can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband. The omission to provide food is the omission of the husband, and that of the wife can only be the omitting to deliver the food to the child after the husband has provided it." (b)

(a) *Supra*, note (v).

(b) *Rex v. Saunders*,^a 7 C. & P. 277. The case was decided on the opening of counsel, and it did not appear whether the wife was living with her husband, or whether he was capable of maintaining the child. By the 4 & 5 Wm. 4, c. 76, s. 71, the mother of every child born a bastard after the passing of the act, "so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen." - By sec. 57, every man who, after the passing of the act, marries a woman having a child or children, either legitimate or illegitimate, "shall be liable to maintain such child or children as a part of his family," until sixteen, or until the death of the mother. In *Laing v. Spicer*, Tyrw. & Gr. 358, 1 M. & W. 129, it was held that the putative father of a bastard, on whom an order of maintenance had been made, under the 18 Eliz. c. 2, s. 2, and 49 Geo. 3, c. 68, before the passing of the 4 & 5 Wm. 4, was no longer liable under such order, where the mother since the passing of that act had married a person capable of supporting the child; and the court seemed to think that the putative father would not be liable, even if the husband were incapable of supporting the child. It seems to follow, from this decision, and from the words of sec. 71, that the liability of the mother of a bastard under that act wholly ceases upon her marriage; and it is presumed that it was upon this ground that *Reg. v. Saunders* was decided. No notice was taken in that case of any common law liability to support a bastard. In 1 Bla. Com. 457, it is said, "the duty of parents to their bastard children by our law is principally that of maintenance; for though bastards are not looked upon to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved; and they hold, indeed, as to many other intentions; as particularly that a man shall not marry his bastard sister or daughter," (citing *Hains v. Jeffell*, 1 Lord Raym. 68 Comb. 356.) And this is in accordance with *Puffendorf*, book 4, c. 11, s. 6, who says "maintenance is due not to legitimate children alone, but to natural and even to incestuous issue." In *Nichols v. Allen*,^b 3 C. & P. 36, Lord Tenterden, C. J., held that there was not only a moral but a legal obligation on a putative father to maintain his bastard child; and though this case seems to be overruled by *Mortimore v. Wright*, 6 M. & W. 482, as to there being no necessity for a promise on the part of the father to pay for the maintenance of the child; this point seems not to have been questioned. It seems, therefore, that there is this distinction between an apprentice and the bastard of the wife, that there is neither a moral nor a legal obligation on the wife to maintain an apprentice, but there certainly is a moral, and, it should seem, a legal obligation to support a bastard. In a note to *Rex v. Saunders*, the reporters observe "an act of parliament (18 Eliz. c. 3, s. 2,) would hardly have been required to fix the mother with the payment of a weekly sum, if at common law she is liable for the entire maintenance of the child." This observation might have been entitled to weight, if there had not been similar provisions to compel the maintenance of legitimate children. These statutes were probably introduced for the purpose of giving a ready means of enforcing a legal obligation by compelling the payment of a sufficient sum to indemnify the parish while the children were supported by it. With regard to legitimate children, it is the duty of their parents, by the common law, to provide for their maintenance. 1 Bla. Com. 446; see *Puff. L. of N.*, book 4, c. 11, s. 4. This duty may be enforced, in the case of poor children, by the 43rd Eliz. c. 2, s. 6, as well on the father as on the mother, being of sufficient ability. By the 5 Geo. 1, c. 8, if either father or mother leave their children a charge upon a parish, the goods of the father or mother may be seized and sold, and the rents of their lands received in discharge of the parish. And by the 5 Geo. 4, c. 83, s. 3, every person able, wholly or in part, to maintain himself, herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, whereby any of his or her family, become chargeable, is to be deemed an idle and disorderly person, and punished accordingly. It should seem that there may be cases where a wife may be liable to maintain her children during her husband's lifetime, as where the husband has deserted her, or she has a separate maintenance, (see *Christian's* note to 1 Bla. Com. 448,) and it may be worthy of consideration whether where the husband is incapable of work, but she is capable of maintaining her children, she is not legally bound so to do; and as the overseers of every parish are bound

^a *Eng. Com. Law Reps.* xxxii. 510.

^b *Id.* xiv. 198.

*493 *But where a child is very young and not weaned, the mother is criminally responsible if the death arose from her not suckling the child when she was capable of doing so. The prisoner who was indicted for manslaughter was a married woman, and was the mother of the deceased, who, at the time of its death, was little more than three months old and not weaned. Patteson, J., said, "in the case of an older child, it would be the duty of the husband to supply food; but in a case like the present, the mother would be liable, if the death arose from her not suckling the child when she was capable of doing so." (c)

A person standing *in loco parentis*. If a person, who stands in the place of a parent, 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 of a disease hastened by such ill treatment, it will be murder if the treatment was of such a nature as to indicate malice: but if such person believed that the child was shamming illness, and was really able to do the work required, it will only be manslaughter, although the punishment were violent and excessive." (d)

A person undertaking to provide necessaries for a person incapable of doing so, is criminally answerable if such person die through his neglect: so if a person confines another in a room and he die for want of food. Where a party undertakes to provide necessaries for a person, who is so aged and infirm that he is incapable of doing so for himself, and through his neglect to perform his undertaking, death ensues, he is criminally responsible: so also if a party confines another, he is bound to provide him with necessaries, and if he neglect so to do, and in consequence thereof the party dies, he is criminally responsible. Upon an indictment for murder, which stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries; it appeared that she was seventy-four years of age, and that upon the death of her sister, with whom she had lived, the prisoner, who attended the funeral, took the deceased home with him, saying she was going home to live along with him till affairs were settled, and he would make her happy and comfortable; and on another occasion the prisoner had said that in *consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. When the deceased first went to the prisoner's a servant was kept, and the deceased lodged in the back parlour, afterwards she was removed into the kitchen. After some time no servant was kept, and the deceased was waited on by the prisoner and his wife, and she remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined: in the cold weather no fire was discernible in the kitchen, and for some time before her death the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she had died from want and starvation. A surgeon proved that the

*494 by law to provide necessary support in cases of emergency, it may well be doubted whether cases may not occur where the wife would be *legally bound* to apply for relief to the parish officers. Suppose a husband were ill in bed, but the wife well, and the children starving for want of food, could it be fairly contended that she was under no legal obligation to apply for relief for them, and that if one of them died for want of food, she was not criminally responsible? C. S. G. See *Urmston v. Newcomen*,^a 4 A. & E. 899.

(c) *Reg. v. Edwards*,^b 8 C. & P. 611, *Patteson, J.* See this case, *post*.

(d) *Rex v. Cheeseman*,^c 7 C. & P. 455, *Vaughan, J.* See this case, *post*.

^a Eng. Com. Law Repts. xxxi. 223.

^b *Ib.* xxxiv. 550.

^c *Id.* xxxii. 583.

immediate cause of death was water on the brain; that the appearance of all parts of the body betokened the want of proper food and nourishment, and that there was great emaciation of the body, and that the water on the brain might have been produced by exhaustion. Patten-son, J. "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder; if, however, you think only that he was so careless that her death was occasioned by the negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she from age and infirmity was incapable of doing." (After reading the evidence as to the contract, the very learned judge added,) "This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries: and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible.(e)

By the ancient common law, a species of killing was held to be murder, concerning which much doubt has been entertained in more modern times, namely, the bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed.(f) But a very long period has elapsed since this offence has been holden to be murder; and in the last instance of a prosecution for it, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment.(g) The then attorney-general, however, declining to argue the point, the prisoners were discharged of that indictment: but it should seem that there are *good grounds for supposing that the attorney-general declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions, if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable.(h) *In foro conscientie* this offence is, beyond doubt, of the deepest malignity.

If a man has a *beast* that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner; (i) and it is agreed by all that such a person is guilty of a very gross misdemeanor: (j) and if a man pur-

(e) Reg. v. Marriott, 8 C. & P. 425, Patten, J.

(f) Mirror, c. 1, s. 9. Brit. c. 52. Bract. lib. 3, c. 4. 1 Hawk. P. C. c. 31, s. 7. 3 Inst. 91. 4 Bla. Com. 196.

(g) Rex v. Maedaniel, Berry and Jones, Frost. 131. 1 Leach, 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kidden, who had been convicted and executed for a robbery upon the evidence of Berry and Jones.

(h) 4 Bla. Com. 196, note (g), where Mr. J. Blackstone says, that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution; and in 1 East, P. C. c. 5, s. 94, p. 333, note (a), the author states that he had heard Lord Mansfield, C. J., make the same observation, and say, that the opinion of several of the judges at that time, and his own, were strongly in support of the indictment.

(i) 4 Bla. Com. 197.

(j) 1 Hawk. P. C. c. 31, s. 8.

* Eng. Com. Law Reps. xxxiv. 461.

posely turn such an animal loose, knowing its nature, it is with us (as in the Jewish law)(*k*) as much murder as if he had incited a bear or a dog to worry people; and this, though he did it merely to frighten them, and make what is called sport.(*l*)

By medicines.

If a physician or surgeon give his patient a potion or plaster, intending to do him good, and contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.(*m*) It has, however, been holden, that if the medicine were administered, or the operation performed by a person not being a regular physician or surgeon, the killing would be manslaughter at the least:(*n*) but the law of this determination has been questioned by very high authority, upon the ground that physic and salves were in use before licensed physicians and surgeons existed.(*o*)†

It makes no difference whether the party be a regular physician or surgeon or not, if he act honestly and use his best skill to cure.

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Van Butchell's case.

And it seems now to be settled that it makes no difference whether the party be a regular physician or surgeon or not. Thus it has been held that if a person *bonâ fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the death of the patient, it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular education or not. *Upon an indictment for manslaughter by causing the death by thrusting a round piece of ivory against the rectum, and thereby making a wound through the rectum, it appeared that upon examination of the body after death, a small hole was discovered perforated through the rectum. The prisoner had attended the deceased, but there was no evidence to show how the wound had been caused, and questions were put in order to show that it might have been the result of natural causes, and it was proposed to show that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him. Hullock, B., (stopping the case,) "This is an indictment for manslaughter, and I am really afraid to let the case go on lest an idea should

(*k*) Exod. c. xxi. v. 29.

(*l*) 4 Bla. Com. 197, and see 1 Hale, 430, where the author says, that he had heard that it had been ruled to be murder, at the Assizes held at St. Alban's for Hertfordshire, and the owner hanged for it; but that it was but an hearsay.

(*m*) 4 Bla. Com. 197. 1 Hale, 429.

(*n*) Brit. c. 5. 4 Inst. 251. In *Rex v. Simpson*, *Lancaster*, 1829; *Wilcock's L. Med. Prof. Append.* 227. 1 Lew. 172. 4 C. & P. 407; a note (*a*), the prisoner was indicted for manslaughter; the deceased had been discharged from the Liverpool Infirmary as cured, after undergoing salivation, and was recommended to go for an emetic to get the mercury out of his bones, to the prisoner, an old woman, who occasionally dealt in medicines; she gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland. Bayley, J., said, "I take it to be quite clear that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one; but he has no right to hazard the consequence in a case where medical assistance may be obtained; if he does so it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another." This case was doubted by Mr. Alley, in *Rex v. St. John Long*,^b 4 C. & P. 434, and it seems inconsistent with the subsequent cases. C. S. G.

(*o*) 1 Hale, 429.

† [An act apparently lawful in itself, when done with a felonious intent, becomes thereby unlawful: thus when a physician was indicted for the murder of a person who had died of the small pox, communicated to him by his patients, whom he had inoculated, and was convicted of manslaughter, it was held, on a motion for a new trial, that it did not amount to that crime, as there was no unlawful design. *Fairlee v. The People*, 11 Illinois, 1.]

^a Eng. Com. Law Reps. xix. 445.

^b Ib. xix. 461.

be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon: indeed, in remote parts of the country, many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons may be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books(*g*) have said has been read to you, but they do not state any decisions, and their silence in this respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation: however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Mr. J. Blackstone, and no book in the law goes any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale(*r*) says, 'God forbid that any mischance of this kind should make a person guilty of murder or manslaughter.' Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this, and if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vezata questio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter.*(s)*

*"Where a person who had been in the habit of acting as man-midwife tore away part of the prolapsed uterus, supposing it to be a part of the *placenta*, it was held that he was not indictable for manslaughter by thus causing the death, unless he was guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. The prisoner who was indicted for the murder of Mrs. D. was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people. Mrs. D. had been delivered by the prisoner on a Friday, and on the Sunday following an unusual appearance took place, which the medical witnesses stated to be a *prolapsus uteri*; this the prisoner mistook for a remaining part of the *placenta*, which had not been brought away at the

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A medical practitioner must be guilty of criminal misconduct arising from the grossest ignorance or most criminal inattention to render him guilty

(*g*) 4 Bla. Com. 197. 1 Hale, P. C. 429. 4 Inst. 251.

(*r*) 1 Hale, P. C. 419.

(*s*) Rex v. Van Butchell, * 3 C. & P. 629, *coram* Hullock, B., and Littledale, J. Verdict, not guilty.

of man-
slaughter.

time of the delivery: he attempted to bring away the prolapsed *uterus* by force, and in so doing he lacerated the *uterus*, and tore asunder the mesenteric artery: this caused the death of the patient; and it appeared, from the testimony of a number of medical witnesses, that there must have been a great want of anatomical knowledge in the prisoner. It was proved that the prisoner had safely delivered many other women. Lord Ellenborough, C. J., "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder, but still it is for you to consider whether the evidence goes as far as to make out a case of manslaughter. To substantiate the charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill." (t)

St John
Long's first
case. A per-
son acting
as a medi-
cal man,
whether
licensed or
not, is not
criminally
responsible
for a
patient's
death,
unless his
conduct
shows gross
ignorance
of his art,
or gross
inattention
to his
patient's
safety.

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Upon an indictment for manslaughter by feloniously rubbing, sponging, and washing Miss C. with a certain inflammatory and dangerous liquid, it appeared that two of the family had died of consumption, but that Miss C. had enjoyed good health. Mrs. C. having heard that the prisoner had said that unless Miss C. put herself under his care she would die of consumption in two or three months, placed her under his course of treatment. The prisoner rubbed a mixture on different parts of the bodies of his patients, and this had been applied to Miss C. on the 3d of August by the prisoner's servant, and by his direction. On Friday, the 13th of August, a witness went with Miss C. to the prisoner's respecting a wound on her back, and Miss C. then inhaled; on the next day the prisoner examined her back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. The prisoner's attention being directed to a part of the wound which was of a darker appearance, he stated that this proceeded from the inhaling, and that unless those appearances were produced he could expect no beneficial result. The wound at this time was about five or six inches square. Miss C. was suffering *much from sickness, and the prisoner said that it was of no consequence, but, on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect. On Saturday, the 15th, Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life, and spoke very confidently that the result of his system would prolong her life, and that no person could be doing better than she was. At this interview the wound, which had extended, was shown to the prisoner. At the same time he was desired to do something to stop the sickness, but he said he had a remedy in his pocket, which he would not apply, as he knew the sickness had been beneficial; and he also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday the 17th, she died. An emi-

(t) *Rex v. Williamson*, 3 C. & P. 635. In addition to the facts above stated, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased wished him to attend her in her last confinement. See 4 C. & P. 407 (a). See *Rex v. Lenoir*, *ante*, p. 458.

^a *Eng. Com. Law Reps.* xiv. 297.

^b *Ib.* xix. 445.

nent surgeon proved that on the Monday her back was extensively inflamed as large as a plate, and in the centre was a spot, as large as the palm of the hand, black, and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearance he saw, to a person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no latent disease or seeds of disease were discovered. It was submitted, for the defence, that, in point of law, this was nothing like the case of manslaughter, and 1 *Hale*, P. C. 429, 4 *Bl. C.* b. 4, c. 14, and *Rex v. Van Butchell*,^(u) were cited and relied on. Park, J. A. J., "I am in this difficulty: I have an opinion, and my learned brother differs from me; I must, therefore, let the case go to the jury." Garrow, B., "In *Rex v. Van Butchell*, the learned judge had very good ground to stop the case, as there was no evidence as to what had been done. I make no distinction between the case of a person, who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Surgeons, or the humblest bone-setter of the village; but be it one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care, and caution. I am of opinion that, if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution." Park, J., in summing up, "The learned counsel truly stated in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect that he may be subject to pecuniary penalties for acting contrary to charters or acts of parliament: but it cannot affect him here." (After citing 1 *Hale*, 529, as an authority in point, the learned judge proceeded,) "I agree with my learned brother, that what is called *mala praxis* in a *medical person is a misdemeanor; but that depends upon whether the practice he has used is so bad that every body will see that it is *mala praxis*. The case at Lancaster^(uu) differs from this case. I have communicated with C. J. Tindal, who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps that he totally neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in *Rex v. Williamson*."^(v) (His Lordship read them.) "And this is important here, for though he be not licensed, yet experience may teach a man sufficient; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?" (After setting the authority of *Hale*, P. C. 429, against the dictum of Lord Coke, 4 *Inst.* 251, and citing the observa-

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 Long's first
 case.

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(u) *Supra*, p. 496, note (s).

(uu) Probably Ferguson's case, *post*, 503.

(v) *Supra*, p. 497, note (t).

tions of Hullock, B. in *Rex v. Van Butchell*,^(w) with approbation, his Lordship proceeded,) "The refusal by the prisoner to apply the medicine to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder; but he mentioned a case in which sickness had been beneficial. Undoubtedly the result proves a very erroneous opinion on his part; and it seems singular that the restlessness and other circumstances did not awaken apprehension, and call for further measures, but the question again recurs, whether this was an erroneous judgment of a person, who was of general competency, though he unfortunately failed in the particular instance." "With respect to the application of the mixture, if he commanded the servant to use it, it is the same as if he used it himself. Perhaps from the evidence you will think that the act caused the death; but still the question recurs as to whether it was done either from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shows such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand we must be careful and most anxious to prevent people from tampering in physic, so as to trifle with the life of man; and, on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case." "If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise."^(x)

St. John Long's second case.

If a person be guilty of gross negligence in attending a patient after he has administered a remedy, or of gross rashness in the application of it, and death ensues, he is guilty of manslaughter.

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The important consideration in these cases is whether in reference to the remedy the party has used, he has acted with a due degree of caution, or, on the contrary has acted with gross and improper rashness and want of caution. Upon a similar indictment against the same person for causing the death of Mrs. L., it appeared that she put herself under his care on the 6th of October, at which time she was in very good health, to be cured of a *complaint she had in her throat. On the 3d she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th and 10th, she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th the redness on the breast and chest was, if any thing, greater. In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale, and go on with the rubbing; the husband replied it was impossible, she was so ill: she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness: the prisoner said it would soon go off, it was generally the

(w) *Supra*, p. 496, note (s).

(x) *Rex v. St. John Long*,^a 4 C. & P. 398. Verdict, guilty. For the defence twenty-nine witnesses were called, who had been patients of the prisoner, and were satisfied with his skill and diligence.

^a Eng. Com. Law Reps. xix. 404.

case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been better, and to put her head under the bed clothes. He was told that her chest and breast looked very red and very bad; he said, that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear of danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and saw Mrs. L., and looked at her breast, and observing the dressing said those greasy plasters had no business there, and she ought to have continued the cabbage leaves. She said she could not bear the pain of keeping them on: He then took off his great coat, and said that he would rub it out, and turned up the cuff of his coat, as if for the purpose of doing so. She exclaimed very much with fright, and expressed her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast; and he asked her what she wished; she replied, to be healed. He said it would never heal with those greasy plasters; that was not the way in which he healed sores. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. She said her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said old linen was better, but she might use the dressing if she liked it, he saw no objection, and, when it skinned over, he would rub it again. He never saw her afterwards; she died on the 8th of November. A surgeon proved that on the 12th of October, he found a very extensive wound, covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid: the skin was destroyed; the centre of the wound was darker, and in a higher state of inflammation than the other parts; he considered the wound very dangerous to life when he first saw it: the centre spot, and the upper part became gangrenous in about a week; and in his opinion Mrs. L. died of the wound, and according to his judgment it was not necessary or proper to produce such a *wound to prevent any difficulty in swallowing, and he did not know of any disease in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the *œsophagus*. Another surgeon stated that he thought that a man of common prudence or skill would not have applied a liquid, which in two days would produce such extensive inflammation; though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say that such conduct was a proof of rashness and of ignorance. It was submitted that this was not manslaughter, but homicide *per infortunium*; that where the mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, which fails, the party is not responsible; and that the indictment, which in substance charged that the death was occasioned by the external application was not supported. There was no count imputing ignorance or want of skill, or hastiness, or roughness of practice. Bayley, B., "I agree with Lord Hale,^(w) and

St. John
Long's
second
case.

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St. John
Long's
second
case.

do not think that there is any difference between a licensed and unlicensed surgeon. It does not follow that in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Mr. J. Foster, p. 263, speaking of a person who happens to kill another by driving a cart or other carriage says, 'If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection.*' And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds not being in your favour, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act: for if a man, either with gross ignorance or gross rashness administers medicine, and death ensued, it will be clearly felony. It was then objected that in this case, as in larceny, there must be a trespass proved. It was not proved that any fraud had been practised by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees: if there had been it might have been evidence to show the existence of trespass. In *Rex v. Van Butchell*,^(x) the case was stopped, because there was no evidence of how the operation was performed, and here there was not any evidence to show the mode in which the application was made." Bayley, B., "In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say, whether the thing which produced such an effect was not improperly applied." Bolland, B., "When you pass the line which the law allows, then you become a trespasser." Bayley, B., "If I had a clear opinion in your favour, or if my brothers had, or if we had *any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the jury; but feeling as I do, notwithstanding all I have heard to-day, and myself and my brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury: I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness; and I consider that *rashness will be sufficient* to make it manslaughter. As, for instance, if I have the toothache, and a person undertakes to cure it by administering laudanum, and says, 'I have no notion how much will be sufficient,' but gives me a cup full, which immediately kills; or if a person prescribing James' powder, says, 'I have no notion how much should be taken,' and yet gives me a table-spoonful, which has the same effect; such persons acting with rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and *the willingness of the patient cannot take away the offence against the public.*" In summing

*502

(x) *Supra*, p. 496, note (s).

up, Bayley, B., said, "the points for your consideration are, first, whether Mrs. L. came to her death by the application of the liquid; secondly whether the prisoner, in applying it, has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, *he has acted with a due degree of caution*, or on the contrary has acted with *gross and improper rashness and want of caution*. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." "If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. L.'s death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid, and the death of the patient, yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied with this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent." (y)

*Any person, whether he be a regularly licensed medical man or not, who professes to deal with the life or health of his majesty's subjects, is bound to have competent skill to perform the task that he holds himself out to perform, and is bound to treat his patients with care, attention, and assiduity, and if the patient dies for want thereof, such medical man is guilty of manslaughter. Upon an indictment for manslaughter, by causing the death of a child by putting a plaster made of corrosive and dangerous ingredients upon its head, it appeared that the child for eighteen months had been afflicted with scald head, and was taken to the prisoner, who applied two plasters successively all over its head. Two surgeons, proved that there was a general sloughing of the scalp, which caused the death, and in their opinion this might have been produced by the plasters; there was no evidence to show of what the plasters were composed. Bolland, B., "The law, as I am bound to lay it down (and I believe I lay it down as it has been agreed upon by the judges; for cases of this kind have occurred of late more frequently than in former times) is this: if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." (z)

(y) *Rex v. St. John Long*,^a 4 C. & P. 423. Bayley and Bolland, Bs., and Bosanquet, J. The prisoner was acquitted. There was no negligence or inattention in the prisoner after the application, as he did not know where Mrs. L. was until the 12th of October, and after that time she was attended by Mr. C.

(z) *Rex v. Spiller*,^b 5 C. & P. 333, *coram* Bolland, B., and Bosanquet, J. See also Lam-

^a Eng. Com. Law Reps. xix. 440.

^b lb. xxiv. 346.

The prisoner, a surgeon and man-midwife, was charged with manslaughter upon an indictment, which alleged that he undertook the care and charge of B. K. as a man-midwife, and to do every thing needful for her during and after the time of her deliuvry, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died. Tindal, C. J., said to the jury, "You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death of the person named in the indictment was caused thereby." (a)

If a duly qualified medical man cause a death by the grossly unskilful, and grossly incautious use of a dangerous instrument, he is guilty of manslaughter. *504

If a medical man, though lawfully qualified to act as such, cause the death of a person by the grossly unskilful or grossly incautious use of a dangerous instrument, he is guilty of manslaughter. Upon an indictment for manslaughter in causing the death of a woman by using a lever in delivering her of a child, it appeared that the prisoner had for nearly thirty years carried on the business of an apothecary and man-midwife, and that he was qualified by law to carry on that profession; his practice had been very considerable, and (amongst others) he had attended the deceased herself on the birth of all her children. On the occasion in question, he made use of a *metal instrument, known in midwifery by the name of a vectis, or lever, inflicting thereby such grievous injuries on the person of the deceased, as to cause her death within three hours; and it was proved by the evidence of medical men, first, that the instrument used was a dangerous one, and at that period of the labour it was very improper to use it at all; and secondly, that it must have been used in a very improper way, and in an entirely wrong direction. There was no evidence on either side as to whether the prisoner had or had not ever made use of such an instrument on former occasions. Coleridge, J., told the jury, that the questions for them to decide were, whether the instrument had in this instance caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the jury thought that in this instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty. (aa)

If a party brings competent knowledge, and makes a mistake,

If a person brings a competent knowledge, and on a particular occasion makes an accidental mistake, he is not answerable; but if a person not acquainted with the medical art, administers a dangerous remedy to a person labouring under a serious disease, proper medical assistance

phier v. Philpot,^a 8 C. & P. 575, where Tindal, C. J., said, "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill: there may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill."

(a) Furguson's case, 1 Lew. 181. *Quære*, whether this be not the same case as that mentioned in *Rex v. St. John Long*,^b 4 C. & P. 404, 405, see *ante*, p. 499. If so, the prisoner was a blacksmith, drunk and wholly ignorant of the proper steps to be taken; no evidence is stated in Lewin.

(aa) *Reg. v. Spilling*, 2 M. & Rob. 107.

^a Eng. Com. Law Reps. xxxiv. 487.

^b *Ib.* xix. 440.

being at the time procureable, and death ensues from such administering he is not it is manslaughter. So if such person administers medicine, of the answer- nature of which he is ignorant, and such medicine, causes death. The able; *secus*, prisoner was indicted for manslaughter in causing the death of R. R., if being by administering to him a large quantity of Morrison's pills; the de- grossly ignorant he ceased, being ill of small-pox, had sent for the prisoner, who was a applies a publican and agent for the sale of the pills, and under his advice had dangerous remedy, taken large quantities of them; his strength gradually wasted under which causes their influence, and on the morning of his death, while in a state of col- death. lapse, the prisoner had, of his own accord, administered to him twenty pills. The prisoner had treated the deceased with great kindness during his illness, and on a former occasion the deceased had recovered from a dangerous illness while under the prisoner's treatment. Several medi- cal men gave it as their opinion that medicine of the violent character, of which the pills were composed, could not be administered to a person in the state in which the deceased was, without accelerating his death. Lord Lyndhurst, C. B., "I agree that in these cases there is no differ- ence between a licensed physician or surgeon, and a person acting as a physician or surgeon without a license. In either case, if a party hav- ing a competent degree of skill and knowlege, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter." (b)

*A question is put by Lord Hale, whether, if a person infected with *505 the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder; but it is admitted that if no such intention should evidently appear, it would not be felony, though a great misdemeanor. (c) It may be ob- served, that an offence of this sort in breach of quarantine is punishable by the provisions of a recent statute. (d)

A question has been raised, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her; but the point was not decided. (e)

It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death administered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first. (f)

Questions may occasionally arise as to the *treatment* of the wound Treatment or hurt received by the party killed. Upon this subject it has been of wounds. ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the

(b) *Rex v. Webb*, 1 M. & Rob. 405. 2 Lew. 196. The very learned Chief Baron added, "If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough, in *Rex v. Williamson*." *Supra*, p. 497.

(c) 1 Hale, 432.

(d) 6 Geo. 4, c. 78, s. 17. *Ante*, 105, *et seq.*

(e) *Rex v. Ladd*, 1 Leach, 96. 1 East, P. C. 226. The judges to whom the case was referred gave no opinion upon the point, as the indictment was holden to be defective, in not having stated that the prisoner gave the deceased a mortal wound.

(f) 1 Hawk. P. C. c. 31, s. 9. 4 Bla. Com. 197. 1 East, P. C. c. 5, s. 112, p. 343, 344.

case may be; though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from a neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstance. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*.(g) Thus, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them.(h)†

Upon an indictment for murder, it appeared that the deceased had been waylaid and assaulted by the prisoner, and that amongst other wounds, he was severely cut across one of his fingers by an iron instrument. The surgeon urged him to submit to amputation of the finger, telling him that unless it were amputated, he considered that his life would be in great hazard. The deceased refused to have the finger amputated. The surgeon dressed it, and the deceased attended from day to day to have the wound dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon deposed, that if the finger had been amputated at first he thought it most probable that the life of the deceased would have been preserved. It was contended for the prisoner that the cause of the death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment. Maule, J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was, whether in the end the wound inflicted by the prisoner was the cause of the death.(hh)

If a man be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the

Killing a
person
labouring

(g) 1 Hale, 428.

(h) Rew's case, Kel. 26.

(hh) Reg. v. Holland, 2 M. & Rob. 351.

† [Acc. *Commonwealth v. Green*, 1 Ashmead, 289. When a surgical operation is performed in a proper manner, and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will nevertheless be responsible for the consequences. *The Commonwealth v. McPike*, 3 Cush. 181.]

disease to operate more violently or speedily, this is murder or other ^{under} homicide, according to circumstances, in the party by *whom such ^{disease.} wound or hurt was given. For the person wounded does not die simply ^{*506} *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong. (i)

Upon an indictment for manslaughter it appeared that the death was caused by a blow on the back of the neck, and that the deceased was not at the time in a good state of health, and that she was desired to remain in a hospital, where she could best be attended to, but would not. Parke, B., said, "It is said that the deceased was in a bad state of health, but that this is perfectly immaterial; as if the prisoner was so unfortunate as to accelerate her death, he must answer for it." (k) So upon an indictment for manslaughter by administering Morrison's pills, it appeared that they were administered whilst the deceased was ill of small-pox, and the medical witnesses all gave it as their opinion that the exhibition of Morrison's pills in such doses must have aggravated the disease under which the deceased laboured, and have accelerated his death; and one of them said that the deceased died of small-pox heightened by the treatment he had received. It was objected that the indictment was not supported by the evidence, which only proved that the deceased died of a natural disorder, accelerated by improper treatment. It might be conceded, for the sake of argument, that if the indictment had so stated the case, it might have been sufficient; but the indictment made quite a different charge, viz., that the party died wholly and solely of a mortal sickness caused by the medicine and improper treatment. Lord Lyndhurst, C. B., "It is true the witnesses do not say whether the deceased would, in their opinion, have died of the small-pox if the pills had not been administered; but they all agree in this, that his death was accelerated by the pills. Now, their evidence being translated comes to this, that the party died on the day when he did die, viz., on the 27th of June, by reason of taking the pills. At present, therefore, it appears to me that the indictment was good." And in summing up, the very learned chief baron adhered to the opinion he had already expressed on the argument, and left it to the jury to say, "whether the death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner." (l)

So where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances; Coleridge, J., told the jury that if a person inflicted an injury upon a person

(i) 1 Hale, 428. Lord Hale says, that thus he had heard that learned and wise judge, Justice Rolle, frequently direct. See Johnson's case, 1 Lewin, 164, where on an indictment for manslaughter in causing a death by a blow on the stomach, on a surgeon stating that a blow on a stomach in this state of things, arising from passion and intoxication, was calculated to occasion death, but not so if the party was sober. Hullock, B., is said to have directed an acquittal, saying, "that where the death was occasioned partly by a blow, and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes as to be able to say with certainty that the death was immediately occasioned by any one of them in particular." This ruling is questioned in Roscoe's Cr. Evid. 647, and as it should seem with very good reason, as it is contrary to the other authorities on this point. C. S. G.

(k) Rex v. Martin, 5 C. & P. 128, Parke, B.

(l) Rex v. Webb, 1 M. & Rob. 405. 2 Lew. 196. Verdict, guilty.

Eng. Com. Law Reps. xxiv. 242.

*507 labouring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be *found guilty of manslaughter, and the question for them was, whether the death of the wife was caused by the disease under which she was labouring, or whether it was hastened by the ill usage of the prisoner. (*m*)

Gross cases
of murder;
poisoning.

It will not be necessary to specify the particular instances of the more gross kinds of wilful murder in which the malignity of the heart, the malice preprende which has been already described, is apparent. It may, however, be remarked, that of all species of death, that by poison has been considered the most detestable, because it can, of all others, be least prevented by manhood or forethought. It is a deliberate act, necessarily implying malice, however great the provocation may have been; (*n*) and on account of its singular enormity was made treason by the 22 Hen. 8, c. 9, and punishable by a lingering kind of death; but this statute was repealed by the 1 Ed. 6 c. 12, ss. 10 & 13. (*o*) By a late statute administering poison with *intent* to murder, though no death should ensue, is made a capital offence, which will be more particularly mentioned in its proper place. (*q*) †

Felo de se.

Self-murder may be mentioned as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death. (*r*) It has been already stated, that a person killing another, upon his desire or command, is guilty of murder; (*s*) but in this case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void. (*t*) But where two persons agree to die together, and one of them at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and used the potion survives by using proper remedies, and the other

(*m*) Reg. v. Fletcher, Gloucester Spr. Ass. 1841. The jury acquitted; the evidence of the surgeon leaving it doubtful whether the death did not arise purely from natural causes. The first and second counts of this indictment were in the ordinary form where the death has been caused by blows; the third alleged that S. F. was ill of a certain mortal disease, whereof, according to the course of nature, she, after a long space of time, (to wit) after the space of four months, would have died; that the prisoner assaulted and beat, &c., (in the usual form) S. F. so being sick and ill as aforesaid, giving her divers mortal strokes and bruises, and which said mortal strokes and bruises did then and there greatly hasten and accelerate the death of S. F., of the same disease whereof she was then and there sick and ill as aforesaid, by then and there irritating, causing, and provoking the said disease to operate more violently and speedily than the same would otherwise have done; of which said mortal disease, so irritated and provoked as aforesaid, S. F. did languish, &c., (in the usual form,) on which said day S. F., of the said mortal disease, so irritated and provoked as aforesaid, did die, &c. No objection was made to this count, which was framed on 1 Hale, 428. See *ante*, note (*i*). C. S. G.

(*n*) 1 East, P. C. c. 5, s. 12, p. 225, s. 30, p. 251. 4 Bla. Com. 200. 1 Hale, 455.

(*o*) The true grounds of this statute of Edw. 6, which was repealed by the 9 Geo. 4, c. 31, have been much discussed, and different opinions have been expressed on the subject by many great lawyers. See the opinions of Lord Coke, 11 Co. 32, *a*; Kelyng, C. J., Kel. 32; Lord Holt, Kel. 125; and Mr. Just. Fost. 68, 69. Mr. Justice Foster considered the enactment of the statute to be not in affirmance of the common law, but by way of *revival* of it; to this solution of the difficulty Mr. Barrington has made some objections, (Obs. on Stat. 524,) which have been observed upon by the editor of Mr. Just. Foster's work, in his preface to the second edition.

(*q*) 1 Vict. c. 85, s. 2, *post*, chap. x.

(*r*) 4 Bla. Com. 189. The 4 Geo. 4, c. 52, regulates the mode of interment of the remains of persons found *felo de se*.

(*s*) *Ante*, p. 485.

(*t*) 1 Hawk. P. C. c. 27, s. 6.

† [On an indictment for murder perpetrated by means of poison, the jury may find the prisoner guilty of murder in the second degree. *The State v. Dowel*, 19 Conn. 388.]

dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his *own wicked purpose, and the other only put it in his power to execute it in that particular manner.(u) Upon a principle which will presently be mentioned more fully, if a man attempting to kill another, miss his blow and kill himself,(v) or intending to shoot at another, mortally wound himself by the bursting of a gun,(w) he is *felo de se*; his own death being the consequence of an unlawful malicious act towards another. It has also been said that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se*;(x) but this has been doubted.(y) A husband and wife being in extreme poverty and great distress of mind, the husband said, "I am weary of life and will destroy myself," upon which the wife replied, "If you do, I will too." The man bought some poison, mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being a wife of the deceased, she was under his control; and inasmuch 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 a verdict of not guilty.(z)

The prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress; and 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, and afterwards 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 was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon 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 the woman was gone; he then endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman 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

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If a man encourages another to murder himself, and he is present abetting him while he does so, such man is guilty of murder as a principal. If two encourage each other to murder themselves together, and one does so but the other fails in the attempt upon himself, he is a principal in

(u) 1 Hawk. P. C. c. 27, s. 6. Keilw. 136. Moor, 754.

(v) 1 Hale, 412.

(w) 1 Hawk. P. C. c. 27, s. 4.

(x) 3 Inst. 54. Dalt. c. 144.

(y) See 1 Hale, 412, who considers that in this case B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not a *felo de se*, but that it is homicide by misadventure. In Hawk. P. C. c. 27, s. 5, it seems to be considered that B. should be adjudged to kill A. *se defendendo*.(z) Anonymous case, as stated by Patteson, J., in Reg. v. Alison, 8 C. & P. 418. The case is reported in Moor, 754. *Quære*, whether they were husband and wife; the report begins, "*homme et se femme ayant long temps vive incontinent ensemble.*" And it states that a special verdict was found, but does not state the decision. See my note, *ante*, p. 18, as to the decision in this case. C. S. G.

* Eng. Com. Law Repts. xxiv. 458.

the murder of the other. *509 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 were 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 stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. But the learned judge thought it right to submit his direction to the consideration of the judges. After considering the case, the judges 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 for a pardon.^(a) So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury 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. It may be said that they were both under the influence of what is called 'temporary insanity,' and a practice has of late years been pursued by coroners' juries of finding verdicts to that effect in cases which do not at all justify such a conclusion. As a lawyer I am bound to say that such verdicts are wholly unwarranted by the law of this country."^(b)

Accessory to suicide. Of aiders and abettors. How far an abettor must be present, at the commission of the crime.

A person cannot be tried as an accessory before the fact, for inciting another to commit suicide, if that person do commit suicide, for the 7 Geo. 4, c. 64, s. 9, only extends to such persons as were previously liable to be tried either with or after the principal, and an accessory before the fact to suicide was not triable at common law.^(c)

In order to make an abettor to a murder or manslaughter principal in the felony, he must be present aiding and abetting the fact committed. The *presence*, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance.^(d) But a person may be present, and if not aiding and abetting, be neither principal or accessory: as, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory.^(e)

(a) Reg. v. Dyson, M. T. 823. Russ. & Ry. 523. { See 13 Mass. R. 356. }

(b) Reg. v. Alison, 8 C. & P. 418, Patteson, J.

(c) Rex v. Russell, R. & M. C. C. R. 356. Reg. v. Leddington, 9 C. & P. 79, Alderson, B., ante, p. 40.

(d) 1 Hale, 615. Fost. 350. 4 Bla. Com. 34. See ante, 27. { 1 Gallison, 624. United States v. Ross. }

(e) Fost. 350. 1 Hale, 439.

^a Eng. Com. Law Repts. xxxiv. 458.

^b Ib. xxxviii. 42.

*If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. (*f*) So if A. assault B. of malice, and they fight, and A's servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A's malice, is guilty of manslaughter only. (*g*) Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis, would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis: but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter, and three others of murder, and three others were executed. (*h*)

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good; for (by Holt, C. J.,) "though the indictment be against the prisoner for aiding, assisting, and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder." (*i*) And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree. (*j*) So that if A. be indicted for murder, or manslaughter, and C. and D. for being present aiding and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned; and if convicted shall receive judgment, though A. neither appear nor be outlawed. (*k*) And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all; for it is only a circumstantial variance, and in law it is the stroke of all who were present aiding and abetting. (*l*)

*Where a count charged Thom with murder, and Tyler and Price being present aiding and abetting in the commission of the murder, and it appeared that Thom was insane at the time of committing the murder,

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(*f*) 1 East, P. C. c. 5, s. 121, p. 350.

(*g*) 1 Hale, 446. *Ante*, 484.

(*h*) *Rex v. Salisbury and others*, Plowd. 97.

(*i*) *Rex v. Wallis and others*, Salk. 334. This point was doubted of by some of the judges in Taylor and Shaw's case, 1 Leach, 360. 1 East, P. C. c. 5, s. 121, p. 351; but a majority of them thought the conviction proper. No express determination, however, was made in the last case, as it was thought by the judge who tried the prisoner, a proper case for a pardon on the special circumstances.

(*j*) 1 Hale, 437. Plow. Com. 100, *a*.

(*k*) 1 Hale, 437. Plow. Com. 97, 100. Gythin's case.

(*l*) 1 Hale, 438. Plow. Com. 98, *a*. 9 Co. 67, *b*. *Rex v. Mackally*, 1 East, P. C. c. 5, s. 121, p. 350. Turner's case, 1 Lew. 177, Parke, B.

it was held that Tyler and Price could not be convicted on this count. (m) Where a count charged Tyler and Price as principals in the first degree with a murder, and it appeared that Thom, an insane person, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities, Thom having declared that he would cut down any constables who came against him, and a constable having come with his assistants, and a warrant to apprehend Thom, Thom, in the presence of Tyler and Price, who were two of his party, shot one of the assailants; it was held that the prisoners were guilty of murder as principals in the first degree, and that it was no ground of defence that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves, because, if their object was to resist all opposers in the commission of any breach of the peace, and for that purpose the parties assembled together and armed themselves with dangerous weapons, however blank the mind of Thom might be as to any ulterior purpose, and however the minds of the prisoners might be unconscious of any particular object, still if they contemplated a resistance to the lawfully constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for any thing which they did in the execution of it. (n)

Of accessories before the fact.

He that counsels, commands or directs, the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact. (o) [1] And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact; so that if A. bid his servant to hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact. (p)

If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given; so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder. (q)

Cases

where the crime is the direct and immediate effect of the command or counsel

It is a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another. (r)

(m) Reg. v. Tyler, 8 C. & B. 616, Lord Denman, C. J. *Sed Quære.*

(n) Reg. v. Tyler, 8 C. & P. 616, Lord Denman, C. J. *Sed Quære.*

(o) 1 Hale, 435.

(q) 1 Hale, 617. 2 Hawk. P. C. c. 28, s. 18. 4 Bla. Com. 37. Dy. 185.

(r) 1 Hale, 435. 2 Hawk. P. C. c. 29, s. 18. 4 Bla. Com. 37.

(p) Fost. 125.

[1] {The crime of an accessory before the fact to a murder is murder, and an indictment is not barred by a statute of limitations which mentions all crimes, &c., "murder excepted." 4 Wend. 225, *People v. Mather.*}

[An accessory before the fact to the crime of self-murder was not triable, at common law, because the principal could not be tried; and is not now triable under 7 Geo. 4, c. 64, s. 9, for that section is not to be taken to make accessories triable—except in cases in which they might have been tried before. *Rex v. Russell*, M. C. C. 356. 1 Harrison's Dig. 356.]

And *a fortiori*, therefore, if *a man command another to rob any person, of the accessory. and in robbing him kill him, the person giving such command is as much *512 an accessory to the murder, as to the robbery which was directly commanded; and it is also said, that if one command a man to rob another, and he kill him in the attempt, but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony.(s)

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus, if A. persuade B. to poison C, and B. accordingly give poison to C., who eats part of it, and gives the rest to D., who is killed by it, A. is guilty of a great misdemeanor only in respect to D., but is not an accessory to his murder: because it was not the direct and immediate effect of the act done in pursuance of the command.(t) And if A. counsel or command B. to beat C. with a small wand or rod, which would not in all human reason cause death, and B. beat C. with a great club, or wound him with a sword, whereof he dies, it seems that A. is not accessory; because there was no command of death, nor of any thing that could probably cause death; and B. departed from the command in substance, and not in circumstance.(u) But if the crime committed be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still accessory to the murder; for the substance of the thing commanded was the death of the party killed, and the manner of its execution is a mere collateral circumstance.(v)

An accessory *after the fact*, in murder, as in any other felony, may be where a person, knowing a murder to have been committed, receives, relieves, comforts, or assists the offender; as to which kind of accessory some points are noticed in a former chapter.(w) And the question for the jury in such a case is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice.(x) It may be here observed, however, that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessory to the homicide; for till death ensues there is no felony committed.(y)

By the 9 Geo. 4, c. 31, s. 3, every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be transported beyond the seas for life, or

(s) 2 Hawk. P. C. c. 29, s. 18.

(t) Id. *ibid.* Sed *quære et vide* Reg. v. Michael, 2 M. C. C. R. 120, *post*, and 1 Hale, 431.

(u) 1 Hale, 436.

(v) 2 Hawk. P. C. c. 29, s. 20. 4 Bla. Com. 37.

(w) *Ante*, 36.

(x) Rex v. Greenacre, 8 C. & P. 35, Tindal, C. J., Coleridge and Coltman, Js.

(y) 4 Bla. Com. 38. 2 Hawk. P. C. c. 29, s. 35. But it should seem that he is accessory to the maliciously wounding. C. S. G.

principals and accessories.
Petit treason to be treated as murder.

to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.(a)

By sec. 2, "every offence, which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no great offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.(z)

It has been before submitted, that a statement of the several instances of gross and direct wilful murder cannot be thought necessary. But there are a variety of cases of a less decided character, and some upon which doubts have arisen, which may properly be here considered. An apt arrangement of them is a matter of some difficulty; but the following order seems to be appropriate: I. Cases of provocation. II. Cases of mutual combat. III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. IV. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act. V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

SECTION I.

Cases of Provocation.

*514 As the indulgence which is shown by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must *be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed.(a) All the circumstances of the case must lead to the conclusion, that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human

(a) The 10 Geo. 4, c. 34, s. 3 & 4, are word for word the same as to the punishment of petit treason and murder in Ireland, as the 9 Geo. 4, c. 31, s. 2 & 3.

(z) Petit treason was a breach of the lower allegiance of private and domestic faith; and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were somewhat numerous and involved in some uncertainty. 1 Hale, 376; but, by the 25 Edw. 3, st. 5, c. 2, they were reduced to the following cases:—1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed faith and obedience. The principles relating to wilful murder were also applicable to the crime of petit treason, which, though it appears to have been sometimes regarded differently [by unwary people, as Mr. J. Foster says, Fost. 323], was substantially the same offence as murder, differing only in degree. [Fost. 323, 327, 336. 4 Bla. Com. 203.] It was murder aggravated by the circumstance of the allegiance, however low, which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, and of that alone, the judgment upon a conviction was more grievous in one case than in the other; though in common practice no material difference was made in the manner of the execution. As the offence of petit treason is now rendered the same as murder, the course is always to indict for murder, and it has therefore been thought unnecessary to reprint the Chapter on Petit Treason, which was in the former editions. C. S. G.

(a) Fost. 315.

infirmity. (b) For there are many trivial, and some considerable, provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead. †

No *breach* of man's *word* or *promise*; no *trespass*, either to lands ^{Words,} or goods; no affront by bare *words* or *gestures*, however false or mali- ^{gestures,} ^{&c.} cious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. (c) And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm. (d) [1]

A. passing by the shop of B. distorted his mouth and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing (e)

If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) takes the wall of him and thereupon A. kill B., this is murder: but if B. had justled A., this justling had been a provocation, and would have made it manslaughter. (f)

If there be a chiding between husband and wife, and the husband strike his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter. (g)

A woman called a man, who was sitting drinking in an ale-house, "a son of a whore," upon which the man took up a broom-staff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made: 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The judges were not unanimous upon this case; and, as the consequence of a resolution on either side was great, it was advised that the king should be moved to pardon the offender which was accordingly done. (h) †

If without adequate provocation, a person strikes another with a ^{If without} deadly weapon, likely to occasion death, although he had no previous ^{adequate} ^{provoca-} *malice against the party, yet he is to be presumed to have had such *515

(b) 1 East, P. C. c. 5, s. 19, p. 232.

(c) Fost. 290. 1 Hawk. P. C. c. 31, s. 33. 1 Hale, 455. Woodhead's case, 1 Lewin, 163. Hullock, B.

(d) Fost. 290, 291.

(e) Brain's case, 1 Hale, 455. Cro. Eliz. 778. Kel. 131.

(f) 1 Hale, 455. But this case probably supposes considerable violence and insult in the justling.

(g) Crompt. fol. 120 (a). See also Kel. 64. 1 Hale, 456.

(h) 1 Hale, 455, 456.

† [On a trial for murder, the question of provocation is proper for the decision of the court; for whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter is entirely a question of law. *State v. Craton*, 6 Iredell, N. C. 164.]

[1] {See 1 Hawk's (N. C.) Rep. 78, *State v. Farborough*. Ib. 210, *State v. Tackett*.}

‡ [Among equals the general rule is that words are not, but blows are, a sufficient provocation, yet there may be words of reproach so aggravating when uttered by a slave, as to excite in the white man the temporary fury, which negatives the charge of malice. *State v. Jarrot*, 1 Iredell, 76.]

tion, &c., kills B. with a deadly weapon it is murder.

malice at the moment from the circumstances, and he is guilty of murder. (i) Where, therefore, a boy, twelve years old, who had been in the habit of going to a cooper's shop, and taking away chips, was told one morning by the cooper's apprentice not to come again, he however went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench took up a whittle (a sharp-pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter; Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge. (j)

Words of menace.

In a case where it was decided that if A. give slighting words to B., and B. thereupon immediately kill him, such killing would be murder in B., it is also stated to have been holden, that words of *menace* or *bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter. (k) But it would be observed, that in another report of the same case this latter position is not to be found. (l) And it seems that such words ought at least to be accompanied by some act denoting an immediate intention of following them up by an actual assault. (m) †

Assault.

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow. (n) Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice. (o) ‡

(i) Per Hullock, B., Langstaffe's case, 1 Lewin, 162.

(j) Langstaffe's case, *supra*.

(k) Lord Moreley's case, 1 Hale, 455.

(l) Kel. 55.

(m) 1 East, P. C. c. 5, s. 20, p. 233.

(n) See *Rex v. Lynch*,^a 5 C. & P. 324, per Lord Tenterden, C. J., *post*, p. 526.

(o) Per Lord Holt, in *Keate's case*, Comb. 408.

† [A. seeks B. and threatens his life; they meet; a quarrel ensues; B. strikes A. with his fist; they separate; A. attempts to arm himself with a stick, which he is unable to do; again stoops to raise another stick or billet of wood of a dangerous kind; whilst stooping B. stabs him. Held that this was not murder, but manslaughter. *Allen v. The State*, 5 Yerger, 453.]

‡ [Where, on a trial of an indictment for murder, the facts proved show, on the part of the prisoner, a deep and settled hatred towards the deceased, mixed up with a recent combat, the difficulty is to assign the homicide to its proper cause, to decide whether it was committed under the sole influence of passion justly excited, or whether it was the carrying into effect of a settled and deliberate purpose. In such case there is no rule, and can be none, other than that the jury must draw their conclusions from all the facts of the case, relying upon legal presumptions, so far as these are applicable to the case. *State v. Ford*, 1 Spears, 146.]

An assault is in general such provocation, as if the party striking is struck again and death ensue, it is only manslaughter. In determining, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument with which the homicide was effected must be taken into consideration. If it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient. The mode of resentment must bear a reasonable proportion to the provo-

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. (p) The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact. (q)

Stedman's case.

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The following case is reported. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying, "He did not intend to hurt the officers; but he would not be ill-used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him; one stabbed him in nine places, he all the while on the ground, begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter by reason of the first assault with a cane. (r) "This (says Mr. Justice Foster) is the case as reported by Sir John Strange; and an extraordinary case it is; that all these circumstances of aggravation, two to one, he helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane." (s)

Tranter and Reason's case.

(p) Stedman's case, Fost. 292. MSS. Tracy and Denton, 57. 1 East, P. C. c. 5, s. 21, p. 234.

(q) Fost. 292.

(r) Rex v. Tranter and Reason, 1 Stra. 49.

(s) Fost. 293, where Mr. J. Foster states many circumstances of the case which the reporter had omitted; and also the direction to the jury, in which the Chief Justice, upon other grounds than the first assault with the cane, told them it could be no more than manslaughter. See this case more fully stated, post, Chap. On Manslaughter.

ention, *Jacob v. The State*, 3 Humphrey, 493. The question, whether a weapon is a deadly weapon or not, is one of law for the court; but when it has been left to the jury, as it is for the benefit of the accused, it will not be ground for a new trial. *The State v. Collins*, 8 Iredell, 407.

When it was proved, on a trial for murder, that the deceased and the prisoner were quarreling, and as the prisoner approached the deceased he pitched over his head a chair without touching him and with no apparent intention so to do, it was held, that this was no provocation, as nothing less than an actual assault or battery, or an attempt to assault, within striking distance, is a legal provocation to reduce murder to manslaughter. *The State v. Barfield*, 8 Iredell, 344.]

If A. overpower B. in a fight, and then strangle him, it is murder.

If two persons fight, and one overpower the other, and knock him down and then strangle him with a rope, this is murder. Upon an indictment for murder by strangling, it appeared that the prisoner had said, "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down, he got up, and I knocked him down again, and kicked him, and then I put a rope around his neck, and dragged him into the ditch." Patteson, J., said to the jury, "if you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other and knocks him down, and then puts a rope round his neck, and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it."^(t)

Personal restraint and coercion.

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As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, where the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. Two soldiers came, *at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer; and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with.^(u)

If A. stands with an offensive weapon in the doorway of a room wrongfully to prevent J. S. from leaving it, and others from entering, and C., who has right in the room, struggles with him to get his weapon from him; upon which D., a comrade of A.'s, stabs C., it will be murder in D. if C. dies. A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one Martin to enlist him; and they gave him a shilling for that purpose, but they had no authority to enlist any body. Martin wanted afterwards to go away; but they would not let him, and a crowd collected. The drummer drew his sword, stood in the doorway of the room where they were, and swore he

^(t) Rex v. Shaw, 6 C. & P. 372, Patteson, J.

^(u) Rex v. Willoughby and another, Bodmin Sum. Ass. 1791, MSS. 1 East, P. C. c. 5, s. 56, p. 288.

would stab any one who offered to go away. The landlord however got by him; and the landlord's son seized his arm in which the sword was, and was wresting the sword from him when the private, who had been struggling with Martin, came behind the son and stabbed him in the back. He was indicted upon the statute 43 Geo. 3, and it was urged for the prisoner, that the soldiers had a right to enlist Martin, and to detain him; and that if death had ensued, the offence would not have been murder; but, upon the point being saved the judges were all of a contrary opinion: and the conviction was held right.(v)

In cases of provocation of slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of *the instrument used, and from the manner of the chastisement.(w) For if on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him.(x)[1]

Thus the case which has been before mentioned, where, upon a chiding between husband and wife, the husband struck his wife with a pestle,(y) proceeded upon the ground of the pestle being an instrument likely to endanger life.(z) And it is probable that the doubt which was felt by some of the judges in a case where a man, upon being called by a woman a son of a whore, took up a broom-staff and threw it at her, and killed her,(a) arose from the consideration that the instrument was not such as was likely, when thrown from the given distance, to have occasioned death, or great bodily harm.(b)

And in order to negative malice, in a case where death has ensued from a blow not likely to have produced death, or mortal disease, all circumstances of aggravation (though not sufficient to warrant giving a deadly blow,) will be material. One Freeman, a soldier, was in a public house drinking, and asked a girl who was sitting there to drink with him: upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to an hospital, where the wound was examined, and did not appear dangerous, being

(v) *Rex v. Longden*, East, T. 1812. MSS. Bayley, J., and Russ. & Ry. 228.

(w) 1 East, P. C. c. 2, s. 23, p. 235, and s. 23, p. 238, 9.

(x) 4 Bla. Com. 199.

(y) *Ante*, 514.

(a) *Ante*, 514.

(z) 1 East, P. C. c. 5, s. 22, p. 235.

(b) 1 East, P. C. c. 5, s. 22, p. 236.

[1] {See *State v. Tackett*, 1 Hawk's (N. C.) Rep. 210, where it was held that the homicide of a slave may be extenuated by acts on his part, which would not produce a legal provocation if done by a white person. Until the year 1817, there was no punishment of manslaughter in North Carolina, if committed on a slave. *Ibid.* 2 Haywood's R. 79, *State v. Piver.*}

[Whether, on the trial of an indictment for homicide, the weapon, alleged to have been used, is a deadly weapon or not, is a question for the court, not for the jury. *State v. Collins*, 8 Iredell, N. C. 407.

Whether an instrument by which death is occasioned, if it be in fact as described by the testimony, be one by which death may or may not be probably caused, is a question of general reason, and therefore proper for the court; and if it be doubtful whether it would probably cause death, the court should direct a conviction for manslaughter only. *State v. Craton*, 6 Iredell, N. C. 164.]

about a quarter of an inch deep; but it produced an erysipelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B., told the jury, that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving of a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows were such as were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only.(c)

Nature of
the instru-
ment used.

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The nature of the *instrument used* has been much considered in the following case. The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody, who presently took a cudgel, ran three-quarters of a mile, and struck the other boy upon the head, upon which he died.(d) This was ruled manslaughter, because done in a sudden heat and passion: but on *this case Mr. Justice Foster makes the following remarks.(e) "Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys. If upon this provocation the father, after running three-quarters of a mile, had set his strength against the child, had dispatched him with a hedge-stake, or any other deadly weapon, or by repeated blows with his cudgel, it must in my opinion, have been murder; since any of these circumstances would have been a plain indication of malice: but with regard to these circumstances, with what weapon, or to what degree the child was beaten, Coke is totally silent. But Croke(f) setteth the case in a much clearer light, and at the same time leadeth his readers into the true grounds of the judgment. His words are, "Rowley struck the child with a *small cudgel*, of which stroke he afterwards died." I think it may be fairly collected from Croke's manner of speaking, and Godbolt's report,(g) that the accident happened by a *single stroke with a cudgel not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe that Lord Raymond layeth great stress on this circumstance: *that the stroke was with a cudgel not likely to kill.*"(h)†

Hazel's
case.

In a case where upon a special verdict it was found that the prisoner, having employed her daughter-in-law, a child of ten years old, to reel

(c) *Rex v. Freeman*, O. B. Jan. 1814. MSS. Bayley, J.

(d) Rowley's case, 12 Rep. 87: S. C. 1 Hale, 453, in which report the words are, "and strikes C. that he dies." Mr. Justice Foster, in citing the case, says, that the father, after running three quarters of a mile, beats the other boy, "who dieth of this beating." Post. 294.

(e) Post. 294.

(f) Cro. Jac. 296.

(g) Godb. 182. It is there said to have been a "rod," meaning probably a small wand.

(h) 2 Lord Raym. 1498. *Ante*, note (d).

† [A father is informed on the evening of one day that his son, a small boy, has been wantonly whipped by a man. He meets the man on the evening of the next day, and then with his fists and feet beats and stamps him, whilst he is unresisting, with so much violence that the man dies from the effects of the beating on the next night. This is murder. *McWhirt's case*, 3 Grattan, 594.]

some yarn, and finding some of the skeins knotted, threw at the child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also found that the stool was sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered as of great difficulty, and no opinion was ever delivered by the judges.⁽ⁱ⁾ The doubt appears to have been principally upon the question, whether the instrument was such as would probably at the given distance, have occasioned death or great bodily harm.^(j)

Where A. finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter,^(k) it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such trespass. For if A. had knocked his brains out with a bill or hedge-stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word.^(l)† Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and *wounded him in the thigh, which led to crsipelas, and the man died: being indicted for murder, he was found guilty and executed.^(m)

Killing
trespassers.

Moir's
case.

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It seems, therefore, that it may be laid down, that, *in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill or do some great bodily harm, such homicide will be murder.* Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savoured of cruelty.⁽ⁿ⁾

Result of
the cases
upon this
subject.

It should be further remembered, upon the grounds which have been before mentioned,^(o) that the plea of provocation will not avail where

Provo-
cation, where
malice.

(i) Hazel's case, 1 Leach, 368.

(j) 1 East, P. C. c. 5, s. 22, p. 236.

(k) 1 Hale, 478.

(l) Fost. 291.

(m) Moir's case, Rose. Cr. E. 717, Lord Tenterden, C. J. See this case as stated in Rex v. Price, 7 C. & P. 178. Moir had gone home to fetch his pistols after he found the deceased trespassing, and the deceased persisted in trespassing, and some angry words passed before the pistol was discharged.

(n) Halloway's case, Cro. Car. 131. Palm. 545. 1 Hawk. P. C. c. 39, s. 42. W. Jones, 198. 1 Hale, 453. Kel. 127. 1 East, P. C. c. 5, s. 22, p. 237.

(o) *Ante*, p. 484.

† [If one deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder; and consequently an assault, with intent to kill, cannot be justified on the ground that it was necessary to prevent a trespass on property. *State v. Morgan*, 3 Iredell, 186.

A man has a right to order another to leave his house, but has no right to put him out by force until gentle means fail; and if he attempts to use violence in the outset, and is slain, it will not be murder in the slayer, if there is no previous malice. *McCoy v. The State*, 3 Engl. 451.]

there is evidence of *express malice*. In such case not even previous blows or struggling will extenuate homicide.†

Mason's
case.
Deliberate
and express
malice.

Richard Mason was indicted for the wilful murder of William Mason his brother, and convicted; but execution was respited, to take the opinion of the judges upon the doubt, whether, upon the circumstances given in evidence, the crime amounted to murder or manslaughter. The prisoner, with the deceased and another brother, and some neighbours, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgel by agreement. All this time no token of anger appeared on either side, till the prisoner, in the cudgel-play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest; but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reproved for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you *not?" said the deceased. The prisoner, replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not, and added, "besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with

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† [No provocation, however grievous, will excuse from the crime of murder, when from the weapon or the manner of the assault, an intention to kill or to do some great bodily harm was manifest. *The State v. Ferguson*, 2 Hill, 619.

Two persons quarrel, and one throws a brick-bat at the other, who has privately armed himself with a deadly weapon and keeps it concealed, in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon, and with it kills the assailant, though then retreating; jury finds this killing, murder in the second degree. *Held*, upon these circumstances, even without proof of any previous malice, the verdict could not be disapproved. *Slaughter v. The Commonwealth*, 11 Leigh. 681.

The circumstance that the prisoner, after the killing, wipes the knife with which the fatal wound is inflicted, is not so controlling or so insignificant as to warrant the prisoner in calling for the charge that it is not evidence of murder or to justify the court in instructing the jury that it was. It is a fact evincing coolness and self-possession, and as such is proper to be left to the jury, in connection with the other circumstances of the case, for them to determine whether the killing was with malice aforethought or in sudden heat and passion. *Pierson v. The State*, 12 Alab. 149.]

the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon; but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother, disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did, indeed, bid his brother stand off: but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second, but he advanced as fast, and took the revenge he had vowed. The circumstances of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed: and the blows were plainly a provocation *sought* on his part, that he might execute the wicked purpose of his heart with some colour of excuse. (p)†

In the foregoing case it was considered that the blows with the cudgel were a *provocation sought* by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated: and it should be observed, that where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will be in no case of any avail. (q) Thus where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. killed him, it was held to be murder. (r) So where A. and B. were at some difference; A. bade B. *take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out his pin, and A. struck him, and killed him and this was ruled murder; first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B. (s)

Provoca-
tion sought
by the
party kill-
ing.

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Where upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that some words passed between the prisoner and a third person, after which he walked up and down the passage of the house with a sword stick in his hand, with the blade open, and was

Thomas's
case. There
must be
both provo-
cation, and
the fatal

(p) Mason's case, Fost. 132. 1 East, P. C. c. 5, s. 23, p. 239.

(q) 1 East, P. C. c. 5, s. 23, p. 239.

(r) 1 Hawk. P. C. c. 31, s. 24.

(s) 1 Hale, 456.

† [Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued, with his arm uplifted, and when he reached his opponent stabbed and killed him, the latter having stopped and first struck him with his fist. Held, that this was a clear case of murder. *The State v. Howell*, 9 Iredell, 485.]

blow must be the result of such provocation to reduce the crime to manslaughter.

heard to say, "If any man strikes me, I will make him repent it." He was desired to put up the stick, which he refused to do; and shortly after the prosecutor, ignorant of what had occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fist, when the prisoner stabbed him; Mr. B. Parke told the jury, "If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things; first, that there should be that provocation; and, secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.^(t) There is no doubt here but that a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault. If you see that the person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit which the law terms 'malice,' in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man, who gives a blow, with such an instrument as the one which the prisoner used: because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such wound to the passion of anger excited by that blow; for no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."^(u)

Kirkham's case.

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On a trial for murder, it appeared that the prisoner and his son were wrestling on a floor together, the son being uppermost, the son got up, and went to the door, and the prisoner took up a coal pick and threw it at the deceased, and hit him on the back. The deceased said it hurt him, and the prisoner said he would have his revenge. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table and jobbed the deceased *with it on the left side. The deceased said, "Father, you have killed me!" and retreated a few paces into the street, reeling as he went. A person told the prisoner he had stabbed his son. He said, "Joc, I will have my revenge!" The deceased came into the house again, and the prisoner stabbed him again in the left side. There was also evidence of expressions of ill-will by the prisoner towards the deceased, and of threats uttered a short time before. Mr. J. Coleridge told the jury, "in some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it,

(t) Reg. v. Kirkham,^a 8 C. & P. 115, per Coleridge, J., S. P.

(u) Rex v. Thomas,^b 7 C. & P. 817, Parke, B.

^a Eng. Com. Law Reps. xxxiv. 318.

^b Ib. xxxii. 750.

you could not doubt that there was express malice. If a person has received a blow, 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 would go for nothing. So, in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason that the blows were not the cause of the crime." After observing on the danger of relying on the previous threats, the very learned judge proceeded, "Then I will suppose that all was unpremeditated till C. came, and then the case will stand thus, the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if when he got up and threw the pick at the deceased he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question, (the son having given no further provocation,) whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done, and whether the father was acting under the recent sting, or had time to cool and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting on its sting, and the blood remained hot: but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows; because, though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions." (v)

On a trial for murder, it appeared that the prisoner, on the evening of Smith's the day on which he was discharged from the Coldstream Guards, went ^{case.} to a public house in company with his brother and another person: there were two more soldiers in the house, and the deceased was sitting with them: a dispute arose about paying the reckoning, and a fight took place between the prisoner and one Burrows; in the scuffle B. fell down by the fire-place on his knees, and the deceased *jumped over the table and struck the prisoner: the deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out; the deceased remained about a quarter of an hour after the prisoner, and then left; the prisoner and the deceased were both in liquor; the deceased tried to get out directly after the prisoner left, but was detained by the persons in the room; as soon as they let him go, he jumped over the table, and went out of the house, saying as he went, that if he caught them he would serve them out: the deceased was a person who boasted of his powers as a fighter; the deceased followed the prisoner and his brother into a mews, not far from the public house where they had been drinking; and a witness, who lived near, stated that he heard a noise, and went to the door of his

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(v) Reg. v. Kirkham,^a 8 C. & P. 115, Coleridge, J.^a Eng. Com. Law Reps. xxxiv. 318.

Smith's
case.

house, and then heard a bayonet fall on the ground, and on going out heard one Croft crying out, "Police, police; a man is stabbed!" and on going up found the deceased lying on the ground wounded. Croft stated that he was near and heard voices, which induced him to run towards a bar, and when within a yard of the bar he heard a blow like the blow of a fist, this was followed by other blows; after the blows he heard a voice say, "take that!" and in half a minute the same voice said, "he has stabbed me!" the deceased then ran towards him, and said, "I am stabbed!" and soon fell on the ground: the prisoner was soon afterwards taken into custody, and was then bleeding at the nose; the prisoner had not any side-arms; but his brother had a bayonet: for the defence, the brother stated that when they got about twenty yards through the bar mentioned by Croft, he heard somebody say something, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of its sheath upon the stones, and the deceased picked it up, and followed the prisoner, who had gone on; there was a great struggle between them, and very shortly after the deceased cried out, "I am stabbed!" A surgeon proved that there were wounds on the prisoner's hands, such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., to the jury, "the question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable; upon the question of whether it amounts to murder you have to consider this; did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him?" If he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in imminent danger. If he used the weapon, *having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified." (w)

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Provoca-
tion will
not avail
if there is
time for
cooling.

It must be further observed also, that in every case of homicide upon provocation, how great soever this provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder. (x)† Therefore, in the case of the most grie-

(w) *Reg. v. Smith*,^a 8 C. & P. 160. *Bosanquet and Coltman, Js., and Bolland, B.* The prisoner was found guilty of manslaughter.

(x) *Fost.* 296.

† [Where it becomes material to inquire whether a homicide committed in a second, after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, or after such an interval of time as would imply premeditation, the proper case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but did the prisoner cool, or was there time for a reasonable man to have cooled? *State v. McCaus*, 1 Spears, 334.

The defence of a prisoner indicted for murder consisted,—1. In the adultery of the deceased
^a Eng. Com. Law Reps. xxxiv. 445.

vous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder.(y) "For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature, for which the law of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High."(z) With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend.(a) In cases of this kind the immediate object of inquiry is whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if from any circumstances what-
If it appear that the party de-
 liberated, or cooled any time before the fatal stroke given; the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty.(b) or had time to do so, it is murder.
 ever it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given; the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty.(b) Whether the blood has had time to cool or not is a question for the court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received and the act done.(c)

Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public-house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen; the knife, a common bread and cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much as not to know right from wrong. Lord Tenterden, C. J., "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime *from murder to manslaughter; but it depends upon *526 the time elapsing between the blow and the injury; and also whether the

Lynch's case.

(y) Fost. 296. 1 East, P. C. c. 5, s. 20, p. 234, and s. 30, p. 251. See Reg. v. Fisher, *infra*, note (c).

(z) Fost. 296. Rom. chap. xii., v. 19.

(a) 1 East, P. C. c. 5, s. 30, p. 251.

(b) Oneby's case, 2 Lord Raym. 1485.

(c) Reg. v. Fisher, 8 C. & P. 182, Parke, B., and Law, Recorder.

with the defendant's wife. 2. In the drunkenness of the defendant, and 3. In his insanity. Held, that only the finding of the adulterous parties in actual connection would reduce the crime of killing from murder to manslaughter, and that the knowledge of their previous adultery was no justification; that the part of the voluntary drunkenness of the defendant was no defence; and that the question of insanity had been found against the prisoner by the jury, and that the evidence consisting of wild declarations and drunken ravings about the adultery of his wife, supported the verdict. *The State v. John*, 8 Iredell, 330.]

* Eng. Com. Law Reps. xxxiv. 345.

injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went any where for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which under the circumstances, I should think you hardly would) then you will find him guilty of murder."(d)

Hayward's case. If thought and contrivance be shown in procuring a weapon after provocation given, that shows that the prisoner was under the influence of reason.

If thought, contrivance, and design be shown by a prisoner in the mode of procuring a deadly weapon after provocation has been given, and in again replacing the weapon immediately after the blow with it has been struck, this tends to show that the prisoner was acting under the influence of judgment and reason, rather than of violent and ungovernable passion. The deceased was requested by his mother to turn the prisoner out of her house, which after a short struggle with the prisoner he effected, and in so doing he gave him one kick. The prisoner said he would make him remember it, and instantly went to his own lodgings from two to three hundred yards distant, passed through his bed-room and kitchen into a pantry, and returned thence hastily back again. Within five minutes after the prisoner had left the deceased, the latter followed him to give him back his hat, which had been left behind, and they met about ten yards from the prisoner's lodging. They stopped for a short time, when they were heard talking together, but without any words of anger; after they had walked on together for about fifteen yards, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument, in two places, giving him a mortal wound in the belly. As soon as he had stabbed him the second time, he said he had served him right, and instantly ran back to his lodgings, passed hastily through his bed-room, and *the kitchen to the pantry, and thence back to his bed-room, where he undressed himself and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument found upon him. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate, and which was kept on a shelf with his meat; and in another part of the

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(d) *Rex v. Lynch*, 5 C. & P. 324.

* *Eng. Com. Law Repts.* xxiv. 341.

pantry three other knives of a similar description, which he used in his business of a butcher. The several knives were found the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the question for them was, whether the wound was given by the prisoner while snarling under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding: or whether there had been time for the blood to cool, and for reason to resume her seat, before the wound was given. That in determining this question, the most favourable circumstance for the prisoner was the shortness of time between the original quarrel and the stabbing; but, on the other hand, the weapon was not at hand when the quarrel took place, but was sought for from a distant place. It would be for them to say whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion. (e)

From the cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; for the law supposed that a party capable of acting in so outrageous a manner upon a slight provocation, must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered. (f) †

SECT. II.

Cases of Mutual Combat.

WHERE words of reproach or other sudden provocation have led to blows and mutual combat, and death has ensued, the important inquiry will be, whether the occasion was altogether sudden, and not the result of pre-conceived anger or malice: for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. (g)

Thus a party killing another in a deliberate duel is guilty of murder: † ^{Deliberate} duel. For wherever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, (h) and cannot help himself by alleging that he was first *struck by the deceased; *528

(e) *Rex v. Hayward*, 6 C. & P. 167, Tindal, C. J.

(f) 1 East, P. C. c. 5, s. 30, p. 252.

(g) 1 East, P. C. c. 5, s. 24, p. 241.

(h) *Reg. v. Young*, 8 C. & P. 644. Vaughan, J., and Alderson, B.

† [If between the provocation received and the mortal stroke given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling, or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder. *Commonwealth v. Green*, 1 Ashmead, 289.]

‡ [Acc. *Smith v. The State*, 1 Yerger, 228. The seconds, and who are present aiding and assisting, are equally guilty as principals. *Reg. v. Cuddy*, 1 C. & K. 210. Eng. C. L. xlvii. 210.]

* Eng. Com. Law Repts. xxv. 331.

† Id. xxxiv. 564.

or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only to vindicate his reputation; (i) or that he meant not to kill, but only to disarm his adversary. (k) He was deliberately engaged in an act highly unlawful, in defiance of the laws, and he must at his peril abide the consequences; and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. (l) And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought; the circumstances was relied on as showing that he did not fight in the first passion. (m) So wherever there is an act of deliberation, and a meeting by compact such mutual combat will not excuse the party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town, and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder: but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. (n) Upon the same principle, if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., in safeguard in his own life, kills A., this is murder in B: because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done. (o)

Where there is an act of deliberation and a meeting by compact it is murder.

Seconds.

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And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his second, *is guilty of murder: (p) and it has been held that the second also of the person killed is equally guilty, by reason of the countenance given to the prin-

(i) As where he had been threatened that he should be posted for a coward. 1 Hale, 452, and see *Rex v. Rice*, 3 East. R. 581.

(k) 1 Hawk. P. C. c. 31, s. 21.

(l) 1 Hawk. P. C. c. 31, s. 22. 1 Hale, 423.

(m) *Bromwich's case*, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 42. *Bromwich* was indicted for aiding and abetting Lord Morley in the murder of Hastings.

(n) 1 Hawk. P. C. c. 31, s. 25.

(o) 1 Hale, 452, 380, who says, "Thus is Mr. Dalton, cap. 93, p. 241, (new edit. c. 145, p. 471,) to be understood." But a *quæ* is added in 1 Hale, 452, whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it, had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder, admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East, P. C. c. 5, s. 54, p. 284, *et seq.*, and it is observed that Mr. J. Blackstone (4 Bla. Com. 185), expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the chief justice in *Oneby's case*. (Lord Raym. 1489.) Mr. East, after reasoning in favour of the extenuation of the crime of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful, whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law." 1 East, P. C. c. 5, s. 54, p. 285.

(p) 1 Hale, 442, 452. 1 Hawk. P. C. c. 31. Reg. Young, * 8 C. & P. 644.

* Eng. Eng. Com. Law Repts. xxxiv. 564.

cipal, and of the compact; but this was considered as a severe construction by Lord Hale, who thought that the law in that case was too far strained. (g) In a very recent case, however, it was held that the seconds of both were guilty of murder. (r)

With regard to other persons who are present at a premeditated duel, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do any thing, yet if they are present and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder. (s)

Where the combat is not an act of deliberation, but the immediate consequence of sudden quarrel, it does not of course fall within the foregoing doctrine; yet in cases of this kind the law may come to the conclusion of malice, if the party killing began the attack with circumstances of undue advantage. (t) For in order to save the party making the first assault, upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defence; at least at the outset: and this more particularly when the attack is made with deadly or dangerous weapons. (u) †

Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword, and a combat ensue, in which A. is killed, this will be murder: for B., by making the pass, while his adversary's sword was undrawn, shows that he sought his blood; and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. (v)

In *Mawgridge's* case, words of anger happening, Mawgridge threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge, and wounded him; whereupon Mawgridge stabbed Mr. Cope. This was ruled to be murder; for Mawgridge, in throwing the bottle, showed an intention to do some great mischief; and his drawing immediately showed that he intended to follow his blow; and it was lawful for Mr. Cope, being so assaulted, to return the bottle. (w)

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; more especially where *there is time for cooling, and such expressions are used as manifest deliberation; as in the following case of Major Oneby:—

(g) 1 Hale, 442, where he says that the book of 22 E. 3, Coron. 262, was relied upon; but, as he thinks, the law was too far strained in that case; and in page 452, he says "some have thought it to be murder also in the second of the party killed, because done by compact and agreement. 22 E. 3, 262. *Sed qu. de hoc.*"

(r) Reg. v. Young, 8 C. & P. 644, Vaughan, J., and Alderson, B.

(s) Reg. v. Young, *supra*.

(t) Fost. 295.

(u) 1 East, P. C. c. 5, s. 25, p. 242.

(v) Fost. 295.

(w) 1 Hawk. P. C. c. 31, s. 27. Rex v. Mawgride, Kel. 128, 129, cited in Fost. 294, 296, where it is said that the judgment in this case was holden to be good law by all the judges of England, at a conference in the case of Major Oneby, 2 Lord Raym. 1485. 2 Stra. 766.

† [If a party enters a contest dangerously armed and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. *The State v. Hildreth*, 9 Iredell, 429.]

* Eng. Com. Law Repts. xxxii. 486.

Oneby's
case.

Major Oneby was indicted for the murder of Mr. Gower; and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard: when Rich, one of the company, asked if any one would set him three half-crowns: whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half-crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but it did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over:" and at the same time offered his hand to the prisoner, who made answer, "No, damn you, I will have your blood." After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "Young man! come back! I have something to say to you;" whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company, the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked upon his death-bed, whether he received his wound in a manner among swordsmen called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under those circumstances the court were of opinion that the prisoner had had reasonable time for cooling: after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. *And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke.

Though even that would not have availed the prisoner under these circumstances : for it must have been implied, according to *Mawgridge's* case, that he acted upon malice : having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him.(x)

If after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. But if a party under colour of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party, any kills the other party with such weapon ; or, if at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon ; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places ; and of one of these stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner ; who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning ; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder ; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.(y)

Use of
deadly
weapons
with previ-
ous inten-
tion.

Upon an indictment for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place between them, but no instrument was seen either before or at the time in the prisoner's hands ; Bayley, J., "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter ; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effect charged in the indictment, and with the instrument ready in his hand, in order that he might resort to it with any of the alleged intents, *then he is guilty. For if death had ensued it would have been murder.(z)

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It seems to have been considered in one case that the nature of a mutual combat might be such as to render the case one of murder. Upon an indictment for manslaughter the evidence was that the prisoner and deceased were "fighting up and down," and that the deceased died of

(x) *Rex v. Oneby*, 2 Str. 766. 2 Lord Raym. 1485.

(y) *Rex v. Anderson*, O. B. December, 1816. Richards, B., and the Recorder, thought the direction right. MS. Bayley, J. See *Rex v. Keesal*,^a 1 C. & P. 437, *post*.

(z) *Whiteley's case*, 1 Lew. 173, Bayley, J.

the injury he sustained in the fight. Bayley, J., to the jury, "Fighting up and down is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of that description, it is murder, and not manslaughter." The prisoner having been convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment.^(a)

Pretended
or counter-
feit recon-
ciliation.

Though, where there had been an old quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeited and that the hurt done was upon the score of the old malice, it is murder.^(b)

SECT. III.

Cases of Resistance to Officers of Justice, to Persons acting in their aid, and to private Persons lawfully interfering to apprehend Felons, or prevent a Breach of the Peace.

Resisting
and killing
officers.

MINISTERS of justice, as bailiffs, constables, watchmen, &c.,^(c) while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political equity; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in execution their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it: and therefore, the law will adjudge the murder, and *that the murderer had malice prepense, because he set himself against the justice of the realm: so if the sheriff or any of his bailiffs, or other officers, is killed in executing the process of the law or in doing their duty, it is murder: the same is the law as to a watchman who is killed in the execution of his office.^(d) This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo morando, et red-eundo*: and therefore if he come to do his office, and meet with great

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(a) Thorpe's case, 1 Lew. 171. "Fighting up and down," is described in Roscoe's Cr. E. 635, as "a brutal and savage practice in the north of England." It is to be remarked, that the observations of the very learned judge were quite unnecessary, as the indictment was only for manslaughter, and their correctness may well be questioned, as they are opposed to all those cases where deadly weapons have been used in mutual combat upon a sudden quarrel. See the cases, *post*, tit. *Manslaughter, Mutual Combat*. C. S. G.

(b) 1 Hale, 451.

(c) 1 Hale, 456, 460. 4 Co. 40.

(d) Cases of Appeals and Indictments, 4 Co. 40. As to the authority for acting, and the exercise of that authority, in a proper manner, see *post*, chap. iii., s. 3.

opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty, (which is a fact to be collected from circumstances appearing in evidence,) this likewise will amount to murder.(e)

A policeman is entitled to the same protection in the execution of his duty as a constable, and if he is killed in the execution of his duty it will be murder. Where, therefore, a policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he did, and then went into the street where the prisoner and many others were standing near the door, when the prisoner refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died, this would have been murder, for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty, if he had gone in, and insisted that the house should be cleared; and much more so if he was required by the landlady: and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn in the clearing of the house, and if any thing was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so, and if in so doing he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used threatening language if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place in order to get him to go home; and therefore any thing that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and therefore any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without any thing being done by the policeman.(f)

So where a policeman saw the prisoner playing the *bagpipes in a street at half past eleven o'clock at night by which he collected a large crowd round him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand on his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing.(g)

A policeman is entitled to the same protection as a constable.

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(e) Fost. 308, 309.

(f) *Rex v. Hems*,^a 7 C. & P. 312, Williams, J.

(g) *Reg. v. Hagan*,^b 8 O. & P. 167, Bolland, B., and Coltman, J.

^a Eng. Com. Law Repts. xxxii. 522.

^b Ib. xxxiv. 338.

Persons acting in their aid.

The protection which the law affords to such ministers of justice is not, as we have seen, confined to their own persons. Every one coming to their aid, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. (*h*) Nor is the protection which the law affords in these cases confined to the ordinary ministers of justice, or their assistants. It extends under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavours to apprehend felons, or those who had given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice. (*i*) A person aiding a policeman in conveying a person suspected of felony to the station house is entitled to the same protection *eundo, morando, et vedeundo* as the policeman. The deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death; it was objected that he was not at the time aiding the policeman. Coltman, J., "He is entitled to protection *eundo, morando, et redeundo*," (*j*)

Private persons. A felony must have been committed, and by the person apprehended.

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But with respect to private persons using their endeavours to bring felons to justice, it should be observed, by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within this especial protection of the law: (*k*) nor will it be extended to those who, where a felony has actually been committed, upon suspicion, possibly well founded, pursue or arrest the wrong person. (*l*) But the law is otherwise in the case of an officer acting in pursuance of a warrant. For if *A., being a peace officer, has a warrant from a proper magistrate for the apprehension of B. by name upon a charge of felony; or if B. stands indicted for felony; or if the hue-and-cry is levied against B. by name; these cases if B., though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A., or any person joining in the hue-and-cry, the person so killing will be indemnified; and, on the other hand, if A., or any person joining in the hue-and-cry, is killed by B., or any of his accomplices joining in that outrage, such killing will be murder; for A. and those joining with him were in this instance in the discharge of a duty required from them by the law; and, in case of their wilful neglect of it, subject to punishment. (*m*)

General rule.

Upon these principles it may be laid down as a general rule, that where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will

(*h*) 1 Hale, 462, 453. Fost. 309.

(*i*) Fost. 309.

(*j*) Reg. v. Phelps, Gloucester Sum. Ass. 1841. MS. C. S. G. S. C. 1 C. & Mars. 180. See the Sissinghurst-house case, *post*, p. 537.

(*k*) Cro. Jac. 194. 2 Inst. 52, 172.

(*l*) 1 Hale, 400. Fost. 318.

(*m*) Fost. 318.

be murder in all who take a part in such resistance; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that resistance be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder.(n) And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him will be guilty of murder.(o) But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the king's name to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it:(p) unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed.(q) As if A., B., and C., be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C. not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C.(r) Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it of manslaughter only.(s)

But it must be well remembered, that this protection of the law is extended only to persons who have authority to arrest or imprison, and who use such authority in a proper manner; and that questions of much nicety and difficulty will often arise upon the points of authority, legality of process, notice, and regularity of proceeding. The consideration of these points will be attempted *in a subsequent part of the work; for as the consequences of defects in any of these particulars will generally be to extenuate the crime of killing, and reduce it to manslaughter, the discussion of them will perhaps be better introduced in the chapter relating to that species of homicide.(t)

With respect to the persons who shall be considered as taking a part in the resistance, it may be observed, that if the party who is arrested yield himself and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him, kill any of the bailiffs, this is murder in them, but not in the party arrested; but not so if he do any act to countenance the violence of the rescuers.(u) And where Jackson and four others, having committed a robbery, were pursued by the country upon hue-and-cry, and Jackson turned upon his pursuers, (others of the robbers being in the same field, and having often resisted the pursuer,) and refusing to yield, killed one of the pursuers; it was held, that inasmuch as

(n) Fost. 270, 271. 1 Hale, 494. 3 Inst. 56. 2 Hale, 117, 118.

(o) 1 Hawk. P. C. c. 31, s. 48, 54.

(p) Fost. 272.

(q) 1 Hawk. P. C. c. 31, s. 49, 50.

(r) 1 Hale, 438.

(s) 1 Hale, 446.

(t) Post, chap. iii., s. 3.

(u) Sir Charles Stanley's case, Kel. 87. See Rex v. Whithorne, 3 C. & P. 394, post, p. 543.

all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from Jackson, were principals, viz., present, aiding and abetting: and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty unless it could be proved that after he was apprehended he had animated Jackson to kill the party. (*v*)

If a man be arrested, and he and his company endeavour a rescue, and while they are fighting, one who knows nothing of the arrest coming by, act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequences of joining in any unlawful act, such as fighting; and his ignorance will not excuse him where the fact is made murder by the law without any actual precedent malice, as in the case of killing an officer in the due execution of his office (*w*) But it should be observed, that, in another report of the same case, it is said to have been resolved, that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, *with intent to prevent mischief*, it would not have been murder in such person, though the bailiff's assistant were killed by one of the rescuers; (*x*) and it should seem that, in a case of this kind, the material inquiry would be, whether the stranger interfered with the intention of preserving the peace and preventing mischief; for if he interposed for the express purpose of aiding one party against the other, he must abide the consequence at his peril. (*y*)

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A. beat B. a constable, who was in the execution of his office, and they were parted; and then C., a friend of A., rushed suddenly in, took up the quarrel, fell upon the constable, and killed him in the struggle; but A. was not engaged in this after he was parted *from B. And it was holden by two judges, that this was murder only in C.; and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to abuse the constable. (*z*) But if a man begin a riot, and the same riot continue, and an officer be killed, he that began the riot would, if he remained present at it, be a principal murderer, though he did not commit the fact. (*a*)

Sissinghurst-house case.

A great number of persons assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A., and divers other persons unknown, who were altogether in *Sissinghurst-house*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A., with the rest of the offenders that were then in the house; and one of the persons within came, and read the warrant, but denied

(*v*) Jackson's case, 1 Hale, 464, 465.

(*w*) Sir Charles Stanley's case, Kel. 87.

(*x*) Rex v. Sir Charles Stanslie and Andrews, 1 Sid. 160. MS. Burnet *accord.* as cited in 1 East, P. C. c. 5, s. 63, p. 296.

(*y*) 1 East, P. C. c. 5, s. 83, p. 318.

(*z*) By Holt, C. J., and Rooksby, at Hertford, temp. Will. 3. *ad incipium*. MS. Tracey, 53. 1 East, P. C. c. 5, s. 63, p. 296: and see also Fost. 353.

(*a*) Reg. v. Wallis and others, 1 Salk. 334.

admission to the constable, or to deliver A. or any of the malefactors; but, going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away; and being about five rods from the door, B., C., D., E., F., &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G. that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined.

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Mackally's* case. (b)

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not at all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counseled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were in the same instant. (c)

*4. That there was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, the constable commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

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5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who came to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

(b) 9 Co. 67 b.

(c) Vide Lord Dacre's case, 1 Hale, 439. The Lord Dacre and divers others came to shoot deer in the park of one Pelham. Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; and it was ruled that it was murder in them all, and they died for it. *Crompt. 25, a Dalt. c. 146, p. 472. 34 Hen. 8, B. Coron. 172. See also Moor, 86. Kely, 56.*

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty, and acquitted those within; not because they were absent, but because there was no clear evidence that they consented to the assault as the jury thought; and therefore judgment was given against the nine to be hanged.(d)

SECT. IV.

Cases where the Killing takes place in the Prosecution of some other Criminal, Unlawful, or Wanton Act.

IF an action, unlawful in itself, be done deliberately and with intention of mischief or great bodily harm to particular individuals or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.(e)

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Particular
malice to
one indi-
vidual fall-
ing upon
another.

*Under this head may be mentioned the case of particular malice to one individual falling by mistake or accident upon another, which, by the ignorance or lenity of juries, have been sometimes brought within the rule of accidental death. But though, in a loose way of speaking, it may be called accidental death when a person dies by a blow not intended against *him*, the case is considered by the law in a very different light. Thus, if it appears from circumstances that the injury intended to A., whether by poison, blow, or any other means of death, would have amounted to murder if he had been killed by it, it will amount to the same offence if B. happen to fall by the same means; (f) so that if C., having malice against A., strikes at and misses him, but kills B., this is murder in C.:(g) and upon the same principle, if B. and B. engage in a deliberate duel, and a stranger coming between them to part them is killed by one of them, it is murder in the party killing.(h) And it has also been resolved, that where A. had malice against D., the master of

(d) *Sissinghurst-house case*, 1 Hale, 461, 2, 3. The award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgments given in the King's Bench have commonly been, *Et dictum est marescallo, &c., quod faciat executionem periculo incumbente.*

(e) Fost. 261.

(f) *Id. ibid.* 1 Hale, 441. *Williams' case*, 1 Hale, 469, which Holt, C. J., thought would have been a case of murder, if the indictment had been so laid. See *Mawgridge's case*, Kel. 131.

(g) 1 East, P. C. c. 5, s. 17, p. 230.

(h) 1 Hale, 441. *Dalt. c. 145, p. 472.* It appears to have been holden in such a case, where the combating was by malice prepense, that the killing of the person who came to part them was murder in both the combatants, 22 Edw. 3, *Coron. 262.* *Lambard out of Dallison's Report*, p. 217. But Lord Hale thinks that this is mistaken, and that it is not murder in both, unless both struck him who came to part them; and says that by the book of 22 Ass. 71, *Coron. 180* (which seems to be the same case more at large) he only that gave the stroke had judgment, and was executed. 1 Hale, 441, to which this note is subjoined; "the other does not appear to have been before the court: but, upon putting the case, the court said, he that struck is guilty of felony, but said nothing as to him who did not strike."

B., and assaulted him, and upon B. the servant coming to the aid of his master, A. killed B., it was murder in A. as much as if he had killed the master. (i) So, where A. gave a poisoned apple to his wife, intending to poison her, and the wife, ignorant of the matter, gave it to a child, who took it and died; this was held murder in A., though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child. (j) And upon the same principle, it was held to be murder where A. mixed poison in an electuary sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. (k) Doubt was entertained, because the apothecary, of his own hand, without incitement from any one, not only partook of the electuary, but mingled it together, so as to incorporate the poison, and make its operation more forcible than the mixture as made by the wife of A.: but the judges resolved that she was guilty of murder; for the putting the poison into the electuary was the cause of the death: and if a person prepares poison with intent to kill any reasonable creature, such person is guilty of the murder of whatever reasonable creature is killed thereby. (l) So if A. put poison into wine, with intent to kill B., and C. drinks thereof and dies, A. is guilty of the murder of C.; and it makes no difference that the wine, unless stirred up, would not have killed C., and that C., thinking there was sugar in it stirred it up. (m)

*So where a person gave medicine to a woman to procure an abortion, (n) and where a person put skewers into the womb of a woman for the same purpose, (o) by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the woman was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.

There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, full where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder. (p) Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder. (q) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. (r) And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against

(i) 1 Hale, 438.

(j) Saunders' case, Plowd. 474. 1 Hawk. P. C. c. 31, s. 45. 1 Hale, 436.

(k) Gore's case, 9 Co. 81. 1 Hawk. P. C. c. 31, s. 45. 1 Hale, 436.

(l) *Ante*, note (k).

(m) 9 Co. 81, b. See Reg. v. Michael, Moo. C. C. R. 120, *post*.

(n) 1 Hale, 429.

(o) Tinckler's case, 1 East, P. C. c. 5, s. 17, p. 230, and 124, p. 354.

(p) 1 Hale, 475. 1 East, P. C. c. 5, s. 18, p. 231.

(q) 1 Hale, 476. 4 Bla. Com. 200. 1 Hawk. P. C. c. 29, s. 12. 1 East, P. C. c. 5, s. 18, p. 231. Hawkins, speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder, though the rider intended no more than to divert himself by putting the people into a fright. 1 Hawk. P. C. c. 31, s. 68, and see *ante*, p. 495.

(r) 4 Bla. Com. 200.

any particular individual: for it is no excuse that the party was bent upon mischief generally.(s)

Death from an unlawful act done with felonious intent.

Whenever an unlawful act, an act *malum in se*, is done in prosecution of a *felonious* intention, and death ensues, it will be murder: as if A. shoot at the poultry of B., intending to steal poultry, and by accident kill a man, this will be murder by reason of the felonious intention of stealing.(t) And it was held, that if such offenders as were mentioned in the statute *De malefactoribus in parcis*,(u) killed the keeper, &c., it was murder in all, although it appeared that the keeper ordered them to stand, assaulted them first, and that they fled, and did not turn till one of the keeper's men had fired and hurt one of their companions.(v)

Death from an act intending bodily harm,

Also, where the intent is to do some great *bodily harm* to another, and death ensues, it will be murder; as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequences, He beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.(w) So if a large stone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him, *or any other, this is murder.(x) If a wrongful act, (an act which the party who commits it can neither justify nor excuse,) be done under circumstances which show an intent to kill, or do any serious injury, or any general malice, the offence is murder.(y) But the nature of the instrument, and the manner of using it, is calculated to produce great bodily harm or not, will vary the offence in all such cases.(z)

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Upon an indictment for murder it appeared that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest; and that while he was there asleep the prisoner covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death: there was no evidence of express malice, but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with any thing short of design. Patterson, J, adverted to the fact of there being no evidence of express malice, but told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter.(a)

Where several join to do an unlawful act.

Where divers persons resolve generally to *resist all opposers* in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must

(s) 1 Hale, 475. 3 Inst. 57. 1 East, P. C. c. 5, s 18, p. 231.

(t) Fost. 258, 569. See *Rex v. Smithies*,^a 5 C. & P. 332, where the prisoner was convicted of murder in causing a death by setting fire to his own house.

(u) 21 Edw. 1, st. 2, now repealed by 7 & 8 Geo. 4, c. 27. 1 Hale, 491.

(v) 1 East, P. C. c. 5, s. 31, p. 226, citing 1 MS. Sum. 145, 175. Sum. 37, 46. Palm. 542. 2 Roll. Rep. 120.

(w) Fost. 259.

(x) 1 Hale, 440, 441.

(y) *Per* Tindal, C. J., Fenton's case, 1 Lewin, 179. See the case, *post*.

(z) Kel. 127. 1 East. P. C. c. 5, s. 32, p. 257.

(a) Errington's case, 2 Lewin, 217.

^a Eng. Com. Law Reps. xxiv. 345.

when they engage in such bold disturbances of the public peace, at their peril abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are all guilty of murder.(b) But it should be observed, that in order to make the killing by any murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened.(c)

And it should also be observed, that the fact must appear to have been committed strictly *in prosecution of the purpose for which the party was assembled*; and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connexion with the crime in contemplation.(d) So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon *that act, and as it appeared that only one of them intended any injury to the person killed, the judges were of opinion that the other could not be guilty, either as principal or accessory; and he was acquitted.(e)

In a case where a party of smugglers were met and opposed by an officer of the crown, and during the scuffle which ensued a gun was discharged by a smuggler, which killed one of his own gang, the question was, whether the whole gang were guilty of this murder; and it was agreed by the court, that if the king's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed.(f) The point upon which this case turned was, discharged *in prosecution of the purpose for which the party was assembled*.(g) In another case the prisoners were hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons; and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse; and, while they were fighting in the street, one of the company, but which of them was not known, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was, whether this was murder in all the company; and

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(b) 1 Hawk. P. C. c. 31, s. 51, Staundf. 17. 1 Hale, 439, *et seq.* 4 Bla. Com. 200. 1 East, P. C. c. 55, s. 33, p. 257.

(c) 1 East, P. C. c. 5, s. 34, p. 259.

(d) 1 Hawk. P. C. c. 31, s. 52. Post. 351. And see the charge of Foster, J., on a special commission for the trial of Jackson and others, at Chichester, 9 St. Tri. (ed. by Hargr.) 715, *et seq.*

(e) 1 Hawk. P. C. c. 31, s. 52.

(f) Plummer's case, Kel. 109.

(g) Post. 352, and see Mansell and Herbert's case, 1 Hale, 440, 441, cited from Dy. 128 b.

Holt, C. J., and Pollexfen, C. J., were of opinion that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed and commanded them to keep the peace; especially as the manner in which they originally assembled, namely, with offensive weapons and in a riotous manner, was contrary to law. (*h*) But the majority of the judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act. (*i*) And it seems that this opinion proceeded upon the ground that there was no evidence to show that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was given in prosecution of the purpose for which the party was assembled. (*j*)

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In these cases it seems that it is a question for the jury whether the act done was in prosecution of the purpose for which the party was assembled, or independent of it and without any previous concert. The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed their guns at the keepers, saying they would shoot them; a shot was then fired, which wounded a keeper, but no other shot was fired; it was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired, instead of the whole number. Vaughan B., "That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the gamekeepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it." (*k*) Two private watchmen seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with; Garrow, B., "To make the prisoner a principal, the jury must be satisfied that when he and his companion went out with a common illegal purpose of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment,

(*h*) They cited *Stamf. 17, 40. Fitz. Cor. 350. Crompt. 244.*

(*i*) *Rex v. Hodgson and others*, 1 Leach, 7. See *Plummer's case*, *ante*, note (*f*). 12 Mod. 629. *Thompson's case*, Kel. 66. *Anon.* cited by Holt, C. J. 1 Leach, 7, note (*a*), and a case *Anon.* 1 Mod. 165. See also *Keilw. 161*, and *Borthwick's case*, Dougl. 202.

(*j*) 1 East, P. C. c. 5, s. 33, p. 258, 259; and see the remarks of Lord Hale upon the case of *Mansell and Herbert* (*Dy. 128 b.*) in 1 Hale, 440, 441.

(*k*) *Rex v. Edmeads*, 3 C. & P. 390.

without any previous concert, the prisoner will be entitled to an acquittal." (l)

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them, after they had gone a little distance, returned and stole his money, it was holden that he alone was guilty of stealing. (m) Where two poachers were apprehended by some gamekeepers, and being in custody, called out to one of their companions, who came to their assistance and killed one of the gamekeepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so, if the two had acquiesced and remained passive in custody. (n)

Where four poachers were met by a keeper and his assistant, and after some words had passed, three of them ran in upon the keeper, knocked him down and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, "Dam'em, we've done'em;" and when they got two or three paces beyond him, one of them turned back and wounded the keeper in the leg, and then the men set off and ran away; Bolland, B., told the jury if they thought the prisoners were acting in concert; they were all equally guilty of inflicting the wound. (o)

*Where upon an indictment for maliciously cutting, the question was, how far one prisoner was concurring in the act of the other; Park, J., told the jury that "if three persons go out to commit a felony, and one of them unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out." (p)

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SECT. V.

Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Proper Authority.

DUE caution should be observed by all persons in the discharge of the business and duties of their respective stations, lest they should proceed by means which are criminal, or improper, and exceed the limits of their authority. This will more especially require the attention of officers of justice; and should be kept in mind by those who have to administer correction *in foro domestico*, and by persons employed in those common occupations from which danger to others may possibly arise.

(l) *Rex v. Collison*,^a 4 C. & P. 565. See the observations of Littledale, J., in *Reg. v. Howell*,^b 9 C. & P. 450.

(m) *Rex v. Hawkins*,^c 3 C. & P. 392, Park, J. A. J.

(n) *Rex v. Whithorne*,^d 3 C. & P. 394, MSS. C. S. G. Vaughan, B. See *ante*, p. 536, notes (u) and (v).

(o) *Rex v. Warner*,^e R. & M. C. C. R. 380. S. C. 5 C. & P. 525.

(p) *Duffey's case*, 1 Lew. 194. See *Macklin's case*, 2 Lew. 225, per Alderson, B., *post*.

^a Eng. Com. Law Repts. xix. 529.

^b Id. xxxviii. 179.

^c Id. xix. 365.

^d Id. xiv. 366.

^e Id. xxiv. 438.

Officers of justice acting improperly.

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It has been shown in a former part of this chapter, (b) that *ministers of justice*, when in the execution of their offices, are specially protected by the law: but it behooves them to take care that they do not misconduct themselves in the discharge of their duty, on pain of forfeiting such protection. Thus, though in cases civil or criminal, an officer may re- pel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence: (c) yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. (d) And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. (e) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken; (f) yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder. (g) So, in civil suits, if the party against whom the process has issued, fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or *out of custody in execution for debt, and the officer not being able to overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it will amount to murder. (h) And also in the case of impressing seamen, if the party fly, it is conceived that the killing by the officer in the pursuit to overtake him would be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors: paying attention nevertheless, to those usages which have prevailed in the sea service in this respect, so far as they are authorized by the courts, which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. (i)

If an officer make an arrest out of his proper district, (except as he may be authorized by the Act 5 Geo. 4, c. 18,) or if another have no warrant of authority at all, he is no legal officer, nor entitled to the special protection of the law; and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner without any such pretence would be guilty to that extent. (k) Thus where a warrant had been directed from the Admiralty to Lord Danby to impress seamen, and on Browning, his servant, without any warrant in writing, (l) im-

(b) *Ante*, 532, *et seq.*

(d) 4 Bla. Com. 180.

(f) 1 Hale, 481. 4 Bla. Com. 179. Fost. 271.

(h) 1 Hale, 481. Fost. 271. 1 East, P. C. c. 5, s. 74, p. 306, 307. Laying hold of the prisoner, and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest. *Horner v. Battyn* and another, Bull. N. P. 62, and see 1 East, P. C. c. 5, s. 68, p. 300. But see *Arrowsmith v. Le Mesurier*, 2 N. R. 211, and *Berry v. Adamson*, 6 B. & C. 528.

(i) 1 East, P. C. c. 5, s. 75, p. 308. *Borthwick's case*, Dougl. 207.

(k) 1 East, P. C. c. 5, s. 78, p. 312.

(l) A verbal delegation of the power to impress seamen was held bad in *Borthwick's case*, Dougl. 207, though it appeared to be the usage of the navy, and that the petty officers had usually acted without any other authority than such verbal orders. But the usage was considered as directly repugnant to the laws of the land.

* Eng. Com. Law Repts. xiii. 245.

(c) *Ante*, 535.

(e) 1 East, P. C. c. 5, s. 63, p. 297.

(g) Fost. 271. 1 Hale, 481.

pressed a person who was no seaman, and upon his trying to escape, killed him, it was adjudged murder.^(m) And where the captain of a man of war had a warrant of impressing mariners, upon which the deputation was indorsed in the usual form to the lieutenant; and the mate with the prisoner Dixon, and some others, but without either the captain, or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife which he held in his hand, Dixon, with a large walking stick, about four feet long and a great knob at the end of it, gave How a violent blow at the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts; first, because neither the captain nor lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful, therefore, under these circumstances, for How to defend himself; and Dixon, killing him, in consequence of an unlawful capture and detention, was murder.⁽ⁿ⁾ So if a court martial order a man to be flogged where they have no jurisdiction, *and the flogging kills the man, the members who concurred in that order are guilty of murder.^(o) #516

It is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. M'Donald, C. B., Rooke and Lawrence, Js., were clear that this was murder, as the person who appeared as a ghost was only guilty of misdemeanor; and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the court said that they could not receive that verdict, and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced: but the prisoner was afterwards relieved.^(p)

Gaolers and their officers are under the same special protection as other ministers of justice: but in regard to the great power which they have, and, while it is exercised in moderation, ought to have, over their prisoners, the law watches their conduct with a jealous eye. If, therefore, a prisoner under their care die, whether by disease or accident, the coroner upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol; and there, upon view of the body, make inquisition into the cause of death; and if the death was owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress.^(q) The person *guilty* of such duress will be the party

(m) O. B. 13th Oct. 1690, Rokeby's MSS. cited in Serjt. Foster's MSS., and in 1 East, P. C. 312.

(n) Dixon's case, Kingst. Ass. 1756, *cor.* Dennison, J. (said to be 1758, in Serjeant Foster's MSS.,) cited in 1 East, P. C. c. 5, s. 80, p. 213.

(o) By Heath, J., in *Warden v. Bailey*, 4 Taunt. 77.

(p) *Rex v. Smith*, O. B. Jan., 1804. MSS., Bayley, J. 4 Bla. Com. 201, n

(q) *Fost.* 321. 1 Hale, 465.

liable to prosecution, because, though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the default of the deputy; yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults.(r)

A gaoler knowing that a prisoner infected with the small pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the gaoler had notice, caught the distemper, and died of it; this was holden to be murder.(s)

Case of
Huggins
and
Barnes.

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Huggins was warden of the Fleet prison, with power to execute the office of deputy, and appointed one Gibbon, who acted as deputy. Gibbon had a servant, Barnes, whose business it was to take care of the prisoners, and particularly of one Arne; and Barnes put Arne into a new built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, *chamber-pot, or other necessary convenience, for forty days, when he died. It appeared that Barnes knew the unwholesome situation of the room, and that Huggins knew the condition of the room fifteen days at least before the death of Arne, as he had been once present at the prison, and seen Arne under such duress of imprisonment, and turned away; at which time Barnes shut the door of the room, in which Arne continued till he died. It was found that Arne had sickened and died by duress of imprisonment, and that during the time Gibbon was deputy, Huggins sometimes acted as warden. Upon these facts the court were clearly of opinion that Barnes was guilty of murder. But they thought that Huggins was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that Huggins knew that his situation was occasioned by the improper treatment, and that he consented to the continuance of it: and they said, that it was material that the species of duress, by which the deceased came to his death, could not be known by a bare looking-in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life; and it was likewise material that no application was made to Huggins, which perhaps might have altered the case. And the court seemed also to think, that as Barnes was the servant of Gibbon, and Gibbon had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy.(t)

Duty of
officers in
the execu-
tion of
criminals.

With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, *that the execution ought not to vary from the judgment*; for if it doth, the officer will be guilty of felony at least if, not of murder.(u) And in conformity to this rule it has been holden, that if the judgment be to be hanged, and the officer behead the party; it is murder;(v) and that even the king cannot change the punishment

(r) Fost. 322. *Rex v. Huggins and Barnes*, 2 Str. 882. See *Rex v. Allen*,^a 7 C. & P. 153, and *Rex v. Green*,^b 7 C. & P. 156, *post*.

(s) Fost. 322, referring to the case of *Castell v. Bambridge and Corbet* (an appeal of murder,) 2 Str. 854.

(t) *Rex v. Huggins and Barnes*, 2 Str. 882. 2 Lord Raym. 1574. Fost. 322. 1 East, P. C. c. 5, s. 92, p. 331, 332.

(u) 1 Hale, 501. 2 Hale, 411. 3 Inst. 52, 211. 7 Blac. 179.

(v) 1 Hale, 433, 454, 466, 501. 2 Hale, 411. 3 Inst. 52. 4 Bla. Com. 179.

^a Eng. Com. Law Reps. xxxii. 475.

^b *Ib.* 477.

of a law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the king may remit the rest.^(w) But others have thought more justly that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law;^(x) and that though the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it; and accordingly that an officer, acting upon a warrant from the crown for beheading a person under sentence of death for felony, would not be guilty of any offence.^(y) But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority.^(z)

Parents, masters, and other persons having authority *in foro domestico* may give reasonable correction to those under their *case; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case.† Where the fact is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, his belly stamped upon, and so killed, it will be murder.^(zz) Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, "I may as well work there, as with such a master;" upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction.^(a)

If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw

(w) 3 Inst. 52. 2 Hale, 412. (x) Fost. 270. F. N. B. 244, h. 19 Rym. Fœd. 284.

(y) Fost. 268. 4 Bla. Com. 405. 1 East, P. C. c. 5, s. 96, p. 335.

(z) It was, however, the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire *till they were dead*. Fost 268. The 30 Geo. 3, c. 48, now directs that they shall be hanged as other offenders.

(zz) 1 Hawk. P. C. c. 29, s. 5. 1 Hale, 453, 473. Rex v. Keite, 1 Lord Raym. 141.

(a) Rex v. Grey, Kel. 64. Fost. 262.

† [The master has not the right to slay his slave, or to inflict what the law calls great bodily harm, to wit, maiming or dismembering him; and the slave has a right to defend himself against unlawful attempts. *Jacob v. The State*, 3 Humphreys. 483. The right of the master to the obedience and submission of his slave in all lawful things is perfect, and the power belongs to the master, to inflict any punishment on his slave not affecting life or limb, which he may consider necessary for the purpose of the keeping of him in such submission and enforcing such obedience to his commands; and if in the exercise of it, with or without cause, the slave resist and slay his master, it is murder and not manslaughter, because the law cannot recognise a violence of the master as a legitimate cause of murder. *Ibid.*]

the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred,^(b) and the act will amount to murder from its gross impropriety.^(c) So if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder.^(d) The act is wilful and deliberate, and manifests a heart regardless of social duty.^(e)

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*SECTION VI.

Of the Indictment, Trial, &c.(A)Indict-
ment.

ALTHOUGH the prisoner may be charged with murder by the *inquisition of the coroner*, it is usual also to prefer an *indictment* against him. And it is said to be proper to frame an indictment for the offence of murder in all cases where the degree of the offence is at all doubtful;^(f) and unquestionably where there is any reasonable ground for supposing that the facts, as they will be given in evidence, may lead to the conclusion of the higher offence having been committed, it will be culpable not to prefer an indictment for murder.

With respect to the place in which the indictment is to be preferred, it will be necessary to state some of the legislative enactments by which trials for murder are regulated.

In what
place the
offender
must be
indicted.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county:^(g) [1] but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted, that the trial should be in the county where the death happened. That

(b) *Ante*, p. 540.

(c) 3 Inst. 57. 4 Bla. Com. 192. 1 East, P. C. c. 5, s. 38, p. 262.

(d) 1 Hale, 475. Fost. 263. 1 East, P. C. c. 5, s. 38, p. 262.

(e) Fost. 263.

(f) 1 East, P. C. c. 5, s. 105, p. 340.

(g) 2 Hawk. P. C. c. 25, s. 36. 1 East, P. C. c. 5, s. 128, p. 361.

(A) PENNSYLVANIA.—In an indictment for murder it is not necessary so to describe the offence, as to show whether it be murder of the first or second degree, nor that the indictment should conclude against the form of the act of assembly. *White v. Commonwealth*, 6 Binn. 179. Nor is it necessary that an indictment for murder should charge it to have been committed by a wilful, deliberate and premeditated killing, as expressed in the act of assembly. *Commonwealth v. Joyce & al.* cited in the above case, 6 Binn. 288.

When a statute creates an offence, the indictment must charge it as being done against the form of the statute; but when the statute only inflicts a penalty upon that which was an offence before, it need not be against the form of the statute, because in truth the offence does not violate the statute. So decided in the case of *Commonwealth v. Searls*, 2 Binn. 339. 6 Binn. 182.

The omission of the technical epithets, feloniously, wilfully, and of malice aforethought, as applied to the manner of killing, in an indictment for murder, is fatal. The indictment stated that the assault was made feloniously, wilfully, &c., but did not allege, that the striking, kicking, &c., (which constituted the manner of killing in that case,) were done feloniously, wilfully, &c. *Commonwealth v. Honeyman*, 2 Dall. 288

The words "languishing did live," in an indictment for murder, are not a material part of the indictment, and may be struck out. *Pennsylvania v. Bell*, Addis. 171, 173.

[1] {By statute of 1795, c. 45, (Massachusetts) when any person is feloniously struck, poisoned, or injured in one county, and dies of the same stroke, &c., in another county—and when any person is struck, &c., on the high seas, without the limits of the state, and dies of

statute was, however, repealed by the 7 Geo. 4, c. 64, the twelfth section of which "for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another," enacts, "that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein." The ninth section also enacts as to the trial of accessories before the fact, "that in case the principal felony shall have been committed within the body of any county, and the offence of counseling, &c. shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, &c., in either of such counties." So with respect to the trial of accessories after the fact, the tenth section enacts, "that in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties."

7 Geo. 4, c. 64, s. 12, principals.

Sec. 9. Accessories before.

Sec. 10. Accessories after.

It has been held under section 12, that where the blow is given in one county, and the death takes place in another, the trial may be in the latter county. Upon an indictment for manslaughter, found by the grand jury of the county of the city of Worcester, *alleging the blow which caused the death to have been struck in the county of Worcester, it was objected that the words "began in one county and completed in another," did not apply to such a case, as the word "completed" necessarily imported some active and continuing agency in the person committing the offence in the county where the felony was completed; but it was held that the clause did extend to this case.(h)

*550

The twelfth section only applies to trials in counties, and does not extend to limited jurisdiction within counties. Where, therefore, a larceny was committed in the city of London, but within five hundred yards of the boundary of the county of Surrey and of the borough of Southwark; it was held that the offence could not be tried by the quarter sessions for the borough of Southwark.(i)

If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest.(j)

(h) *Rex v. Jones*, Worcester Lent Ass. 1830, *Jervis, K. C.*, MSS. C. S. G. Mr. Bellamy, the clerk of arraigns, had consulted Mr. J. Littledale about this case, and he thought that the indictment ought to be preferred in the city, and it had been so preferred accordingly. C. S. G.

(i) *Rex v. Welsh, R. & M. C. C. R.* 175.

(j) 2 Hale, 66. 1 MSS., Sum. 53. 1 East, P. C. c. 5, s. 127, p. 361.

the same stroke, &c., in the state—the offender may be indicted and tried in the county where the death happens.

This statute is not repugnant to the declaration in the constitution of the state, that "in criminal prosecutions the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, &c., of the citizen." 2 Pick. 550, *Commonwealth v. M. & W. Parker.*

[Where a deadly blow is struck in one county and the party struck dies thereof in another county, the offence will be held to have been committed in the county in which the blow was struck, and the offender must be indicted in such county. *Riley v. The State*, 9 Kemp. 646.

If a mortal blow be struck in one county, and death takes place therefrom in another, the offender may be indicted and tried in the latter. *Nash v. The State*, 2 Greene, 286.]

It has recently been held that a coroner has no jurisdiction to hold an inquest, in a case of an accidental death where the cause of death occurred out of his jurisdiction, (i. e. in a county, he being the coroner for a borough,) although the death took place within his jurisdiction. (*jj*) But see now the 6 & 7 Vict. c. 12.

Trial when the murder is committed in Wales.

By the 26 Hen. 8, c. 6, it is enacted, that murder and other felonies committed in Wales may be inquired of and tried upon an indictment in the next adjoining English county where the king's writ runneth: and Herefordshire has been holden to be the next adjoining English county to South Wales, and Shropshire to North Wales: (*k*) but it has been considered as a doubtful point in what place the trial ought to be, supposing the stroke given in an English county, and the death in Wales. (*l*)

There is also statutes which relate to the trial of murder, and other offences which have been committed upon the sea, and either within the king's dominions or without.

When it is committed upon the sea, or in any haven, &c., where the admiral has jurisdiction; or in foreign parts.

The 28 Hen. 8, c. 15, s. 1, enacts, that all felonies, murders, &c., committed upon the sea, or in any haven, creek, river, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, &c., in such shires and places in the realm as shall be limited by the king's commission, in like form as if such offences had been committed upon the land. The proceedings upon this statute and the extent of the Admiralty jurisdiction have been already considered: (*m*) it may, however, be again mentioned in this place, that by the 15 Rich. 2, c. 3, the admiral has jurisdiction given to him to inquire "of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, only beneath the bridges of the same rivers, nigh to the sea, and in none other places of the same places." In a case at the Admiralty session, of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made, whether the place where the murder was committed was *to be considered as within the limits to which commissions granted under the 28 Hen. 8, c. 15, extend by law: and upon reference to the judges, they were unanimously of opinion that the trial was properly had. (*n*) [1]

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(*jj*) Reg. v. The Grand Western Railway Company, E T. 1842. 11 Law J., N. S. Mag. C. P. 15.
(*k*) Athos case, (father and son,) 8 Mod. 136. Parry's case, 1 Leach, 108. 1 Stark. Cr.

(*l*) 1 East, F. C. c. 5, s. 129, p. 363, *et seq.* where see a learned argument upon this point. And see also 1 Stark. Cr. Pl. 14, 15.

(*m*) *Ante*, p. 100.

(*n*) Rex v. Bruce, 2 Leach, 1093, *ante*, p. 100.

[1] The statute of the United States, 1790, c. 36, § 8, (1 U. S. Laws, 84, Story's ed.) enacts, "that if any person shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, &c., which if committed within the body of a county, would, by the laws of the United States, be punishable with death—every such offender, being convicted thereof, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

Under this statute, the death, as well as the mortal stroke, &c., must happen on the high seas, &c.,—if the death occurs on shore, the federal courts have no jurisdiction of the offence. 4 Dallas, 426, *United States v. M'Gill*. The "high seas," in this statute, mean any waters on the sea coast which are without the boundaries of low water mark; the courts of the United States, therefore, have cognizance of the offences mentioned in the statute, though committed in an open roadstead, adjacent to a foreign territory, and within half a mile of

By the 46 Geo. 3, c. 54, all murders and other offences committed ^{46 Geo. 3, c. 54.} upon the sea, or in any haven, river, &c., where the admiral has jurisdiction, may be inquired of and tried according to the common course of the laws of the realm, used for offences committed upon the land within the realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under the king's commission; and the commissioners are to have the same powers for such trial within any such island, &c., as any commissioners appointed under the 28 Hen. 8, c. 15, would have for the trial of offences within ^{57 Geo. 3, c. 53.} the realm. The provisions of this act are extended by the 57 Geo. 3, c. 53, to murders and manslaughters committed in places not within his majesty's dominions. It enacts, that murders and manslaughters committed on land at the settlement in the Bay of Honduras, by any person residing or being within the settlement, and in the islands of New Zealand and Otaheite, or within any other islands, countries, or places not within his majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in and belonged to, and have quitted any British ship or vessel to live in any of the said islands, &c., or that shall be there living, may be tried and punished in any of his majesty's islands, plantations, colonies, &c., by the king's commission, issued by virtue of the 46 Geo. 3, c. 54, in the same manner as if such offences had been committed upon the high seas. (o)

(o) 57 Geo. 3, c. 53, s. 1. The second section provides, that the act shall not be construed to repeal the 33 Hen. 8, c. 24. And see further as to the trial of offences committed on land in the Bay of Honduras, the 59 Geo. 3, c. 44.

the shore. 1 Gallison, 624, *United States v. Ross*. But this statute does not confer on the courts of the United States jurisdiction of the offences committed on the waters of a state, where the tide ebbs and flows. 3 Wheat. 336, *United States v. Bevans*.

The courts of the United States have jurisdiction of murder, &c., committed on the high seas, although not committed on board a vessel of the United States; as if she has no national character, but is held by pirates not lawfully sailing under the flag of any foreign nation. If the offence be committed on board of a foreign vessel, by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board a piratical vessel, the offence is equally cognizable by the courts of the United States. 5 Wheat. 412, *United States v. Holmes and others*. 5 Wheat. 184, *et seq. United States v. Pirates*. But they have not jurisdiction of a murder committed by one foreigner on another foreigner, on board a foreign vessel on the high seas. 5 Wheat. 184, *et seq.*

By § 12 of the above mentioned statute it is enacted that if any seaman or other person shall commit manslaughter upon the high seas, &c., &c., such person, being thereof convicted, shall be imprisoned, &c.

Under this section, the courts of the United States have no jurisdiction of manslaughter committed by the master upon one of the crew on board a merchant vessel of the United States, lying in the river Tigris, 35 miles above its mouth, 100 yards from the shore, below water mark. The description of places in § 8, cannot be transferred to § 12, so as to give jurisdiction of manslaughter committed in the river of a foreign country, and not on the high seas. 5 Wheat., *United States v. Wittberger*. See S. C., 3 Wash. C. C. Rep. 515. See *post*, 464.

The statute of 1825, c. 276, § 5, (3 U. S. Laws, 2000, Story's ed.) has given jurisdiction to the courts of the United States, of offences committed on board a ship belonging to a citizen of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any of the company of the ship, or any passenger, in the same manner as if the offence had been committed on the high seas—with a proviso, that a trial for the offence in a competent court of such foreign state or sovereign, shall exempt the offender from another trial in a court of the United States.

The 6th, 7th, 8th, and 22d sections of the statute provide for the punishment of divers offences committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state."

In this statute, the words "high seas," mean the unenclosed waters of the ocean on the

10 & 11 W
3, c. 25. With respect to murders and other capital crimes committed in Newfoundland and the isles thereto belonging, it is enacted by the 10 and 11 Wm. 3, c. 25, s. 13, that they may be tried in any county of England; and though the king is enabled by subsequent statutes (*p*) to erect courts of civil and criminal jurisdiction in that country, it does not appear that those statutes take away the jurisdiction given by the statute 10 and 11 Wm. 3.

33 Hen. 8,
c. 23.

The 33 Hen. 8, c. 23, enacted, that if any person being examined before the king's council, or three of them, upon treasons, murders, &c., confess such offences, or the council, or three of them upon such examination, think any person so examined to be vehemently suspected of any treason or murder, the king's commission may be made to such persons, and into such shires and places as shall be named and appointed by the king for the speedy trial of such offenders; and gave power to the commissioners to inquire and determine such offences within the shires and places limited by their commission, in whatsoever other shire or place, *within the king's dominions or without*, such offences so examined were *done or committed. But this statute is repealed by

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9 Geo. 4, c.
31, s. 7.
British
subjects
may be
tried in
England
for murder
or man-
slaughter
committed
on land
abroad.

the 9 Geo. 4, c. 31, which by sec. 7 enacts, "That if any of his majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact, to any murder or manslaughter, the same being respectively committed *on land* out of the United Kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal, shall be directed to such persons, and into such county or place as shall be appointed by the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to inquire of, hear, and determine all such offences, within the county or place limited in their commission, by such good and lawful men of the said county or place, as shall be returned before them for that purpose, in the same manner as if the offences had actually been committed in the said county or place: provided always, that if any peers of the realm, or persons entitled to the privileges of peerage, shall be indicted of any such offences, by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: provided also that nothing herein contained shall prevent any person from being tried in any place out of this kingdom, for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act."

Proviso.

(*p*) 32 Geo. 3, c. 46. 33 Geo. 3, c. 76, continued by the 34 Geo. 3, c. 44, and 35 Geo. 3, c. 25.

sea-coast outside of the *fauces terræ*. Where an arm of the sea, or creek, heaven or bay, is so narrow that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county. The state courts have jurisdiction of offences committed on arms of the sea, creeks, &c., within the ebb and flow of the tide, when those places are within the body of a county; and the courts of the United States have no jurisdiction under this statute. But it seems that in such waters, the admiralty and common law courts have concurrent jurisdiction. 5 Mason, 290, *U. States v. Grush.*}

And now, by the Central Criminal Court Act, the 4 & 5 Wm. 4, c. 36, s. 23, any offence committed, or alleged to have been committed, within the jurisdiction of the Admiralty, may be tried at the Central Criminal court. (g)

Though the 33 Hen. 8, was not confined to offences committed within the king's dominions, yet, in a case where a prisoner at war abroad had entered on board an English merchant ship, and whilst in that capacity had committed an offence upon an Englishman in a foreign country, it was decided that he could not be tried for it here under that statute, on the ground that he could not be deemed a subject of this country. The offender, Depardo, was a Spaniard, and taken a prisoner at sea, and whilst abroad, entered on board an Indiaman, sailed to China, and murdered an Englishman in the Canton river; it was within the tide-way, about eighty miles from the sea. Upon a case reserved for the opinion of the judges, it was urged, that the prisoner was not liable to be tried here, because he never became subject to the laws of this country; that he was not so by birth, and did not become so by entering on board the Indiaman. No judgment was given, but the prisoner was discharged. (r)

But it was holden that a British subject was indictable under the *33 Hen. 8, for the murder of another British subject, though the murder were within the dominions of a foreign state; and that the indictment need not allege in terms that either the deceased or the offender were British subjects; the statement that the person murdered was at the time in the king's peace, being considered a sufficient allegation that he was a British subject; and the conclusion in the indictment that the offence was against the king's peace, being considered as showing sufficiently that the offender was a British subject. The indictment charged in substance, that the prisoner, at Lisbon, in the kingdom of Portugal, in parts beyond the seas without England, one H. G., in the peace of God and of our lord the king, then and there being, feloniously did assault, shoot, and murder, against the peace of our said lord the king. After a conviction upon this indictment, it was objected—1st, That the offence being out of the king's dominions, and within the dominions of a foreign state, was not triable under the 33 Hen. 8; and, 2d, that the prisoner and the deceased should have been stated to have been subjects of our lord the king at the time. But, after argument, the judges held that the offence was triable here though committed in a foreign kingdom, the prisoner and the deceased being both subjects of this realm at the time; and that the stating H. G. to be in the king's peace, sufficiently imported that the prisoner was also a subject of this realm at that time. (s) But it has since been held, upon the 9 Geo. 4, c. 31, that the indictment must aver, that the prisoner and deceased were subjects of his majesty, but that the declarations of the prisoner were evidence to go to the jury to prove this fact. The indictment charged the murder to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-Bow, in the ward of Cheap, &c." The grand jury objected to finding the bill, as it stated the death to have occurred in two different places. Bayley, J., (having conferred with

Trial under 33 Hen. 8, of murders committed by subjects of this country in foreign states.

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The indictment must state that the prisoner and the deceased were British subjects.

(g) See the section, *ante*, p. 104.

(r) *Rex v. Depardo*, Mich. T. 1807. 1 Taunt. 26. Russ. & Ry. 134.

(s) *Rex v. Sawyer*, East. T. 1815. MSS. Bayley, J., and Russ. & Ry. 294. Another objection was that the indictment ought to have concluded *contra formam statuti*; but that was also overruled.

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Bosanquet, J., and the Recorder,) directed the words, "to wit, at the parish of St. Mary-le-Bow, in the ward of Cheap, &c.," to be struck out. His lordship also said, that it was deemed by the court to be necessary to have inserted in the bill an allegation that the prisoner and the deceased were subjects of his majesty; and the bill was so amended accordingly. Upon the trial it appeared, that the deceased was killed in a duel at Boulogne, and that he was an Englishman, born at Islington; and the prisoner had said he was an Irishman, and had come from Kilkenny. It was objected that, under the 9 Geo. 4, c. 31, it was necessary to prove that the parties were neutral born subjects of his majesty; the present act differed from the 33 Hen. 8, c. 33, the words of which were "any person or persons." It never could have been intended that this act should apply to foreigners domiciled in England, or naturalized either by act of parliament, or by service to the state. That it was necessary to prove, by some one acquainted with the fact, where the prisoner was born, which was a fact the prisoner *could not know of his own knowledge. But it was held, that the declaration of the prisoner, unexplained, was, as against himself, evidence to go to the jury; and the case was left to the jury to say, whether they were satisfied by the evidence that the prisoner was a British *born* subject; for that they must be quite satisfied that such was the fact before they could pronounce him guilty. (t)

Where an indictment for manslaughter, stated that the prisoner being a subject of his majesty, on land out of the United Kingdom, to wit, at Zanzibar, in the East Indies, did make an assault on J. K., and did give him divers mortal wounds, &c., of which he died, at Zanzibar aforesaid, and it appeared that the prisoner, a Spaniard, being in England, entered into certain articles to serve in a ship bound on a voyage to the Indian seas, and elsewhere, on a seeking and trading voyage (not exceeding three years' duration,) and back to the United Kingdom, and on the ship's arrival at Zanzibar, an island in the Indian seas, under the dominion of an Arab king, the captain left the vessel, and set up in trade there, and engaged the prisoner (who was black, and said to be by birth the son of a governor on another part of the African coast,) to act as interpreter, the new captain not requiring his services, but the rest of the crew not consenting. The ship went one or two short voyages without the prisoner, and having returned to anchor in a roadstead, a few hundred yards from Zanzibar, and the crew being allowed to go on shore, some dispute arose between the prisoner and the deceased, who was one of the crew, which led to the blows on the land, of which the deceased afterwards died on board the ship. It was held that there was no evidence of the prisoner being a British subject or under British protection. To claim his allegiance, it must at least be shown, that he was under British protection. And although he was on board a British ship for a time, yet it seemed as if the articles were abandoned, and he was living on shore, and had been so for months. And, secondly, that the offence was alleged to have been committed on land out of the United Kingdom, but though the blows were given on land, the death took place on board ship, and there was no clause in the 57 Geo. 3, c. 53, providing for such a case. (u)

(t) *Rex v. Helsham*,^a 4 C. & P. 394, *coram* Bayley and Bosanquet, Js., and Knowlys, R.

(u) *Rex v. M. A. de Mottos*,^b 7 C. & P. 458, Vaughan and Bosanquet, Js. It was doubted

^a Eng. Com. Law Repts. xix. 438.

^b Ib. xxxi. 584.

Where a person was struck, &c., upon the high seas, and died upon shore, it was holden that the admiral had no cognizance of the offence by virtue of his commission. *(uu)* And it was doubtful whether such offence could be tried at common law: *(v)* the 2 Geo. 2, c. 21, therefore made provision for such cases, but that act was repealed by the 9 Geo. 4, c. 31, which, by sec. 8, enacts, "that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously *stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in England, in which such death, stroke, poisoning or hurt shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place."

9 Geo. 4, c. 31, s. 8. Provision for the trial where the death, or the cause of death only, happens in England,

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Where a person standing on the shore of a harbour fired a loaded musket, at a revenue cutter which had struck upon a sandbank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was holden that the trial must be in the Admiralty Court, and not at common law. *(v)*

The 9 Geo. 4, c. 81, s. 32, enacts, "that all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the Admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England, and may be dealt with, inquired of, tried and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of England: *(vv)* provided always, that nothing herein contained shall alter or affect any of the laws relating to the government of his majesty's land or naval forces."

Provision for offences against this act committed at sea. Not to effect the forces.

A few of the general rules relating to the form of the indictment may be mentioned in this place. Form of indictment.

If the name of the party killed be known, it should be correctly stated in the indictment: but it is sufficient to describe a party by the name by which he is commonly known. *(w)* A peer should properly be described only by his Christian name, and his name of dignity; as James, Duke of G. *(x)* But it seems that he may be described by his surname Description of the party killed.

in this case by Rolfe, S. G., whether the limitation put upon the 9 Geo. 4, c. 31, s. 7, in *Rex v. Helsham*, was correct, and the court seem to have thought that that construction was too narrow. Vaughan, J., in charging the grand jury said, "there are other ways which may constitute a man a British subject; as for instance, he may owe allegiance for protection:" and the case was decided on the ground that the prisoner was not a British subject in any sense of those words. C. S. G.

- (uu)* 2 Hale, 17, 20. 1 East, P. C. c. 5, s. 131, p. 365, 366. *Ante*, 101.
- (v)* *Id.* and 1 Hawk. P. C. c. 31, s. 12.
- (v)* *Rex v. Coombes*, 1785-6. 1 Hawk. P. C. 37, s. 17. 1 Leach, 388. 1 East, P. C. c. 5, s. 131, p. 367, *ante*, 102.
- (vv)* All offences committed within the jurisdiction of the Admiralty may be tried in the Central Criminal Court, by the 4 & 5 Wm. 4, c. 36, s. 22, *ante*, p. 105.
- (w)* 2 Hale, 237; *Rex v. Norton*, R. & R. 510. *Rex v. Williams*, 7 C. & P. 298, Williams, J., and Alderson, B. *Rex v. Berriman*, 5 C. & P. 601, Parke, J.
- (x)* 2 Inst. 666.

^a Eng. Com. Law Reps. xxxii. 516.

^b *Ib.* xxiv. 473.

also; as William Byron, Baron Byron.^(y) And although the proper way to describe a baron be to describe him by his Christian name, and his degree in the peerage, as William, Baron B., yet it is sufficient if he be described as William, Lord B.^(z) If the name of the party killed be not known, it may be laid to be a certain person to the jurors unknown.^(a) An indictment must either state the name of the party killed, or that the party was unknown to the jurors. An indictment stated that the prisoner murdered "an infant male child, aged about six weeks, and not baptized," it was objected that the indictment was bad, as it neither stated the name of the child, nor that the name was unknown to the jurors: and, upon a case reserved, the judges held that the *objection was good and the judgment was arrested.^(b) A bastard must not be described by his mother's name till he has gained that name by reputation. Frances Clark was indicted for the murder of George Lake-man Clark, a base-born infant male child, aged three weeks. The child was hers, and had been christened George Lakeman, the father's name. The murder was proved, but there was no evidence that the child had ever been called Clark; and on a case reserved, the judges held that, as it had not obtained the mother's name by reputation, it was improperly called Clark in the indictment; and that as there was nothing but the name to identify it in the indictment, the conviction could not be supported.^(c) Upon an indictment for the murder of "a certain female child whose name to the jurors was unknown," it appeared that the child had not been baptized, but the prisoner had said that she should like it to be called "Mary Ann," and had called it "her Mary Ann" at one time, and "Little Mary" at another; the father was a Baptist, and the child was a bastard, and twelve days old: and upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was good.^(d) And where an illegitimate child, three weeks old, had been baptized by the name of "Eliza," but no surname was mentioned at the time of baptism, and neither the register nor any copy of it was produced at the trial, and an indictment for murder described her as "Eliza Waters," Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong.^(e) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held

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A bastard must not be described by its mother's name till gained by reputation.

Smith's case.

Water's case.

Evans' case.

(y) 19 St. Tr. 1177. In *Rex v. Brinkett*,^a 3 C. & P. 416, an indictment for manslaughter described the deceased as Henry Sandford, Baron Mount Sandford, of, &c., in Ireland; and it was proved that his Christian name was Henry, his surname Sandford, and his title Baron Mount Sandford, and it was held by Vaughan, J., that this was no variance.

(z) *Reg. v. Pitts*,^b 8 C. & P. 771, Erskine, J.

(a) 1 East, P. C. c. 5, s. 114, p. 345.

(b) *Reg. v. Biss*,^c 2 Moo. C. C. R. 93. 8 C. & P. 773. See *Reg. v. Hicks*, 2 M. & Rob. 302, S. P.

(c) *Rex v. Clark*, East, T. 1818. MSS. Bayley, J., & Russ. & Ry. 358.

(d) *Rex v. Smith*,^d R. & M. C. C. R. 402. 6 C. & P. 151, S. C.

(e) *Rex v. Waters*,^e R. & M. C. C. R. 457. 7 C. & P. 250.

^a Eng. Com. Law Reps. xiv. 376.

^b Ib. xxxiv. 629.

^c Ib. xxxiv. 630.

^d Ib. xxv. 327.

^e Ib. xxxii. 503.

that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable to the last, because there was no evidence there that the child was ever called Waters at all. (f) It is not necessary to state the addition of the party killed, though it may sometimes be convenient to do so for the sake of distinction. (g) Nor is it necessary to allege that the party killed was "in the peace of God and of our lord the king, &c.;" though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace. (h) If a constable, watchman, or other minister of justice be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally of murder by malice prepense. (i)

Where on an indictment for the murder of "a certain illegitimate male child then lately before born of the body of the said S. Hogg," it appeared that the child had been destroyed by the prisoner almost instantly after its birth; Lord Denman, C. J., held, that the description was clearly sufficient. The indictment described the party murdered in the only way which under the circumstances could have been pursued. It was not the case of a party whose name was unknown, but of one who had never acquired a name, and the indictment identified the party by showing the name of its parent. (ii)

Hogg's case.

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The indictment should in all respects be adapted as closely to the truth as possible. It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected: (j) and this statement may, according to the circumstances of the case, be one of considerable length and particularity. (k)† But it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party were killed by a different weapon from that described, it will maintain the indictment; as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe; or a wound or bruise alleged to have been given with a wooden staff, be proved to have been given with a stone. [1] So if the death be laid to have been by one sort of poisoning, and it turn

Statement of the manner of the death, and the means by which it was effected. It is sufficient if the manner of death agree in substance with that charged.

(f) Reg. v. Evans, 8 C. & P. 765. Erskine and Patteson, Js. See Rex. v. Sheen, 2 C. & P. 630.

(g) 2 Hale, 182.

(h) 2 Hawk. P. C. c. 25, s. 73. 2 Hale, 186.

(i) Rex v. Mackally, 9 Rep. 68. 1 Hale, 460. 12 Rep. 17.

(ii) Reg. v. Hogg, 2 M. & Rob. 380.

(j) 1 East, P. C. c. 5, s. 107, p. 341.

(k) As in the case of Jackson and others, 9 State Trials, 715, (ed. by Hargr.,) where the indicted stated a murder by a long course of barbarous usage. But see *post*, as to the statement of special circumstances.

† [An indictment for murder may be good without stating the accused to be a person of sound memory and discretion, and though the killing must be set out in such terms as to show clearly that it was unlawful, yet the word "unlawful" need not necessarily be used. *Jerry v. The State*, 1 Blackf. 396.]

[1] {In the *Commonwealth v. Boies*, tried by the Supreme Court of Massachusetts, Norfolk county, June, 1827, the indictment alleged the mortal wounds to have been inflicted with an axe. It was doubtful, upon the evidence, whether they were made by an axe, saw, broom, or some other instrument. The court instructed the jury that if the death was caused by the wounds mentioned in the indictment, it was immaterial whether the instrument used for the purpose was an axe, if they were given by some deadly weapon.}

[In a prosecution for murder, the defendant may be convicted, though it turns out that the mortal wound was given with a different weapon from the one mentioned in the indictment. *The People v. Townsend et al.*, 3 Hill, 479.

An indictment for murder, by poison, need not specify the particular kind of poison; and if it do so state, it will not be necessary that the proof correspond. *Carter v. The State*, 2 Carter, 617.]

If one kind of killing is charged and another proved, it is insufficient.

out to have been by another, the difference will not be material. So if an indictment allege that a woman "with both *her hands about her neck*" of a child, did press and squeeze, and thereby suffocated and strangled the child, it is sufficient to prove that the child came by its death by strangulation or suffocation, and it is not necessary that the prisoner should have done it with her own hands, for if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, that is sufficient. *(l)* So where a count charged the death to be by suffocation, by the prisoner having placed her hand on the mouth of the deceased, and the evidence was that the deceased had died from suffocation and pressure; it was held that, if any violent means were used to stop respiration, and the death was thereby caused, the count was proved. *(m)* But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. *(n)* So where an indictment charged that the prisoner struck the deceased with a piece of brick, and it appeared probable, not that the prisoner struck with the brick, but that the prisoner struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall on the brick was the cause of the death; it was held, upon a case reserved, that, as the indictment did not contain any charge of throwing the deceased down, the prisoner ought to have been acquitted. *(o)* So where the indictment charged the death by striking and beating on the head, and the evidence was that the prisoner knocked the deceased down by a blow upon the head, and that in falling upon the ground the deceased received a mortal wound; it was held, upon a case reserved, that the cause of death was not truly stated. *(p)* So where the indictment charged the wound to have been inflicted by a blow with a hammer held in the prisoner's hand, and the injury might have been occasioned by a fall against the lock or key of a door; it was held, that if the injury *was occasioned by a fall against the door, produced by the act of the prisoner, it was not sufficient, but if the injury was occasioned by a blow with a hammer or any other hard substance held in the hand, the indictment was proved. *(pp)* So where the indictment alleged the death to have been caused by striking, and the jury found it was caused by over-exertion in the fight, the judges held the prisoner entitled to an acquittal. *(q)* Where the manner of the death is doubtful, it will be proper to lay it differently in different counts, so as to meet the evidence. *(r)*

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Statement of striking.

It seems to be necessary to aver *a striking* where the death has been occasioned by a wound, bruise, or other assault; and it appears have to been holden that an indictment stating that the party of malice aforethought, murdered, or gave a mortal wound, without saying that he *struck*, &c. was bad. *(s)* But this doctrine has been questioned, *(t)* though

(l) Rex v. Culkin, ^a 5 C. & P. 121. Parke, J. J., Park, J. A. J., and Bolland, B. The allegation "about the neck," was also held sufficiently certain, as it means around the neck, though *circiter pectus* would be bad. 2 Hale, 185.

(m) Rex v. Waters, ^b 7 C. & P. 250. Lord Denman, C. J.

(n) 1 East, P. C. c. 5, s. 107, p. 341. 2 Hawk. P. C. c. 23, s. 34. 2 Hale, 185, 186. 2 Inst. 319. Mackally's case, 9 Co. 67.

(o) Rex v. Kelly, R. & M. C. C. R. 113. 1 Lew. 193.

(p) Rex v. Thompson, R. & M. C. C. R. 139. 1 Lew. 194.

(pp) Rex v. Martin, ^c 5 C. & P. 128, Parke, J.

(q) Brown's case, 1 Lew. 165, cited by Hullock, B.

(r) As in Rex v. Hindmarsh, 2 Leach, 669.

(s) Rex v. Long, 5 Co. 122 a. Dy. 99. 2 Hale, 184. Rex v. Lorkin, 1 Bulst. 124.

(t) 2 Hawk. P. C. c. 23, s. 82, referring to Cro. Jac. 655. Sum. 207. Yelv. 28.

^a Eng. Com. Law Repts. xxiv. 238.

^b Ib. xxxii. 503.

^c Ib. xxiv. 242.

it is admitted to be the safest course to use the term where it may seem to be required by the nature of the fact.^(u) In a late case where the indictment charged that the prisoners *with certain stones of no value*, which they in their right hands then and there had and held, in and upon the back part of the head of him, the said W. W. then and there feloniously, &c., and of their malice aforethought *did cast and throw*, and that they with the stones aforesaid, so as aforesaid east and thrown, the said W. W. in and upon the back part of the head of him the said W. W. feloniously, &c., did strike, &c., an objection was taken that the mode of causing the death was not properly stated. But the judges, upon a case reserved, were unanimously of opinion that the cause of the death was sufficiently stated; it being clear that the *stones* were what were cast and thrown at the deceased; and the word *with* might be rejected, or the words *cast and throw* might be considered to be used as neuter verbs.^{(v)†} It seems also that if the death be occasioned by any instrument holden in the hand of the party killing at the time, it should be so alleged; and that regularly the instrument should be stated to be of a certain value or of no value: but an able writer says that he could not find the grounds for the first of these averments, and that the latter does not seem to be essential.^(w) It has been considered as necessary to state in what part of the body the wound was given, and also to state the length and depth of it.^(x) But this doctrine was overruled, or at least qualified in a late case. The indictment, after stating that the prisoners feloniously and of their malice aforethought, made an assault on the party killed, and threw him down upon the ground; and with their hands and feet, while he was upon the ground, in *and upon his head, stomach, breast, belly, back, and sides, feloniously, &c. divers times, with great force and violence did strike, beat and kick, and with their hands, feet, and knees did strike, push, press and squeeze, proceeded thus,—“given to the said J. D. then and there, as well by the pulling, pushing, casting, and throwing of him, the said J. D. down, unto and upon the ground as aforesaid, and by the striking, beating, and kicking of him the said J. D., whilst he was so lying and being upon the ground as aforesaid, in and upon the head, stomach, breast, belly, back, and sides, of him the said J. D. as aforesaid, also by the striking, pushing, pressing, and squeezing of him the said J. D., whilst he the said J. D. was so lying and being upon the ground as aforesaid, in and upon the belly, breast, stomach, and sides of him the said J. D., with the hands, knees, and feet of them the said R. M. and B. M. in manner aforesaid, several mortal bruises, lacerations, and wounds, in and upon the belly, breast, stomach, and sides of him the said J. D. ;” of which said several mortal bruises, lacerations and wounds, the said J. D., from, &c. did languish, &c.; and then it averred the death and murder in the usual form. A conviction having taken place, the prisoner’s counsel moved in arrest of judgment, that the indictment was sufficient in stating only that there were several mortal bruises, lacerations and wounds, on

Mode of
stating
wounds
and
bruises.

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(u) 2 Hawk P. C. c. 23, s. 82.

(v) Rex v. Dale, Hil. T. 1824. 1 R. & M. C. C. 5.

(w) 1 East, P. C. c. 5, s. 108, p. 341, 342. In the case of Rex v. Dale, ante, note (v), it was objected that, after the words “certain stones,” there should have been a *videlicet*, mentioning the number, and also that it was not expressed in what hand the stones were held by each of the prisoners; but the objections were not considered material.

(x) 2 Hale, 185, 186. 2 Hawk P. C. c. 23, s. 80, 81. Trem. Ent. 10. Staundf. 78 b, 79 a. 4 Co. 40 b, 41. 5 Co. 120, 121 b, 122. Cro. Jac. 95. Stark. Cr. L. 375, 380.

† [See Acc. *White v. The Commonwealth*, 6 Binn. 179.]

several parts of the body, of which the party languished and died; that a considerable degree of certainty was necessary in the statement of the wounds on the face of the indictment, and of the situation, length, &c. of each that it was necessary to describe the particular parts of the body on which the wound or wounds is or are alleged to be; that charging a wound to be inflicted on the side or sides of a man is bad, without more particularity, as *non constat* whether it is to be taken to be the side or sides of the body, or of the head or of any of what limb; that the indictment according to ancient forms, should so state the fact as that a finger might be placed upon the part of the body where the wound is described to be; that this was still requisite, although a conviction might take place upon evidence varying from it, for the particulars ought to be stated accurately, according to the facts as they are supposed to be, for the previous information of the court, and of the part charged, with a view to a due investigation, and in order that they might appear, by such statement of particulars, that a due inquiry had been made by the grand jury or the coroner's inquest as to these circumstances, before a party should be put to undergo the pain and peril of a trial; and that the facts ought not to be wantonly or purposely varied from in such statement; and 2 *Hale*, P. C. 185, 186, was cited and observed upon. Judgment was respited; and the murder submitted to the consideration of the judges, who met twice for the purpose of considering the case. At the second meeting the majority of the judges, viz., Gaselee, J., Hullock, B., Garrow, B., Burrough, J., Parke, J., Bayley, J., Graham, B., Alexander, L. C. B., Best, L. C. J., and Abbot, L. C. J., held the conviction right, as it appeared in several old precedents,^(y) that the length, breadth, and depth of the wounds were not stated; [1] and also that Mr. Justice Lawrence *had instructed the clerk of assize upon the Oxford circuit to omit these particulars when there were more wounds than one, and that his instructions had been followed. And they held that although they might have felt great difficulty had the precedents been uniform; yet, as there were precedents against the objection, they might consider whether common sense required a statement of these particulars; and as the statement, if introduced, need not be proved, they thought it unnecessary. Littledale, J., and Holroyd, J., differed from the other judges, and thought the indictment bad.^(z)

The ground of the preceding decision was, that as common sense did not require the length, depth and breadth of the wounds to be stated, it was not necessary that they should be stated.^(a) And upon the authority of this case, where an indictment stated the length and breadth of a wound, but not the depth, and it was objected that as there was only one wound, the depth ought to be stated; it was held that it was not necessary, for if common sense did not require it where there were several wounds, common sense did not require it where there was only one.^(b) So where an indictment merely alleged the giving of "one

^(y) Rast. Entr. 263, 382. Co. Entr. 355. West. Symb. 117, 151, 153, 154, 155, 235, 260, 261.

^(z) Rex v. Moseley and another, *cor.* Holroyd, J., York Lent. Ass. 1825. Ry. & Mood. C. C. 97.

^(a) So stated by Patteson, J., after having inquired what they were from Park, J. A. J., in Rex v. Tomlinson.

^(b) Rex v. Tomlinson, 6 C. & P. 370. Patteson, J. MSS. C. S. G.

[1] { *United States v. Maunier*, N. Carol. Cas. 79, acc.—as cited in Coxe's Digest, 357. }

^a Eng. Com. Law Reps. xxv. 442.

mortal bruise," and it was urged that the dimensions of the bruise ought to have been described, Mr. J. Parke said, "I am disposed to go further than the judges in Mosely's case, and to say that it is not necessary to describe the bruises at all, such rule being, in my judgment, most consistent with common sense."(c)

It had long been settled, that though it was considered necessary to state the manner and place of the hurt, and its nature, in order that the indictment might be good as to its formality: yet, if it appeared upon the evidence that the party died of another kind of wound, in another place, the indictment was nevertheless maintainable.(d) It is necessary in all cases, that the death by the means stated should be positively alleged, for it cannot be taken by implication; if, therefore, it be stated that the death was caused by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound or bruise, whereof he died;(e) and an indictment setting forth that the prisoner choked the deceased, *quâ suffocatione obiit*, instead of *de quâ suffocatione*, &c., was adjudged to be erroneous.(f) And if the means of the death be alleged to be by poison, it should be averred, after stating particularly the manner in which the poison was administered, that the party died of the poison so taken, and the sickness thereby occasioned.(g) But an indictment for poisoning, which alleges that the deceased swallowed the poison, and that she died of the sickness caused thereby is good. An indictment stated that the prisoner administered a large quantity of a certain deadly poison, called white arsenic, to the deceased, and that she swallowed down *into her body the said white arsenic, by means of which swallowing down the said white arsenic she became mortally sick, of which said mortal sickness she languished from, &c., until, &c., on which day she "of the said mortal sickness died:" it was objected, in arrest of judgment, that the indictment ought to have alleged that she died of the poison and of the sickness occasioned thereby, and that it was not sufficient to allege that by reason of the swallowing of the poison she became mortally sick, and that she afterwards died of the said mortal sickness. Erskine, J., overruled the objection, and, upon a case reserved, the judges held that the indictment was good.(gg) An indictment which stated the death to have been caused by means of ravishing an infant, but omitted to aver that a mortal wound or bruise was given, was holden to be defective.(h)

It is sufficient in the indictment to state the act done by the prisoner, and it is not necessary to allege the causes merely natural which contributed to the death. An indictment alleged in several counts that the prisoner administered noxious and deleterious substances to the deceased,

It is not necessary to prove the wounds, &c., as laid. Mode of stating the death.

By poison.

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It is sufficient to state the act done, without mentioning

(c) Turner's case, 1 Lewin, 177.

(d) 2 Hale, 185, 186. 2 Hawk. P. C. c. 23, s. 81.

(e) 2 Hale, 186.

(f) 1 Roll. 137. 2 Hawk. P. C. c. 23, s. 83. See an inquisition for murder by suffocating a child in flannel. *Rex v. Huggins*, 3 C. & P. 414.

(g) 1 East, P. C. c. 5, s. 111, p. 343. 2 Hawk. P. C. c. 23, s. 82, 83.

(gg) *Reg. v. Sandys*, Erskine, J., Chester Sum. Ass. 1841, and M. T. 1841. 2 Hale, 184. 2 Hawk. P. C. c. 23, s. 82, 83, and Kel. 125, were cited in support of the objection. The surgeon in this case proved that the deceased died of the inflammation caused by the poison. It is apprehended that this indictment was in the most correct form, for a person poisoned never dies of the poison, but always of the effects produced by the poison, and it would be just as correct to say that a party who was stabbed died of the knife, as to say that a party who was poisoned died of the poison. C. S. G.

(h) *Rex v. Lad*, 1 Leach, 96. S. C. 1 C. & Mars. 345.

* Eng. Com. Law Repts. xiv. 374.

⁴ Ib. xli. 191.

the state of
body of the
deceased.

and that he died of the sickness occasioned thereby⁽ⁱ⁾ The prisoner had administered to the deceased, while ill of small pox, large quantities of Morrison's pills, and his death was thereby accelerated: it was objected that the indictment was not supported by the evidence, which proved nothing more than that the deceased died of a natural disorder, accelerated by improper treatment; that the charge in the indictment was a different one, *viz.*, that the party died solely of a mortal sickness caused by the medicine and improper treatment: that the indictment was framed as though the small-pox had nothing to do with the cause of death; and yet that there was no evidence whatever to show that the party would have died but for that distemper: it was answered that it was not necessary to allege more than the act with which the prisoner was charged: that it was not the practice to allege the state of body in which the deceased might be, however much that state of body might assist to render the act of the prisoner fatal; and the indictment was held good, as all the witnesses agreed that the death was accelerated by the pills. ^(j)

It is sufficient to state the primary cause of death.

In a case where the death proceeded from suffocation, by the swelling up of the passage of the throat; and such swelling proceeded from wounds occasioned by forcing things into the throat; it was held that the statement might be that the things were forced into the throat, and the deceased thereby suffocated; and that it was not necessary to mention the immediate cause of suffocation; namely, the swelling of the throat. The indictment charged a murder, by forcing and thrusting moss and dirt into the mouth, nose, and throat of a child, by which forcing and thrusting of the moss and dirt into the mouth, &c., the child was then and there suffocated. It appeared that this forcing of the moss and dirt did not produce immediate strangulation, and that they were removed before the child died; but the forcing them into the throat made the throat swell so as to choke up the passage; and then the child died of suffocation. Upon a case reserved, the judges held, that as the primary cause of the suffocation was the forcing the moss into the throat of the child, it was not necessary to state in the indictment the intermediate process, *viz.*, the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat. ^(k)

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Where the indictment charged the death by cutting the throat, and a surgeon proved that the jugular vein was divided, but not the carotid artery, and that what he called the throat was not cut, the wound not having extended so far round the neck; it was held that this was sufficient, for the term throat meant not that part of the throat which was scientifically called the throat, but that which was commonly called the throat. ^(l) So where an indictment charged the cutting of the throat with "a certain sharp instrument," and it was proved that the throat was partly cut and partly torn by an instrument that was not sharp; it was held that the indictment was certain enough, and that it was supported by the evidence, as the degree of sharpness was not at all material. ^(m)

⁽ⁱ⁾ The two first counts did not state that the deceased was ill, the others did, but they all alleged the death to have been occasioned by the operation of the medicine and the sickness occasioned thereby. C. S. G.

^(j) *Rex v. Webb*, 2 Lewin, 196. S. C. 1 M. & Rob. 405. Lord Lyndhurst, C. B.

^(k) *Rex v. Tye*, East. T. 1818, MSS. Bayley, J., Russ. & Ry. 345.

^(l) *Rex v. Edwards*,^a 6 C. & P. 401, Patteson, J.

^(m) *Rex v. Grounell*,^b 7 C. & P. 788, Parke, B.

^a Eng. Com. Law Repts. xxv. 458.

^b *Ib.* xxxii. 737.

Where an indictment charges the death to have been caused by omitting to provide sufficient food to the deceased, it must show that it was the duty of the prisoner to provide it. An indictment charged that E. E., the wife of J. E., in and upon E. E., the younger, being an infant of tender age (to wit) of the age of six months, did feloniously make divers assaults, and that the said E. E., the elder, did feloniously neglect, &c., to give and administer to the said E. E., the younger, proper and sufficient food, by means of which neglecting, &c., (omitting any reference to the assaults) the said E. E., the younger, died. It was suggested that the indictment was bad, as it did not allege that it was the duty of the prisoner to maintain the child, neither did it state that the prisoner was the mother of the deceased, or in any way liable to take care of it. Patteson, J., "This indictment is bad; it does not state any duty, nor does it state that the prisoner was the mother of the deceased. Where the indictment charges an imprisoning it shows an obligation to maintain, for if you imprison a man you must feed him. But in this case the judgment must be arrested. Every word of this indictment may be literally true, and yet the prisoner and deceased might have been strangers to each other."(n) So where a coroner's inquisition alleged that the prisoner did feloniously make divers assaults upon E. S., "she then and there being the natural child" of the prisoner, and that she neglected, &c., to give and administer to the said E. S., sufficient meat and drink; by means of which neglect E. S. died; and it was moved that the inquisition might be quashed, on the ground that it did not allege that it was the duty of the prisoner to find sufficient *meat for the deceased; Taunton, J., after carefully perusing the inquisition, ordered it to be quashed.(o)

Where the death is charged to have been caused by neglect, the indictment must allege that it was the prisoner's duty to provide food.

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It is necessary to state, that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*,(p) which as we have already seen, is the great characteristic of the crime of murder;(q) and it must also be stated, that the prisoner murdered the deceased.(r) If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner murdered, &c., or killed or slew the deceased, the conviction can only be manslaughter.(s) It is also necessary to allege the *time* and *place*, as well of the wound as of the death; so that where a party was indicted in the county where the death happened under the 2 & 3 Edw. 6, c. 24,(t) the stroke must have been alleged in the county where it really was; and by the same rule the offence must have been alleged in the place where it was committed in indictments upon 28 Hen. 8, c. 16, and 33 Hen. 8, c. 23,(u) for murders upon the sea, or in other places therein mentioned.(x) A charge that A., on such a day, at, &c., made an assault upon B., and him with a knife feloniously struck, killed, and murdered, was held not

Averment of malice aforethought.

Time and place of the wound and death.

(n) Reg. v. Edwards,* 8 C. & P. 611.
 (o) Rex v. Sarah Goodwin, Stafford Lent Ass. 1832, MSS. C. S. G. The motion to quash was made on the part of the Crown, and in the absence of the prisoner. C. S. G.
 (p) 2 Hale, 185, 187. Staundf. P. C. 130. Bradley v. Banks, Yelv. 205.
 (q) Ante, 482, et seq.
 (r) 2 Hawk. P. C. c. 23, s. 77. Anon. Dy. 304. Post, note (s).
 (s) 1 East, P. C. c. 5, s. 116, p. 345, 346. 2 Hale, 186.
 (t) Repealed by the 7 Geo. 4, c. 64.
 (u) Repealed by the 9 Geo. 4, c. 31.
 (x) 1 East, P. C. c. 5, s. 112, p. 348.

Conclusion
of the in-
dictment.

to import sufficiently that the stroke was at the same time and place as the assault, for want of the words "then and there;" and for this and other exceptions an outlawry on this charge was reversed.^(y) And the respective times of the wound and death must be shown, that it may appear that the deceased died within a year and a day from the stroke or other cause of death: but though the day or year be mistaken it is not material, if it appear by the evidence that the death happened within the time limited, without which the law does not attribute the death to the stroke or poison.^(z) The indictment is concluded, by charging the murder upon the party by way of consequence from the antecedent matter, in a positive allegation that the prisoner in manner and by the means aforesaid feloniously, wilfully, and of his malice aforethought, did (poison,) kill, and murder.^(a) And where the stroke was at one time or place, and the death at another, if the day be specially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder.^(b) The concluding averment "and so the jurors do say," does not require either time or place to be alleged in it.^{(c)†}

A coroner's inquisition merely alleging, that the deceased of the said mortal shock "at the parish aforesaid, in the county aforesaid, *instantly* died," is bad.^(cc)

Where an inquisition after correctly charging the principal in the first degree, alleged that the two other prisoners, at the time of the felony aforesaid " (to wit) on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, were feloniously present, then and there abetting, aiding, and assisting, the said N." &c., it was objected and the word "feloniously" only applied to "present," and not to "abetting, aiding, and assisting;" and it was held that the inquisition was bad on this ground.^(d) And where an indictment for murder, after correctly charging the principal in the first degree, proceeded to allege that "at the time of the felony and murder was committed (to wit" &c., precisely in the same terms as in the preceding case, and upon demurrer, it was objected that the indictment was bad, and that case was relied upon as in point; Coltman, J., said, that it was a grave authority in support of the objection, but he would reserve the point as the case was so serious a one: it was further objected that the bad English made the averment insufficient, but Coltman, J., was inclined to think, that the word "was" might be rejected, he however would reserve the point also.^(dd)

^(y) 2 Hawk. P. C. c. 23, s. 90. 2 Inst. 318. 1 East, P. C. c. 5, s. 112, p. 343.

^(z) Rex v. Buckler, Dy. 69 a.

^(a) 1 East, P. C. c. 5, s. 117, p. 347.

^(b) Id. *ibid.*

^(c) Rex v. Nicholas,^a 7 C. & P. 538. Littledale and Patteson, Js.

^(cc) Reg. v. Brownlow,^b 11 A. & E. 119.

^(d) *Ante*, p. 563, note (c).

^(dd) Reg. v. Phelps, Southan and Smith, Gloucester Sum. Ass. 1841. MSS. C. S. G. The principals in the second degree were acquitted, so it became unnecessary to reserve the points. C. S. G. S. C., 1 C. & Mars.^c 180.

† [An indictment for murder states that the mortal wound was inflicted on the 7th of November, 1845, that the deceased languished until the 8th of November, in the year aforesaid, and then says, "on which said 8th of May, in the year aforesaid, the deceased died." The prisoner pleads not guilty. *Held*: the insertion of May for November is a mistake apparent on the face of the indictment, and will not exclude proof of the death subsequent to the 7th of November, or be cause for arresting the judgment. *Ailstock's case*, 3 Grattan, 650.

^a Eng. Com. Law Reps. xxxii. 620.

^b *Ib.* xxxix. 34.

^c *Ib.* xli. 130.

Where an indictment alleged that Cox made an assault on the deceased at the parish of All Saints, in Middlesex, and that the deceased at the parish of St. Paul's, in the county of Kent, did languish, &c., and that he there died, and that Hargrave and others were *then and there* present aiding, &c., Cox in the commission of the said felony; it was held that the word "there" referred with sufficient certainty to the parish of All Saints, where the blows, which continued the felony, were given.(e)

An inquisition against two prisoners, charging an injury done by one of them on one day, and another injury done by the other on another day, and that the death arose from both, is bad, there being no averment that the one was present when the act was done by the other. An inquisition stated that Devett, on the 27th of May, struck the deceased on the head with a poker, and gave her one mortal bruise and contusion, and that Fox, on the 23d of June, kicked the deceased with her foot and gave her thereby one mortal bruise and contusion, of which said mortal bruise and contusion so given by Devett, as well as of the mortal bruise and contusion so given by Fox, she languished, and afterwards of the said mortal bruises and contusions died: it was held that the inquisition could not be sustained.(ee)

Where the grand jury return the bill of indictment only a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one of manslaughter;(f) and this appears to be the practice at the present time upon some of the circuits;(g) but it has been thought to be the safer way to present a new bill to the grand jury for manslaughter.(h) And a very learned judge has ordered this to be done where the grand jury have returned manslaughter upon a bill for murder, saying he thought it the better course to prefer a new bill, *although the usual course on the circuit had been to alter the bill for murder, on the finding of the grand jury.(i) Though the same indictment may charge one with murder and another with manslaughter, yet if it charge both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter (j)

Of the finding the bill of indictment by the grand jury.

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If, as is very commonly the case, there be an indictment for murder, Arraignment. and a coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice appears to be to arraign and try the prisoner upon both, in order to avoid the plea of *autrefois acquit* or *attaint*; and to endorse his acquittal or attainder upon both presentments.(k)†

(e) *Rex v. Hargrave*, 5 C. & P. 170, Patteson, J.

(ee) *Reg. v. Devett*, 8 C. & P. 639, Bosanquet, Coleridge, and Coltman, Js.

(f) 2 Hale, 162.

(g) *Ex relat.* Mr. Pugh, Clerk of Assize, on the Oxford Circuit, 1816.

(h) By Lord Hale (2 Hale, 162), on the ground that the words of the indorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is the indictment when affirmed.

(i) *Turner's case*, 1 Lew. 176, Parke, B., at Carlisle.

(j) 1 East, P. C. c. 6, s. 116, p. 347.

(k) 1 East, P. C. c. 5, s. 134, p. 371.

† [One duly committed upon a regular indictment for murder cannot be discharged upon *habeas corpus*, by proving his innocence merely, however clear the proof may be; but must abide a trial by jury. *The People v. M'Leod*, 1 Hill, 377.]

^a Eng. Com. Law Repts. xxiv. 260.

^b Ib. xxxiv. 561.

And where the coroner's jury have found a verdict of manslaughter, and the grand jury a bill for murder, the prisoner has been arraigned and tried on both the inquisition and indictment at the same time.(l) So where the grand jury have found a bill for manslaughter, and the coroner's jury a verdict of wilful murder.(m)

Where there is an inquisition charging some prisoners with murder, and an indictment charging the same prisoners and others with murder, the course is to arraign and try all the prisoners on the indictment, and those charged by the inquisition on it also at the same time.(mm)

Pleas of
autrefois
acquitt, and
autrefois
attaint.

Where a man has been acquitted generally upon an indictment for murder, *autrefois acquit* is a good plea to an indictment for the manslaughter of the same person; and *e converso*, where a man has been acquitted on an indictment for manslaughter, he shall not be indicted for the same death as murder; the fact being the same, and the difference only in the degree.(n) And upon similar grounds it should seem, that one who had been convicted upon an indictment for manslaughter, and had his clergy allowed, might have pleaded *autrefois convict* to an indictment, charging the same death upon him as a murder.(o) And it is clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder.(p) And *autrefois convict*, or *autrefois attaint*, upon an indictment for murder, was a good plea to an indictment charging the same death as petit treason.(q)†

*566

As a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction, it has been *held that a party who has killed another in a foreign country, and been there prosecuted, tried, and acquitted, may avail himself of such acquittal in answer to any charge against him in this country for the same offence.(r)

(l) Reg. v. Walters, Hereford Sum. Ass. 1841, *coram*, Coltman, J. MSS. C. S. G.

(m) Reg. v. Smith, 8 C. & P. 160 Bosanquet and Coltman, Js., and Bolland, B.

(mm) Reg. v. Dwyers, Gloucester Sum. Ass. 1842, *cor.* Erskine, J.

(n) Rex v. Holoeroft, 4 Co. 46 b. 2 Hale, 246.

(o) The only objection would be, that he could not have been convicted of murder upon the former indictment; and though this might be said equally where the party has been acquitted upon a former indictment for manslaughter, the plea in the latter case is clearly proper, upon the ground that if the party was not guilty even of manslaughter, he cannot be charged with having caused the death, with the circumstances of aggravation necessary to constitute murder.

(p) Rex v. Wiggles, 4 Co. 45.

(q) 2 Hale, 246, 252. Fost. 329. As to the general doctrine of these pleas, and that they can only avail where the first indictment was valid, see 1 Chit. Crim. L. 452, *et seq.* And see Rex v. Clarke, *post*, p. 567, note (z). As a party may now be convicted of an assault upon an indictment for murder or manslaughter, Reg. v. Gould,^b 9 C. & P. 346, Tindal, C. J., and Parke, B.; Reg. v. Phelps, Gloucester Sum. Ass. 1841, MSS. C. S. G.; Reg. v. Pool,^c 9 C. & P. 728, Gurney, B.; it should seem that he might plead *autrefois acquit*, or *autrefois convict* of murder or manslaughter to an indictment for an assault. In Reg. v. Gould, the prisoner had been acquitted of murder, and was tried for a simple burglary in the house where the murder was committed; and Parke, B., said, "if he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even of an assault on the indictment for murder, on which he had been acquitted altogether, in his opinion that acquittal would have been answer to the allegation of violence if it had been inserted in the present indictment." C. S. G.

(r) Rex v. Hutchinson, 3 Kebl. 785, cited in Beak v. Thyrwhit, 1 Show. 6. Bull. N. P. 245. 3 Mod. 194. 1 Leach, 135, note (a). The defendants being apprehended in England,

† [If the defendant be acquitted of a capital offence by the verdict of a jury, a new trial will not be granted on the part of the state. *State v. Riely*, 2 Brevard, 444.

The plea of *autrefois convict* is sufficient when the evidence necessary to support the second indictment would have sustained the first, and also whenever the proof shows the second case to be the same transaction with the first. *Roberts v. The State*, 14 Georgia. S.]

^a Eng. Com. Law Reps. xxxiv. 334.

^b Ib. xxxviii. 156.

^c Ib. 309.

In a case where the prisoner had been tried for murder, and convicted of manslaughter, and had received the benefit of clergy, and was subsequently tried for murder, and convicted of manslaughter, in killing another individual (who died after the first trial) by the same act which caused the death of the first; the judges were unanimously of opinion, that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar. (s)

The evidence, in cases of murder, will consist of the proof of the particular facts and circumstances which show the killing as stated in the indictment, and that it was committed by the party accused, of malice aforethought. It should be observed, however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shown by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears. (t) †

Of the evidence.

and committed to Newgate, was brought into K. B. by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal: but the king (Car. 2), being unwilling to have him tried for the same offence, referred the point to the consideration of the judges: who all agreed, that as the party had been already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

(s) *Rex v. Jennings*, East. T. 1819. Russ. & Ry. 388. The act which occasioned the death of the two individuals (two children) was one and the same. The general effect of the allowance of clergy, after the 8 Eliz..c. 4, was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by the 6 Geo. 4, c. 25, s. 4, the allowance of the benefit of clergy to any person who was convicted of any felony, did not render the person to whom such benefit was allowed, dispensable for any other felony, by him or her committed, before the time of such allowance.

(t) *Fost.* 255. *Ante*, 483, 484.

† [On a trial for murder, evidence of the good or bad character of the deceased is inadmissible, except in cases where the killing is attended by circumstances to create a doubt of its character. As where it appears that the slayer has been actuated, in the commission of the offence, by the principle of self-defence, or by some other fact that would excuse the offence. *Queensbury v. The State*, 3 Stewart, 308.

It is not competent for one indicted for manslaughter to prove, on the trial, that the deceased was well known and understood by the accused and others to be a drunken, quarrelsome, savage, and dangerous man. *State v. Field*, 14 Maine, 244.

Facts that occurred at or about the time of the fatal encounter, involving the conduct of the deceased, which might have been observed by the slayer, are competent and admissible in evidence, without precedent proof that he had notice of them. *Reynolds v. The State*, 1 Georgia, 230.

On a trial for murder, evidence of the general character and habits of the deceased as to temper and violence cannot be received. The only exception to this rule, if there be one, is where the whole evidence as to the homicide is circumstantial. *State v. Barfield*, 8 Iredell, N. C. 344.

Evidence on the part of a prisoner, indicted as accessory in a murder, that he was a man of violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the defendant, is irrelevant and inadmissible. *State v. Duncan*, 6 Iredell, N. C. 236.

The character of the deceased for violence may be given in evidence to show the motive of the slayer, where there is doubt whether the act was done in self-preservation. *Monroe v. The State*, 5 Georgia, 85.

Though it is necessary to prove in a trial for homicide, that the violence inflicted by the defendant was the cause of the death of the deceased, yet it is not always necessary to prove by positive testimony that life continued to the moment of the fatal blow. The presumption that a person proved to have been alive at a particular time is still so, holds until it is rebutted by lapse of time or other satisfactory proof. *Commonwealth v. Harman*, 4 Barr, 269.

When it appeared in evidence on a trial for murder, that the prisoner had threatened, if the deceased took a deed of his land, which he bought at sheriff's sale, that he would kill him on the next day, a deed duly proved and registered of the land was admitted in evidence, though it would have been sufficient to have shown that the deceased professed to have a deed. *The State v. Shepherd*, 8 Iredell, 195.

On the trial of a husband for the murder of his wife, the State has a right to prove a long course of ill-treatment, by the husband towards the wife. *The State v. Rash*, 12 Iredell, 382.]

Where a count charges the death to have arisen from one cause, and it appears that the death was accelerated by that cause, but really arose from another, not being a natural cause, the evidence does not support the count. A count charged the death of a child to have been occasioned by exposure to cold; the evidence was, that the child was found in a field, alive, with a contusion on the head, and that it died a few hours afterwards; the medical men stated that the contusion was in itself sufficient to occasion death, and that the exposure might have accelerated it; it was submitted on behalf of the prisoner, that supposing the death to have been accelerated only by the exposure, the count which charged it as the cause could not be supported, and of this opinion was the very learned judge who tried the case. *(u)*

Death charged to two causes, and it turns out to be from one, is insufficient. *567

Where an indictment charges the death to have been occasioned by two co-operating causes, and the evidence fails to support one of the causes, it is sufficient. A count stated that the death to have been caused by omitting to give the deceased proper food, and also by beating; it was held that the prisoner, being a married woman, *was not legally responsible for omitting to provide food, and consequently that this count which charged the death jointly by starving and beating, was not supported. *(v)*

Where an indictment describes the instrument which caused the death by two names, it is sufficient if it be proved to be either. The prisoner was indicted for manslaughter, in causing the death of a female, by neglecting slinging a cask, which was described in the indictment as "a cask and puncheon;" and it was objected to the indictment on the ground that it was so described; but Parker, J., held, that if it was either, it was sufficient. *(w)*

A charge of forcing to take and swallow poison, is supported by proof of forcing to take into the mouth and throat, if that cause the death.

A charge of murder by forcing a person to take, drink, and swallow down oil of vitriol, will be sufficiently supported by evidence of forcing him to take it into his mouth and throat, if that produced the death; and negative evidence that none could have been swallowed down, and that the effect upon the throat must have produced the death will not vary the case. The indictment was, that the prisoner, contriving to murder J. S. with oil of vitriol, gave him a quantity thereof, and forced him to take it into his mouth and throat, knowing that it would occasion his death; by means whereof he became disordered; and by the oil of vitriol aforesaid, and by the disorder, choking, &c., occasioned thereby, died; and to this indictment there was a plea of *autrefois acquit*. The former indictment stated that the prisoner, contriving to murder J. S. by poison, gave him poison; that is oil of vitriol, and forced him to take, drink, and swallow it down, by means whereof he became sick; and by the poison so by him taken, drank, and swallowed down as aforesaid, and of the sickness occasioned thereby, he died. On demurrer, the plea was overruled, subject to a case, and the prisoner was tried and convicted. The case was argued; and it was urged, that on the first indictment swallowing must have been proved, which in fact had been negatived;

(u) Stockdale's case, 2 Lew. 220, Patteson, J.

(v) Rex v. Saunders, 7 C. & P. 277, Alderson, B. See this case, *ante*, p. 472, note *(p)*. See also Stockdale's case, 2 Lew. 220, where a count charged the death to have been occasioned by throwing a child on the ground, and also by exposure; and Patteson, J., inclined to think, as the evidence only supported one of the causes of death, that the count was not supported.

(w) Rigmaidon's case, 1 Lew. 180, Parke, J.

and that proof of forcing J. S. to take it into his mouth and throat would not have been sufficient: but eleven judges (Wood, B., being absent) held otherwise. It was also urged, that upon the first indictment it must have been proved that oil of vitriol was a poison, which in the second would not be necessary; but the judges seemed to think that the second indictment implied that the oil of vitriol was a poison, and a pardon was recommended. (x)

It has been holden as a rule, that no person should be convicted of murder unless the body of the deceased has been found: and a very great judge says, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead." (y) But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, *and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress was stained with blood; the court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved of by the judges) was afterwards executed. (z)†

But where upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen, with the child in her arms, on the road from the place where she had been at service to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's, without the child, and the body of a child was found in a tide-water, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to show that was not the body of such child; it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child,

(x) *Rex v. Clarke*, 2 Hill. T. 1820. 1 Brod. & Bing. 473.

(y) 2 Hale, 290.

(z) *Rex v. Hindmarsh*, 2 Leach, 569. It was urged on the prisoner's behalf at the trial, by Garrow (the late Mr. Baron Garrow), that he was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was, that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Mr. J. Gould. The mother and reputed father of a bastard child were observed to take the child to the margin of the dock, at Liverpool; and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea flowed and reflowed into and out of the dock, the learned judge, upon the trial of the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *quæ* the form of the indictment in this case.

† [Conviction for murder may take place when the body is not found. *United States v. Gilbert*, 2 Sanner, 19.]

which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to show that her child was actually dead (a)

Proof of averments in the indictment.

It is better not to put forth more of the special circumstances of the case, in an indictment for murder, than are required by the established rules: but if all the special matter in respect of which the law implies malice, be set forth, it is laid down that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. (b) Upon this principle, where an indictment for the murder of a serjeant-at-mace of the city of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant-at-mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant *ex officio*, at the request of the plaintiff, might arrest a defendant *absque aliquo precepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to *circumstance. (c) And if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for the murder, to produce the writ and warrant, without showing the judgment or decree. (d)

*569

It has already been shown that if A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appear that B. gave the stroke, and A. and C. were aiding and assisting, or it be not proved which gave the stroke, the charge is proved, for in law it is the stroke of all. (dd) So if a prisoner be indicted for strangling the deceased with her own hands, and upon the evidence it turns out that the deceased was strangled by some one else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, that is sufficient. (e)

Evidence in cases of poisoning.

In a case where the prisoner was charged with murder by poisoning, and the defendant stated that she *delivered* the poisoned food to the deceased, it was ruled that such allegation was proved, by showing that the prisoner put the poison in some pudding meal, which was in a bowl in the milk house, from whence it was taken by the deceased, as usual, to make the pudding for the family, and afterwards eaten by her. (f)

An indictment for murder, stating that the prisoner gave and administered poison, is supported by proof that the prisoner gave the poison to A. to administer as a medicine to the deceased, and that A. neglecting to do so, it was accidentally given to the deceased by a child, the prisoner's intention to murder continuing. Upon an indictment for murder, which alleged that the prisoner feloniously, &c., did administer a large quantity of laudanum to a child, it appeared that the prisoner delivered to one S. Stephens, with whom the child was at nurse, about an ounce of laudanum, telling her that it was proper medicine for the child, and directing her to administer to the child every night a tea-

(a) Reg. v. Hopkins, 8 C. & P. 591, Lord Abinger, C. B.

(b) East, P. C. c. 5, s. 115, p. 345.

(d) Fost. 311, 312.

(e) Rex v. Culkinn, 5 C. & P. 121. Park, J. A. J., Parke and Bolland, Bs.

(f) Rex v. Nicholson, 1 East, P. C. c. 5, s. 116, p. 346.

* Eng. Com. Law Repts. xxxiv. 540.

(c) Rex v. Mackally, 9 Co. 67.

(dd) Ante, p. 510, 1 Hale, 462.

b Ib. xxiv. 238.

spoonful thereof, which was quite a sufficient quantity to kill the child: the prisoner's intention in so doing, as shown by the finding of the jury, was to kill the child. Stephens took home the laudanum, and thinking the child did not require medicine, did not intend to administer it at all, and left it on the mantle-piece of her room. A few days afterwards a little boy of the said S. Stephens, during her accidental absence, removed the laudanum from its place, and administered a much larger dose than a tea-spoonful to the child, in consequence of which the child died. The jury were directed that if the prisoner delivered the laudanum to Stephens, with intent that she should administer to the child, and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that, if the laudanum was afterwards administered by an unconscious agent, while the prisoner's original intention continued, the death of the child, under such circumstances, was murder by the prisoner, and that if the tea-spoonful was sufficient to produce death, the administration of a much larger quantity by the little boy would make no difference. The jury found the prisoner guilty, and, upon a case *reserved for the opinion of the judges, whether the facts above stated constituted an administering of the poison by the prisoner to the child, they were unanimously of opinion, that the administering of the poison by the child, was, under the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had actually administered it with her own hand.(g)

*570

Upon an indictment, alleging that the prisoner did an act which caused the death, it is sufficient to prove that the prisoner caused and procured the act to be done by an innocent agent. An indictment charged that the prisoner, a certain plaster made by the prisoner of certain dangerous ingredients, feloniously did place and fix upon the head of the deceased; the prisoner was proved to have applied two plasters over the head of the deceased, but a third, which was applied last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with materials, which had been given by the prisoner to the mother for that purpose: it was objected that the indictment was not proved; but it was held that, though indictments often go on to say, that the prisoner "caused and procured" the thing to be done yet if the plaster was made by the direction of the prisoner, that was enough.(h)

There is one important species of evidence occasionally resorted to in cases of homicide, namely, the dying declaration of the party killed, which will be considered in a future part of this Treatise(i).

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide;(j) or of an assault under the 1 Vict. c. 85, s. 11.(k)

(g) Reg. v. Michael, 2 Moo., C. C. R. 120. S. C. 9 C. & P. 356. "If A. gives poison to B., intending to poison him, and B., ignorant of it, gives it to C., a child, or other near relation of A., against whom he never meant harm, and C. takes it and dies, this is murder in A., and a poisoning by him. Plowd. Com. 474, a, Dalt. cap. 93, but B., because ignorant, is not guilty." 1 Hale, 431. See ante, p. 539.

(h) Rex v. Spiller, 5 C. & P. 333. Bolland, B., and Bosanquet, J.

(i) Post, Book VI., upon Evidence.

(j) 1 Hale, 449. 2 Hale, 302. Co. Lit. 282 a.

(k) Reg. v. Phelps, Gloucester Sum. Ass. 1841, Coltman, J., MSS. C. S. G. Reg. v. Pool, 9 C. & P. 728, Gurney, B. Reg. v. Gould, 9 C. & P. 364, Tindal, C. J., Parke, B. See the section and the decisions upon it, post.

* Eng. Com. Law Reps. xxxviii. 152. b Ib. xxiv. 346. c Ib. xxxviii. 309. d Id. 156.

Where, however, the facts of the case amount only to excusable homicide, it is usual for the judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the conduct of the party.^(k) And several persons present at a homicide may be guilty in different degrees, one of murder, the other only of manslaughter.[†]

Man-
slaughter
committed
on the seas.

By the 39 Geo. 3, c. 37, s. 2, any person tried for murder or manslaughter committed upon the sea, by virtue of any commission directed under the 28 Hen. 8, c. 15,^(l) and found guilty of manslaughter only, shall be entitled to the benefit of clergy in like manner, and shall be subject to the same punishment as if he had committed such manslaughter upon land.

The jury
should at-
tend to the
directions
of the
court.
*571

In every case where the point turns upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing or alleviating, the matter of fact, namely, *whether the facts alleged by way of justification, excuse or alleviation, are true*, is the proper and only province of the jury. *But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court.^(m) In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a *special verdict*. But where the law is clear, the jury under the direction of the court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will find a general verdict, conformably to such direction.⁽ⁿ⁾ And if the jury bring in a verdict of manslaughter in a case which clearly amounts to murder, the court should not receive the verdict.^(o)

43 Geo. 3,
c. 58.
Concealing
the birth of
children.

The 43 Geo. 3, c. 58, which repealed the 21 Jac. 1, c. 27, and the Irish act, 6 Anne, provided that the trials in England and Ireland, of women charged with the murder of any issue of their bodies, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed to take place in respect to other trials for murder; and that the jury, by whose verdict any prisoner charged with such murder as aforesaid, should be acquitted, might find, "that the prisoner was delivered of issue of her body, male or female, which, if born alive would have been bastard; and that she did, by secret burying, or otherwise, endeavour to conceal the birth thereof."

Where an indictment stated that the prisoner was delivered of a child, and that she did, "by secretly disposing of the dead body" of the child, endeavour to conceal the birth thereof, it was objected that it was bad, inasmuch as it did not specify the mode of disposing of the body, and that the mode ought to be stated, in order to enable the court to see whether it amounted to the complete disposition contemplated by the

(k) *Post*, chap. on *Excusable Homicide*. *Post*, 279, 280.

(l) *Ante*, 100, 550.

(m) See *Reg. v. Fisher*, 8 C. & P. 182.

(n) *Post*, 255, 256.

(o) *Rex v. Smith, ante*, 546. And see *Slaughterford's case*, cited *Str.* 855.

† [Under an indictment for murder, the jury may find the prisoner guilty of the lesser offence of manslaughter, either voluntary or involuntary, and the verdict will be legal, although there is no count for manslaughter in the indictment. *Reynolds v. The State*, 1 Georgia, 227.]

statute; and Maule, J., expressing a strong opinion that the objection was good, the council for the prosecution declined to press the case, and the prisoner was acquitted. (oo)

On an indictment for child-murder, bad for not stating the name of the child, or accounting for the omission, no conviction for concealing the birth can take place; for the indictment being bad for its professed purpose is bad altogether. (pp)

This provision, as it could only be acted upon where the child was a bastard, and where the party was charged with murder by an inquisition or an indictment, (p) was open to much objection, and has been repealed by the 9 Geo. 4, c. 31; sec. 14 of which enacts, "that if any woman shall be delivered of a child, and shall, by secret burying or otherwise (q) disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years: and it shall not be necessary to prove whether the child died before, at, or after its birth: provided always, that if any woman tried for the murder of her child, shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child and that she did by secret burying, or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon *the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth." (qq)

Where women endeavour to conceal the birth of their children, they are punishable either by indictment for the offence or the jury may find them guilty of it on an indictment for murder.

*572

By the repealed statute of 21 Jac. 1, the concealment of the death of a bastard child by the mother made her guilty of a capital offence, unless she would prove that the child was born dead; and upon this statute it was decided, that if the mother called for help, or confessed herself with child, she was not within its construction: and upon the same principle, evidence was always allowed of the mother's having made provision for the birth, as a circumstance to show that she did not intend to conceal it. (r) So upon the 43 Geo. 3, c. 58, it seems that if the woman had made her pregnancy known to persons not implicated with her in the concealment, it would have been an answer to the charge of concealment. Thus where the prisoner threw a bastard child of which she had been delivered into the privy; and it was probable upon the evidence that the child was still-born; Bayley, J., held that this was no answer to the charge of concealment: but he said, that if the prisoner

As to the construction of the 21 Jac. 1, c. 27. Preparing baby linen, &c.

43 Geo. 3, c. 58.

(oo) Reg. v. Hounsell, 2 M. & Rob. 292.

(pp) Reg. v. Hicks, 2 M. & Rob. 302. Coleridge, J., and Maule, J.

(p) This statute did not make the concealment an offence for which an indictment could be preferred. Rex v. Parkinson, Carlisle Sum. Ass. 1821. MSS. Bayley, J. The 49 Geo. 3, c. 14, which repeals the Scotch act of parliament, relating to the murder of bastard children, differs from the 43 Geo. 3, c. 58, and does not make the concealment a matter which can only be found by the jury upon the trial of an indictment for murder, but enacts (sec. 2.) "that if any woman in Scotland shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be missing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the court before which she is tried shall direct and appoint."

(q) The words "disposing of the dead body of the said child" are new, and they seem very much narrower than those of the 43 Geo. 3, c. 58. The words of the 21 Jac. were, "either by drowning, or secret burying, or any other way." C. S. G.

(qq) The Irish Act, 10 Geo. 4, c. 34, s. 17, is word for word the same as this section.

(r) 1 East, P. C. c. 5, s. 15, p. 228. {See 1 Bay, 167, State v. Love.}

had communicated her pregnancy, or, to the knowledge of any other persons, made preparations for her confinement, the case would not have been within the statute (s) So since the new act, where the body of a child was found among the feathers of a bed, but it did not appear by whom it had been placed there, and the prisoner had prepared clothes for the child, and sent for a surgeon at the time of her confinement, an acquittal was directed. (t)

Presence of an accomplice.

Upon the 21 Jac. 1, the presence even of an accomplice was holden to take a case out of the act; so that where a woman was indicted for the murder of her bastard child, and the mother of the woman was indicted at the same time for being present aiding and abetting, and there was no other evidence of guilt but the concealment by both the prisoners, they were acquitted. (u) And if from the view of the child it were testified by one witness, by apparent probabilities, that it had not arrived at its *debitum partus tempus*, as if it wanted hair or nails, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury upon the evidence, as at common law, to say whether the mother was guilty of the death. (v) But the construction upon the 43 Geo. 3, c. 58, has been different. A woman may be found guilty of concealment, although from appearances it is probable the child was still-born, and although the birth was probably known to an accomplice. The prisoner and one Diana Thompson were indicted for the murder of the prisoner's bastard child: it was a seven months' child, and from the state in which it was found the probability was that it was still-born. D. Thompson, when questioned immediately after the child's birth, wholly denied it, though she must have known it. The prisoner threw the child down the privy; and the jury found this an endeavour to conceal the birth: but Silvester, R., doubted the propriety of that finding. Upon a case *reserved, the judges were unanimous that this was evidence of an endeavour to conceal the birth, and held the conviction right. (w)

A woman may be convicted though the child was still-born, and birth known to an accomplice.

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Sending for a person at the beginning of the labour, and the pregnancy being known to other persons, is only evidence for the consideration of the jury, not a bar to the prosecution.

The sending for a female to attend at the beginning of the labour, and the fact of its being known to the mother of the woman and others that she is pregnant, are no bar to a conviction for concealing the birth, but only evidence for the consideration of the jury. If the dead body of the child be buried, or otherwise disposed of by an accomplice of the mother in her absence, the accomplice acting as her agent in so doing, she may be convicted of endeavouring to conceal the birth. Upon an indictment for the murder of a child, it appeared that the male and female prisoner, had been living together for some time, and that she was delivered of the child about four in the morning, in the presence of the man who was the father of it, and that the man very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female remaining in bed up stairs; she had said she knew it was to be done; the fact of her being with child was some time before her delivery known by her mother, who lived at some distance, and it was ap-

(s) *Rex v. Southern*, Stafford Assizes, 1809. MSS. Bayley, J.

(t) *Rex v. Higley*, 4 C. & P. 356, Park, J. & J. See *Rex v. Douglas*, *infra*, note (z)

(u) Peat's case, Exeter Sum. Ass. 1793, *cor.* Heath, J. 1 East, P. C. c. 5, s. 15, p. 229.

(v) 2 Hale, 289.

(w) *Rex v. Cornwall*, Trin. T. 1817. MSS. Bayley, J., and Russ. & Ry. 336.

^ Eng. Com. Law Reps. xix. 421.

parent to other women: no female was present at the delivery; one had been sent for at the commencement of the labour, about twelve at night, but was so ill she could not attend: there were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty. The prisoner's counsel contended, upon the authority of Peat's case,^(x) and *Rex v. Higley*,^(y) that she could not be convicted of concealment: but it being doubted whether those cases would now be considered law, the opinion of the jury was taken, and they found her guilty; and, upon a case reserved upon the questions, 1st, whether there was evidence to convict her as a principal; and 2nd, whether, in point of law the conviction was good, the judges were of opinion that the communication made to other persons was only evidence, but no bar; and that the conviction was good.^(z)

In order to bring a case within the clause, the body of the child must be completely disposed of. The prisoner was found going across a yard in the direction towards a privy with a bundle of cloth sewed up, with the body of a child in it, and was stopped. Gurney, B., interposed, and said, that the prisoner could not be convicted, the offence not being complete; "the body must be buried or otherwise disposed of, to bring the case within the act. Here she was interrupted in the act, probably, of disposing of the body, but the act was incomplete."^(a) So where the dead body of a child was found, on the day of his birth, shut up in a trunk in the same room where the prisoner had been delivered, and which she had not quitted after the delivery, and there was some evidence to show that it was placed there for the purpose of concealment, it was contended that the prisoner could not have intended to let the body remain in the box, but must have meant, if she wished to conceal the birth, to remove it to some other place, and that, if that was the case, she was not guilty of an offence within this clause, and the preceding case was referred to; and Gurney, B., directed the jury *to acquit, if they thought the prisoner had not put the body in the trunk, as in a place of ultimate disposal.^(b)

Where on an indictment for murder, it appeared that the prisoner had placed her child in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket; Maule, J., held that the prisoner could not be convicted of concealing the birth, as the words "otherwise disposing of," contemplated a final disposing of the body, similar to what takes place by the act of secret burying.^(c)

And so where on an indictment for endeavouring to conceal the birth, it appeared that the prisoner had placed the child in a box in her bedroom; Rolfe, B., was clearly of opinion that the statute contemplated some mode of disposing of the body *ejusdem generis*, with the preceding term "burying," as by burning, or cutting to pieces, &c., or by hiding it in some place intended for its final deposit. Here it was clear the body had been placed by the prisoner in the box merely for a temporary purpose, and with a view to ultimate deposit in another place.^(p)

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^(x) *Rex v. Ante*, note (u).^(y) *Ante*, note (t).^(z) *Rex v. Douglas*, R. & M., C. C. R. 480. S. C., 7 C. & P. 644. As the offence is a misdemeanor, all taking part in it, although absent, are principals. See note (b), *ante*, p. 82. C. S. G.^(a) *Rex v. Snell*, 2 Moo. & R. 44.^(b) *Rex v. Watkins*. Monmouth Spr. Ass. 1841. MSS. C. S. G.^(c) *Reg. v. Ash*, 2 M. & Rob. 294.^(p) *Reg. v. Bell*, 2 M. & Rob. 294.

The same point was again decided by the learned baron in a similar way.^(g)

But where on an indictment for murder, it appeared that the prisoner had been suspected of being with child, but had always denied it, and that after her delivery, she persisted in denying that she had had a child, but upon a surgeon, who examined her, discovering all the symptoms of recent delivery, and asking her what had become of the child, she said it was under the bed, but the body of the child was found between the bed and the mattress, and the jury found the prisoner guilty of concealing the birth of the child; it was objected that the 9 Geo. 4, c. 31, s. 14, only applied to cases where the body was either secretly buried or disposed of in some place of final deposit, and not to cases where there was hiding of the body in a place from which a further removal of the body was contemplated. And *Reg. v. Ash*, 2 M. & Rob. 294, and *Reg. v. Bell*, *ibid.* were cited. But it was held, upon a case reserved, that the conviction was right.^(r)

There must be some act of disposal of the dead body of the child.

In order to bring a case within the clause, some act of disposal of the body must be done after the death of the child. Where on an indictment for endeavouring to conceal the birth of a child, it appeared that the prisoner was delivered in a privy; that the child dropped from her there into the soil, and that there she left it, and the jury thought that she went to the privy for the purpose of being delivered there and for the purpose thereby of concealing the birth; upon a case reserved, the judges thought, upon the wording of the act, it was necessary something should be done by the prisoner after the birth to bring the case within the act.^(c) So in a similar case where the prisoner had denied her pregnancy and the birth, and the body of the child was found in a privy. Mr. J. Patteson told the jury that the offence was not merely the endeavouring to conceal the birth of a child, but the prisoner, to come within the meaning of the act, must have endeavoured to conceal the birth by secret burying, or otherwise disposing of the dead body of the child; and it was essential to the commission of this offence that she should have done some act of disposal of the body after the child was dead. If she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted, notwithstanding her denial of the birth of the child, because she does not come within the provisions of the act unless she had done something with the child after it was dead. If there had been evidence that the child was born elsewhere, and was, after it was dead, carried by her to this place, and thrown in, that would be a disposing of the body within the act.^(d)

Persons assisting in concealing the birth.

Although upon an indictment for murder, the woman alone can be found guilty of concealing the birth,^(e) yet it seems that any person who counsels, aids or abets the mother in endeavouring to conceal the birth, may be indicted under sec. 31, of the 9 Geo. 4, c. 31, by which

^(g) *Reg. v. Halton*, M. & Rob. 294; and afterwards by Maule, J., in *Reg. v. Mary Jones*, *ibid.*

^(r) *Reg. v. Goldthorpe*,^a 1 C. & Mars. 335.

^(c) *Rex v. Wilkinson*, M. T. 1828. MSS. Bayley, J. 3 Burn. J., D. & W. 348.

^(d) *Reg. v. Turner*,^b 8 C. & P. 755, Patteson, J. And where the evidence strongly tended to show that the child had been born in a privy, and there was no evidence to show any act done to it by the prisoner after its death, Mr. J. Coleridge approved of the preceding case, and the counsel for the prosecution offered no evidence, as the case could not be distinguished from *Reg. v. Turner*. *Reg. v. Nash*, Hereford Spr. Ass. 1841. MSS. C. S. G.

^(e) *Reg. v. Douglas*, *supra*, note (z). *Reg. v. Wright*,^c 9 C. & P. 754. Gurney, B.

^a Eng. Com. Law Reps. xli. 187.

^b *Ib.* xxxiv. 622.

^c *Ib.* xxxviii. 322.

“every person who shall counsel, aid or abet the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against and punished as a principal offender.”(f)

An indictment for concealing the birth of a child must expressly allege the child to be dead, for it is only an offence to conceal the dead body.(g)

Whether the prisoner were charged with the murder of her bastard child by the coroner’s inquisition, or by a bill of indictment returned by the grand jury, she might have been found guilty under the 43 Geo. 3, of endeavouring to conceal the birth, for the coroner’s inquisition is a charge.(h)

*SECT. VII.

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Of Judgment and Execution.

THE judgment and mode of execution in cases of murder, is now regulated by the following statutes. The 9 Geo. 4, c. 31, which repealed the provisions upon that subject in the former statute, 25 Geo. 2, c. 37, by sec. 4, enacted, “that every person convicted of murder shall be executed according to law, on the day next but one after that on which sentence shall be passed, unless the same shall happen to be Sunday, and in that case on the Monday following; and the body of every murderer shall, after execution, either be dissected or hung in chains, as to the court shall seem meet; and sentence shall be pronounced immediately after the conviction of every murderer, unless the court shall see reasonable cause for postponing the same; and such sentence shall express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender shall be dissected or hung in chains, whichever of the two the court shall order: provided always, that after such sentence shall have been pronounced, it shall be lawful for the court or judge to stay the execution thereof, if such court or judge shall think fit.”

9 Geo. 4, c. 31, s. 4. Period of execution, and marks of infamy.

Sentence to be pronounced immediately.

Power to respite.

Sec. 5 provided as to the mode of dissection of the bodies of murderers.

By sec. 6, “every person convicted of murder shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison may order other necessaries to be administered; and no person but the goaler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission in writing, of the court or judge before whom such convict shall have been tried, or of the sheriff or his deputy: provided always, that in case the court or judge

Sec. 6. Prison regulations as to murderers under sentence.

(f) *Rex v. Douglas, supra.*
 (g) *Rex v. Ann Davis, Hereford Spr. Ass. 1829. Parke, J. J. MSS. C. S. G. Perkin’s case, 1 Lew. 44, per Parke, J. J.*
 (h) *Reg. v. Maynard, Mich. T. 1812. MSS. Bayley, J. Russ. & Ry. 240. Cole’s case, 3 Campb. 371. 2 Leach, 1995. Gloucester Lent Assiz. 1813. Dobson’s case, 1 Lew. 48. Moylan’s case, ib. 44, and there seems no doubt that the prisoner might be so convicted under the new statute, for she is “tried for the murder of her child,” as much on the inquisition as on the indictment. C. S. G.*

shall think fit to respite the execution of such convict, such court or judge may, by a license in writing, relax, during the period of the respite, all or any of the restraints or regulations herein before directed to be observed."

2 & 3 Wm. 4, c. 75. So much of the 9 Geo. 4, c. 31, as directs the bodies of murderers to be dissected, repealed.

By the 2 & 3 Wm. 4, c. 75, s. 16, "And whereas an act was passed in the ninth year of the reign of his late majesty for consolidating and amending the statutes in England relative to offences against the person, by which latter act it is enacted, that the body of every person convicted of murder shall, after execution, either be dissected or hung in chains, as to the court which tried the offender shall seem meet; and that the sentence to be pronounced by the court shall express that the body of the offender shall be dissected or hung in chains, whichsoever of the two the court shall order; be it enacted, that so much of the said last-recited act as authorizes the court, if it shall see fit, to direct that the body of a person convicted of murder, shall, after execution, be dissected, be and the same is *hereby repealed; and that in every case of conviction of any prisoner for murder, the court before which such prisoner shall have been tried shall direct such prisoner either to be hung in chains, or to be buried within the precincts of the prison in which such prisoner shall have been confined after conviction, as to such court shall seem meet; and that the sentence to be pronounced by the court shall express that the body of such prisoner shall be hung in chains, or buried within the precincts of the prison, whichever of the two the court shall order."

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4 & 5 Wm. 4, c. 26, repeals so much of the 9 Geo. 4, c. 31, 10 Geo. 4, c. 34, and 2 & 3 Wm. 4, c. 75, as authorizes the dissecting or hanging in chains.

The 4 & 5 Wm. 4, c. 26, s. 1, reciting the 9 Geo. 4, c. 31, s. 4, the 10 Geo. 4, c. 34, relating to offences in Ireland, and the 2 & 3 Wm. 4, c. 75, s. 16, enacts, that "so much of the said recited act made and passed in the ninth year of the reign of his majesty, King George the Fourth, as authorizes the court to direct that the body of a person convicted of murder should after execution be hung in chains, and also so much of the said recited act made and passed in the tenth year of the same reign, as authorizes the court to direct that the body of a person convicted of murder should, after execution, be dissected or hung in chains, and also so much of the said recited act made and passed in the second and third years of the reign of his present majesty as provides that in every case of conviction of any prisoner for murder, the court shall direct such prisoner to be hung in chains, shall be, and the same is hereby repealed." (d)

6 & 7 Wm. 4, c. 30, repeals the 9 Geo. 4, c. 31, and 10 Geo. 4, c. 34, partly.

The 6 & 7 Wm. 4, c. 30, recites, that by the 9 Geo. 4, c. 31, it was enacted, that "every person convicted of murder should be executed according to law on the day next but one after that on which the sentence should be passed, unless the same should happen to be Sunday, and in that case on the Monday following, and that sentence should be pronounced immediately after the conviction of every murderer, unless the court should see reasonable cause for postponing the same, and such sentence should express, not only the usual judgment of death, but also the time thereby appointed for the execution thereof; and it was by the said act provided, that after such sentence should have been pronounced, it should be lawful for the court or judge to stay the execu-

(d) By sec. 2, "every case of conviction in Ireland of any prisoner for murder, the court before which such prisoner shall have been tried shall direct such prisoner to be buried within the precincts of the prison within which such prisoner shall have been confined after conviction, and the sentence to be pronounced by the court shall express that the body of such prisoner shall be buried within the precincts of such prison."

tion thereof, if such court or judge should so think fit; and whereas every person convicted of murder should, after judgment, be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison might order other necessaries to be administered: and that no person but the gaoler and his servants and the chaplain and the surgeon of the prison, should have access to any such convict without the permission in writing of the court or judge before whom such convict should have been tried, or of the sheriff or his deputy; and it was by the said act further provided, that in case the court or judge should think fit to respite the execution of such convict, such court or judge might, by a license in writing, relax, during the period of the respite, all or any of the restraints or regulations thereinbefore directed to be observed:" and also reciting the 10 Geo. 4, c. 34, by *which the like provisions were made with respect to persons convicted of murder in Ireland: "And whereas, for the ends of justice, and especially more effectually to preserve from an irrevocable punishment any persons who may hereafter be convicted upon erroneous or perjured evidence, it is expedient to alter and amend the said recited acts in these respects. Be it therefore enacted, that so much of the said acts of the ninth and tenth years respectively of the reign of his late majesty, King George the Fourth, as is hereinbefore recited, shall be, and the same is hereby repealed."

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Sec. 2 enacts, "that from and after the passing of this act, sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects as after convictions for other capital offences." Present sentence in murder.

Sentence of death may be recorded, under the 4 Geo. 4, c. 48, against a person convicted of murder, the 6 & 7 Wm. 4, c. 30, s. 2, providing that "the judge shall have the same power in all respects, as after convictions for other capital offences." (*dd*)

Where two persons had been convicted of a barbarous murder in Pembrokeshire, at the Hereford assizes, being the next English county, and the indictment had been removed by *certiorari* into the Court of King's Bench, in order to argue some exceptions, which were overruled, that Court decided, after some question made whether the prisoners ought not to be sent back to Herefordshire to receive sentence, that they had the same jurisdiction over facts committed in Wales, as if committed in the next adjacent county in England; and the prisoners were therefore sentenced in the King's Bench, and were executed by the marshal. (*e*) But it seems to have been considered in a late case, by a judge at *nisi prius* upon an indictment for murder removed by *certiorari* into the Court of King's Bench, and afterward tried at *nisi prius*, without remitting the transcript of the record of the Court of King's Bench. (*f*) Sentence after removal of the indictment to the King's Bench by certiorari.

On the application of the attorney-general, the Court of King's Bench will, as a matter of course, grant a *habeas corpus* to bring up prisoners Garside's case.

(*dd*) Reg. v. Hogg, 2 M. & Rob. 380, Lord Denman, C. J.

(*e*) Athos' case (father and son,) as cited in note (*r*), 1 Hale, 463, where it is said, that the prisoners were executed at Kennington gallows, near Southwark. In Taylor's case, 5 Burr, 2797, the reporter says that he remembers this case; and that the defendants, being in the custody of the marshal, were executed at St. Thomas a Waterings, near the end of Kent street. And see also the case in Str. 553, and 8 Mod. 136; and see Sissinghurst-house case, *ante*, p. 538, note (*d*).

(*f*) Rex v. Thomas, 4 M. & S. 447.

convicted of murder and sentenced to death at the assizes; and a *certiorari* to remove into the King's Bench the record of the conviction and judgment. The prisoners were convicted of murder at Chester, and sentenced to be executed the next Friday; but a question arose, whether, since the 11 Geo. 4, & 1 Wm. 4, c. 70, ss. 13, 14, and 15, the sheriffs of the city or the sheriff of the county were bound to execute the sentence; and both parties refusing to do it, the prisoners had been from time to time respited. The attorney-general moved for a *certiorari* to remove the record of the conviction and the judgment, and for a *habeas corpus* to bring up the prisoners, in order that execution might be awarded by the King's Bench, and said he considered himself entitled to the writs of right: but from respect to the court, and for his own justification, in the course he adopted, he stated the grounds of his application, and cited many cases to show that he was entitled to the writs as of course, and that the Court of King's Bench might direct execution to be done by the sheriff of the county of Chester, or those of the *city, by the sheriff of Middlesex, or by the marshal of the King's Bench; and the writs were forthwith granted by the court.(g)

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When the prisoners were brought up and called upon to state if they had any thing to say why execution should not be awarded, one of them prayed three days' time to answer; and the court, in the exercise of its discretion, granted the application as to both.(h) When the prisoners were brought up again, one of them pleaded *ore tenus*.(i) that the king, by proclamation in the *Gazette* had promised pardon to any person, except the actual murderer, who should give information, whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information and thereby entitled himself to the pardon. The attorney-general demurred to the plea *ore tenus*, and the court held that it was bad.(j) The court in the same case also refused to hear an application from the sheriff of Middlesex, into whose custody the prisoners had been removed, praying that the order to do execution might not be made upon him.(k)

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*CHAPTER THE SECOND.

OF MANSLAUGHTER.(A)

IN this species of homicide, malice, which has been shown(o) to be the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is

(g) *Rex v. Garside*,^a 2 Ad. & E. 266. 4 N. & M. 333. See *Rex v. Antrobus*,^b Ad. & E. 788.

(h) *Rex v. Garside*, *supra*.

(i) As he may do. See *Dean's case*, 1 Leach, 476.

(j) *Reg. v. Garside*, *supra*.

(k) *Ibid.* The court, however, awarded execution to be done by the marshal of the Marshalsea, assisted by the sheriff of Surrey.

(a) *Ante*, p. 482, *et seq.*

(A) MASSACHUSETTS.—In the case of *The Commonwealth v. Thomas O. Selfridge*, for manslaughter, the charge of Mr. Justice Parker states several important points and principles of law relative to the crime of manslaughter, in a clear and forcible manner. It is there laid down:

“*Firstly*. That a man who in the lawful pursuit of his business is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his

^a Eng. Com. Law Reps. xxix. 84.

^b *Ib.* 213

imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. (b)

(b) Fost. 290. 1 Hale, 466. "Manslaughter is homicide, not under the influence of malice but where the blood is heated by provocation, and before it has time to cool." *Per* Taunton, J., Taylor's case, 2 Lew. 215.

power, otherwise to save his own life or prevent the intended harm; such as retreating as he can, or disabling his adversary without killing him, if it be in his power."

"Secondly. When the attack upon him is so sudden, fierce and violent, as that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all."

"Thirdly. When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

"Of these three propositions, the last is the only one that will be doubted any where; and this will not be doubted by any who are conversant in the principles of the criminal law. Indeed if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause, are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case; A., in the peaceable pursuit of his affairs, sees B. rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B., over the head, before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require, that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol was loaded. A doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." *Selfridge's Trial*, p. 160.

In another part of the charge, it is said, "I doubt whether self-defence could in any case be set up where the killing happened in consequence of an assault only, unless the assault be made with a weapon, which, if used at all, would probably produce death." *Ibid.* 164.

"When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant, to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence." *Ibid.*

"There is another point of more importance for you to settle, concerning which you must make up your minds from all circumstances proved in the case, namely, whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or by throwing himself into the arms of his friends, who would protect him. If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted. If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature." *Ibid.*

"It has however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace were intended by the deceased, there are certain principles of honour and natural right, by which the killing may be justified. These are principles which you as jurors, and I as a judge cannot recognize. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honour; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom, ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power, he has been guilty of manslaughter, notwithstanding you may believe that the case does not present the least evidence of malice or premeditated design to kill the deceased." *Ibid.*

"If a man for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger, kill his adversary, he will be guilty of manslaughter, if not murder, because the necessity being of his own creating, shall not operate in his excuse." *Ibid.* 165.

"You are therefore to inquire whether this assault upon the defendant by the deceased,

Of aiders and abettors, and of accessories. In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed.^(c) But there cannot be any accessories before the fact in manslaughter, because it is presumed to be altogether sudden, and without premeditation.^(d) Thus, if the indictment be for murder against A., and that B. and C. were counseling and abetting as accessories before only, (and not as *present* aiding and abetting, for such as principals,) if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged.^(e) There may, however, be accessories after the fact in manslaughter.^(f) If, therefore, upon an indictment against the principal and an accessory after the fact for murder, the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter.^(g)

The several instances of manslaughter may be considered in the following order:—

- I. Cases of provocation.
- II. Cases of mutual combat.
- III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace.
- IV. Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act.
- V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

^(c) 1 Hale, 430, 437, and see *ante*, p. 509, *et seq.* as to what will be a presence, aiding and abetting.

^(d) 1 Hale, 437. Hawk. P. C. c. 30, s. 2.

^(e) 1 Hale, 437, 450.

^(f) 1 Hale, 450. 1 East, P. C. c. 5, s. 123, p. 353. This seems to have been doubted before the statute, 1 Anne, stat. 2, c. 9, s. 1 (2 Hawk. P. C. c. 29, s. 24); but the effect of that statute seems to have removed the doubt. So much of the 1 Anne as relates to accessories is repealed by the 7 Geo. 4, c. 64.

^(g) *Rex v. Greenacre*,* 8 C. & P. 35. Tindal, C. J., Coleridge and Coltman, Js.

was or was not by the procurement of the defendant; if it were, he cannot avail himself of the defence now set up by him" *Ibid.*

NEW JERSEY.—In order to excuse a homicide on the ground of self-defence, it must clearly appear that it was a necessary act, in order to avoid destruction or some severe calamity. No man is justified or excusable for taking away the life of another, unless the necessity for so doing is apparent, as the only means of averting his own destruction, or some very great injury. *The State v. Wells*, 1 Coxe's Rep. 424. In which case it was also decided, that parol confessions are admissible in evidence, although there was also a written confession taken before a magistrate; that evidence of general character is admissible in a criminal prosecution, although of little weight, unless where the fact is dubious, or the testimony presumptive; and that no new trial, even in a criminal prosecution, is to be granted, where justice has been done by the verdict, although there may have been a misdirection in an important particular.

PENNSYLVANIA.—The punishment of voluntary manslaughter is not within the 10th and 11th sections of the act of April 23d, 1794. And therefore a person convicted of that crime cannot be sentenced to undergo confinement in the solitary cells, in the gaol and penitentiary-house in Philadelphia, or low and coarse diet. *White v. The Commonwealth*, 1 Serg. & Rawle, 139.

{One who is indicted of murder cannot be convicted of involuntary manslaughter. If, on such indictment, the offence proved is involuntary manslaughter, the defendant should be acquitted—and he may be indicted for a misdemeanor, 7 Serg. & Rawle, 423, *Commonwealth v. Gable and another.*}

* Eng. Com. Law Reps. xxxiv. 280.

*SECTION I.

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Cases of Provocation.

WHENEVER death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter. (g) It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved. (h)

It has been shown that the most grievous words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. (i) But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. (k)

It is indeed said to have been held in one case that words of *menace of bodily harm* are a sufficient provocation to reduce the offence of killing to manslaughter; (l) but it has been considered that such words ought at least to be accompanied by some act denoting an immediate intention of following them up by an actual assault. (m) †

But though words of slighting, disdain, or contumely, will not of themselves make such a provocation as to lessen the crime into manslaughter; yet, it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter. (n)

Where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the

(g) 1 Hale, 466. 1 Hawk. P. C. c. 30. Fost. 290. 4 Bla. Com. 191. 1 East, P. C. c. 5, s. 19, p. 232.

(h) *Ante*, p. 483.

(i) *Ante*, p. 514.

(k) Fost. 591. 1 East, P. C. c. 5, s. 20, p. 233.

(l) Lord Morley's case, 1 Hale, 455. The same case is mentioned in Kel. 55; but no such position is there stated.

(m) 1 East, P. C. c. 5, s. 29, p. 233.

(n) 1 Hale, 455, where it is said, that this was held to be manslaughter, according to the proverb, "the second blow makes the affray;" and Lord Hale says, that this was the opinion of himself and some others.

† [Homicide in a sudden quarrel, provoked by the words of the deceased is manslaughter. *Short v. The State*, 7 Yerger, 510. It is perfectly settled that no words or gestures, nor any thing less than the indignity to the person of a battery, or an assault, at least, will extenuate a killing to manslaughter. *State v. Barfield*, 8 Iredell, N. C. 344.

Ordinary provocation given by a woman or child to a man of average strength, even though it amounts to a blow given, does not, it seems, lower a homicide from murder to manslaughter. *Commonwealth v. Mosler*, 4 Barr, 264.]

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aggressor killed in the heat of blood, the *furor brevis*, occasioned by the provocation.(o) So if A. be passing along the street, and B. meeting him (there being convenient distance *between A. and the wall) take the wall of him and justle him, and thereupon A. kill B., it is said that such justling would amount to a provocation which would make the killing only manslaughter. And again, it appears to have been considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.(p)

Slight provocation, even by a blow, will not extenuate, if the revenge be barbarous.

But, in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, and will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature: but where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity, and entitled to lenient consideration. Thus, where a woman, after some words of abuse on both sides, gave a soldier a box on the ear, which the soldier returned, by striking her on her breast with the pomel of his sword; and the woman then running away, the soldier pursued, and stabbed her in the back with his sword; Holt, C. J., at first considered it to be murder: but, upon it coming out in the progress of the trial that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be no more than manslaughter.(q) In this case, the smart of the soldier's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact.(r)

Provocation by restraining a person of his liberty.

Where a man has been injuriously and without proper authority restrained of his liberty, the provocation has been considered sufficient to extenuate: as where a creditor placed a man at the chamber door of his debtor, with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him; and the debtor stabbed the creditor, who was discoursing with him in the chamber.(s) And the same doctrine was held in a case where a serjeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted; and whilst the serjeant had hold of him to force him, he drew the serjeant's sword, plunged it into his body, and killed him. The serjeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J., considered it in two lights: first, if the serjeant had authority: and, secondly, if he had not, on account of the coolness, deliberation, and reflection with which the stab was given. The jury found the prisoner guilty: but the judges were unanimous that the articles of war should have been produced; and for want thereof held the conviction wrong.(t)

(o) Kel. 145. 4 Bla. Com. 191. 1 East, P. C. c. 5, s. 20, p. 233.

(p) 1 Hale, 455. Lanure's case. See also 2 Haywood's (N. C.) Rep. State v. Piver.}

(q) Stedman's case, Old Bailey, Apr. 1704. MSS. Tracy and Denton, 57, Fost. 292. 1 East, P. C. c. 5, s. 21, p. 234.

(r) Fost. 292. See the case more fully stated, ante, p. 515.

(s) Buckner's case, Sty. 467.

(t) Rex v. Withers, Mich. T. 1784. MSS. Bayley, J., and 1 East, P. C. c. 5, s. 20, p. 233. This case is also cited as to a point of evidence in Holt's case, 2 Leach, 594.

Where a man finds another in the act of adultery with his wife, and kills him or her (u) in the first transport of passion, he is only guilty of *manslaughter, and that in the least degree: (v) for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shown, that the killing of an adulterer deliberately, and upon revenge, would be murder. (w) So it seems that if a father were to see a person in the act of committing an unnatural offence with his son, and were instantly to kill him, it would only be manslaughter; but if he only hear of it from others, and go in search of the person afterwards, and kill him, when there had been time for the blood to cool, it would be murder. (x) †

Provoca-
tion by de-
tecting an
adulterer.
*582

There are instances where slight provocations have been considered as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise rather than to a cruel and implacable malice. But, in cases of this kind, it must appear that the punishment was not urged with brutal violence, not greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life. (y) [1] Thus, where A. finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was holden to be manslaughter: but it must be understood that he beat him, but not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again. (z) And of the case of a keeper of the park, who, finding a boy stealing wood in his master's ground, tied him to a horse's tail, and beat him, upon which the horse running away, the boy was killed, (a) it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation done to one to be felt by the other. (b) And *a fortiori*, if the master had himself caught the trespasser, and beat him in such a manner as showed a desire only to chastise and prevent a repetition of the offence, but had unfortunately, and against his intent killed him, it would only have been manslaughter. (c)

Provoca-
tions of a
slight kind,
which have
been allowed
to extenuate,
where the party
killing has
not acted
with cruelty,
or used
dangerous
instruments.

Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecillities of human nature, where certain provocations are given. (d)

(u) Pearson's case, 2 Lew. 216, Parke, B.

(v) Manning's case, T. Raym. 212. 1 Vent. 159. And the court directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

(w) *Ante*, p. 525.

(x) *Reg. v. Fisher*, 8 C. & P. 182. Park, J. A. J., Parke, B., and Law, Recorder.

(y) *Fost.* 291. 4 Bla. Com. 200. (z) *Fost.* 291. 1 Hale, 473. *Ante*, 519.

(a) *Halloway's case*, Cro. Car. 131. 1 Hale, 453. 1 Hawk. P. C. c. 31, s. 42. *Fost.* 292. *Ante*, p. 520.

(b) 1 East, P. C. c. 5, s. 22, p. 237.

(c) 1 East, P. C. c. 5, s. 22, p. 237.

(d) *Fray's case*. Old Bailey, 1785. 1 Hawk. P. C. c. 31, s. 38. 1 East, P. C. c. 5, s. 22, p. 236.

[† Suspicion of adultery, however strong, will not reduce the offence of killing to manslaughter. *Reg. v. Kelly*, 2 C. & K. 814. Eng. C. L. lxi. 813.]

[1] {See 1 Hawk's (N. C.) Rep. 210, *State v. Tuckett*. Ib. 349, *State v. Roberts*. 1 Ashmead's Rep. 289, *Commonwealth v. Green*.}

Father
taking up
the quarrel
of his son.
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In a case where the prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the *other boy upon the head, upon which he died; it was ruled to be manslaughter, because done in sudden heat and passion: (*dd*) but the true grounds of the judgment seem to have been that the accident happened by a single stroke given in heat of blood, with a cudgel not likely to destroy, and that death did not immediately ensue. (*e*)

Nature of
the instru-
ment used
by the
party kill-
ing.

Several other cases are reported, in which the nature of the instrument used led to a lenient consideration of the homicide on the ground that such instrument was not likely to endanger life. Thus, where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff, and threw it at her from a distance, and killed her; the judges were not unanimous, and a pardon was advised: and the doubt appears to have arisen upon the ground that the instrument was not such as could probably, at the given distance, have occasioned death, or greater bodily harm. (*f*) A similar doubt appears to have been entertained in the following case, which was stated in a special verdict. A mother-in-law employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw a four-legged stool at the child, which struck her on the right side of the head, on the temple, and caused her death soon afterwards; the verdict stated, that the stool was of sufficient size and weight to give a mortal blow; but that the mother-in-law did not intend, at the time she threw the stool, to kill the child. (*g*) And in a case where the prisoner had struck his boy with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life. (*h*)

In a case where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J., told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy; and that if they thought the stake was an improper instrument, they should further consider, whether it was probable that it was used with an intent to kill: if they thought it was, that they must find the prisoner guilty of murder; but, on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount, at most, to manslaughter. The jury found it manslaughter. (*i*) So on an indictment for wounding *with a tin can, with

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(*dd*) Rowley's case, 12 Rep. 87. 1 Hale, 453.

(*e*) Post. 294, 295 Cro. Jac. 296. Godb. 182. See the case, *ante*, p. 519.

(*f*) 1 Hale, 455, 466. 1 East, P. C. c. 5, s. 22, p. 236.

(*g*) Hazel's case, 1 Leach, 368. The question whether this was murder or manslaughter was considered as of great difficulty, and no opinion was ever delivered by the judges.

(*h*) Turner's case, cited in Comb. 407, 408, and 1 Ld. Raym. 143, 144. 2 Ld. Raym. 1498. The clog was a small one; and Holt, C. J., said, that it was an unlikely thing to kill the boy.

(*i*) Wigg's case, reported in a note to Hazel's case, 1 Leach, 378. If, however, the instru-

which the prisoner has struck the prosecutor four times on the head, Alderson, B., directed the jury to consider, "whether the instrument employed was, in its ordinary use, likely to cause death: or though an instrument unlikely, under ordinary circumstances to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? A tin can, in its ordinary use, was not likely to cause death, or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or a bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest, but where an instrument like the present is used, you must consider whether the mode in which it was used, satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it." (j)

Upon an indictment for murder it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, resistance was made to them by the mob; and one of the constables was beaten severely by the mob, the different prisoners all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists; of this aggregate violence, the constable afterwards died. Alderson, B., "The principles on which this case will turn are these:—if a person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used, or if after much injury by beating, the violence is still continued, then the question is, whether this excess does not show a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e. g.*, a stick, then the same question as above will arise as to the purpose to kill: and in any case if the nature of the violence, and the continuance of it be such, as that a rational man would conclude that death must follow from the acts done, then it is reasonable for the jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the

Macklin's case. If the nature of the violence be such that a rational man would conclude death would follow, it is reasonable for the jury to conclude death was intended.

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ment used is so improper, as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance. *Ante*, p. 517, 518.

(j) *Rex v. Howlett*, 7 C. & P. 274, Alderson, B.

* Eng. Com. Law Repts. xxxii. 509.

head, such an act would affect the individual only by whom it was done. Here, therefore, in considering the case, you must determine, whether all these prisoners had the common intent of attacking the constables; if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each if done by one man, would together show such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter.”(j)

It has been before shown, that the plea of provocation will not avail in any case, where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice;(k) and that even where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice.(l) It has also been observed, that in every case of homicide upon provocation, how great soever that provocation may have been, if there were sufficient time for passion to subside, and reason to interpose, such homicide will be murder;(m) and it should always be remembered, that where a party relies upon the plea of provocation, it must appear, that when he did the fact, he acted upon such provocation, and not upon any old grudge.(n)

SECT. II.

Cases of Mutual Combat.

Man-
slaughter
in mutual
combat.

INSTANCES of mutual combat in which, from the deliberate conduct of the parties, from some undue advantage taken by the party killing, or from the violent conduct which the party killing pursued in the first instance, the conclusion of malice has been drawn, and the killing has consequently amounted to murder, have been shown in the preceding chapter.(o) We have now to consider those cases where upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side; for if death happen under such circumstances, the offence of the party killing will amount only to manslaughter.(p)

Sudden
quarrel.

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If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them be killed, it will be manslaughter, because it may be presumed that the blood never cooled.(q) And it must be observed, with regard to sudden rencounters, that when they are begun; the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extended the offences.(r)

(j) Macklin's case, 2 Lew. 225, Alderson, B.

(k) *Ante*, p. 521.

(l) *Ante*, p. 520.

(m) *Ante*, p. 525. Fost. 296.

(n) 1 Hale, 451. 1 East, P. C. c. 5, s. 23, p. 239. See Mason's case, *ante*, p. 520, *et seq.*

(o) *Ante*, p. 527, *et seq.*

(p) Fost. 285.

(q) 1 Hale, 453. 1 Hawk. P. C. c. 31, s. 29. 3 Inst. 51.

(r) Fost. 138, 296.

If two draw their swords upon a sudden quarrel, and one kills the other, it is only manslaughter. Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern; and on coming out Sir Charles P. and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles P. through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W.; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, "Damn you, you are dead." Jenner, B., told the jury that this was only manslaughter; the jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c.: but Allibone, J., repeated to them that it was manslaughter only, and they found accordingly.^(s)

Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors; Lord B. asked which they were; Mr. C. named Nuttall and another; Lord B. repeated his question: Mr. C. said, "Surely you will allow Nuttall to be Sir C. Sedley's: but if you have any thing more to say, you will find Sir C. Sedley in Dean-street, and me in Berkley-row." The conversation then dropped, and they stayed together at least half an hour: and Lord B. during that time conversed with a gentleman who sat next him; Mr. C. settled the bill, but made a mistake in marking the club room, which might arise from agitation; he marked Lord B. as absent though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him; to which Mr. Dodston answered "No," and was returning into the room, when he met Lord B. coming out. Lord B. said to Mr. C., "I want to speak to you;" upon which they both called the waiter, and were shown into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him; upon which Mr. C. said, "if you have any thing to say we had better shut the door, or we shall be heard," and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, "Draw, Draw." Mr. C. drew, and thrust at Lord B.; and after one or two thrusts, Mr. C. received a mortal wound, of which he died. An indictment was preferred for murder; but upon the trial, the peers (123) were unanimous that it was manslaughter only.^(t)

In a case where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other *stamped upon his stomach and belly with great force, and thereby killed him, it was considered to be only manslaughter. The deceased who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gaming, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow in the eye: upon

(s) *Rex v. Walters and others*, 12 St. Tr. 113.

(t) *Rex v. Lord Byron*, 11 St. Tr. 1177.

which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face, the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps on the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by the heat of blood: but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter. (u)

First blow immaterial, if quarrel sudden, and combat equal.

A. uses provoking language or behaviour towards B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow. (v) But it would be otherwise if the terms were not equal, and if the party killing sought or took undue advantage; as if B., in the foregoing case, had drawn his sword and made a pass at A., the sword of A. being then undrawn, and thereupon, A. had drawn and a combat had ensued, in which A. had been killed: for this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, showed that he sought his blood. (w) And A.'s endeavour to defend himself, which he had a right to do, will not excuse B.: but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter. (x)

And such an indulgence is shown to the frailty of human nature, that where two persons, who had formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the case. (y) †

If equal at onset, the use of a deadly weapon afterwards will not make the offence more than manslaughter. *588

Though, from the preceding cases, it appears, that not only the occasion must be sudden, but that the party assaulted must be put upon an equal footing in point of defence at the onset, to save the party making the first assault and killing from the guilt of murder; yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, *after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter. (z) But we have seen that the conclusion would be different if there were any previous intention or preparation to use such a weapon in the course of the affray. (a)

(u) *Rex v. Ayes*, East. T. 1810. MSS. Bayley, J., and Russ. & Ry. 166.

(v) *Fost.* 295. 1 *Hale*, 456.

(w) 1 *Hawk. P. C. c. 31*, s. 27. *Fost.* 295. And see *ante*, p. 531.

(x) 1 *Hawk. P. C. c. 31*, s. 28. *Fost.* 295.

(y) 1 *Hawk. P. C. c. 31*, s. 30. 1 *Hale*, 452.

(z) 1 *East, P. C. c. 5*, s. 26, p. 243.

(a) *Ante*, p. 531.

† [If a prisoner, upon meeting her adversary unexpectedly, who had interrupted her upon her lawful road and in her lawful pursuit, accepted the fight, when she might have avoided it by passing on; the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping her on the way, and it would be manslaughter. *Copeland v. State*, 7 *Humphreys*, 479.]

John Taylor, a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist; the servant who was struck went out of the room into the yard, to fetch his fellow servants to turn Taylor and his company out of the room; and in the meantime, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor and go out of the house; and Taylor after some further altercation was going away, when the deceased laid hold of him by the collar, and said, "he should not go way till he had paid for the liquor;" and then threw him down against the settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage: and Taylor then said "he did not mind killing an Englishman more than eating a mess of crowdy." The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse; whereupon, Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter. (b)

In another case of a similar kind, where the jury had found the prisoner guilty of murder, the following facts were stated for the opinion of the judges. The prisoner, whose name was William Snow, and who was a shoemaker, lived in the same neighbourhood as the deceased, and at no great distance from him. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning, in his way home, by the prisoner's house: and on passing the prisoner, as he sat on the bench, the deceased called out to him, *"Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so

(b) *Rex v. Taylor, 5 Burr, 2703. 1 Hawk. P. C. c. 31, s. 39.*

hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has stabbed me to the heart; I am a dead man;" and expired. Upon inspection, it appeared that he had received three wounds, one very small on the right breast: another on the left thigh, two inches deep and half an inch wide; and the mortal wound on the left breast. After great argument and consideration, the judges determined that the offence was only manslaughter.(c)

It appears that the judges thought in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word or gesture. The deceased began first, by ill-language, and afterwards by collaring him and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders: though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought the offence only amounted to manslaughter; and the prisoner was recommended for a pardon.(d)

Kessal's case.

Upon an indictment for maliciously cutting, it appeared that the prisoner and the prosecutor, both being intoxicated, a quarrel ensued; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued, and overtook him, on which the prisoner, who had taken out his knife in his retreat, gave the prosecutor a cut across the abdomen. Park, J. A. J., "The question I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so to gain an advantage in the conflict? for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion that if death had ensued, the crime would have been murder; or whether the prisoner, *bona fide*, ran away from the prosecutor with intention to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself? as in this latter case, if *the prosecutor had been killed, the crime would have been manslaughter only."(e)

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Third person interfering in the combat of others.

It is said, that he shall be adjudged guilty of manslaughter, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other.(f) And it seems clear that if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants, seeing their

(c) *Rex v. Snow*, 1 Leach, 151.

(d) 1 East, P. C. c. 5, s. 26, p. 245, who cites Sergeant Foster's MSS.

(e) *Rex v. Kessal*, 1 C. & P. 437. *Rex v. Taylor*, *supra*, note (b), and *Rex v. Snow*, *supra*, note (c), had been cited for the prisoner.

(f) 1 Hawk. P. C. c. 31, s. 35.

master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, but the master of murder. (g) From this it follows, *a fortiori*, that if a man-servant or friend, or even a stranger, coming suddenly, and seeing him fighting with another man, side with him, and kill the other man, or seeing his sword broken send him another, wherewith he kills the other man, such servant, friend or stranger, will be only guilty of manslaughter. (h) But this proposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend, or servant of A., not being acquainted therewith, come in and take part against B., and kill him, this, (though murder in A.) is only manslaughter in C.: yet it would be otherwise, if C. had known that the fighting was upon malice, for then it would be murder in both. If A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*: but if the servant had killed him before the master had retreated as far as he could it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant. (i)

If two persons be fighting, and another interfere with intent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter. (k) And if a third person should take up the cause of one who had been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in Fleet street, and B. gave some provoking language to A., who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C. and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B., and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it *appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him; and accordingly, at last, it was found manslaughter. (l)

Where, upon an indictment for wounding under the 9 Geo. 4, c. 31, it appeared that the prisoner and the prosecutor's brother were fighting, and the prosecutor laid hold of the prisoner in order to prevent him from beating his brother, and held him down on a locker, but did not strike him, and the prisoner then stabbed him; the jury were directed that if they were of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime, if death had ensued, would have been murder; but if they thought that the prose-

(g) 1 Hawk. P. C. c. 31, s. 55. 1 Hale, 438. Plow. Com. 100 b. Rex v. Salisbury.

(h) 1 Hawk. P. C. c. 31, s. 56. 1 East, P. C. c. 5, s. 58, p. 290.

(i) 1 East, P. C. c. 5, s. 58, p. 292, and the authorities there cited. 1 Hale, 484. So Tremain says, that a servant may kill a man to save the life of his master, if he cannot otherwise escape. 21 H. 7, c. 39. Plowd. Com. 100. 1 MSS. Sum.

(k) 1 East, P. C. c. 5, s. 59, p. 292. Kel. 66.

(l) 1 Hale, 482, 483. A case at Newgate, 1671.

cutor did more than was necessary to prevent the prisoner from beating the brother, or that he struck any blows, then it would have been manslaughter. *(m)*

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend. *(n)* But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray or striving being such a provocation to one person to meddle with the injury done another as will lessen the offence to manslaughter, if a man be killed by the person so meddling. *(o)*

Though Lord Hale and others appear sometimes to intimate a distinction between the interference of servants and friends, and that of a mere stranger, yet the limits between them do not appear to be any where actually defined. And it has been observed that the nearer or mere remote connexion of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction. *(p)*

Blow intended for one individual lighting on another.

As a blow aimed with malice at one individual, or by mistake or accidentally falling upon another and killing him, will amount to murder; *(q)* so if a blow intended against A. and lighting on B. arose from such a sudden transport of passion as, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it should happen to kill B. *(r)*

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A widow finding that one of her sons had not prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death; Park, J. A. J., to the jury: "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter, and there is no doubt if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances." *(s)*

Brown's case.

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man!"

(m) Rex v. Bourne, * 5 C. & P. 120, Parke, J. J.

(n) 12 Rep. 87.

(o) See the opinion of the judges in Rex v. Huggett, Kel. 59, and 1 East, P. C. c. 5, s. 89, p. 328, 329.

(p) 1 East, P. C. c. 5, s. 58, p. 292.

(q) Ante, p. 539.

(r) Post. 262.

(s) Rex v. Conner, ^b 7 C. & P. 438, Park, J. A. J., and Gaslee, J.

The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and on their pressing on him, he struck at them with the flat side of the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes 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. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but before he passed, the soldier went to him, and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses, that if the soldier had not drawn his sword, they would both of them have been murdered. The judges were clearly of opinion that this was only manslaughter.(t)

SECT. III.

Cases of Resistance to Officers of Justice; to Persons acting in their Aid; and to Private Persons lawfully interfering to apprehend Felons, or to prevent a Breach of the Peace.

IT has been before mentioned, as a general rule, that where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance.(u) But this protection of the law is extended only to persons who have proper *authority, and who use that authority in a proper manner;(v) wherefore, questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding; and as the consequence of defects in any of these particulars is in general that the offence of killing the person resisted is extenuated to manslaughter, it will be proper in this place to consider some of those questions which have met with judicial decision.†

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A special constable, duly appointed under the 1 & 2 Wm. 4, c. 41, Special remains a constable until his services are either determined or suspended constables. under sec. 9. Upon an indictment for the murder of J. Nutt, it appeared that Nutt was appointed on the 9th of February, 1832, by two justices, in writing, and under their hands, "to act as a special constable for the parish of St. George, until he received notice that his service is suspended or determined." Nutt was killed in conveying a prisoner to the station-

(t) Brown's case, 1 Leach, 148. 1 East, P. C. c. 5, s. 26, p. 245, 246.

(u) *Ante*, p. 532.

(v) *Fost.* 319.

† [Where one man is unlawfully restrained of his liberty, and kills the aggressor, the offence is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when the restraint is upon one man by another, so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained in that manner and for that cause kill the other, it is murder. *State v. Craton*, 6 Iredell, N. C. 164.]

house on the 16th of August, 1840; it was objected that Nutt did not continue a special constable till that time; but it was held that the appointment was indefinite in point of time, and remained valid and in force till it was either suspended or determined under sec. 9, and as Nutt's appointment was not shown to have been determined, he continued to be a special constable under the act on the 16th of August, 1840, and had then, under sec. 5, all the ordinary powers of a common constable. (*w*)

Authority of officers and others to arrest and imprison in cases of felony.

The authority to arrest and imprison is greater in cases of felony than in matters of mere misdemeanor; and least of all in civil suits.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit, will be under the same protection of the law; and the same rule holds, if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake him without killing him. (*x*) Thus, where upon a robbery committed by several, the party robbed raised the hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon the hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder. (*y*)

Authority of private persons to arrest, &c. in cases of felony. A felony must have been committed, and by the party apprehended.

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But where private persons use their endeavours to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested; for if that be not the case, no suspicion, however well grounded, will bring the person so interposing within the protection which the law extends to persons acting with proper authority. (*z*) *If it is clear that a felony has been committed, the next consideration will be, whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprized of the truth of the fact, the other not having submitted and rendered himself to justice. (*a*)

Upon an indictment for wounding it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ash-pit,

(*w*) Reg v. Porter, 9 C & P. 778, Coleridge, J.

(*x*) 1 Hale, 489, 490. 1 Hawk. P. C. c. 28, s. 11. Fost. 309. 1 East, P. C. c. 5, s. 67, p. 298.

(*y*) Jackson's case, 1 Hale, 464, ante, p. 536.

(*z*) 2 Inst. 52, 172. Fost. 318. Samuel v. Payne, Dougl. 359. And in Coxe v. Worrall, Cro. Jac. 193, it was holden that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4, 3; 5 Hen. 7, 5; 7 Hen. 4, 35, are cited.

(*a*) 1 Hale, 490. Fost. 318. {See 1 Hawk's N. C. Rep. 467, State v. Rutherford.}

* Eng. Com. Law Reps. xxxviii. 334.

which he was permitted to do; as he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle, which had stood on a shelf near the ash-pit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife: a rattle of copper had been heard while the prisoner was at the ash-pit: it was objected that the prosecutor had no right to detain the prisoner. Alderson, B., "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding would be felony."^(b)

In a late case, where Headley, being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some house-breaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by Headley and his servant, and during such detention, and in the course of the same night, the prisoner had cut Headley's servant with a knife, a point was made that such cutting was not within the 43 Geo. 3, c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the judges held that the prisoner being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate.^(c)

These distinctions between officers and private persons proceed upon the principle of discouraging persons from proceeding to extremities upon their own private suspicion or authority. And upon this principle, it appears to have been considered, that a private *person is not bound to arrest any one standing *indicted* for felony, against whom no warrant can be produced at the time; and therefore, the law does not hold out the same indemnity to such person, as it does to constables and other peace officers, who are *ex officio*, not merely permitted, but enjoined by law, to arrest the parties, as well on probable suspicion of felony, as in case of felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority.^(d) In this case, however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot be properly considered as acting upon his own private suspicion or authority; and ought, therefore, to have the same protection as the officers of justice. And it seems agreed, that the indictment found is a good cause of arrest

Of attempts to commit felony.

Distinctions between the authority of officers and private persons.

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^(b) Reg. v. Price, 8 C. & P. 282. Alderson, B.

^(c) Rex v. Hunt, East. T. 1825. Ry. & Mood. Cr. C. 93, *post*, Book III., Chap. x. See Rex v. Howarth, R. & M. C. C. R. 207, *post*, p. 608, particularly. In *Ex parte Krans*, 1 B. & C. 261, Abbott, C. J., said, "it is lawful for any person to take into custody a man charged with felony, and keep him until he can be taken before a magistrate"

^(d) 2 Hale, 84, 85, 87, 91, 93, *sed vide*, 1 Hale, 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. P. C. c. 28, s. 12. But upon this it is remarked, that it does not readily occur why officers only can take notice of the charge on record. 1 East, P. C. c. 5, s. 68, p. 300.

by private persons, if it may be made without the death of the felon : (e) but it is said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out : otherwise, they will be guilty of manslaughter. (f)

A constable may arrest on a reasonable suspicion of felony, without a warrant.

Even in the case of a constable, it was formerly supposed to be necessary, that there should have been a felony committed in fact, which the constable must have ascertained at his peril ; but it has since been determined, that a peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant ; although it should afterwards appear that no felony had been committed. (g) And where a private person suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be that the constable did aid him in taking the party suspected : and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. (h) "There is this distinction between a private individual and a constable ; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed ; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. (i)

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A magistrate has no authority to detain a person known till a charge of misdemeanor is made against him.

A magistrate has no authority to detain a person known to him till some other person makes a charge against him ; before he detains *a person known, he ought to have a charge actually made. Upon an indictment for false imprisonment and assaulting one Smyth, it appeared that Smyth went to a police office, where two magistrates were sitting, to make a complaint, which was dismissed, and he was retiring, when one of the magistrates said, "Stop him, shut the door, don't let that man escape. Where is the person that has got that information to lay against him for tampering with the due course of justice ? On which he was detained. For the defendants it was opened, that the magistrates were informed that an officer had a complaint to make against Smyth, for having tampered with the due course of justice ; and that the officer not being then at the office, Smyth was detained till he was sent for ; and it was contended that if a magistrate has a person before him ; charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his pleasure. (j) Lord Tenterden, C. J. "I am of opinion that the justices could not detain a person known to them till some other person should make a charge : I

(e) Dalt. c. 170, s. 5. 1 East, P. C. c. 5, s. 68, p. 301.

(f) 2 Hale, 83, 92 ; and see 1 East, P. C. c. 5, s. 68, p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived, that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact. Certainly not. C. S. G. See *Rex v. Turner*, R. & M. C. C. R. 347, ante, p. 43.

(g) *Samuel v. Payne*, Dougl. 359.

(h) 2 Hale, 79, 80, 91, 92, 93. 3 Inst. 221. 1 East, P. C. c. 5, s. 69, p. 301.

(i) *Per* Lord Tenterden, C. J. *Beckwith v. Philby*, 6 B. & C. 638.

(j) *Broughton v. Mulshoe*, Moor. 408, was cited for this position. See *Edwards v. Ferris*, 7 C. & P. 542.

think before they detain a known person, they should have a charge actually made." (k)

Killing an officer will amount to murder, though he has no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony. And it appears, from the same case, that it will be no excuse for killing an officer that such officer was proceeding to handcuff the party who was in his custody upon a charge of felony. The prisoner had produced a forged bank note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a constable, and delivered with the note to a constable; and the charge to the constable was, "because he had a forged note in his possession." After he had been in custody at the constable's some hours, namely, from six o'clock in the evening until eleven, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the prisoner having been convicted, and the case reserved for the consideration of the judges, they were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession. (l)

In this case there was not only reasonable suspicion of a felony having been committed, but the charge naturally implied the particulars necessary to constitute a felony, though they were not specified in terms. But in a case, where an arrest by a constable would *have been clearly illegal; an attempt to make it under the circumstances was held to be such a provocation as would have reduced the case to manslaughter if death had ensued.† The indictment was for stabbing and cutting with intent to murder upon the 43 Geo. 3, c. 57. On the trial, it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work: that he applied again subsequently, was again refused, and became abusive, upon which the master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, and came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody: making no charge further than saying that he suspected

(k) *Rex v. Birnie*, 5 C. & P. 206. 1 M. & Rob. 160. S. C. Lord Tenterden, C. J. The charge against Smyth was only a misdemeanor, *quod nota*. C. S. G.

(l) *Rex v. Ford*, East. T. 1817. MSS. Bayley, J., and Russ. & Ry. 329.

† [A homicide, in resisting an illegal arrest, is manslaughter in the absence of proof of express malice. *Roberts v. The State*, 14 Missouri. 138. *Ibid.* 409.

* Eng. Com. Law Reps. xxiv. 281.

the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if his master would give charge of him : and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there: the privy had no door to it. The master said, "that is the man, and I give you charge of him;" upon which the constable said to the prisoner, "My good fellow, your master gives me charge of you, you must go with me." The prisoner, without saying any thing, presented the knife, and stabbed the constable under the left breast; and attempted to make several other blows which the constable parried off with his staff. The constable then aimed a blow at the prisoner's head, upon which he ran away with the knife. The knife had struck against one of the constable's ribs and glanced off; if it had struck two inches lower, death would have ensued; but the wound as it happened was not considered dangerous. The prisoner having been found guilty, upon a case reserved, a majority of the judges present, namely, Abbott, C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise. (n)

Killing an officer attempting to arrest without a warrant on a charge of felony, is murder, though no felony be committed, and no notice of the charge given.

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Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man had done nothing, for which he was liable to be arrested; if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer do not notify to him that he has such a charge. Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle ensued. The prisoners walked on, and the man complained to Harrison, a watchman, that *they had attempted to rob him, desired him to arrest them, followed them till Harrison came up to them, and then said, sufficiently loud for them to hear, "That's them." There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When Harrison came up to the prisoners, all he said to them was, "You must go back and come along with me." He did not explain why, nor was any charge against the prisoners stated. He was dressed in a watchman's coat, and had his lantern. W., one of the prisoners, said, "keep off," and drew a sharp instrument from his side; the watchman said, "It's of no use, you must go back." A third man put himself in a position as if to strike the watchman, and W. made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W., and hit him on the thick part of the arm with his staff; W. immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet, for which Harrison was watchman, but the place where he overtook the prisoners did not ap-

(n) *Rex v. Thompson*, Hil. T. 1825, 1 Ry. & Mood. 80. Best, C. J., and Alexander, C. B., were absent.

pear to be within those limits. The jury found that the prisoner knew Harrison to be a watchman. Mr. Baron Bayley doubted whether, as no felony had been committed, and there had been no breach of the peace in Harrison's presence, he could legally arrest, at least without first stating to the prisoner why he purposed to arrest, and he also doubted his power out of the limits of his hamlet; and he reserved the case for the opinion of the judges, nine of whom held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the arrest; and that had death ensued it would have been murder. Four of the judges(o) were of a contrary opinion.(p)

A constable, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance; there being either implied or express notification of the character in which he interposed.(q) It has, however, often been questioned, how far a constable or other peace officer is authorized to arrest a person upon a charge by another of a mere breach of the peace, after the affray is ended, and peace restored, without a warrant from a magistrate;(r) and it is now settled that he has no such authority.

*If a constable take a man without warrant, upon a charge of ill using a person, which ill usage was not in the presence of the constable, and therefore gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest is illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also: and that though the prisoner, while in custody of the constable, struck the man by whom the charge was given; because a blow whilst he was under the influence of the provocation from the illegal arrest caused by such a man, would not justify the constable in detaining him: at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor made a new and distinct ground of detainer. Upon an indictment for maliciously cutting Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him; on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered Walby to assist him, which W. did, and to which the prisoner

Authority to arrest and imprison in cases of misdemeanors.

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An arrest for a misdemeanor, committed out of a constable's view, is illegal, and if a party so arrested escape, his recaption is illegal.

(o) Bayley, B., Park, J., Littledale, J., and Bosanquet, J.

(p) Rex v. Wooler, R. & M. C. C. R. 334. Lord Lyndhurst, and Taunton, J., were absent.

(q) 1 Hale, 463. 1 Hawk. P. C. c. 31, s. 54. Fost. 310, 311. 1 East, P. C. c. 5, s. 71, p. 303.

(r) 1 East, P. C. c. 5, s. 72, p. 305, who cites 2 Inst. 52. 2 Hawk. P. C. c. 12, s. 20, and c. 13, s. 8. 2 Lord Raym. 1301. Strickland v. Pell, Dult. c. 1, s. 7; and says, that there can be no such authority for the purpose of imprisoning or compelling the party to find sureties; though Lord Coke says (4 Inst. 265), that a constable may take surety of the peace by obligation. Lord Hale, and some later authorities, have holden, that such officer may arrest the party upon the charge of another, though the affray be over, for the purpose of bringing him before a justice, to find sureties of the peace, or for appearance. 2 Hale, 90. Handcock v. Sandham and others, 1685, and Williams v. Dempsey, 1787, cited in East, P. C. id. 306. But see ante, 295.

submitted. No particulars of what the supposed ill-usage or insult consisted of appeared in evidence, *nor did they pass in the constable's view or hearing*, and therefore the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was in custody, and before they found a magistrate, the prisoner struck the man in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and some time afterwards, as they were proceeding along to the magistrate's, the prisoner ran away and attempted the escape, but was pursued by W. by the constable's order: and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick, which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let go he would stab him, and then gave him the cut in the face, for which he was thus indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprisonment tortuous, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the judges, who held that the original arrest was illegal, and that the reception would have been illegal, and therefore the case would not have been murder if death had ensued. (s)

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If an affray
be over, a
constable
has no
power to
apprehend
the persons
engaged
in it.

Upon the trial of an action for an assault, it appeared that about midnight there was a disturbance, and ringing and knocking at many doors; that the disturbance continued about three hours, and about three o'clock in the morning the high constable asked the plaintiff to assist him in taking the parties into custody, and that the plaintiff went into the street, and that one White desired the defendant to go home, and the defendant replied, "if you do not leave me alone, I will knock your brains out, or give you a good ducking," whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and when near the cage door all three fell down; and it was imputed that at this time the defendant kicked the plaintiff on the leg, which was the injury for which the action was brought. Alderson, B., (in summing up,) "The questions for your consideration in this case are, whether the defendant was engaged in the affray; whether the constable had view of the affray while he was so engaged in it; and whether the affray was continuing at the time that he ordered the plaintiff to apprehend the defendant. If you are satisfied that all these points are made out, then, if the defendant assaulted the plaintiff while the plaintiff was endeavouring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray was over, then the constable had not and ought not to have the power of apprehending the persons engaged in it: for the power is given by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right

of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would materially affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray; and you think that those words showed that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but, if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences." (t)

Upon an indictment for maliciously stabbing with intent to murder, it appeared that the prisoner, about half-past ten at night, went to a house and demanded to see the servant girl. He was desired to quit the house, which he refused to do, and the prosecutor, who was a constable, was sent for. But the prosecutor came, the prisoner left the house and went into the garden. In about twenty minutes the prosecutor came. The prisoner did nothing in his presence; but upon the prisoner saying, "If a light appear at the windows, I will break every one of them," the prosecutor took him into custody, and he afterwards cut the prosecutor with a knife; it was submitted that the arresting the prisoner was illegal, as nothing had been done by him in breach of the peace in the presence of the constable. Parke, J., "I think that the detention of the prisoner by the prosecutor was illegal. There was no breach of the peace when the prisoner was taken into custody." (u)

*There is no distinction as to the power to apprehend between one kind of misdemeanor and another, as between a breach of the peace and fraud, but the rule is general, that in all cases of misdemeanor there is no power to apprehend after the misdemeanor has been committed. To trespass for false imprisonment, the defendant pleaded that an evil disposed person, to him unknown, had obtained goods from him by false pretences; that the plaintiff afterwards passed by the defendant's shop, and was pointed out to him by his servant as the person who had so obtained the goods, whereupon the defendant, vehemently suspecting that the plaintiff was the person who had committed the offence, gave charge of him to a police officer to be taken before a magistrate; and upon this plea the defendant had a verdict. It was contended, in showing cause against a rule for judgment *non obstante veredicto*, that offences partaking of the nature of a felony, as a fraud, which borders upon a theft, might come under a different rule from misdemeanors, which merely constituted a breach of the peace. [Lord Tenterden, C. J. "The distinction between felony and misdemeanor is well known and recognized, but is there any authority for distinguishing between one kind of misdemeanor and another?"] It was admitted that there was no direct authority, but 2 *Hawk. P. C.* c. 12, s. 10, and 2 *Hale*, 88, 89, were relied upon. Lord Tenterden, C. J. "The instances in *Hawkins* are where a party is caught in the fact, and the observation there added assumes that the party was guilty. Here the case is only of suspicion. The instances in *Hale*, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that the parties should apply to a justice of peace for a warrant, than take the law into their own hands, which they are too apt to do. The rule must be made absolute." (v)

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In all cases of misdemeanor, there is no power to apprehend after the misdemeanor has been committed.

(t) *Cook v. Nethercote*,^a 6 C. & P. 741.(u) *Rex v. Bright*,^b 4 C. & P. 387.(v) *Fox v. Gaunt*,^c 3 B. & Ad. 798.^a Eng. Com. Law Reps. xxv. 27.^b *Ib.* xix. 434.^c *Ib.* xxiii. 187.

If one menace another to kill him, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger arrest the party, and detain him till he can conveniently bring him to a justice of the peace. (*w*)

Of apprehending night-walkers.

It has been said, that if peace officers meet with *night-walkers*, or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent. (*x*) But it is either justifiable or necessary (especially in the case of bare flight), unless there were a reasonable suspicion of felony. (*y*) And it has been considered, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. (*z*) *Where a private act authorized watchmen to apprehend night-walkers, malefactors, and suspicious persons, and a watchman apprehended a gentleman returning from a party, for uttering some words in a street at night, it was held that the apprehension was illegal, for by night-walkers is meant such persons as are in the habit of being out at night for some wicked purpose. (*a*) So the words "suspected person or reputed thief," in the 3 Geo. 4, c. 55, s. 31, (the former London Police Act,) were directed against persons of *general* suspicious character and frequenting places where they might be reasonably suspected of resorting for felonious purposes. (*b*)

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Night-walkers.

Reputed thieves.

Authority Questions not unfrequently arise as to the authority of constables and

(*w*) 2 Hale, 88. This power seems to be grounded on the duty of the officer to prevent a probable felony, and must be governed by the same rules which apply to that case; though Dalton (ch. 116, s. 3), extends it even to the prevention of a battery. *Vide* 1 East. P. C. c. 5, s. 72, p. 306.

(*x*) 2 Hale, 89, 97. The statutes 2 Ed. 3, c. 3, and 5 Ed. 3, c. 14, relate to the apprehension of night-walkers and persons unduly armed. And see *Lawrence v. Hedger*, 3 Taunt. 14.

(*y*) 1 East, P. C. c. 5, s. 70, p. 303. Both the statutes mentioned in the last note were levelled against particular descriptions of offenders who roved about the country in bodies, in a daring manner.

(*z*) *Tooley's case*, 2 Lord Raym. 1296. There is a MS. note of this case given by the editor of Lord Hale, (2 Hale, 89,) which states Lord Holt to have said, that, of late, constables had made a practice of taking up people only for walking the streets: but that he knew not whence they had such authority. But see *Lawrence v. Hedger*, 3 Taunt. 14, where it was holden that watchmen and beadles have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. And it has been said by Hawkins and others, that every private person may, by common law, arrest any suspicious night-walker, and detain him until he give a good account of himself. 2 Hawk. P. C. c. 13, s. 6, c. 12, s. 20; and it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. 2 Hawk. P. C. c. 12, s. 20. *Latch*. 173. Poph. 208. By the vagrant act, 5 Geo. 4, c. 83, s. 6, it is made lawful for any person whatsoever to apprehend any person who shall be found offending against that act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is thereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid; and it further enacts, that in case any constable or other peace officer shall refuse, or wilfully neglect to take such offender into custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavours to apprehend and to convey before some justice of the peace, any person that he shall find offending against the act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall, on conviction, be punished in such a manner as is thereinafter directed.

(*a*) *Watson v. Carr*, 1 Lewin, 6, Bayley, J.

(*b*) *Cowles v. Dunbar*,^a Moo. & M. 37, Lord Tenterden, C. J.

^a Eng. Com. Law Reps. xii. 265.

other officers to interfere with persons in inns or beer houses. It is no part of a policeman's duty to turn a person out of an inn, although he may be conducting himself improperly there, unless his conduct tends to a breach of the peace. The plaintiff was using abusive language in an inn to one of the persons there, on which the owner of the inn sent for a policeman, who, by his direction, took the plaintiff to the station house. Patteson, J., "The landlord of an inn or public house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out by force, and may call in his servants to assist in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law: but although it would be no part of the policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do." (c) Neither is it the duty of a policeman to prevent a person from going into a room in a public house, unless a breach of the peace was likely to be committed by such person in that room. Upon an *indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public house to put an end to a disturbance which the defendant was making; he and the landlady were at high words: W. L. interfered, and the defendant was in the act of squaring at him, when the policeman desired the defendant not to make a disturbance: the defendant, who was at the side of the bar, then attempted to go into her parlour, in which a person was sitting; as the defendant attempted to get into a parlour, the policeman collared him, and prevented his going in: he then struck the policeman; neither the landlord nor landlady had desired the policeman to turn the defendant out of the house. Parke, B., "The policeman had a right to be in the house, without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlour; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlour." (d)

of officers
in public
houses.

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But if a person make such a noise and disturbance in a public house as would create alarm and disquiet the neighbourhood, this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policeman. To trespass for false imprisonment the defendant pleaded that he was possessed of a public house, and that plaintiff was in the house, and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner, and committed a breach of the peace therein: that the plaintiff was requested to depart, and refused, whereupon the defendant gently laid his hands on the plaintiff to remove him, and because the plaintiff violently and forcibly resisted the said removal, the defendant gave him in charge to a watchman, who saw the said breach of peace: it appeared that a watchman, who was on duty, in consequence of hearing a noise,

If a person
make such
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ance in a
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house as
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hood a
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custody.

(c) *Wheeler v. Whiting*,^a 9 C. & P. 262, Patteson, J.

(d) *Reg. v. Mabel*,^b 9 C. & P. 464, Parke, B.

^a Eng. Com. Law Reps. xxxviii. 111.

^b *Ib.* xxxviii. 189.

went into the defendant's public house, where he found the plaintiff and five or six other young men making a disturbance; he led the plaintiff out of the house, and about fifteen yards along the street, and then let him go; he said he would go back and have his revenge, and went towards the public house; the watchman went round his beat, and on his return he heard a person at the door of defendant's house cry "watch," and he in consequence went in and found the plaintiff sitting down; he then sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar to resist being put out, on which the watchman took the plaintiff into custody, and took him to the watchhouse. Parke, B. "There is no doubt that a landlord may turn out a person who is making a disturbance in a public house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lay hands on the landlord, that is an unjustifiable assault upon the landlord; and if the watchman in this case saw such assault committed, that would make out the plea. There might, it is true, be a sufficient breach of the peace to justify the defendant, as the landlord of the house, *in giving the plaintiff into custody without this assault; and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm and would disquiet the neighbourhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman; the watchman has said he saw the piece of work the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighbourhood, this would justify the watchman in turning the plaintiff out, and in taking him into custody, if on his going to the house the second time he found the plaintiff still there."(e)

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Officers taking opposite parties.

It has sometimes happened that peace officers have taken opposite parties in an affray, and the death of one of them has ensued; as in the case put by Lord Hale, where A. and B., being constables of the vill of C., and a riot or quarrel happening between several persons, A. joined with one party, and commanded the adverse party to keep the peace, and B. joined with the other party, and in like manner commanded the adverse party to keep the peace, and the assistants and party of A. in the tumult killed B.(f) This Lord Hale says, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other:(g) but upon this it has been remarked, that perhaps it had been better expressed, to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever.(h) And in another case, Lord Hale says, that if the sheriff have a writ of possession against the house and lands of A., and A. pretending it to be a riot

(e) Howell v. Jackson, 6 C. & P. 723, Parke, B.

(f) 1 Hale, 460.

(h) 1 East, P. C. c. 5, s. 71, p. 504.

(g) Id. *ibid.*

upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ. (i)

There is a late case, which appears to have been ruled upon the foregoing principles. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and as it was thought for some time had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them *into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly. (j)

Where private persons interpose in the case of sudden affrays, to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing: but it will not be murder in the other affrayer, unless he also strike the party. (k)

Some late statutes (l) give authority not only to constables, but also to private persons to apprehend persons *found committing* certain offences specified in such statutes; in these cases it is requisite that the authority to apprehend should be strictly pursued. Thus where upon an indictment for maliciously cutting a farmer's servant, it appeared that the farmer had directed the servant to apprehend the prisoner for stealing turnips, and the servant very soon after this found the prisoner in a field adjoining his master's turnip field, with a quantity of turnips in possession, and took him into custody, and proceeded with him first to his masters house, and thence to the house of a constable; but on their way there the prisoner said he would go no further, and drew a knife and wounded the servant; it was contended that the servant had a right to apprehend the prisoner under the 7 & 8 Geo. 4, c. 29, s. 63; but it was held that by that section the owner of the property or his servants were only empowered to apprehend persons *found committing* offences against the act, and to take them *forthwith* before a justice of the peace. That in this case the prisoner was not found committing the offence, but was in the next field; which brought the case neither within the letter nor the spirit of the enactment. Again, by this enactment, the owner or servant who apprehends must take the offender *forthwith* before a

(i) 1 Hale, 460.

(j) Anon. Exeter Sum. Ass. 1793. 1 East, P. C. c. 5, s. 71, p. 305.

(k) 1 Hawk. P. C. c. 31, s. 48, 54. Fost. 272, 311. 1 East, P. C. c. 5, s. 71, p. 304. *Ante*, 283.

(l) 7 & 8 Geo. 4, c. 29, s. 63; 7 & 8 Geo. 4, c. 30, s. 28; 5 Geo. 4, c. 83, s. 6; 9 Geo. 4, c. 69, s. 2, &c.

justice. Now the prisoner was actually taken to the master's and was about to be taken to the constable's, all which was clearly wrong. (m)

606 So where on an indictment for the murder of a person, who was assisting a policeman to take a prisoner to the station-house, it appeared that the policeman apprehended the prisoner at night, and that he had concealed on his person new potatoes, fresh dug out of the ground, and with moist earth upon them, and which did not appear to have been dug out of the ground more than half an hour, and the policeman stated that he had been informed that gardens had been robbed, and that he apprehended the man on suspicion of stealing the potatoes out of a garden : but there was no evidence either to show that the garden had been robbed, or that the prisoner had been in or near any garden ; it was objected that the policeman had no authority to apprehend the prisoner ; for at common law stealing growing potatoes out of a garden was neither a felony nor misdemeanor, and therefore a policeman had no right at common law to apprehend for it ; and under the 7 & 8 Geo. 4, c. 29, s. 63, an offender could only be apprehended if he were "found committing" the offence, and the preceding case was relied upon ; it was held that the objection was valid, and consequently that the case was one of manslaughter only. (n)

The party must be apprehended either committing the offence, or upon immediate and fresh pursuit.

But the words "found committing" must not be taken so strictly as to defeat the reasonable operation of such clauses. The plaintiff, a pedler, went to the house of Mr. B., and a small dog of Mr. B.'s ran out at the plaintiff, who with a stick gave the dog a blow, which knocked out one of his eyes. The plaintiff then went away, and Mrs. B. immediately sent a boy to fetch a constable, the boy returned with the constable, and Mrs. B. directed them to go after the plaintiff and apprehend him for the injury done to the dog. They went in pursuit of the plaintiff and found him at a public house about a mile from Mrs. B.'s, and the constable apprehended him and took him before a magistrate. Tindal, C. J., (in summing up,) the jury will have to consider, first, whether the plaintiff had committed a wilful injury to the dog ; and secondly, whether he was found committing that offence and immediately apprehended : "with respect to the second question, the words of the 7 & 8 Geo. 4, certainly differ materially from those in the 1 Geo. 4, c. 56, and were obviously meant to restrict the powers given by that act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, because otherwise such offences would frequently be committed by per-

(m) *Rex v. Curran*,^a 3 C. & P. 397, Vaughan, B. By the 7 & 8 Geo. 4, c. 29, s. 63, "any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the day time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property, on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law." By sec. 43, of the same act, stealing any cultivated root or plant used for the food of man or beast, growing in any land not being a garden, &c., subjects the party to a summary conviction.

(n) *Reg. v. Phelps*, Gloucester Sum. Ass. 1841, Coltman, J., MSS. C. S. G. Neither in this case nor *Rex v. Curran*, was the party seen in the act of committing the offence ; but it seems that if the party be seen in the commission of the offence by one person, he may be apprehended by another who did not see him in the commission of the offence. See *Rex v. Howarth*, *infra*, p. 608, note (p), and *Hanway v. Boulton*, *infra*, note (o). *Ballinger v. Ferris*, 1 M. & W. 628 ; *Reed v. Cowmeadow*,^b 6 Ad. & E. 661, 7 C. & P. 821 ;^c and *Beechey v. Sides*,^d 9 B. & C. 806, cases of actions for illegal apprehension under the 7 & 8 Geo. 4, c. 0, may also be referred to. C. S. G.

^a Eng. Com. Law Reps. xiv. 368. ^b *Ib.* xxxiii. 165. ^c *Id.* xxxii. 753. ^d *Id.* xvii. 502.

sons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from the 1 Geo. 4, c. 56, and does not allow a stale apprehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defend its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit be made; I think that would be sufficient. So, in this case, *the party is actually seen in the commission of the act complained of: as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an 'immediate apprehension' for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was 'found committing.'"

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Where a policeman found the prisoner in a garden at night, stooping down close to the ground, and the prisoner jumped up and ran away, and the policeman ran after him and caught him; and it appeared that the prisoner was cutting or plucking some picketees and carnations in the garden, and the jury found that the prisoner had wilfully and maliciously plucked and cut flowers from plants or roots in the garden with intent to steal them, and that he was found by the policeman committing that offence, but that the policeman did not inform the prisoner by word of mouth that he belonged to the police force; it was held, on a case reserved, that the policeman had authority to apprehend the prisoner. (o)

A person may be apprehended without a warrant under the 5 Geo. 4, c. 83, s. 6, as a person found in a dwelling house, &c., with intent to commit a felony, if he is seen in a dwelling house, &c., but gets out of it and is taken on fresh pursuit, and it makes no difference that he was not seen getting out of the house, and was found concealing himself to prevent being apprehended upon other premises near. (p) To make such an arrest legal, it is not necessary that the person should have, at the time he is apprehended, a continuing purpose to commit the felony; he may be apprehended though that purpose is wholly ended. Upon an indictment for maliciously wounding, it appeared that near midnight two men were seen near a board-house belonging to Oxley; on two persons going up to the board-house, they heard a noise there, and they found the door of the board-house half open, and saw the prisoner inside the board-house, and heard a noise among the boards, and the prisoner said, "bring the board!" the two persons then went to Oxley's house to call him up; one of them then went to the bottom of the road, which was about one hundred yards from the board-house, and in a quarter of an hour Oxley came up, with a carving-knife in his hand, and having also

(o) *Hanway v. Boulbee*,^a 1 Moo & Rob. 14. S. C. 4 C. & P. 350. The words of the 1 Geo. 4, c. 56, s. 3 (which was repealed by the 7 & 8 Geo. 4, c. 27), were, "any person or persons who shall have actually committed, or be in the act of committing, any offence." The words of the 7 & 8 Geo. 4, c. 80, s. 28, on which this case turned, are the same as those in the 7 & 8 Geo. 4, c. 29, s. 73. See note (n) *supra*.

(p) See *Rex v. Fraser*, R. & M. C. R. 419. See this case more at full, *post*.

^a Eng. Com. Law Reps. xix. 415.

got another person to assist him, they went to the board-house, the door of which was then closed; the hasp was over the staple, and the padlock was in the staple, but not locked; nobody was in the board-house: they went in, and Oxley found two planks removed from the place where they had seen them four days before, to another part of the board-house, nearer the door; they then went on from the board-house, and after searching in several places, found the prisoner in the garden of another person, crouched down under a tree, and with a drawn sword in his hand: the prisoner was asked twice what he did there, he made no answer, and then he started off; one of the witnesses ran and caught hold of him, but the prisoner compelled him to leave hold of him: the prisoner fell over *something, and then the other witnesses came up: the prisoner struck Oxley on the side with his sword, but did not cut him; then the prisoner again attempted to get away, but was prevented by some paling: the prisoner then turned round and struck Oxley with his sword, cut through Oxley's hat into his head, and produced a slight wound on his head: up to that time Oxley had not struck the prisoner any blow; the jury negatived the felony in removing the boards from one part of the board-house to another; and it was objected that the prosecutor had no right to apprehend either at common law or under the vagrant act, (5 Geo. 4, c. 83, s. 6;) for at common law the power to arrest for offences inferior to felony was confined to the time of committing the offence, and it was the same under the vagrant act: that the prisoner was not found by the prosecutor committing the offence, but on the contrary had ceased from the attempt and abandoned the intention, which distinguished this case from *Rex v. Hunt*; (p) but the judges, on a case reserved, held that he might lawfully be apprehended, for as he was seen in the board-house, and was taken on fresh pursuit before he had left the neighbourhood, it was the same as if he had been taken in the out-house, or in running away from it. (q).

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- If several hours elapse after the offence is committed, a constable cannot apprehend although he saw the offence committed.

But if several hours elapse between the time when the offence is committed and the apprehension, the apprehension is not warranted by the vagrant act, although the constable who apprehends saw the party committing the offence. Upon an indictment for maliciously wounding, it appeared that the prisoner, with several other persons, were found by Jones, a constable, playing at thimble-ig and betting with the people at a fair, between two and four o'clock in the afternoon. Jones, having received verbal instruction from the magistrates to apprehend such offenders, tried, with the assistance of another person, to apprehend the prisoner and his companions, and succeeded in taking one, but the prisoner and two others of his company fell upon Jones, rescued their

(p) *R. & M. C. C. R.* 93, *ante*, p. 594.

(q) *Rex v. Howarth*, *R. & M. C. C. R.* 207. *Rex v. Hunt* was relied upon as showing a right to apprehend at common law, independently of the 5 Geo. 4, c. 83, s. 6, which enacts, "that it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this act;" and by sec. 4, "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard, garden, or area, for any unlawful purpose, shall be deemed a rogue and vagabond." In the prisoner's house, on the following day, were found some oak boards of Oxley's, which had been seen in the board-house four days before, but Littledale, J., told the jury, that he thought they could not take into consideration any felony committed in respect of them, as they had been at a time previous to the night in question, and it was not for that transaction that the prisoner was endeavoured to be apprehended. It was contended for the prisoner that the arms in the hands of Oxley were such as justified the prisoner in what he did, but the learned judge did not think that they did, and did not draw the attention of the jury to them.

companion, and got away themselves. About nine o'clock in the evening, Jones not having been able to find the prisoner before, saw him with several of his companions in a public house, and said to him, "you are my prisoner." The prisoner asked "for what?" and Jones replied, for what he had been doing at the fair; the prisoner resisted, and a scuffle ensued; the prisoner escaped and concealed himself in a privy in the garden. Jones called another constable to his assistance, and they together broke open the privy door and endeavoured to take the prisoner, upon which he took a knife out of his pocket *and stabbed the other constable. The jury found that the prisoner knew that the constable was endeavouring to take him for the offence (against the vagrant act) committed at the fair; and upon a case reserved, the judges held that the attempt to apprehend was not lawful under the vagrant act, as it was not made on fresh pursuit. (gg)

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Under the 9 Geo. 4, c. 69, s. 2, (r) a keeper may apprehend poachers though there are three or more found armed, for though sec. 2, only authorizes apprehending for offences under sec. 1, yet the offences punishable under sec. 9, are also offences under sec. 1; and if the keeper be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender or one of his party; if he struck in self-defence only, and to diminish the violence illegally used against him and not vindictively to punish. Upon an indictment for maliciously shooting, it appeared that the prisoner and twenty-one other persons were found armed with long poles and guns in a coppice, which belonged to Mr. P., in the night, by the keepers of Mr. P. and four of his men: that they came up to the keepers, who warned them off; that they asked the keepers whether they meant to take them, for that they could shoot as well as the keepers; that one of the keepers said, that the first man that broke the peace he would shoot, and one of the keeper's men said he would do the best he could towards taking them; that the prisoner and his party then turned to go away, and walked between four and five hundred yards over some fields of Mr. P.'s, turning once upon the keeper and his men, and then got over the hedge into a turnpike road; that the keeper and his men followed them pretty closely all the way, and got over the hedge after them; that the prisoner and his party then formed three deep upon the road, and said the keepers should not go any farther; that the keeper again repeated that the first man that broke the peace he would shoot; that the prisoner and his party rushed upon the keeper and his men, and some others who had joined them; that *one of the prisoner's party* struck the keeper on the head with a pole, and the keeper knocked him down: that another man struck at the keeper with another pole, and the keeper parried off the pole, and knocked him down; that one of the prisoner's party fired a gun which wounded one of the keeper's men; that another man then struck the keeper on the head, and the keeper knocked him down, immediately after which one of the prisoner's party fired the shot in question, which wounded the prosecutor. It was insisted on the part of the prisoner that the 9 Geo. 4, c. 69, s. 2, gave a power of apprehending for offences within the first clause only, and that the offence was an

A keeper may apprehend poachers committing an offence against the 9 Geo. 4, c. 69, s. 2; and may lawfully defend himself against violence offered to him by the poachers.

(gg) *Rex v. Gardener*, R. & M. C. C. R. 390. By 5 Geo. 4, c. 83, s. 4, "every person playing or betting in any street, road, highway, or other open or public place, at or with any table or instrument of gaming, at any game, or pretended game of chance," shall be deemed a rogue and vagabond." See sec. 6, note (p), *supra*, p. 608.

(r) See the sections, *ante*, p. 470, 471.

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offence upon sec. 9, and not upon sec. 1, but Bayley, B., thought that the offence was an offence within the first section; it was further insisted that, as the keeper had knocked down three of the men before the shot in question was fired, it would not have been murder if death had ensued, but Bayley, B., was of opinion *that if the keeper struck not vindictively, or by way of punishment, or for the purpose of offences, but in self-defence only, and to diminish the violence which was illegally brought into operation against him, it would have been murder had death ensued; and he told the jury that he thought the keeper and his men, even if they had no right to apprehend, had full right to follow the prisoner and his party, in order to discover who they were, and that the prisoner and his party were not warranted in attempting to prevent them; and that if they had attempted to apprehend them, which however they did not, they would have been warranted by the statute in so doing; and the learned baron left it to the jury whether the keeper did more than was necessary for his own defence, and to diminish the violence and force which was illegally brought against him, as well as the questions of intent; the jury found the prisoner guilty with intent to prevent the lawful apprehension of himself and others, and for that purpose to do grievous bodily harm; and upon a case reserved, the judges unanimously held that the keeper had power to apprehend, inasmuch as the prisoner was guilty of an offence under the first section as well as the ninth; and notwithstanding the blows given by the keeper, that it would have been murder had the keeper's man died.(s)

Killing a keeper who merely strikes in self-defence is murder.

If a keeper, attempting lawfully to apprehend a poacher, be met with violence, and in opposition to such violence, and in self-defence, strike the poacher, and then is killed by the poacher, it is murder. Upon a similar indictment, it appeared that some keepers found the prisoners and from six to nine men more shooting in the wood at night: the prisoners and their party immediately attacked the keeper and his party with the butt ends of their guns, and knocked one of his men down, and struck the keeper many blows, but there was no blow that broke the skin and made a wound until after the keeper had knocked down one of the opposing party. Mr. B. Bayley left this case to the jury, as he did the preceding one, and they found the prisoners guilty with intent to do grievous bodily harm; and at the same meeting as the last case this was also considered, and the judges affirmed the conviction on the same ground as in the preceding case.(t)

A poacher found committing an offence on a manor, who runs off and again returns on the manor, may be apprehended under 9 Geo. 4, c. 69, s. 2.

If a poacher be found committing an offence upon a manor, and being pursued run off the manor, and then return on it again, he may be apprehended under sec. 2. Upon an indictment for attempting to discharge loaded arms with intent to murder, it appeared that the prosecutor found the prisoner and two others by night in a wood in a manor belonging to Lord C.; he pursued them out of that wood into a field not within the manor, and of which Lord C., was neither the owner nor the occupier; and that being hard pressed, the prisoner returned back unto Lord C.'s manor; and being still pursued, he levelled his gun and snapped it at the prosecutor; it was objected that the authority to apprehend ceased

(s) *Rex v. Ball, R. & M. C. C. R. 330.* The 9 Geo. 4, c. 69, s. 2, differs from the other acts authorizing the apprehension of parties found committing offences, in authorizing the apprehension not only upon the land where the offence is committed, but also "in case of pursuit being made in any other place to which the offender may have escaped." See the section, *ante*, p. 471. See *Rex v. Payne, R. & M. C. C. R. 377, post*, p. 624.

(t) *Rex v. Ball, R. & M. C. C. R. 333.*

the moment that the prisoner was out of Lord C.'s manor; but it was held, that *as the prisoner returned again upon the manor it was the same as if he had never been off the manor. (u) *611

It was held in the same case that a person, who was not a regularly appointed gamekeeper, but who was employed as a watcher to watch for poachers, had authority to apprehend poachers, and that it was not necessary that he should have any written authority. (v) Watchers.

In order to justify the apprehension of a person for night poaching, it must be proved that he was in pursuit of game between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. Upon an indictment for maliciously shooting, it appeared that the prosecutor on the 17th of December heard a shot fired in a plantation, and saw the prisoner there; he dropt a hen pheasant; the prosecutor went towards him, and he fired at the prosecutor; the prosecutor was not sure that it was before eight o'clock in the morning that this occurred; it was objected that as the prisoner was not shown to have been in pursuit of game an hour before sunrise, the prosecutor had no right to apprehend him, and the objection was allowed. (w)

A keeper has no right to apprehend poachers under the 9 Geo. 4, c. 69, s. 2, unless they are found committing an offence upon land which belongs to his master, or is within his master's manor. (x) If, therefore, a keeper endeavour to apprehend a poacher in a place where he is not authorized by that statute, and the poacher kill him in order to prevent his apprehension, it is only manslaughter. Upon an indictment for murder, it appeared that a party of poachers were in a wood by night in pursuit of game; and that the deceased, who was an assistant gamekeeper of Mr. Clive, and others, pursued them, and tried to apprehend them: upon which one of the poachers turned round and shot the deceased; the wood was neither the property, nor in the occupation of Mr. Clive, nor was it within any manor that belonged to him; Mr. Clive only having the permission of the owner to preserve game there; it was held that the deceased had no authority to apprehend the poachers in the wood, and consequently that the shooting of the keeper was only manslaughter. (y) So where a servant of Sir T. W. found poachers by night in a covert of Colonel C.: they ran away and he pursued them, and was then shot by one of them in the side. Parke, B., said; "This was not on Sir T. W.'s land. If a person who was out poaching saw a man running after him, he might fairly presume that the person meant to apprehend him; and if the person had no authority to do so he would not be guilty of murder in using the gun he had in his hand." "Unless the prosecutor had authority from Colonel C. to arrest poachers, it would only have been manslaughter if death had ensued; he was attempting an illegal arrest, and the pursuit was a sufficient attempt: he was not the servant of Colonel C., but of Sir T. W.: if Sir T. W. was lord of a manor, including his own land and Colonel C.'s, he might be justified in apprehending." (z)

(u) *Rex v. Price*,^a 7 C. & P. 178, Park, J. A. J., and Coleridge, J. It seems that the terms of sec. 2 were not adverted to in this case, they seem clearly to give authority to apprehend "in any other place" to which the offender escapes, without reference to its being within the manor or the property of the persons on whose land the poachers found. C. S. G.

(v) *Rex v. Price*, *supra*, note (u).

(w) *Rex v. Tomlinson*,^b 7 C. & P. 183, Coleridge, J.

(x) Admitted in *Rex v. Warner*, R. & M. C. C. R. 380, *post*, p. 612.

(y) *Rex v. Addis*,^c 6 C. & P. 388, Patteson, J.

(z) *Rex v. Davis*,^d 7 C. & P. 785, Parke, B.

^a Eng. Com. Law Reps. xxxii. 486.

^b *Ib.* 487.

^c *Ib.* xxv. 452.

^d *Ib.* xxxii. 736.

*612 *But the interference by a gamekeeper with persons found armed in the pursuit of game by night on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. The prosecutor, being out on duty at night as gamekeeper with his assistant on his master's manor, heard shots towards a wood not belonging to his master, and shortly afterwards saw the prisoners coming along a road in the direction from the wood; the prisoners were armed with a gun, gun-barrel, and bludgeons; they stopped when they saw the prosecutor and his assistant, the prosecutor and his assistant advanced towards the prisoners, when the prosecutor said, "So you have been knocking them down, you are a pretty set of people to be out so late at night;" they were then about three yards off; the prosecutor said to his assistant, sufficiently loud for the prisoners to hear, "Mind him with the gun," the assistant took hold of the gun gently, one hand on the stock, the other on the barrel, and took off the cap gently; there was no struggle; the man did not seem angry at the assistant's holding the gun; the prosecutor saw one of the prisoners, and advanced to look at the faces of the other two, but they bounced off. The prosecutor then turned back towards his assistant and the man who had the gun, and called out as loud as he could, "Forward, Giggles." Giggles was the keeper of the manor in which the wood was situate, but he was not there. Three of the men ran in upon the prosecutor, knocked him down, and stunned him; when he recovered himself he saw all the men coming by him, and one said, "damn 'em, we have done 'em both;" they had got two or three paces beyond him, and one of them turned back and struck the prosecutor a violent blow on the left leg with what he thought was a stick, which wounded him in the leg; the prosecutor had committed no assault on either of the four men. The assistant took hold of the gun to prevent the man's running away, but did not tell him so; he took hold of it to let the keeper see if he knew the men; the manor in which the wood was, extended more than 200 yards beyond where the prisoners were seen; it was objected that the prisoners were on the high road, and the prosecutor and his assistant had no right to obstruct them; but the jury having found the prisoners guilty, the judges, upon a case reserved, held the conviction right.(a)

Authority to arrest and imprison in civil suits.

It has been shown that though, even in *civil* cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity,(b) yet if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.(c)

*613 The authority of an officer, in civil cases, must be regulated and *limited by the writ or process which he is empowered to execute, and

(a) *Rex v. Warner*, R. & M. C. C. R. 380. S. C. 5 C. & P. 525. It was also objected that the blow on the leg was the act of one alone, and there was no evidence which of the prisoners inflicted it: and as one of the prisoners, before the blow was given, said "we've done em," it must be taken that it was supposed both men were dead, and therefore there could be no intent to murder, &c. *Bolland, B.*, told the jury that if they thought the prisoners were acting in concert, they were all equally guilty.

(b) *Ante*, p. 535.

(c) 1 Hale, 481. Fost. 271.

by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits. (d)

A press-warrant extends in terms to "seamen, sea-faring men, and others, whose occupations and callings are to work in vessels and boats upon rivers:" (e) and persons of this description may be impressed to serve on board his majesty's ships of war, by those who have proper authority delegated to them for that purpose. (f) A proceeding which has been sometimes considered as hardly consistent with the temper and genius of a free government, but which may be defended on the ground of its necessity for the safety of the state: in order that the government may be enabled, in time of need, thus peremptorily to call for the services of persons who have freely chosen a seafaring life, and whose education and habits have fitted them for the employment.

But as this is a power of an extraordinary nature, it is highly requisite that no persons should assume it without being duly qualified for that purpose; as the special protection which the law affords to its officers will not be extended to those who venture to act without proper authority. Thus, where the execution of a press-warrant is directed by the terms of the warrant (as is now always the case) not to be intrusted to any person but a commissioned officer, the execution of it by another person will be illegal. As in a case where the lieutenant of a press-gang, to whom the execution of a warrant was properly disputed, remained in King Road, in the port of Bristol, while his boat's crew went some leagues down the channel, by his directions, to press seamen; this was illegal; and when in the furtherance of that service, one of the press-gang was killed by a mariner in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only manslaughter, though no personal violence had been offered by the press-gang. (g) And upon the same principles, where the mate of a ship and a party of sailors, without either the captain who had the press-warrant, or the lieutenant who was regularly deputed to execute it, impressed a man, and upon his making some resistance, one of the party struck him a violent blow with a large stick, of which he died some days after, it was adjudged murder. (h) And, in another case, the delegation of the power of impressing by a lieutenant (to whom the warrant had been directed) to a petty officer and several others, to whom he had given verbal orders to impress certain seafaring men, of whom he had received intelligence, was decided to be clearly bad; though it was found to be the constant usage and invariable custom of the navy for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty officers whom they might think fit to employ upon the impress service, and that such petty officers usually acted without any other authority than such verbal orders. (i)

Authority to impress seamen.

The delegation of authority to impress is illegal.

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(d) 1 Hawk. P. C. c. 28, s. 19.

(e) Softly, *ex parte*, 1 East, R. 466. 1 East, P. C. c. 5, s. 75, p. 307. The same terms occur also in the warrant in Broadfoot's case, Fost. 156.

(f) Broadfoot's case, 18 St. Trials (by Howell), 1323, Fost. 154; where see an elaborate argument delivered by Mr. J. Foster, as recorder of Bristol, in support of the legality of impressing seamen.

(g) Broadfoot's case, Fost. 154. But if a warrant be directed to several, one of them may execute it. 1 Hale, 459.

(h) Dixon's case, 1 East, P. C. c. 5, s. 80, p. 313; and see also Browning's case, 1 East, P. C. c. 5, s. 80, p. 312.

(i) Borthwick's case, Dougl. 207. The warrant enjoined all mayors, &c., to aid and assist the officer to whom it was directed, and those employed by him in the execution thereof.

Murder by ship's sentinel in preventing persons from approaching the ship.

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats; had ammunition given to him when he was put upon guard; and acted under the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship; and he then fired at a man who was in the boat, and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken impression that it was his duty: and they found that he did. But a case being reserved, the judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon: and further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. (*j*)

The authority to arrest and imprison can only be exercised by a legal officer within the proper district.

The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law: and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. (*k*) And it has been ruled, that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. (*l*) It has been held, that if the constable of the vill of A. come into the vill of B., to suppress some disorder, and in the tumult the constable be killed in the vill of B., this will be only manslaughter, because he had no authority in B. as constable. (*m*) But it was considered, that if the constable of the vill of A. had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A., to suppress a riot in the vill of B., or to apprehend a person in the vill of B. for some misdemeanour within the jurisdiction and consequence of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B., and in executing his warrant, was killed in B., this amounted to murder. (*n*) Where a warrant was directed "to *C. S., one of the collectors of the parish of W., the constable of the said parish, and all others his majesty's officers," to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.: the rule of law being, that where a warrant is directed

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(*j*) *Rex v. Thomas*, East. T. 1816, MSS. Bayley, J.

(*k*) 1 Halc. 457, 458, 459. 1 East, P. C. c. 55, s. 89, p. 312, 314.

(*l*) *Rex v. Mead and another*, 2 Stark. C. 205.

(*m*) 1 Hale, 459.

(*n*) 1 Hale, 459. 2 Hawk. P. C. c. 13, s. 27, 30. It may be here mentioned, that by 24 Geo. 2, c. 44, s. 6, if a warrant is irregular in the frame of it, the officer executing it ministerially is indemnified against any action for damages by the party injured, though the magistrate by whom it was issued exceeded his jurisdiction.

to officers, as individuals, or to individuals who are not officers, they may execute it any where within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts in which they are officers.^(o) But the law as to the latter point was altered by the 5 Geo. 4, c. 18, which recites, ^{5 Geo. 4, c. 18, s. 6.} that warrants addressed to constables, headboroughs, tithing-men, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithing-men, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice; and then for remedy thereof enacts, ^{Constables may execute warrants out of their precincts, provided it be within the jurisdiction of the justice granting or backing the same.} "that it shall and may be lawful to and for each and every headborough, tithing-man, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, township, hamlet or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borsholder, or other peace officer, specially, by his name or names, and notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place for which he shall be constable, headborough, tithing-man, or borsholder, or other peace officer; provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed."^(p) This statute does not extend to the warrant of a judge of the King's Bench, but only to the warrants of persons having authority as justices of the peace within the limited jurisdictions therein expressed.^(q) It may be observed, that if a warrant be directed to several persons, any of them may execute it.^(r)

A warrant must be executed by the party named in it, or by some one assisting such party, and in his presence, either actual or constructive. Upon an indictment under the 9 Geo. 4, c. 31, for maliciously stabbing, it appeared that a constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner, in company with his brother, the father stayed behind; *the brothers found the prisoner lying under a hedge; and when they came up he had a knife in his hand, running it into the ground; he got up from the ground to run away, one of them laid hold of him, and he stabbed him with the knife; the father was in sight at about a quarter of a mile off. Parke, ^{A warrant must be executed either by the person named in it, or by some one in his actual or constructive presence.} *616
 B. "The arrest was illegal as the father was too far off to be assisting

^(o) *Rex v. Wier*, 1 B. & C. 288. 2 D. & R. 444. See per Lord Holt, in *Rex v. Chandler*, 1 Lord Raym. 545.

^(p) It has been decided that this statute only authorizes constables to execute the warrants therein mentioned out of their own parishes, &c., but does not compel them to do so. *Gimbert v. Coyney* and another, Excheq. Trin. T. 1825. Macl. & Y. 269.

^(q) *Gladwell v. Blake*, 5 Tyrw. 186.

^(r) 1 Hale, 459.

in it.”(s) So where upon a similar indictment, it appeared that a warrant issued by commissioners of bankrupt was directed to “J. Adams and W. Smith our messengers and their assistants;” and that the prosecutor, who was the assistant of Smith, having obtained the warrant from him, went in pursuit of the prisoner, who, on the prosecutor overtaking him, and saying he had the warrant, wounded the prosecutor with a stone; neither Smith or Adams being present at the time, nor any where near the place where the attempt to arrest occurred; it was objected that the prosecutor was not authorized by the warrant to arrest the prisoner except in the presence, actual or constructive, of either Adams or Smith, and that the word “assistants” only extended to persons who went with Adams and Smith to assist in taking the prisoner. Williams, J., said, “I think it is not sufficient that the prosecutor should have been deputed to act on the warrant by the messenger; and I think also, that to authorize him to act, he must derive his authority direct from the commissioners themselves. It appears to me that the term ‘assistant,’ would apply to any person whom Adams or Smith directed to go in aid of them. It therefore remained uncertain who those assistants might be, till either Smith or Adams had named them; and I think that it is not a legal execution of the warrant, unless it be executed in the presence, actual or constructive, of either Adams or Smith who are named in it.”(t)

As to the time a warrant continues in force.

The following case has been decided as to the continuing in force of a magistrate’s warrant. The prisoner was indicted for maliciously wounding the prosecutor with intent to resist his apprehension for a certain offence, to wit, for that he on, &c., at, &c., did violently assault and beat one W. P. The prosecutor having received a warrant, whereby he was commanded “to apprehend the prisoner and to bring him before me to answer unto the same complaint (assaulting W. P.) and to be further dealt with according to law,” went in search of the prisoner and brought him before the magistrate, who granted the warrant, and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal direction of the magistrates to the clerk, who was making out the commitment, the latter ordered the prosecutor to go after the prisoner: the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved, for that the party having been taken before the magistrate, the warrant was *functus officio*; and that the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the *offence stated in it, viz., assaulting W. P., was an offence for which the prisoner was liable to be apprehended: but Gaselee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having found the prisoner guilty both objections were considered upon a case reserved, and the conviction was held good.(u)

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(s) *Rex v. Patience*,^a 7 C. & P. 775. See this case, *post*, p. 623.

(t) *Rex v. Whalley*,^b 7 C. & P. 245. See *Blatch v. Archer*, Cowp. 63, where Aston, J., said, “it is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand, and acting in the arrest.”

(u) *Rex v. Williams*, R. & M. C. C. R. 387. As no time is usually prescribed for the

^a Eng. Com. Law Repts. xxxii. 730.

^b *Ib.* xxxii. 502.

Where an officer endeavouring to arrest process is resisted and killed, the crime will not amount to murder, unless the *process is legal*; but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. (v) Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for the officer to whom it is directed must, at his peril, pay obedience to it. (w) And for this reason, if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without showing the judgment or decree. (x) But it seems that the writ, as well as the sheriff's warrant to the bailiff, must be produced. (y) So, though the warrant of a justice of peace be not in strictness lawful, as if it do not express the cause with sufficient particularity; yet if the matter be within his jurisdiction, the killing of the officer executing the warrant will be murder; for it is not in the power of the officer to dispute the validity of the warrant, if it be under the seal of the justice. (z) It may be observed also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice; (a) and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it. (b)

As to the
legality of
the process.

Falsity of
the charge
no excuse.

A serjeant at mace in the city of London having authority according to the custom of the city, by entry in the porter's book at one of the Counters, to arrest one Murray for debt, arrested him between five and six in the evening of the 8th of November, saying at the same time, "I arrest you in the king's name, at the suit of *Master Radford;" but he did not produce his mace: Murray resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the serjeant should have shown his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled: and

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execution of a warrant, it continues in force till fully executed, though it be seven years after its date, provided the magistrate so long lives. *Dickenson v. Brown, Peake, N. P. 344, Lord Kenyon, C. J.*

(v) *Fost. 311.* An attachment issued, and signed by the county clerk in his own cause, is legal process; for it was held, that in issuing it the county clerk acted merely in a ministerial capacity, and not as judge in his own cause. *Baker's case, 1 Leach, 112.* He was the only officer who signed such process, and the process was in the name and under the seal of his superior, and it was process against the goods only.

(w) *Fost. 312. 1 Hale, 457.*

(x) *Roger's case, Cornwall Sum. Ass. 1735, ruled by Lord Hardwicke. Fost. 311, 312, ante, p. 569.*

(y) *Rex v. Mead and another, 2 Stark. C. 205, an arrest upon mesne process.*

(z) *1 Hale, 459, 460.* It is said, however, that this must be understood of a warrant containing all the essential requisites of one. *1 East, P. C. c. 5, s. 78, p. 310, and see Rex v. Hood, post, p. 618, note (f).*

(a) *1 East, P. C. c. 5, s. 8, p. 310.*

(b) *Curtis's case, Fost. 135. And see Fost. 312.*

judgment was given for the king, and one of the prisoners were executed.(c)

Process defective in the frame of it.

But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of the officer or the party be inserted without authority, and after the issuing of the process, and the officer endeavouring to execute it be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded.(d)†

Every warrant ought to specify the offence charged, the authority under which the arrest is to be made, the person who is to execute it, and the person to be arrested.

Every warrant ought to specify the offence charged; the authority under which the arrest is to be made; the person who is to execute it; and the person to be arrested.(e) A warrant, therefore, leaving a blank for the Christian name of the person to be apprehended, and giving no reason for the omission, but describing him only as — H., the son of S. H., and stating the charge to be for assaulting A. B. in the execution of his duty without particularizing the time, place, or any other circumstances of the assault, is too general and unspecific, and therefore a resistance to an arrest thereon, and killing the person attempting to execute it will not be murder. Upon an indictment for maliciously wounding, it appeared that George Hood having assaulted Brown, a sheriff's officer, who was endeavouring to arrest his father, Samuel Hood, under a *capias ad respondendum*, Brown applied to a magistrate for a warrant to apprehend George Hood for an assault, but not being at that time acquainted with his Christian name, the warrant, so far as it related to the name and description of the person committing the assault, was in the following terms viz., "to take the body of — Hood (leaving a blank for the Christian name) of, &c., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c., on the oath of Francis Brown, an officer of the sheriff of the county of Wilts, for assaulting him in the execution of his duty." This warrant was delivered to the tithing-man to execute, and he went to S. Hood's house, with Brown and others to execute it; and Brown pointed out G. Hood to the tithing-man as the person on whom the warrant was to be executed, and upon attempting to apprehend him, he stabbed a person whom the tithing-man had charged to aid and assist. S. Hood had four sons who resided with him. It was objected that as the Christian name of George Hood was omitted, the warrant was illegal, and would not authorize his apprehension; and, upon a case reserved, the judges were unanimously of opinion that the warrant was bad, because it omitted the Christian name; it should have assigned some reason for the omission, and have given some particulars of George Hood, by which he might be distinguished from his brothers.(f)

(c) Mackally's case, 9 Co. 65, b.

(d) 1 Hale, 457. 1 Hawk. P. C. c. 31, s. 64. Fost. 312. 1 East, P. C. c. 5, s. 78, p. 310. Sir Henry Ferrers's case, Cro. Car. 371.

(e) *Per Coleridge, arguendo, Rex v. Hood, infra.*

(f) *Rex v. Hood, R. & M. C. C. R. 281.* See *per Tindal, C. J., in Hoyer v. Bush, infra*, note (g). The decision seems to have proceeded on the omission of the Christian name alone, but the marginal note adverts to the insufficiency of the statement of the offence for which the warrant was granted, and it seems that the warrant was bad on that ground also, as it did not state where the assault was committed, and therefore did not show that it was within the jurisdiction of the magistrate who granted the warrant. C. S. G.

† [If a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter, and not murder. *Tuckett v. The State*, 3 Yerger, 392.]

*It is of the essence of a warrant that it should be so framed that the officer should know whom he is to take, and that the party upon whom it is executed should know whether he is bound to submit to the arrest. If, therefore, a constable, having a warrant directing him to apprehend A. B., arrest C. B. under the warrant such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate pointed out C. B. as the man against whom the warrant was issued. A magistrate for the county of Herts issued his warrant, directing a constable to take John H., charged with stealing a mare. Armed with this warrant, the constable went to Smithfield, and there arrested Richard H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant, and who was supposed to be called John H.; his name, however, was really Richard H., John H. being the name of his father. There was no proof that a felony had been committed. The person who made the charge before the magistrate pointed out Richard H. as the man who had stolen the mare, and a person present said that his name was John H., and there was clearly evidence to go to the jury that Richard H. was the man intended to be taken up. Colton, J., told the jury that the law would not justify the constable's act, the warrant being against John and not against Richard, although Richard was the party intended to be taken: that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name; that a constable may, in many cases, take up a person on a charge of felony, by virtue of his office of constable, and without any warrant from a magistrate; but that he can only do so within the district for which he is chosen constable. The jury having found a verdict against the constable, the court held that the direction was right. That in civil process, the taking a person by the name mentioned in a warrant, his real name being different, cannot be justified, and that no distinction could be made between civil and criminal process. In either case the object of the warrant is to identify the party intended to be arrested.^(g)

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The essence of a warrant is to describe the party to be taken, so that the officer may know who he is to take and the party may know whether he is bound to submit to the arrest

It appears to have been formerly a very common practice to issue *blank warrants*, notwithstanding their illegality; a practice exceedingly reprehensible, and which, in the following case, afforded, to a *desperate and atrocious offender a shelter from the capital punishment, which he well merited, by extenuating his crime of killing the person who assisted in executing the warrant to manslaughter. The prisoner Stockley, about Lady-day, 1753, had been arrested by Welch, the deceased, at the suit

Illegality of blank warrants. *620
Stockley's case.

^(g) Hoye v. Bush, 1 M. & Gr. 775. As there was no authority to apprehend Richard H. under the warrant, and the constable was out of his district, he was in the same situation as a private individual, and therefore could only have defended himself by proving that a felony had been committed by Richard H. See *ante*, p. 534, and *per* Tindal, C. J., 1 M. & Gr. 780. "If he were the *guilty* person, the officer would not want the warrant, supposing a felony to have been committed. If the constable had been within his district, the facts of this case seem to have been sufficient to have justified his apprehending Richard H.; as in such a case, although no felony had been committed, yet if there were reasonable ground to suspect Richard H. of having committed a felony, that would justify the constable in apprehending him. See *Beckwith v. Philby*, 6 B. & C. 638, *ante*, p. 595, note (i). *Quære*, whether it ought not in this case to have been left to the jury to say whether or not the party was as well known by the name of John as Richard. If he were as well known by the one or the other, as an indictment describing him by either name would be good, (*ante*, p. 555,) so it is conceived would a warrant. C. S. G.

^a Eng. Com. Law Reps. xxxix. 649.

^b *Ib.* xiii. 287.

of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle, (who acted for the under-sheriff of Staffordshire,) to have warrants made out upon such writ. The custom of the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th of July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked: upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavoured to get into the house; and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley then absconded, and was not apprehended till December, 1771. At the Lent Assizes following, he was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict: but, to save expense, the case was referred to the judges of the King's Bench, who certified that the offence amounted, in point of law, only to manslaughter. (*h*)

Other cases as to the illegality of blank warrants.

This practice of issuing blank warrants was reprobated in a more recent case, where the sheriff having directed a warrant to A. by name, and all his other officers, the name of another of the sheriff's officers, B., was inserted after the warrant was signed and sealed by the sheriff; and, therefore, an arrest by B. was holden illegal. (*i*) And in another case it was considered that the arrest was illegal, where the warrant was filled up after it had been sealed. (*j*) But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the sheriff of Salop, upon a writ of possession against the prisoner's house: and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance; and, on their bursting open the doors, shot at Banks, and wounded *him severely. Upon an indictment for wilfully shooting, upon the 43 Geo. 3, c. 58, objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, and the point reserved for the consideration of the judges, all who were present (*viz.* 11) held that the conviction was right. (*k*) But where a magistrate who

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(*h*) Stockley's case, 1772, Serjeant Foster's MSS. 1 East, P. C. c. 5, s. 78, p. 310, 311. The case was so decided without argument.

(*i*) Housin v. Barrow, 6 T. R. 122. And see a case referred to by Lord Kenyon, 6 T. R. 123.

(*j*) Stevenson's case, 19 St. Tr. 846. (*k*) Rex v. Harris, East. T. 1801. MSS. Bayley, J.

kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavouring to arrest the party, was killed; it was held that this was murder in the person killing the officer, and he was accordingly executed. (l)

It may be proper to remark a circumstance in the preceding case of Stockley, which had been thought to deserve consideration, (m) namely, that he had before deliberately resolved upon shooting Welch in case he offered to arrest him again, which in all probability it might be his duty to do. It certainly resembles a former case, where upon some officers breaking open a shop door to execute an escape warrant, the prisoner, Curtis's case. who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an axe. A few of the judges to whom this case was referred, were of opinion that this would have been murder, though the warrant had not been legal, and though the officer could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the axe in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man. (n) But in another case, prior to either of these, where the cruelty and the deliberation were of a similar kind, the crime was considered as extenuated by the illegality of the officer's proceeding. A bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. It was holden that this was not murder, because the officer had no right to break the house; but that it was manslaughter, because the party knew the officer to be a bailiff. (o) Cook's case.

(l) *Per* Lord Kenyon, in *Rex v. The Inhabitants of Winwick*, 8 T. R. 454, who there mentions it as a case determined by the judges some years before.

(m) 1 East, P. C. c. 5, s. 78, p. 311.

(n) Curtis's case, 1756. Fost. 135.

(o) Cook's case, 1 Hale, 458. Cro. Car. 537. W. Jones, 429. Upon these cases the following very sensible observations are made in Roscoe's Cr. Ev. 707, 708: "These decisions would appear to countenance the position that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. In Thompson's case, 1 R. & M. C. C. R. 80, where the officer was about to make an arrest on an insufficient charge, the judge adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in Stockley's case, *supra*, note (h), and in Curtis's case, *supra*, note (n), the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such cases from the operation of the general rule, that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "it may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer." 1 East, P. C. c. 328. It may be remarked that this question is fully decided in the Scotch law, the rule being as follows:—In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. Alison's Prin. Cr. Law of Scotland, 25. If, says Baron Hume, instead

- *622 *Patience's case.* *Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that a constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner in company with his brother; the father stayed behind; they found the prisoner lying under a hedge, and when they first saw him he had a knife in his hand running the blade of it into the ground; he got up from the ground to run away, and the son laid hold of him, and he stabbed the son with the knife; the father was in sight at about a quarter of a mile off. Parke, B. "The arrest was illegal, as the father was too far off to be assisting in it; and there is no evidence that the prisoner had prepared the knife beforehand to resist illegal violence. If a person receives illegal violence, and he resists that violence with any thing he happens to have in his hand, and death ensues, that would be manslaughter. If the prisoner had taken *out his knife on seeing the young man come up, it might be evidence of previous malice, but that is not so, as we find that the knife was in his hand when the young man first came in sight." (*p*)
- *623 *As to notice of the authority to arrest.* The party whose liberty is interfered with must have due notice of the officer's business; or their resistance and killing of such officer will amount only to manslaughter. (*q*) Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party not knowing that the other was an officer, in his first surprise snatched

of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 Hume, 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only." Alison's Princ. Cr. Law of Scotland, 28. In such cases it seems to me that it may be well deserving of consideration whether the first inquiry ought not to be whether or no the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill will. (See *Rex v. Thomas*, *ante*, p. 522; *Reg. v. Kirkham*, *ante*, p. 523.) From the observations of Mr. B. Parke, in *Rex v. Patience*, *infra*, note (*p*), I infer that the very learned baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act and not the illegality of the arrest. In such an inquiry the fact that the prisoner was ignorant at the time that the arrest was illegal would be most material, because it would almost conclusively show that the act did not arise from that cause. It should also be observed, that if "one has a legal and illegal warrant and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification," *per Holt*, C. J. *Greenville v. The College of Physicians*, 12 Mod. 386, and see *Crawford v. Ramsbottom*, 7 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264; so it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual. See *per Tindal*, C. J., in *Hoye v. Bush*,^b 1 M. & Gr. 775, *ante*, p. 619, note (*g*). So also as a constable has authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony (*Beckwith v. Philby*, *ante*, p. 595, note (*i*)); in such a case also it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant. C. S. G.

(*p*) *Rex v. Patience*, 7 C. & P. 775. See this case, *ante*, p. 616.

(*q*) 1 Hale, 458, *et seq.* 1 Hawk. P. C. c. 31, s. 49, 50. *Fost.* 310.

^a Eng. Com. Law Repts. xxviii. 80.

^b Id. xxxix. 649.

^c Id. xxxii. 730.

down a sword, which hung in his room, and killed the bailiff; it was ruled to be manslaughter.^(r) But it will be otherwise, if the officer and his business be known;^(s) as where a man said to a bailiff, who came to arrest him, "Stand off, I know you well enough, come at your peril," and, upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder.^(t) This will apply as well to a special bailiff as to a known officer; but where the party does not show by his conduct that he is acquainted with the officer and his business, material distinctions arise as to notice of a known officer, and one whose authority is only special.

Where a party is apprehended in the commission of an offence, or upon fresh pursuit afterwards, notice is not necessary, because he must know the reason why he is apprehended. Upon an indictment for maliciously wounding it appeared that two persons heard a noise in a board-house, near midnight, and saw the prisoner inside the board-house, and heard a noise among the boards, and heard the prisoner say, "Bring that board:" on which the persons went for the owner, who came in a quarter of an hour, when no one was found in the board-house, but two planks had been removed to a part of the board-house nearer the door, and after searching in several places they found the prisoner in the garden of another person crouched down under a tree, with a drawn sword in his hand, and being asked twice what he did there, he made no answer, and then started off, but was pursued and caught hold of by one of the persons, whom he compelled to leave his hold: he then fell over something, and the others came up, and he then attempted to get away, but was prevented by some paling, and he then turned round and wounded the owner of the boards; it was held on a case reserved, that the circumstances of the case told him why he was apprehended, and that it was not necessary to tell him what he must have known.^(u) So where upon an indictment for maliciously wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say, "the first man that comes out *I'll be d——d if I don't shoot him," upon which the prosecutor drew his pistol, cocked it, and ran out; they all ran away together; the prosecutor followed them, and when they had run about fifty yards they stood; they had all turned round; one of them shot at the prosecutor who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected, that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them: the objection was overruled: and, upon a case reserved, the judges were of opinion that the circumstances constituted sufficient notice.^(v) So where a servant of Sir. T.

Where a party is apprehended in the commission of an offence notice is unnecessary-

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(r) 1 Hale, 470, case at Newgate, 1657. And see Kel. 136.

(s) Mackally's case, 9 Co. 69.

(t) Pew's case, Cro. Car. 183. 1 Hale, 458.

(u) Rex v. Howarth, R. & M. C. C. R. 207, ante, p. 608. See Rex v. Woolmer, R. & M. C. C. R. 334, ante, p. 598.

(v) Rex v. Payne, R. & M, C. C. R. 378. See Rex v. Fraser, R. & M. C. C. R. 419, ante, p. 607, note (p).

W. was out with his gamekeeper at night, and they heard two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them and got close up to one of them, and made a catch at his legs, and was immediately shot through the side: Parke, B., said, "Where parties find poachers in a wood, they need not give any intimation by words that they are gamekeepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?"^(w)

Private persons interfering in affrays.

With regard to private persons interfering, as they may do, in case of sudden affrays, in order to part the combatants, and prevent bloodshed, it is quite necessary that they should give express notice of their friendly intent; otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they come to act as parties ^(x)

As to notice by officers interposing in the case of riots and affrays.

With regard to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties engaged should have some notice of the intent with which they interpose; for the reason which was mentioned in relation to private persons; lest the parties engaged should in the heat and bustle of an affray, imagine that they come to take part in it.^(y) But, in these cases, a small matter will amount to a due mortification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially if it be in the day time.^(z) In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient.^(a) Killing a watchman in the execution of his office is not the less murder for being done in the night; and the *killing of an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the king's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril.^(b) Therefore though the saying of a learned judge, "that a constable's staff will not make a constable," is admitted to be true; yet if a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the day-time when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he

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(w) *Rex v. Davis*, 7 C. & P. 785, Parke, B. See *Rex v. Taylor*, 7 C. & P. 266, Vaughan, J.

(x) Fost. 310, 311. (y) Fost. 310. Kel. 66, 115.

(z) 1 Hale, 460, 461. Fost. 310, 311. So in the *Sissinghurst-house* case, 1 Hale, 462, 463, it was resolved, that there was sufficient notice that it was the constable before the man was killed:—1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party. See the case fully stated, *ante*, 538, *et seq.*

(a) 1 Hale, 461. Fost. 311.

(b) 9 Co. 66, a.

* Eng. Com. Law Reps. xxxii. 736.

† Ib. 505.

or any of his assistants killed, it will be murder in every one who joined in such resistance. (c) For it seems, that in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety; and, upon this ground, though the warrant by which he was constituted bailiff be demanded, he need not show it; (d) and it is sufficient if he notify that he is the constable, and arrest in the king's name. (e) And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt. (f) Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed to the constable of Pattishal, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the day-time to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such: it was determined that this was sufficient evidence and notification of the deceased being constable although there were no proof of his appointment, or of his being sworn into the office. (g)

It is laid down in one case, that if, upon an affray, the constable, or others in his assistance, come to suppress it, and preserve the peace, and be killed in executing their office, it is murder in law, although the murderer know not the party killed, and though the affray were sudden; because he set himself against the justice of the realm. (h) It is said, however, that in order to reconcile this with other authorities, it seems that the party killing must have had **implied notice* of the character in which the peace officer and his assistants interfered, though not a personal knowledge of them. (i) For it is elsewhere laid down, that if there be a sudden affray, and the constable come in, and, endeavouring to appease it, be killed by one of the company who knew him, it is murder in the party killing, and in such of the others as knew the constable, and abetted the party in the fact; but only manslaughter in those who knew not the constable: (j) and that others continuing in the affray, neither knowing the constable, nor abetting to his death, would not be guilty even of manslaughter. (k) But these positions do not apply to an affray, deliberately engaged in by parties determined to make common cause, and to maintain it by force. (l)

To what persons in an affray notice extends; and of notice in the case of third persons interfering. *626

(c) Fost. 311.

(d) 1 Hale, 458, 461, 583. Mackally's case, 9 Co. 69, a. But it is otherwise as to the writ or process against the party. Both a public and private bailiff, where the party submits to the arrest and demands it, are bound to show at whose suit, for what cause, and out of what court the process issues, and where returnable, 6 Co. 54, a. 9 Co. 69, a; but it will be no excuse that he did not tell the party if the party resisted so as not to give time for telling, 9 Co. 69, a. And in no case is the bailiff required to part with the possession of the warrant; neither is a constable, whether acting within or without his jurisdiction. 1 MSS. Sum. 250. 1 East, P. C. c. 5, s. 84, p. 319. By a known bailiff is meant one who is commonly known to be so; it is not necessary that he should be known to the party to be arrested. 9 Co. 69, b.

(e) 1 Hale, 583.

(f) 1 East, P. C. c. 5, s. 81, p. 315.

(g) Rex v. Gordon, Northampton Spring Assizes, 1769, cor. Thomson, B., afterwards considered at a conference of all the judges, 26th June, 1789. See 1 East, P. C. c. 5, s. 81, p. 315.

(h) Young's case, 4 Co. 40, b. 3 Inst. 52.

(i) 1 East, P. C. c. 5, s. 82, p. 316.

(j) 1 Hale, 438, 446, 461. Kel. 115, 116.

(k) 1 Hale, 446. Lord Hale adds, *quod tamen quere*, but (as it is said 1 East, P. C. c. 5, s. 82, p. 316,) perhaps over cautiously, if in truth there were no abetment.

(l) See as to the cases of that kind, *ante*, p. 29.

It is however agreed, that if a bailiff or other officer be resisted in the regular discharge of his duty in executive process against a party, and a third person, even the servant or friend of the party resisting come in and take part against the officer, and kill him, it will be murder, though he knew him not. (*m*) But it is suggested, that in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend under the like ignorance. (*n*) The law upon this point may, perhaps, hardly seem to be reconcilable with that above-mentioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging in cold blood, in a breach of the peace, by assaulting another, instead of endeavouring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril. (*o*) And upon this principle, if a stranger seeing two persons engaged, one of them a bailiff, attacking the other with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace, and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration. (*p*)

Notice
before
doors are
broken
open.
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In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a *refusal on the other, before the parties proceed to that extremity. (*pp*) In a case where an outer door had been broken open by two constables and a gamekeeper, to execute a warrant granted under the 22 and 23 Car. 2, c. 25, s. 2, to search for, and seize any guns, &c., for destroying game: and it appeared, that the door was broken open without the party having been previously requested to open it; the court held, that, in a case of misdemeanor, a previous demand of admittance was clearly necessary, before an outer door was broken open. Abbott, C. J., said, "it is not at present necessary to decide how far in a case of a person charged with felony it would be necessary to make a previous demand of admittance, before you could justify breaking open the outer door of the house; because I am clearly of opinion, that in the case of a misdemeanor, such previous demand is requisite." Bayley, J., said, generally, "even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door. That point was mentioned in the judgment of the court in *Burdett v. Abbott*. (*q*) The question

(*m*) 1 Hawk. P. C. c. 31, s. 57, Keb. 87. 4 Co. 40, b. 1 East, P. C. c. 5, s. 82, p. 316.

(*n*) 1 East, P. C. c. 5, s. 82, p. 316.

(*o*) 1 Hawk. P. C. c. 31, s. 59. 1 East, P. C. c. 5, s. 82, p. 316, 317, where the grounds upon which the law in each of these cases may be supported, and considered as reconcilable, are more fully stated.

(*p*) See the case of Sir C. Standlie and Andrews, Sid. 159, where Andrews, under similar circumstances, was guilty of murder. This case is differently reported by Kelyng; and Keble, reporting the same case very shortly, says:—It was adjudged, that if any casually assist against the law, and kill the bailiff, it is murder, especially if he knew the cause. 1 Keb. 584; and see 1 East, P. C. c. 5, s. 83, p. 318.

(*pp*) Post. 320. 2 Hawk. P. C. c. 14, s. 1. 1 East, P. C. c. 5, s. 87, p. 224.

(*q*) Launock v. Brown, 2 B. & A. 592.

as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant; and finding the shop door shut, called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the judges were of opinion, that no precise form of words was required in a case of this kind; and that it is sufficient if the party has notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and, consequently that the prisoner had not due notice that they came under the authority of a warrant grounded on the breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers.(r)

In the case of a *private* or *special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, "Stand off, I know you well enough; come at your peril;" or, that there was some such notification thereof that the party might have known it, as by saying, I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder.(s) A private bailiff ought also to show the warrant upon which he acts, if it is demanded:(t) and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to *show at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable.(u) In no case, however, is he required to part with the warrant out of his own possession; for that is his justification.(v)

Notice by private bailiff.

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It may be observed generally, that where an officer, in executing his office proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; and if he killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded."(w) He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be only manslaughter.(x) But, if the process be executed within the jurisdiction of the court or magistrate from whence it issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office.(y) And the

As to the regularity of the proceeding.

(r) Curtis's case, Fost. 135.

(s) 1 Hale, 461. Mackally's case, 9 Co. 69, b.

(t) 1 Hale, 583. That is, the warrant by which he is constituted bailiff; which a bailiff or officer, *juratus et cognitus*, need not show upon the arrest, 1 Hale, 458. And see 1 Hale, 459, where it is said that a justice of peace may issue his warrant to a private person; but then such person must show his warrant, or signify the contents of it.

(u) 1 Hale, 458, note (g). 6 Co. 54, a. 9 Co. 69, a.

(v) 1 East, P. C. 5, s. 83, p. 319.

(w) Fost. 312.

(x) 1 Hale, 458, 459. 1 East, P. C. c. 5, s. 80, p. 314.

(y) 1 Hale, 459. 2 Hawk. P. C. c. 13, s. 27, 30. 1 East, P. C. c. 5, s. 80, p. 314. And see 5 Geo. 4, c. 18. *Ante*, p. 615.

officer must also be careful not to make an arrest on a *Sunday*, except in case of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority.^(z) But process may be executed in the night time, as well as by day.^(a)

Right of officers to break open windows or doors to make an arrest.

The right of officers to break open windows or doors in order to make an arrest, has been a subject of some litigation; but many of the points have been settled and require to be shortly noticed. And the general rule must be kept in mind, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.^(b)

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced after the notification, demand and refusal, which have been mentioned.^(c) So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken.^(d) And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it.^(e) And the officer may act in the same manner upon a *capias uligatum*, or *capias pro fine*,^(f) or upon an *habere facias possessionem*.^(g) The same force may be used, where a forcible entry or detainer is found by inquisition before justices of the peace, or appears upon their view;^(h) and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute, which gives the whole or any part of such penalty to the king.⁽ⁱ⁾ But in this latter case the officer executing the warrant must, if required, show the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken.^(j)

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Cases of suspicion.

But though the felony has been actually committed, yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion.^(k) For where a person lies under a probable suspicion only, and is not indicted,^(l) it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified:^(m) or must at least be considered

(z) 29 Car. 2, c. 7. 1 East, P. C. c. 5, s. 88, p. 324, 325. The statute makes void all process, warrants, &c., served and executed on a Sunday, except in the cases mentioned in the text.

(a) 9 Co. 66, a. 1 Hale, 457. 1 Hawk. P. C. c. 31, s. 62.

(b) Fost. 320. 2 Hawk. P. C. c. 14, s. 1. *Ante*, p. 626.

(c) Fost. 320. 1 Hale, 459. And see 2 Hawk. P. C. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

(d) Fost. 320. 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 3. *Curtis's case*, Fost. 135.

(e) *Burdett v. Abbott*, 14 East, 157, where the process of contempt proceeded upon the order of the House of Commons; and see *Semayne's case*, Cro. Eliz. 909; and *Brigg's case*, 1 Rol. Rep. 336.

(f) 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 4.

(g) 1 Hale, 458. 5 Co. 95, b.

(h) 2 Hawk. P. C. c. 14, s. 5.

(i) Fost. 321.

(m) 2 Hawk. P. C. c. 5, s. 87, p. 322.

(k) 2 Hawk. P. C. c. 14, s. 6.

(j) 27 Geo. 2, c. 20.

(l) *Ante*, p. 595.

as done at the peril of proving that the party, so apprehended on suspicion, is guilty.(n) But a different doctrine appears to have formerly prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant.(o)

It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger:(p) and it is also said, that if there be disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder.(q) And further that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to the house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers, in either case, he may justify breaking open the doors.(r)

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measures for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process.(s) If he do so, he will be a trespasser: and if the occupier of the house resist *him, and in the struggle kill him, the offence will be only manslaughter;(t) for if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony.(u)

It has been considered, however, that this rule of every man's house being his castle has been carried as far as the true principle of political justice will warrant, and that it will not admit of any extension.(v) It should be observed, therefore, that it will apply only to the breach of outward doors or windows: to a breach of the house for the purpose of arresting the occupier or any of his family; and to arrest in the first instance.

Outward doors or windows are such as are intended for the security of the house, against persons from without endeavouring to break in.(w) These are protected by the privilege which has been before mentioned; but if the officer find the outward door open, or it be opened to him from within, he may then break open any inward door, if he find that necessary in order to execute his process.(x) Thus, it has been holden

(n) 1 East, P. C. c. 5, s. 87, p. 322.

(o) 1 Hale, 588. 2 Hale, 92. 13 Ed. 4, 9, a.

(p) 2 Hale, 95.

(q) 2 Hale, 95; and it is added, "This is constantly used in London and Middlesex."

But see ante, p. 294, 295.

(r) 2 Hawk. P. C. c. 14, s. 8.

(s) Cook's case, Cro. Car. 537. Fost. 319. (t) Cook's case, Cro. Car. 537. Fost. 319.

(u) 1 Hale, 458. 1 East, P. C. c. 5, s. 87, p. 321, 322.

(v) Fost. 319, 320. (w) Fost. 320.

(x) 1 Hale, 458. 1 East, P. C. c. 5, s. 87, p. 323.

to the breach of outward doors.

that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger.(y) And in a late case it was decided, that the sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house; B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him.(z) But it seems that if the party, against whom the process is issued, be *not within the house* at the time, the officer can only justify breaking open doors in order to search for him, after having first demanded admittance.(a) Though in case the person, or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand.(b) If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as if they are not, he will not be justified.(c)

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open) and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and the officer prevailing, the prisoner shot at and killed him; it was held to be murder.(d)

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What constitutes the dwelling-house.

*The privilege only extends to the dwelling-house, but it should seem that within that term are comprehended all such buildings as are within the curtilage, and as are considered as parcel of the dwelling-house at common law. In trespass the defendant justified an entry into a close and breaking into a barn under a *fieri facias*; the plaintiff replied that the door of the barn was shut, and it was adjudged upon demurrer that in such a case the sheriff can break open the door of the barn without a request, in order to take the goods; for it shall be intended to be a barn in a field, and not a barn which is parcel of a house. For the court agreed that if the barn had been adjoining to and parcel of the house, it could not be broken open.(e)

The privilege only extends to cases where the house is broken, in order to arrest the occupier or any of his family.

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence, there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary.(f) But it should be observed, that in all

(y) *Lee v. Gansel*, Cowp. 1.

(z) *Lloyd v. Sundilands*,^a 2 Moore, 207. 8 Taunt. 250. See *Hodgson v. Towning*, 5 Dowl.

(a) *Ratcliffe v. Burton*, 3 Bos. & Pull. 223.

(b) *Per Gibbs, J., in Hutchinson v. Birch and another*,^b 4 Taunt. 619.

(c) *Cook v. Birt*, 5 Taunt. 765. *Johnson v. Leigh*,^c 6 Taunt. 246. *Post*, p. 631.

(d) *Baker's case*, 1 Leach, 112. 1 East, P. C. c. 5, s. 87, p. 323. It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment. *Ante*, p. 617.

(e) *Penton v. Browne*, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law, under the titles of *Burglary* and *Arson*.

(f) *Fost*. 320. 5 Co. 93. Mr. Smith, in his learned note to *Semayne's case*, 1 Sm. Lead.

^a Eng. Com. Law Reps. iv. 92.

^b *Ib.* i. 258.

^c *Ib.* i. 374.

cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant. (*g*) And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser. (*h*) And it has been decided that a sheriff cannot justify breaking the inner door of the house of a stranger, upon suspicion that a defendant is there, in order to search for such defendant, and arrest him on mesne process. (*i*)

*And the privilege is also confined to arrests in the first instance. *632
For if a man, being legally arrested, (*j*) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused. (*k*) If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate; and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. (*l*) Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants; it was ruled to be only manslaughter. (*m*)

And also to
arrests in
the first
instance.

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty. (*n*) So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner nor any one else is there so that he

C. 45, after citing the observations of Lord Loughborough in *Sheere v. Brookes*, 2 H. Bl. 120, says, "it seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal."

(*g*) 2 Hale, 103. Fost. 321. 1 East, P. C. c. 5, s. 87, p. 324. Mr. Smith, in the same note, says, "there may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter." It certainly is reasonable in such a case that the party should not be permitted to show that in fact the defendant was not concealed in this house, and this would be in accordance with the principles established by *Pickard v. Sears*, 6 A. & E. 469. *Heane v. Rogers*, 9 B. & C. 586. *Kieran v. Sanders*, 6 A. & E. 515, and *Gragg v. Wells*, 10 A. & E. 90, in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. C. S. G.

(*h*) *Cooke v. Birt*,^a 5 Taunt. 765.

(*i*) *Johnson v. Leigh*,^b 6 Taunt. 246, ante, p. 630.

(*j*) Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest. Fost. 320. But bare words will not make an arrest; the officer must actually touch the prisoner. *Genner v. Sparkes*, 1 Salk. 89. *Berry v. Adamson*,^c 6 B. & C. 528.

(*k*) Fost. 320. *Genner v. Sparkes*, 1 Salk. 79. 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 9.

(*l*) 1 East, P. C. c. 5, s. 87, p. 324.

(*m*) *Stevenson's case*, 10 St. Tr. 462.

(*n*) 2 Hawk. P. C. c. 5, s. 87, p. 324.

^a Eng. Com. Law Reps. i. 258.

^b *Ib.* 374.

^c *Ib.* xiii. 245.

can request them to open the door, he may break the door open to take out the goods.(c)

Interference by third person, &c.

It has been deemed a question worthy of great consideration how far *third persons, especially mere strangers*, interposing in behalf of a party illegally arrested, are entitled to insist upon the illegality of the arrest, in their defence, as extenuating their guilt in killing the officer.

Tooley's case.

The point was raised in the following case:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority;(p) and there took up one Anne Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up; and, though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he showed them his constable's staff, declared that he was about the Queen's business, and intended them no harm. The prisoners then put up their swords; and Bray carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; *upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. The case was elaborately argued; and the judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder.(q) The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned;(r) and they also thought that the prisoners, in this case, had sufficient provocation; on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a colour of justice;(s) and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob.

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Huggett's case.

The case of Huggett, and also that of Sir Henry Ferrers, appear to have been relied upon in support of the argument of the seven judges, who in the preceding case held the offence to be manslaughter. Huggett's

(c) Pugh v. Griffith, 7 A. & E. 827.

(p) One judge only thought that Bray acted with authority, as he showed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

(q) Rex v. Tooley and others, 2 Lord Raym. 1296. "That case has been overruled," per Alderson, B. Rex v. Warner, R. & M. C. C. R. 385.

(r) For this Young's case, 4 Co. 40, was cited; and Mackally's case, 9 Co. 65.

(s) In Rex v. Osmer, 5 East, 304, ante, p. 410. Lord Ellenborough, C. J., said, "If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose."

case, in the fuller report of it, (t) appears to have been thus :—Berry and two others pressed a man without any warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry showed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry; whereupon Berry and his two companions drew their swords, and a fight ensued, in which Huggett killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances: A press-master seized B. for a soldier; and with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.; and by the advice of all the judges, except very few, it was ruled that this was but manslaughter. (u) Sir H. Ferrers's case. The case of Sir Henry Ferrers was only this:—That Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer; but upon the evidence, it appeared clearly that Sir Henry Ferrers, upon the arrest, obeyed and was put into a house before the fighting between the officer and his servant; wherefore he was found not guilty of the murder and manslaughter. (v)

*But Mr. Justice Foster is of opinion, that these cases of Huggett and Sir Henry Ferrers's servant did not warrant the doctrine laid down by the seven judges in the case of Tooley; and this great master of the crown law (w) has animadverted upon that doctrine with such force, viewing it as having carried the law in favour of private persons officiously interposing in case of illegal arrest further than sound reason, founded on the principles of true policy, will warrant. (x) After observing that, in Huggett's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; (y) whereas, though in Tooley's case, the prisoner had, at the first meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seemed to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round-house; he says that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman. He then proceeds, "Now, what was the case of Tooley and his accomplices, stript of a pomp of words, and the colouring of artificial reasoning? They saw a woman, for aught appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are pre-

(t) Huggett's case, Kel. 59.

(u) 1 Hale, 465.

(v) Sir Henry Ferrers's case, Cro. Car. 371.

(w) So called by Mr. J. Blackstone, 4 Com. 2.

(x) Foster, 312, *et seq.*

(y) In Huggett's case the judges, who held it to be manslaughter, put the point upon an endeavour to rescue.

sumed to have been seized all on a sudden, with a strong fit of zeal for Magna Charta(z) and the laws; and in this freuzy to have drawn upon the constable, and stabbed his assistant. It is extremely difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at that time, could be the provocation which led them into this outrage. But, admitting for argument sake that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under colour of justice, possibly can. The indignation that kindles in the breast in one case is instinct, it is human infirmity; in the other it may possibly be called a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection, than in human infirmity; and it is to human infirmity alone that the law indulges in the case of a sudden provocation." He then proceeds further, "But if

*635 *must, against all experience, be presumed to inflame beyond a personal affront, let us suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution, under a sentence of death manifestly unjust. This is a case that may well arouse the indignation, and excite the compassion, of the wisest and best men; but wise and good men know that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would be unhinged. And yet, what proportion doth the case of a false imprisonment, for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put."(a)

Adey's
case.

In a more recent case, the prisoner who cohabited with a person named Farmello, killed an assistant of a constable, who came to apprehend Farmello, as an idle and disorderly person, under the 19 Geo. 2, c. 10. Farmello, though he was not an object of the act, did not himself make any resistance to the arrest; but the prisoner immediately upon the constable and his assistant requiring Farmello to go along with them, without making use of any agument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. And Hotham, B. with whom Gould, J., and Ashurst, J., concurred, held the offence to be murder. A special verdict, however, was found:(b) and the case was argued in the Exchequer chamber, before ten of the judges; but no opinion was ever publicly delivered.(c)

(z) Holt, C. J., in delivering the judgment in Tooley's case, said, "Sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprison a man, he is an offender against Magna Charta."

(a) Fost. 315, 316, 317.

(b) The court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in Tooley's case, and the case of Huggett, *ante*, p. 633.

(c) Adey's case, 1 Leach, 206. And see *ib.* p. 212, where it is said that the prisoner laid eighteen months in gaol, and was then discharged:—but the following note is added: "It is said, that the judges held it to be manslaughter only, but no opinion was ever publicly given; and *qu.* whether the prisoner did not escape pending the opinion of the judges, when the gaol was burnt down in 1780, and was never retaken?" And see also 1 East, P. C. c. 5, s. 89, p. 329, note (a), where it is said, "Upon inquiry, however, it appears that, pending the consideration of the case by the judges, she escaped during the riots in 1780, and was never retaken." In *Reg. v. Porter and others*, which is reported as to another point,

*SECTION IV.

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Cases where the Killing takes place in the Prosecution of some other Criminal, Unlawful, or Wanton Act.

It has been shown, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: (d) and it may be here observed, that if such deliberation and mischievous intention does not appear, (which is matter of fact, and to be collected from circumstances,) and the fact was done heedlessly and incautiously, it will be manslaughter. (e)

Where an injury intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. † For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B. (f)

There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter. (g) But it is said, that in such a case it would be murder, if the rider had intended to divert himself with the fright of the crowd. (h) And if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house

9 C. & P. 778,* upon an indictment for murder, where it appeared that the deceased, who was a watchman, and another, were taking a person towards a station-house on a charge of robbing a garden, and were proceeding quietly along a road, the prisoner making no resistance, when they were attacked, and the deceased beaten to death; in opening the case it was asserted, that even if the prisoner were not lawfully in custody, the offence was murder, for if a person were illegally in custody, and was making no resistance, no person had any right to attack the persons who had him in custody, and that if they did, and death ensued in consequence of the violence used to release the prisoner, it was murder; and that although there might be old cases to the contrary, they were no longer considered as binding authorities; the point, however, did not ultimately become material, as it was held that the party was in lawful custody, but the above position was neither controverted by the very learned judge who tried the case, nor by the prisoner's counsel; and it should seem that it could not be successfully disputed, for it is difficult to discover upon what principle any individual can be justified in interfering to prevent what apparently is the due execution of the law, and that the question, whether he is guilty of murder or manslaughter, if death ensue, is to depend upon whether the custody is legal or illegal, of which, probably, at the time, he was perfectly ignorant, and which, consequently, could in no respect influence his conduct. See *ante*, p. 626. C. S. G.

(d) *Ante*, p. 538, *et seq.*

(e) Fost. 261.

(f) Fost. 262.

(g) 1 East, P. C. c. 5, s. 18, p. 231.

(h) 1 Hawk. P. C. c. 31, s. 68.

† [Where the prisoner shot at a person on horseback and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person and produced his death, the court held the crime to be murder. *State v. Smith*, 2 Strobbart, 77.]

* Eng. Com. Law Repts. xxxviii. 334.

or wall, and a person be thereby killed, this will be manslaughter, though there were no intent to do hurt to any one, because the act itself was unlawful.⁽ⁱ⁾ So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper.^(j)

Giving a child spirits in an unfit quantity.

A party who causes the death of a child by giving it spirituous liquours in a quantity quite unfit for its tender age, is guilty of manslaughter. Upon an indictment for manslaughter, which charged the prisoner with giving a quartern of gin to a child of the age of four years, which caused its death, and which quantity of gin was averred to be excessive for a child of that age, it appeared that the prisoner having ordered a quartern of gin, asked the child if it would have a drop, and that on his putting the glass to the child's mouth, the child twisted the glass out of his hand, and swallowed nearly *the whole of the gin, which caused its death. Vaughan, B. "As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter, because I have no doubt that the causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, amounts, in point of law, to that offence."^(k)

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Where an indictment for manslaughter stated that the prisoners gave, administered and delivered to M. A. divers large and extensive quantities of wine and porier, and induced, procured, and persuaded M. A. to take, drink, and swallow the said quantities of spirituous liquors; the same being likely to cause and procure his death, and which the prisoners then and there well knew; and that M. A., by means of the said inducement, procurement, and persuasion, took, drank, and swallowed the said large quantities of spirituous liquors; by means whereof he became greatly drunk, &c., and whilst he was drunk as aforesaid, the prisoners made an assault on him and forced and compelled him to go, and put, placed, and confined him in a cabriolet, and drove and carried him about therein for a long time, and thereby shook, threw, pulled, and knocked about M. A., by means whereof M. A. became mortally sick: of which said large quantities of spirituous liquors, and of the drunkenness occasioned thereby, and of the said shaking, &c., and the sickness occasioned thereby, M. A. died. It appeared that the deceased was in possession of the goods of one of the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet, he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the prisoners knew that the quantity of liquor taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the

(i) 1 Hale, 475. 1 Hawk. P. C. c. 29, s. 9.

(j) Burton's case, 1 Str. 481.

(k) Rex v. Martin, 3 C. & P. 211.

* Eng. Com. Law Repts. xiv. 273.

prisoners put the deceased in the cabriolet, then the questions would be : first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose ; or, whether, when he had taken it, they put him into a cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution ; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, was not an unlawful act ; or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house ; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. (*kk*)

It has been shown that where death ensues from an act done in the prosecution of a felonious intention, it will be murder : (*l*) but a distinction is taken in the case of an act done with the intent only of committing a bare trespass ; as if death ensues from such act, the offence will be only manslaughter. (*m*) Thus, though if A. shoot at the poultry of B. intending to steal them, and by accident kill a man, it will be murder ; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter. (*n*) And any one who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstance of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not. (*o*) And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, it is manslaughter. (*p*) But it seems that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent. (*q*)

Death from acts of trespass.

Where a carman was in the front part of a cart loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart,

(*kk*) Reg. v. Packard, 1 C. & Mars. 236.

(*l*) *Ante*, p. 539.

(*m*) Fost. 258. Though Lord Coke seems to think otherwise, 3 Inst. 56.

(*n*) Fost. 258, 259. 1 Hale, 475.

(*o*) 1 East, P. C. c. 5, s. 32, p. 256, 257. 1 Hale, 39.

(*p*) 1 Hale, 39.

(*q*) 1 East, P. C. c. 5, s. 32, p. 257.

but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received, it was held that the boy was guilty of manslaughter.^(r) So where an indictment for manslaughter alleged that the prisoners in and upon one L. H. did make an assault, and that L. H. then lying in a certain cart containing divers bags of nails of great weight, the prisoners did with their hands force up the shafts of the said cart, and throw down the body of the said cart in which L. H. was so as aforesaid lying, and him the said L. H. by such forcing up of the shafts and throwing down of the body of the said cart as aforesaid, did cast and throw upon the ground under the said bags of nails, by means whereof the said bags of nails were thrown and forced against over and upon the breast of L. H., L. H. then being upon the ground, and the said bags of nails *then and there did press and lie upon the breast of L. H., thereby giving, &c., and it was urged that this indictment was bad, as it did not allege that the prisoners knew that the deceased was in the cart; Taunton, J., held that it was not necessary to allege such knowledge, as malice was not an ingredient in the crime.^(s)

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If death ensues in consequence of a wrongful act which can neither be justified nor excused, it is manslaughter.

If death ensues in consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is manslaughter. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners by throwing large stones down the mine, broke the scaffolding: and that the consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, in which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in mines in the neighbourhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf, striking against it, would upset and occasion death or injury. Tindal, C. J., "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."^(t)

Where sports are lawful in themselves, or productive of danger, riot or disorder, so as to endanger the peace, and death ensue, in the pursuit

(r) *Rex v. Sullivan*, 7 C. & P. 641. Gurney, B., and Williams, J.

(s) *Rex v. Lear and Kempson*, Stafford Spring Assizes, 1832. MSS. C. S. G.

(t) *Fenton's case*, 1 Lewin, 179. Tindal, C. J.

of them, the party killing is guilty of manslaughter.^(u) Such manly sports and exercises as tend to give strength, activity and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however, deemed unlawful sports; <sup>Death hap-
pening at
unlawful
sports.</sup> ⁶³⁹ but prize-fighting, public boxing-matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration.^(v) For in these last mentioned cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained: and meetings of this kind have also a strong tendency in their nature to a breach of the peace.^(x) Therefore, where the prisoner had killed his opponent in a boxing-match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, *and was also urged to engage by taunts; and the occasion was sudden.^(y)

There is no doubt that prize-fights are altogether illegal; indeed just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize fight to see the combatants strike each other, and who are present when they do so, are in point of law guilty of an assault.^(z) Where it appeared that there was a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks which they used with great violence, and the deceased died in consequence of blows received on this occasion, and for the prisoner it was attempted to be proved, that though he was present during the fight, yet he neither did nor said any thing. Littledale, J., said, "If the prisoner was at this fight encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it. My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence; I mean if they remain present during the fight. I say if they were not casually passing by, but stayed at the place, they encouraged it by their presence, also they did not say or do any thing. This is my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for if he came by his death by any means not connected with the fight itself, that is if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the

^(u) *Fost.* 259, 260. 1 *East*, P. C. c. 5, s. 41, p. 268.

^(v) *Post*, Chap. on *Excusable Homicide*.

^(w) *Fost.* 260.

^(x) 1 *East*, P. C. c. 5, s. 41, p. 268.

^(y) *Ward's case*, O. B. 1789, *cor.* *Ashhurst*, J. 1 *East*, P. C. c. 5, s. 42, p. 270.

^(z) *Rex v. Perkins*, * 4 C. & P. 537. *Patteson*, J. *Rex v. Bellingham*, ^b 2 C. & P. 234. *Burrough*, J. *Rex v. Hargrave*, ^c 5 C. & P. 170. *Patteson*, J. In the last case it was held, that persons present at a prize fight were not such accomplices as to need corroboration.

* *Eng. Com. Law Reps.* xix. 515.

^b *Ib.* xii. 105.

^c *Ib.* xxiv. 260.

fight itself, that is, by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter.”(a)

The custom of cock-throwing at Shrovetide, has been considered as an idle, dangerous, and unlawful sport; and, accordingly, where a person throwing at a cock missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and speaking of the custom, he says, “it is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the by-standers, and ought to be discouraged.”(b) So throwing stones at another wantonly in play, being a dangerous sport without the least *appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter.(c)

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Though the sports be not in their nature unlawful, yet if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter; as was the case of Sir John Chichester, who unfortunately killed his man-servant as he was playing with him. Sir John Chichester made a pass at the servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword.(d) This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.(e)

Shooting at deer in another’s park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a by-stander be killed by the shot, such killing will be manslaughter.(f)

Where several join to do an unlawful act. It has been shown, that where a body of persons, resolving generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, happen to kill any one in the prosecution of this unlawful purpose, they will be guilty of murder.(g) Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of

(a) *Rex v. Murphy*,^a 6 C. & P. 103. Littledale, J., and Bolland, B. See also *Reg. v. Young*,^b 8 C. & P. 644. *Ante*, p. 529.

(b) *Fost.* 261.

(c) 1 Hawk. P. C. c. 29, s. 5.

(d) *Sir John Chichester's case*, 1 Hale, 472, 473. *Alley*, 12, *Keil.* 108.

(e) 1 Hale, 473. *Fost.* 260. 1 East, P. C. c. 5, s. 41, p. 269. But see in Hale, 473, the following note:—“This seems a very hard case; and indeed the foundation of it fails; for the pushing with a sword in the scabbard, by consent, seems not to be an unlawful act; for it is not a dangerous weapon likely to occasion death, nor did it so in this case, but by an unforeseen accident, and therein differs from the case of justing, or prize-fighting, wherein such weapons are made use of as are fitted and likely to give mortal wounds.”

(f) 1 Hale, 475.

(g) *Ante*, p. 538.

^a Eng. Com. Law Repts. xxv. 301.

^b *Ib.* xxiv. 564.

manslaughter. *(h)* It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself. *(i)*

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Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.

AN act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. *(j)* And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.

Though officers of justice are authorized to execute their duties in a proper and legal manner, notwithstanding any resistance which may be made to them: *(k)* yet they should not come to extremities upon every slight interruption, nor unless there be a reasonable necessity. Therefore, where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case. *(l)*

There is a case reported in Strange, as a case of manslaughter, which, if the circumstances of it were as stated in that report, does not seem to have been entitled to so favourable a construction. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, "He did not intend to hurt the officers, but he would not be ill-used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. (m)* This is reported to have been holden manslaughter, *by reason of the first assault with the cane*: but Mr. Justice Foster thinks it a very extraordinary case, as thus reported; and men-

Officers of
justice
acting im-
properly.

Case of
Tranter
and Reason.

(h) Drayton Basset case, Crom. 28. 1 Hale, 440.

(i) 1 Hawk. P. C. c. 31, s. 53.

(k) *Ante*. p. 535, 544.

(l) Goffe's case, 1 Vent. 216.

(m) *Rex v. Tranter and Reason*, Stra. 499. *Ante*, p. 516.

(j) *Ante*, p. 444, *et seq.*

tions the following additional circumstances which are stated in another report.(n) 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down because he would not be forced out of his *lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot, (for both pistols were discharged in the affray,) and slightly wounded on the wrist by some sharp pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not, that he was on the ground begging for mercy, but that on the ground he held up his hands, *as if* he was begging for mercy. Upon these facts the chief justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent them taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared it would be no more than manslaughter.(o)

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Officers acting upon resistance.

Or upon flight of the party arrested for felony.

Misdemeanor.

Though resistance be made to an officer of justice, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter.(p)

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him: and the jury ought to inquire whether it were done of necessity or not.(q) In making arrests in cases of misdemeanor and breach of the peace, (with the exception, however, of some cases of flagrant misdemeanors,) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and, generally speaking, it will be murder; but under circumstances, it may amount only to manslaughter, if it appear that death was not intended.(r)

Although an officer must not kill for an escape, where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party. Upon a trial for murder it appeared that the prisoner, an excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers, in the act of landing whiskey from the Scottish shore, contrary to law; the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood and was greatly weakened in the

(n) 6 St. Tri. 195. 16 St. Tri. (by Howell), 1.

(o) Post. 293, 294.

(p) MSS. Burnet, 27. 1 East, P. C. c. 5, s. 63, p. 297. And if there were time for the blood to have cooled, it would, it is conceived, amount to murder, *ante*, 442.

(q) 1 East, P. C. c. 5, s. 67, p. 525.

(r) Post. 271. 1 East, P. C. c. 5, s. 70, p. 302.

struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge *did not take effect, and the deceased prepared to make another assault; that seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; but the deceased disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol, and killed him. Holroyd, J., told the Jury, "an officer must not kill for an escape, where the party is in custody for a misdemeanor, but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to."^(s)

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In civil suits, if the party against whom the process has issued, fly from the officer endeavouring to arrest him, and be killed by him in the pursuit, it has been said that it will be murder.^(t) But it is rather to be considered as murder or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence.^(u)

In cases of pressing for the sea service, if the party fly, the killing by the officer, in the pursuit to overtake him, will be manslaughter, at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea service, in this respect, so far as they are authorized by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. An officer in the impress service, put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her, with a musket loaded with ball, for the purpose of hitting the halyards, and bringing the boat to, which was found to be the usual way, and one of the shots unfortunately killed Collyer. The court said it was impossible for it to be more than manslaughter.^(v) It is presumed, that this decision proceeded on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as

Pressing
for the sea
service.

(s) Forster's case, 1 Lewin, 187. Holroyd, J.

(t) By Lord Hale, 1 Hale, 481.

(u) Fost. 271.

(v) Rex v. Phillips, Cowp. 830.

*644 such an act was calculated to breed *danger, and not warranted by law, though no bodily hurt were intended, it was holden to be manslaughter, and the defendant was burned in the hand. (*w*) It may here be observed, however, that by the statute for the prevention of *smuggling*, it is enacted, that in case any vessel or boat, liable to seizure or examination, shall not bring to on being required to do so, or being chased by any vessel or boat in his majesty's navy, having the proper pendant and ensign of his majesty's ship hoisted, or by any vessel or boat duly employed for the prevention of smuggling having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person, having the charge or command of such vessel in his majesty's navy, or employed as aforesaid, (first causing a gun to be fired as a signal,) to fire at or into such vessel or boat; and such captain, master, or other person, acting in his aid or assistance, or by his direction, shall be indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing. (*x*)

Officer arresting out of his proper district.

Where an officer makes an arrest out of his proper district, or without any warrant or authority, (*y*) and purposely kills the party for not submitting to such illegal arrest, the crime will, generally speaking, be murder; that is, in all cases at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (*z*) In the case of private persons, using their endeavours to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavouring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter. (*a*)

Gaolers.

Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a gaoler, which would warrant him (apart from personal danger,) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent. (*b*) And if an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter. (*c*)

Captains of vessels.

Persons on board ship are necessarily subjected to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter against the captain and mate of a vessel, by accelerating the death of a seaman really in ill-health, but whom, they allege, they believe to be a skulker, that is, a person endeavouring to avoid his duty, the question is, (in determining whether it is a slight or aggravated case,) whether the *phenomena of the disease were such as would excite the attention of humane and reasonable men; and, in such a case, if the deceased be taken on board after he was discharged

(*w*) 1 East, P. C. c. 5, s. 75, p. 308.

(*x*) 3 & 4 Wm. 4, c. 53, s. 8.

(*y*) *Ante*, p. 544, 545.

(*z*) 1 East, P. C. c. 5, s. 80, p. 312.

(*a*) Fost. 318.

(*b*) 1 East, P. C. c. 5, s. 91, p. 331, citing 1 MSS. Sum. 145, semb. Pult. 120, 121. And see 1 Hawk. P. C. n. 28, s. 13, where it is said, that if a criminal endeavouring to break the gaol, assault the gaoler, he may be lawfully killed by him in the affray.

(*c*) 1 Hawk. P. C. c. 29, s. 5.

from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. (d)

Moderate and reasonable correction may properly be given by parents, masters, and other persons, having authority in *foro domestico*, to those who are under their care; but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but if with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter. (e)

In the following case, the nature of the instrument used, and the probability of its causing death, or great bodily harm, when used in the manner stated in the case, occasioned much doubt. The prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head, on the temple, and caused her death soon afterwards. The stool was of sufficient size and weight to give a mortal blow: but the prisoner did not intend, at the time she threw it, to kill the child. These facts were stated in a special verdict: but the matter was considered of great difficulty, and no opinion was ever delivered by the judges. (f)

In the foregoing case, the counsel for the prisoner cited the following case. A shepherd boy had suffered some of the sheep which he was employed in tending, to escape through the hurdles of their pen. The boy's master, the prisoner, seeing the sheep get through, ran towards the boy, and, taking up a stake that was laying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. The learned judge, (g) in his directions to the jury, after stating that every master had a right moderately to chastise his servant, but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired them to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw, in the heat of his passion, was, or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which if death actually happen, will be murder. Therefore, if the jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill: that if they thought it was they must find the prisoner guilty of murder; but if they were persuaded it was done with an intent to kill, the *crime would then at most amount to manslaughter. The jury found it manslaughter. (h) In this case it is presumed that the learned judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous,

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(d) Reg. v. Leggett, 8 C. & P. 191, Alderson, B., Williams and Coltman, Js.

(e) Post. 262. 1 Hale, 454. Rex v. Keite, 1 Ld. Raym. 144.

(f) Rex v. Hazel, 1 Leach, 368. Ante, p. 519.

(g) Nares, J.

(h) Rex v. Wiggs, Norfolk Summer Assizes, 1784. 1 Leach, 378, note (a).

and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill.

Improper
correction
by a
parent.

A mother, being angry with one of her children, for not having prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answer, which put her in a passion, and she took up a small piece of iron, used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door, when she threw the poker at him, and the iron struck the deceased, who happened to be coming in at the moment, on the head, and killed him: it was held that when a blow intended for A. lights upon B., being given in a sudden transport of passion, if, supposing A. had been struck and died, it would have amounted to manslaughter, it is no less manslaughter if it causes the death of B., and there was no doubt, if the child at whom the blow was aimed had been struck and died, it would have been manslaughter; and so it was under the present circumstances.(i)

Nature of
the provo-
cation con-
sidered in
case where
a child was
killed by
the correc-
tion of the
parent-

Though the correction exceeds the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him, in a passion, with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge by whom the father was tried, consulted his colleague in office, and the principal counsel on the circuit, who all concurred in opinion, that it was only manslaughter; and so it was ruled.(j)

Excessive
correction
given
under the
belief that
the de-
ceased was
shamming
illness to
avoid work.

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The prisoner was aunt to the deceased, a girl about fifteen, who, with her sister, who was two or three years younger, had been placed, after their mother's death, under the prisoner's care, who employed them in stay-stitching fourteen or fifteen hours a day, and when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in a consumption, and did not do so much work as her sister, and, in consequence, was much oftener, and more cruelly punished by the prisoner, who accompanied her corrections with very violent and threatening language, and said that she was acting the hypocrite, and shamming illness, and that she had a very strong constitution. The surgeon said she died from consumption, but that her death was hastened by the treatment she had received. Under these circumstances, the counsel for the prosecution thought there was not proof of malice sufficient to constitute the crime of murder, as the pri-

(i) *Rex v. Conner*, 7 C. & P. 438; *Park, J. A., and Gaselee, Js.*

(j) *Anon. Worcester Spring Ass. 1775, Serj. Forster's MSS. 1 East, P. C. c. 5, s. 37, p. 261.*

* Eng. Com. Law Reps. xxxii. 576.

soner always alleged that she believed the girl was shamming illness, and was really able to do the work required, and which it appeared her younger sister actually did, and the court concurred in that opinion. (*k*)

Cases may occur in which the correction is not inflicted by means of Self's case. Correction by a system of privation and ill-treatment. any active and personal violence, but by a system of privation and ill-treatment. The following case seems to be of this nature:—The prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to lie in a bed, on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. In this case, the medical persons who were examined were of opinion that the boy's death was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home: and they inclined to think, that if he had been properly treated when he came home he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner; and it was proved that the apprentice had had sufficient sustenance; and the prisoner had a general good character for treating his apprentices with humanity, and had made application to get this boy into the hospital. Under these circumstances the recorder left it to the jury to consider, whether the death of the boy was occasioned by the ill-treatment he received from his master, after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Mr. J. Gould and Mr. B. Hotham, that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blameable and improper, they might, under all these circumstances, find him guilty of manslaughter; which they accordingly did. (*l*) And upon the question being afterwards put to the judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged. (*m*)

In a note upon the foregoing case, Mr. East says, "I have been the more particular in stating the ground of the decision in this case, because Mr. Justice Gould's note of the case, from whence this is taken, is evidently different from another report (*n*) of the opinion of the judges in this case, from whence it might be collected, that there *could be no gradation of guilt in a matter of this sort, where a master, by his ill-conduct or negligence, had occasioned or accelerated the death of his apprentice, but that he must either be found guilty of murder or acquitted; a conclusion which, whether well or ill-founded, certainly cannot be drawn from this statement of the case. The same opinion, however, is stated in the Old Bailey Sessions Papers, to have been thrown out by the Recorder in Wade's case." (*o*) †

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(*k*) *Rex v. Cheeseman*, 6 C. & P. 455, Vaughan, J. The prisoner pleaded guilty of manslaughter.

(*l*) *Rex v. Self*, O. B. 1770, MSS. Gould, J. 1 East, P. C. c. 5, s. 13, p. 226, 227.

(*m*) *Easter T.*, 16 Geo. 3, De Grey, C. J., and Ashhurst, J., being absent.

(*n*) 1 Leach. 137.

(*o*) *Rex v. Wade*, O. B. Feb. 1784, Sess. Pap.

† [Where a husband refused to shelter his wife, though they were separated and she received an allowance from him, when the wife was destitute of shelter, and died in conse-

Persons following their common occupations.

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter, at least, on account of such negligence. (p) Thus, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter. (q) It was a lawful act, but done in an improper manner. It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used. (r) But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable; but when the streets are full, such ordinary caution will not suffice; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. (s)

Negligent delivery of medicine.

If a chemist's apprentice be guilty of negligence in delivering medicine, and death ensues in consequence, he is guilty of manslaughter.

Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a phial, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed him. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., to the jury:—"If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him." (t)

Negligent slinging of casks.

If a person adopts a mode of raising casks over a street, which is reasonably sufficient, and death ensues from the fall of a cask, he is not guilty of manslaughter. The prisoner was indicted for manslaughter, in having, by negligence in the manner of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway. It appeared that there were three modes of slinging casks customary in Liverpool; one by slings passed round each end of the casks; a second by can hooks; and a third in the manner in which the prisoner had slung the cask which caused the accident—namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and, on being pulled endways towards the door, it slipped from the rope as soon as it touched the floor of the room.

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Parke, J., to the jury:—"The *double slings are undoubtedly the safest mode; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him." (u)

Negligent casting of cannon.

Where the prisoner, who was an iron-founder, was employed to make twelve cannons, to celebrate the passing of the reform bill, and four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up; but the prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part that had burst, as it matched the former aperture: and the cannon,

(p) Fost. 262. 1 East, P. C. c. 5, s. 38, p. 262.

(q) Fost. 262. 1 Hale, 475.

(r) Rex v. Hull, Kel. 40.

(s) Fost. 263.

(t) Tessymond's case, 1 Lew. 169.

(u) Rigmaldon's case, 1 Lew. 180.

being loaded not heavier than usual, burst, and thereby killed the deceased, it was held that the prisoner was guilty of manslaughter.(v)

If a person driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection.(w)

Negligent driving of carriages.

Upon this subject the following case is reported—A. was driving a cart with four horses, in the highway at Whitechapel, and he being in the cart, and the horses upon a trot, they threw down a woman, who was going the same way, with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter.(x) But upon this case the following observations have been made:—"It must be taken for granted from this note of the case, that the accident happened in a highway, *where people did not usually pass*; for otherwise the circumstance of the driver's being in the cart, and going so much faster than is usual for carriages of that construction, savoured much of negligences and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the way in time. And, indeed, such conduct, in a driver of such heavy carriages, might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might possibly pass by the same road. The greatest possible care is not to be expected, nor is it required: but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do."(y)

It is the duty of every man who drives a carriage to drive it with such care and caution, as to prevent, as far as in his power, any injury to any person. And if death be caused to any person, by the rapidity of the driving, it is no answer that the driver called out to the deceased to get out of the way, which the deceased might have done if he had not been in a state of intoxication. On an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication; the prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart; on seeing the *deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of the cart-wheels passed over him, and he was killed; it was held, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving, or from any other cause, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man, who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.(z)†

It is the duty of every man driving a carriage to drive with such care as to prevent accidents.

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(v) *Rex v. Carr*,^a 8 C. & P. 163, Bayley and Gurney, Bs., and Patteson, J.

(w) *Fost.* 263.

(x) *Anon.* O. B. 1704. 1 East, P. C. c. 5, s. 38, p. 263.

(y) 1 East, P. C. c. 5, s. 38, p. 263, 264.

(z) *Rex v. Walker*,^b 1 C. & P. 320, Garrow, B.

† [Two drivers of carts, inciting each other to drive furiously, are both guilty if death ensues. *Reg v. Swindall*, 2 C. & K. 230. Eng. C. L. lxi. 229.]

^a Eng. Com. Law Repts. xxxiv. 336.

^b *Ib.* xi. 408.

A foot passenger is entitled to use the carriage-way, though there be a foot-path,

A foot passenger, though he may be infirm from disease, has a right to walk on the carriage-way, although there be a foot-path, and he is entitled to the exercise of reasonable care on the part of persons driving carriages along the carriage-way.^(zz) A tradesman was walking on a road, about two feet from the foot-path, after dark, but there were lamps at certain distances along the line of the road, when the prisoner drove along in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and from six to seven miles an hour according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. Bolland, B., told the jury, that the question was, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter.^(a)

Sitting in a cart.

If, in consequence of a person sitting in a cart, instead of being at the horse's head, or by its side, death is occasioned, such person is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was, that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held, that the prisoner, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter.^(b)

If the driver of a carriage urges his horses to such a pace that he loses the command over them, and thereby death ensues, he is guilty of manslaughter.

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If the driver of a carriage urges his horses to such a pace, that he loses the command over them, and thereby death is occasioned, he is guilty of manslaughter. So, if the driver be racing with another carriage, and, from being unable to pull up his horses in time, his carriage is upset, and a person killed, the driver is guilty of manslaughter. Upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and the witnesses for the *prosecution stated that the prisoner was whipping his horses just before his omnibus upset. The defence was, that the horses in the omnibus driven by the prisoner took fright and ran away. Patteson, J., "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however, he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable: for a man is not to say, I will race along a road, and when I am got beyond another carriage I will pull up. If the prisoner did really race, and only when he had got past the other omnibus endeavouring to pull up, he must be found guilty; but

(zz) *Boss v. Litton*,^a 5 C. & P. c. 407, Lord Denman, C. J.

(a) *Rex v. Grout*,^b 6 C. & P. 629, Bolland, B., and Park, J. A. J.

(b) *Knight's case*, 1 Lew. 168. In a similar case, *Hullock, B.*, expressed a similar opinion, *ibid.*

^a Eng Com. Law Reps. xxiv. 384.

^b *Ib.* xxv. 569.

if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? If you are of that opinion you ought to convict him.”(c)

A person driving a carriage is not bound to keep on the ordinary side of the road; but if he do not do so, he is bound to use more care and diligence, and keep a better look out, that he may avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.(d)

If a person, riding in an improper and furious way along a road, cause the death of a person, it is manslaughter; but if two persons be riding in such an improper way, and death be caused by the second after the first has passed, the first is not responsible. A. and B. were riding on horseback, at a very rapid pace along a highway: the deceased, who was also on horseback, drew off his horse as far from the middle of the road as the place would allow; A. passed by him without any accident; but B.’s horse and the horse of the deceased came in collision, and both the deceased and B. were thrown, and the deceased killed. Patteson, J., “I think that if two are riding fast, and one of them goes by without doing any injury to any one, he is not answerable, because the other, riding equally fast, rides against some one, and kills him. A., therefore, must be acquitted. If you think that B. was riding in an improper and furious way, and rode against the deceased, he is guilty of manslaughter, but if you think that the deceased’s horse was unruly, and got into the way, you ought to acquit.”(e)

Those who navigate a river improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving, or by negligent conduct. An inquisition charged that the prisoner did “propel and force” a vessel against a skiff, whereby the deceased was drowned. The counsel for the prosecution, in opening the case, said, that he apprehended the rule as to traversing the river *Thames was the same as that applicable to the mode of passing along any of the queen’s common highways: therefore, if the speed at which, or the manner in which, the prisoners were navigating the vessel, and were proceeding before they saw the skiff, was such as to prevent them, after they did see it from stopping in time to prevent mischief to the person in it, they would be responsible for the offence of manslaughter, if his death happened in consequence; if, on a misty night, the prisoners were proceeding at such a rate, that they could not stop in time, their so proceeding was illegal, and, as death ensued, they were responsible. Parke, B., “You have stated the law most correctly. There is no doubt that those who navigate the Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensue, as those who cause it on a public highway, either by furious driving, or negligent conduct.”(f)

In order to convict the captain of a steamer of manslaughter in causing a death by running down another vessel, there must be some act of per-

Right side of the road.

Persons riding on horseback at an improper pace.

The same rule applies to navigating a river as to travelling on a road.

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(c) *Rex v. Timmins*,^a 7 C. & P., 499, Patteson, J.

(d) *Pluckwell v. Wilson*,^b 5 C. & P. 375, Alderson, B.

(e) *Rex v. Mastin*,^c 6 C. & P. 396, Patteson, J.

(f) *Reg. v. Taylor*,^d 9 C. & P. 572.

^a Eng. Com. Law Reps. xxxii. 600. ^b *Ib.* xxiv. 368. ^c *Ib.* xxv. 455. ^d *Ib.* xxxviii. 284.

steamer of
man-
slaughter.
some act of
personal
misconduct
or negli-
gence on
his part
must be
proved.

sonal misconduct, or personal negligence shown on his part. The captain and pilot of a steamer were indicted for manslaughter in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the forecabin to keep a look-out, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was coming up the Thames without any light on board; the deceased was below: a boy who was on board the smack stated that when the steamer struck the smack he got on board the steamer, and found nobody forward: other witnesses were present to show that no person was forward on the look-out at the time. Park, J. A. J., "Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box, as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible." Alderson, B., "If you could show that there was a man at the bow, and that the captain had said, 'Come away, it's no matter about looking out,' that would be an act of misconduct on his part. If you can show that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him." Park, J. A. J., "Supposing he had put a man there, and had gone to lie down, and the man had walked away, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make any thing of it." Alderson, B., "I think this case has arrived at its termination; there is no act of personal misconduct or personal negligence on the part of these persons at the bar." (g)

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A mere omission of a captain, in not doing the whole of his duty, will not render him criminally responsible; some personal act must be shown.

To make the captain of a vessel guilty of manslaughter in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient: but if there be sufficient light, and the captain of a steamer either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter in causing a death by running down a boat, the counsel for the prosecution, in opening the case, said, if a party engaged in a lawful occupation is guilty of wilful misconduct, or of gross negligence, it is manslaughter. Park, J. A. J., "You must show some act done; you rather state it as if a mere omission on the part of the prisoner in not doing the whole of his duty would be enough; and we are of opinion that is not sufficient. I have no hesitation in saying, that if there was sufficient light, and the captain himself was at the helm, or in a situation to be giving the command, and did that which

(g) *Rex v. Allen*,^a 7 C. & P. 153. In opening the case, Ryland said, the question will be whether there was a sufficiently cautious and careful look-out kept by the people on board the steamer. Alderson, B., "You put it as a case of a negligent act of omission. I have great doubt whether that amounts to manslaughter; not keeping a good look-out is a negligent act of omission." Ryland, "The steering in a particular and improper direction, in consequence of not keeping a good look-out, is an act of omission, unless the party is bound by law to do the act omitted, as providing food for a person of tender years." At the conclusion of the case a jurymen asked, "Is the captain bound to have a person on the look-out?" Alderson, B., "Civilly he is, but not criminally." See *ante*, p 547. Fost. 322.

^a Eng. Com. Law Reps. xxxii. 475.

caused the accident, he would be guilty of manslaughter." Alderson, B., "There must be some personal act. In the case of a coach, the coachman is driving animals, and in the case of the captain, he is governing reasonable beings." It appeared in evidence that the deceased and two other persons were in a small boat going down the river, when a small steamer used for towing, of which the prisoner was master, met them, and, notwithstanding their shouting, struck the boat, and nearly cut it in two, in consequence of which the deceased was drowned; the waterman proved that he and the captain were on the starboard side of the windlass, and two other men were on the larboard side; that the captain did not leave his place once, and the mate was at the helm, and remained there till after the accident; that the engine was all open, and worked on deck, and made a great noise; that he did not hear the shouting in time to do any thing to avert the accident. Park, J. A. J., "This case has come to its end; at the outside it can only be considered as one of those accidents which will happen in a river navigation; it appears that they kept a proper look out; and there were several persons on deck at the time."(h)†

There is one species of criminal negligence, punishable by the provisions of the statute law, which may be mentioned in this place, though the offence is not made manslaughter. By the 7 & 8 Geo. 4, c. 75, (local and personal,) s. 38, in case any greater number of persons or passengers shall be taken or carried in any such wherry, boat or other vessel (mentioned in the act) on the river Thames, (within *the limits there mentioned*,) than are respectively allowed to be carried therein, and any one or more of them shall by reason thereof be drowned, every person or persons who shall work or navigate such wherry, &c., offending therein, and being convicted, shall be deemed guilty of a misdemeanor, and shall be liable to punishment,* as in cases of misdemeanor, at the discretion of the court, and shall also be disfranchised, and not allowed to work or navigate any wherry, &c., or to enjoy any of the privileges of a freeman of the company of watermen, &c., on the river Thames.(i)

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SECT. VI.

Of the Indictment and Judgment.

THE indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder;" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion.(j)‡

(h) *Rex v. Green*,^a 7 C. & P. 156.

(i) It was observed upon a former statute, 10 Geo. 2, c. 31, containing a more severe punishment for an offence of this kind, that it might serve as a caution to stage coachmen and others, who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers; the number of whom are regulated by act of parliament. 1 East, P. C. c. 5, s. 38, p. 264, and see the provisions as to carrying too many passengers, in the 2 & 3 Wm. 4, c. 120, s. 35.

(j) *Ante*, p. 564.

† [Neglect of trustees of road to contract for repair, by means of which death ensues, does not make them guilty of manslaughter. *Reg. v. Pacock*, 17 Q. B. 34. Eng. Com. Law lxxix. 34.]

‡ [It is no defence to an indictment for manslaughter, that the homicide therein alleged

^a Eng. Com. Law Repts. xxxii. 477.

Punish-
ment of
man-
slaughter.

The 9 Geo. 4. c. 31, s. 9, enacts, "that every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, or to pay such fine as the court shall award."

By sec. 31, "Every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years."

Where a party is charged with manslaughter in causing the death of a person by negligence in the discharge of his duty, it must be proved that the negligent act was that of the party charged. Upon an indictment for manslaughter, it appeared that it was the prisoner's duty to attend to a steam engine, but on the occasion in question he had stopped the engine and gone away, and that, during his absence, a person came and put it in motion, and being unskilled was not able to stop it again, and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, saying, that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away. That it is necessary in order to a conviction for manslaughter that the negligent act which causes the death should be that of the party charged. (*k*)

Where an indictment for manslaughter stated that the prisoner "did compel and force A. B. and C. D. to leave" a windlass, by means of which the death was occasioned, and it appeared that the *prisoner, who was working one handle of the windlass, went away, and A. B. and C. D., then finding they were not strong enough to hold the windlass without him, let go their hold, by reason of which the deceased was killed, it was held that the words "did compel and force" must be taken to mean personal affirmative force applied to A. B. and C. D., and therefore the prisoner must be acquitted. (*l*) So where an indictment alleged that the prisoner did "propel and force" a vessel against a skiff, Parke, B., said, "The allegation in the inquisition is, that the defendants forced and propelled the vessel against the skiff: evidence against those who gave the immediate orders will be necessary to sustain this allegation." (*m*)

It has been held upon two cases reserved, that a person indicted for murder may be convicted of manslaughter, and punished accordingly, although such indictment do not conclude *contra formam statuti*. (*n*) And so on an indictment for manslaughter not concluding *contra formam statuti*, the punishment provided by the 9 Geo. 4, c. 31, s. 9, may be awarded, for such conclusion is only necessary where a statute creates the offence, not where it merely regulates the punishment. (*o*)

If a person be indicted as accessory after the fact to a murder, he

(*k*) Hilton's case, 2 Lew. 214, Alderson, B. See *Rex v. Waters*,^a 6 C. & P. 328, *ante*, p. 489.

(*l*) *Rex v. Lloyd*,^b 9 C. & P. 301, Garrow B.

(*m*) *Reg. v. Taylor*,^c 9 C. & P. 672. See the case *ante*, p. 652.

(*n*) *Rex v. Chatburn*, R. & M. C. C. R. 403. *Rex v. Rushworth*, R. & M. C. C. R. 404.

(*o*) *Rex v. Berry*, 1 Moo. & Rob. 463, Parke, B.

appears by the evidence to have been committed with malice aforethought, and was therefore murder; but the defendant in such case may notwithstanding be properly convicted of the offence of manslaughter. *The Commonwealth v. McPike*, 3 Cush. 181.]

^a Eng. Com. Law Repts. xxv. 423. ^b *Ib.* xi. 399. ^c *Ib.* xxxviii. 284.

may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter. (*p*) Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact. (*q*)

Upon an indictment for manslaughter, the jury may find the prisoner guilty of an assault under the 1 Vict. c. 85, s. 11, and he may be sentenced to three years imprisonment, with or without hard labour, and solitary confinement, not exceeding one month at any one time, and not exceeding three months in any one year in addition to such imprisonment, or such imprisonment with hard labour, by virtue of sec. 8 & 11, of that statute. (*r*) †

*CHAPTER THE THIRD.

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OF EXCUSABLE AND JUSTIFIABLE HOMICIDE.

WE may now properly proceed to treat of such homicide as, not amounting even to manslaughter, must be considered either as excusable or justifiable; excusable when the person by whom it is committed is not altogether free from blame; and justifiable when no blame whatever is attached to the party killing.

Excusable homicide is of two sorts: either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defence. This term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them: (*a*) and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or in self defence. (*b*) There might, however, formerly have been cases so bordering upon, and not easily distinguishable from, manslaughter, that the offender might have been put to sue out his pardon, according to the provisions of the statute of Gloucester; (*c*) but that statute was re-

(*p*) *Rex v. Greenacre*,^a 8 C. & P. 35, Tindal, C. J., Coleridge and Coltman, Js.

(*q*) *Ibid.*

(*r*) *Reg. v. Pool*,^b 9 C. & P. 728. Anonymous, 2 Mood. C. C. R. 40. See the sections and cases upon them, *post*, title, "Aggravated Assaults."

(*a*) 4 Bla. Com. 188. The penalty for this offence is said by Sir Edward Coke to have been anciently no less than death, 2 Inst. 148, 315; but this is denied by other writers, 1 Hale, P. C. c. 425. 1 Hawk. P. C. c. 29, s. 20, *et seq.* Fost. 282.

(*b*) 4 Bla. Com. 188. Fost. 288. 1 East, P. C. c. 5, s. 8, p. 222.

(*c*) Fost. 289. The 9 Geo. 4, c. 31, and the 10 Geo. 4, c. 34, the Irish Act, repeal so much of the 6 Ed. 1, c. 9, "as relates to one person killing another by misfortune, or in his own defence, or in any other manner, without felony."

† [A person indicted for manslaughter may be convicted of an assault and battery, though the indictment contains no count specially charging the minor offence. *The State v. Scott*, 24 Vermont, 127. See *contra. Reg. v. Conner*, 2 C. & K. 518. Eng. C. L. ixi. 518.]

^a Eng. Com. Law Reps. xxxiv. 280. ^b Ib. xxxviii. 309.

pealed by the 9 Geo. 4, c. 31; sec. 10 of which enacts, "that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony." (d)

Justifiable homicide is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice or for the prevention of some atrocious crime.

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*SECT. I.

Of excusable Homicide by Misadventure.

Persons doing a lawful act and happening to kill.

HOMICIDE by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. (e) The act must be lawful; for if it be unlawful, the homicide will amount to murder, or manslaughter, as has been already shown; (f) and it must be done with intention of great bodily harm; for then the legality of the act, considered abstractedly, would be no more than a mere cloak, or pretence, and consequently would avail nothing. The act must also be done in a proper manner, and with due caution, to prevent danger. (g)

Persons following their common occupations.

Thus, if people, following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be homicide by misadventure. As if workmen threw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, this will be misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given (h) to such as might be below. (i) And the party will not be more criminal who is working with a hatchet, when the head of it flies off, and kills a by-stander. (k) So where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. (l) A. was driving a cart with four horses in the highway at Whitechapel, he being in the cart; and the horses being upon a trot, threw down a woman who was going the same way with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure: but by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter. (m) And, upon the same ground of no want of due care being imputable to the party in a case where a person was riding a horse, and the horse, being whipt by some other person, sprang out of the road,

(d) The 10 Geo. 4, c. 34, s. 13, is, word for word, the same as this section.

(e) 1 East, P. C. c. 5, s. 8, p. 221, and s. 36, p. 8, 260, 261. Fost. 258. 1 Hawk. P. C. c. 29, s. 1. (f) *Ante*, p. 538, *et seq.*, p. 636, *et seq.*

(g) 1 East, P. C. c. 5, s. 36, p. 261.

(h) *Ante*, p. 648.

(i) 1 Hale, 472, 475. 1 Hawk. P. C. c. 29, s. 4. Fost. 262. 1 East, P. C. c. 5, s. 38, p. 262.

(k) 1 Hawk, P. C. c. 29, s. 2.

(l) Fost. 263. 1 Hale, 476.

(m) O. B. Sess. before Mich. T. 1704, MSS. Tracy, 32. 1 East, P. C. c. 5, s. 38, p. 263; and see observations on this case, *ante*, 649.

and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse.⁽ⁿ⁾

As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments ^{*658} in their nature peculiarly dangerous, must proceed with such appropriate and reasonable precaution as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter.^(o)

Persons using dangerous articles, or instruments.

A., having deer frequenting his corn field, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him orders to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed in the corn himself: and the servant, supposing it to be the deer, shot and killed the master. This was ruled to be misadventure, on the ground that the servant was misguided by the master's own direction, and was ignorant that it was any thing else but the deer. It seemed, however, to the learned judged, who so decided,^(p) that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark.^(q) But upon this it has been remarked, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act; and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act.^(r) By the same rule as to due caution being observed, it has been holden to be misadventure only, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances from an enemy.^(s)

But it should be observed, that the caution which the law requires, is not the *utmost* caution that can be used: it is sufficient that a reasonable precaution be taken; such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary course of things, to answer the end.^(t) This proper modification of the rule respecting caution does not appear to have been sufficiently attended to in the following case. A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer; he carried it home and showed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off and killed the woman. This was ruled manslaughter.^(u) But the legality

As to the degree of caution which must be observed in the use of dangerous instruments.

(n) 1 Hawk. P. C. c. 29, s. 3.

(o) 1 Hale, 431. 1 East, P. C. c. 5, s. 40, p. 266.

(p) Lord Hale.

(q) 1 Hale, 476. The same case is previously mentioned, 1 Hale, 40, where the learned author seems to think that the offence amounted to manslaughter; but considers the question as of great difficulty. The case was, however, determined at Peterborough, as stated in the text.

(r) 1 East, P. C. c. 5, s. 40, p. 266.

(s) 1 Hale, 42.

(t) Fost. 264.

(u) Rampton's case, Kel. 41.

*659 of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases.^(w) And Mr. J. Foster, after stating *his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar accident, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. "I did not inquire," says Mr. J. Foster, "whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted."^(x)

Correction
in foro
domestico.

It has been shown, that where parents, masters, and other persons, having authority *in foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances:^(y) but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure.^(z)

Death hap-
pening
from lawful
sports.

Such sports and exercises as tend to give strength, activity and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, are deemed lawful sports; and if either party happen to be killed in such sports, it is excusable homicide by misadventure.^(a) A different doctrine, indeed, appears to have been laid down by a very learned judge:^(b)

^(w) Fost. 264, where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But, *qu.* whether the ordinary and proper precaution would not have been to have examined the pan, which in all probability must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that it would be very incautious in a person previously unacquainted with the state of the instrument to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *qu.* to the case in the margin of the report; and that it appears that the learned editor (Holt, C. J.,) was not satisfied with the judgment; and that it is one of the points which, in the preface, he recommends for further consideration.

^(x) Fost. 265.

^(y) *Ante*, p. 547. Chap. on *Murder*, p. 645. Chap. on *Manslaughter*.

^(z) 1 Hale, 454, 473, 474. 4 Bla. Com. 182.

^(a) Fost. 259, 260. 1 East, P. C. c. 5, s. 41, p. 268. But there are other sports which come under a different consideration. See *ante*, p. 638.

^(b) 1 Hale, 472.

but the grounds of that doctrine have been ably combated by Mr. J. Foster, who gives this good reason for considering such sports as lawful, that *bodily harm is not the motive on either side.*(c) And certainly, though it cannot be said, that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet if they may breed danger, there should be due warning given, that each party may start upon equal terms. For, if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not to murder, the intent not being malicious.(d) *660

Ordinarily the weapons made use of upon such occasions are not deadly in their nature: but, in some sports, the instruments used are of a deadly nature; yet, in such cases, if they be not directed by the persons using them against each other, and therefore no danger be reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case, therefore, where persons shoot at game or butts, or any other lawful object, and a by-stander is killed:(e) and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a by-stander to manslaughter.(f) ^{Sports where deadly weapons are used.}

SECT. II.

Of excusable Homicide in Self-defence.

HOMICIDE in self-defence is a sort of homicide committed *se et sua defendendo*, in defence of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable.(g)

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death.(h) Under such circumstances the killing will be excusable self-defence, sometimes expressed in the law by the word *chance medley*, or (as it has been written by some,) *chaud medley*, the former of which, in its etymology, signifies a casual affray; the latter an affray in the heat of *blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by one of the statutes,(i) and the ancient books,(k) ^{Defence of persons. Chance medley.} *661

(c) Fost. 260.

(d) 1 East, P. C. c. 5, s. 41, p. 269.

(e) 1 Hale, 38, 472, 475. 1 Hawk. P. C. c. 29, s. 6. 1 East, P. C. c. 5, s. 41, p. 269.

(f) 1 Hale, 475. Fost. 259.

(g) Fost. 273. "Self-defence culpable, but through the benignity of the law excusable."

(h) 1 East, P. C. c. 5, s. 51, p. 280. Fost. 273.

(i) 24 Hen. 8. c. 5.

(k) Staund. P. C. 16. 3 Inst. 55, 57. Kel. 67.

that it is properly applied to such killing as happens in self-defence upon a sudden encounter. (l)

Homicide on chance medley borders nearly upon manslaughter.

Homicide upon chance medley borders very nearly upon manslaughter; and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. (m) In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but, in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at the time in imminent danger of death. (n) And the true criterion between them is stated to be this; when both parties are actually combatting at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. (o)†

(l) 4 Bla. Com. 184. Fost. 275. *Skene De verborum significatione*, Verb Chaudmelle.

(m) Fost. 276.

(n) Fost. 277.

(o) 4 Bla. Com. 184.

† [The right of resorting to force, upon the principal of self-defence, does not arise while the apprehended mischief exists in machination only; nor does it continue so to authorize violence by way of retaliation or revenge for a past injury. *The People v. McLeod*, 1 Hill, 377. If the prisoner was going her own road, in a lawful pursuit, and was assailed in that road with a hickory stick of dangerous character, and thereupon slew her adversary with a knife, this is homicide in self-defence. *Copeland v. The State*, 7 Humphreys, 479.

The common law of Alabama on the subject of homicide is the same as the common law of England: and wherever that law requires the person assailed to decline the contest or to retreat before he will be excused in taking the life of his adversary, the law of Alabama requires the same. *Pierson v. The State*, 12 Alab. 149.

Where upon the trial of an indictment for murder, the prisoner attempts to justify the homicide on the ground that it was committed in self-defence he must show to the satisfaction of the jury that he was in imminent danger either of death or of some great bodily harm; and it is not sufficient that the accused believed that it was necessary to take the life of his assailant in order to protect himself from some great personal injury. *The People v. Shorter*, 4 Barb. Sup. C. c. 460.

One who is without fault himself, when assailed by another, may kill his adversary if the circumstances be such as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished, although it may afterwards turn out that the appearances were false, and that there was in fact no such design nor any danger that it would be accomplished. A person is not justified in returning blows with a dangerous weapon, when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm; nor is homicide justified when the combat can be avoided or when, after it is commenced, the party can withdraw from it in safety before he kills his adversary. *Shorter v. The People*, 2 Comst. 193.

On a trial for murder, there being evidence that the prisoner shot the deceased as he was coming up the street towards the prisoner's office, it was held, that the prisoner's declaration to the witness, "Yonder comes Macon" (the deceased) "with his yeager," (a kind of gun) before firing, was admissible, as part of the *res gesta*; but not the statement which followed, "He intends to shoot or kill me." Held, also a statement of the prisoner to a witness, before the shooting, that he saw the conduct of the deceased that morning, which conduct was testified to by the witness as being violent and threatening as he passed with his gun, was admissible, as showing the prisoner's ground for alarm. *Monroe v. The State*, 5 Geo. 85. Evidence of threats by the deceased, accompanied by occasional acts of personal violence, is admissible to justify the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him. And repeated quarrels may be shown between the parties to establish the *malus animus*; but the evidence cannot be allowed to go back to a remote period and prove a particular quarrel or cause of grudge, unless it be followed up with proof of a continued difference flowing from that source. Evidence that as a justice of the peace, the prisoner had prosecuted the deceased for embezzlement of the county school fund, and that in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him, is admissible in connection with other circumstances to show that the defendant was in fear of his life from the deceased, and that the killing was in self-defence. *Ibid*.

A person having reasonable apprehension of great personal violence, involving imminent

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned in order to get an opportunity or interval to enable the party to renew the fight with advantage. (p) The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm, and then, in his defence, he may kill his assailant instantly. (q) Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified. (r)

The party killing must not act with premeditation, and must forbear as much as he can with safety to himself.

*662

*If A. challenges B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself: and then B., going about his business and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not. (s)

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow: so in case of excusable self-defence, it seems that the first assault in a *sudden affray, all malice apart*, will make no difference if either party quit the combat and retreat, before a mortal wound be given. (t) According to this doctrine, if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bona fide* flies, and being driven to the wall, turns again upon B. and kills him, this will be *se defendendo*: (u) but some writers have thought this opinion

(p) 1 Hale, 481, 483. Fost. 277, 4 Bla. Com. 185.

(q) 1 Hale, 483. 4 Bla. Com. 185.

(r) *Per* Bosanquet, J., Reg. v. Smith, 8 C. & P. 160, *præsentibus*, Bolland, B., and Colman, J. See Reg. v. Bull, 9 C. & P. 22.

(s) 1 Hale, 453.

(t) Fost. 277.

(u) 1 Hale, 482.

peril to life or limb, may protect himself even at the expense of his assailant's life, if necessary. *Holmes v. The State*, 23 Alabama, 17.

A reasonable apprehension of death or of great violence to his person will justify killing in self-defence by a party assailed. *Young v. The State*, 11 Humphreys, 200.

When a man expects to be attacked, the right to defend himself does not arise until he has done everything to avoid that necessity. *The People v. Sullivan*, 3 Selden, 396.

The necessity that will justify the taking of life, need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. *Oliver v. The State*, 17 Alabama, 587. *The People v. Doe*, 1 Manning, 451.

When he who kills another, seeks and provokes an assault on himself in order to have a pretext for stabbing an adversary, and does, on being assaulted, stab and kill him, such killing is not excusable homicide in self-defence. *Stewart v. The State*, 1 Ohio Stat. Rep. 66.]

• Eng. Com. Law Repts. xxiv. 334.

• Ib. xxxviii. 19.

too favorable, inasmuch as the necessity to which A. is at last reduced, originally arose from his own fault.(v) With regard to the nature of the necessity, it may be observed, that the party killing, cannot in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself.(w)†

Under the excuse of self-defence, the principal civil and natural relations are comprehended: therefore 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.(x)

Defence of
property
against
trespassers.

If A., in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is at least common manslaughter; unless, indeed, there were danger of his life. But if B. enter into the house, and A. having first requested him to depart, gently lay his hands upon him to turn him out, and then B. turn upon him and assault him, and A. then kill him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession. And so it will be, if B. enter upon A., and assault him first, though not intending to kill him, but only as a trespasser to gain the possession; for, in such case, if A. thereupon kill B., it will only be *se defendendo*, and not manslaughter.(y) And it seems, that in such a case A. being in his own house, need not fly as far as he can, as in other cases of *se defendendo*; for he has the protection of his house to excuse him from flying, as that would be *to give up the protection of his house to his adversary by his flight.(z) But where the trespass is barely against the property of another, the law does not admit the force of the provocation

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(v) 1 Hawk. P. C. c. 29, s. 17. Lord Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating, 1 Hale, 482. Upon this subject some remarks are offered by Mr. East, (1 East, P. C. c. 5, s. 53, p. 281, 282), and he concludes by saying, "At any rate I think there is great difficulty in applying the distinction taken by Lord Hale and Hawkins against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, where neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question."

(w) Fost. 273, 275, 289. 4 Bla. Com. 184. (z) 1 Hale, 484. 4 Bla. 186.

(y) 3 Edw. 3. Coron. 35. Crompt. 27, b. 1 Hale, 486.

(z) 1 Hale, 485. In Dakin's case, 1 Lew. 166, where the prisoner was a lodger at a house, to which there was a back-way, of which the prisoner was ignorant, it being the first night he had lodged in the house, and some persons split open the door of the house in order to get the prisoner out and ill treat him; Bayley, J., is reported to have said, "If the prisoner had known of the back-way, it would have been his duty to have gone out backwards, in order to avoid the conflict." But it is submitted that the protection of the house extends to each and every individual dwelling in it. In *Rex. v. Cooper*, Cro. C. 544, it was held that a lodger might justify killing a person endeavouring to break into the house where he lodged, with intent to commit a felony in it; and see 1 East, P. C. c. 5, s. 57, p. 289, Fost. 274, and Ford's case, Kely, 51. *Post*, p. 669. C. S. G.

† [If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither murder nor manslaughter, but self-defence. But if, from the facts, it appears he only believed that a violent assault and battery, without endangering his life or inflicting great bodily harm, was intended, it is manslaughter. *Granger v. The State*, 5 Yerger, 450.]

Where an assailant intends to commit a trespass, to kill him is *manslaughter*; but when a felony, the killing is in *self-defence*. The character of the deceased for violence is admissible to elucidate this question. *Monroe v. The State*, 5 Georgia, 85.

The defendant cannot prove the character of the deceased for evidence where the killing took place under circumstances that showed he did not believe himself in danger; yet in a case of doubt whether the homicide was perpetrated in malice or from a principle of self-preservation, it is right to admit any testimony of this kind, as it tends to illustrate to the jury the motive by which the defendant was influenced. *Ibid.*]

as sufficient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. But if the beating be with an instrument, or in a manner not likely to kill, it will only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes without any colour, to take the goods of another, as is necessary to make them desist. (a)

A man is not authorized to fire a pistol on every intrusion or invasion of his dwelling-house, which may be made forcibly at night; he ought, if he has a reasonably opportunity, to endeavour to remove the trespasser, without having recourse to the last extremity. M., who was indicted for murder, had made himself obnoxious to some boatmen, by giving information of certain smuggling transactions, in which some of them had been engaged; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police; the boatmen, however, as he was going away, called to him that they would come at night, and pull his house down: in the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. M., under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J., "A civil trespass will not excuse the firing a pistol at a trespasser, in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So if a man with force invades and enters into the dwelling of another; but a man is not authorized to fire a pistol on every intrusion or invasion of his house: he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to *manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did." (b)

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A person must only use so much force as is reasonably necessary, in order to turn a trespasser out of his house. Upon an indictment for manslaughter, it appeared that the prisoner, upon returning home, found the deceased in his house, and desired him to withdraw, but he refused to go; upon this, words arose between them, and the prisoner becoming

(a) 1 Hale, 473, 486, 1 East, P. C. c. 5, s. 56, p. 289.

(b) Meade's case, 1 Lew. 484, Holroyd, J.

to turn a trespasser out of his house.

excited, proceeded to use force, and, by a kick which he gave to the deceased, caused his death. Alderson, B. "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited, and gives another a kick, it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, is guilty of manslaughter."^(c)

Upon an indictment for manslaughter, it appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow; they exerted force; a scuffle took place, in which the prisoner received a blow on the breast, whereon she threw a stone at the deceased, the master, which killed him. Holroyd, J. "The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unforeseen accident that may have happened in so doing."^(d)

Homicide upon unfortunate necessity.

There is one species of homicide *se defendendo* where the party slain is equally innocent as the person who occasions his death; and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life, in preference to that of another, where one of them must inevitably perish. Of this kind is the case mentioned by Lord Bacon, where, upon two persons being shipwrecked, and getting on the same plank, one of them, finding it not able to save them both, thrust the other from it, whereby he was drowned.^(e) But, according to Lord Hale, a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply: so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.^(f) But upon this it has been observed, that if the commission of treason may be extenuated by the fear of present death, and while the party is *under actual compulsion,^(g) there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity: though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder.^{(h)†}

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It should further be observed that, as the excuse of self-defence is founded on necessity, it can, in no case, extend beyond the actual continuance of that necessity, by which alone it is warranted:⁽ⁱ⁾ for if a person assaulted does not fall upon the aggressor, till the affray is over, or when he is running away, this is revenge, and not defence.^(j)

(c) Wild's case, 2 Lew. 214, Alderson, B. (d) Hinchcliffe's case, 1 Lew. 161, Holroyd, J.

(e) 4 Bla. Com. 186. Bac. Elem. c. 5. 1 Hawk. P. C. c. 28, s. 26.

(f) 1 Hale, 51, 434.

(g) 1 East, P. C. c. 2, s 15, p. 70, and the authorities there cited.

(h) 1 East, P. C. c. 5, s. 61, p. 294, Lord Hale says that in the most extreme cases, where there could be no recourse to law, the person assailed ought rather to die himself than kill an innocent person.

(i) 1 East, P. C. c. 5, s. 60, p. 293.

(j) 4 Bla. Com. 293.

† [Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own; and they can in no circumstances claim exemption from the common lot of the passengers. In case of shipwreck and extreme peril, where there is an absolute necessity that a part should be sacrificed in order to save the remainder, a decision by lot should be resorted to, unless the peril is so instant and overwhelming as to leave no chance of means and no moment for deliberation. *United States v. Holmes*, Wallace, Jr.]

SECT. III.

Of Justifiable Homicide.

It has been already stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the permission of the law. (k) †

Among the acts of unavoidable necessity may be classed the execution of malefactors, by the person whose office obliges him in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity and even of civil duty; and, therefore, not only justifiable, but commendable, where the law requires them. (l) But the law must require them, otherwise they are not justifiable: and therefore, wantonly to kill the greatest of malefactors, would be murder; and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed. (m)

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest and imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable. (n) † A rule founded in *reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest, were obliged to desist, and leave the business undone; and a case in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken, (o) seems to stand alone, and has been mentioned with disapprobation. (p) With respect to offenders against the revenue laws, it is enacted, that if any person or persons, liable to be detained under the provisions of that or any other act relating to the customs, shall not be detained at the time of committing the offence for which he or they is or are liable, or after detention, shall make his or their escape, it shall and may be lawful for any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs, or excise, or any other person acting

Acts of unavoidable necessity.

Execution of malefactors.

Officers killing those who assault and resist them.

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(k) *Ante*, p. 656.

(l) *Fost.* 267. 1 *Hale*, 496, 502. 4 *Bla. Com.* 178.

(m) *Ante*, p. 547, and see 1 *Hale*, 501. 2 *Hale*, 411.

(n) 1 *Hale*, 494. 1 *Hawk. P. C. c.* 28, s. 17, 18. *Fost.* 270. 4 *Bla. Com.* 179. 1 *East, P. C. c.* 5, s. 74, p. 307.

(o) 1 *Roll. Rep.* 189

(p) *Fost.* 271. 1 *East, P. C. c.* 5, s. 74, p. 307.

† [A subject of Great Britain, who, under directions from the local authorities of Canada, commits homicide in this state in time of peace, may be prosecuted in our courts as a murderer; even though his sovereign subsequently approve his conduct, by avowing the directions under which he did it as a lawful act of government. *The People v. M'Leod*, 1 *Hill*, 377.]

‡ [So long as a party liable to arrest, endeavours peaceably to avoid it, he may not be killed: but whenever by his conduct he puts in jeopardy the life of any attempting to arrest him he may be killed, and the act will be excusable. *State v. Anderson*, 1 *Hill*, 327.]

in his or their aid or assistance, or duly employed for the prevention of smuggling, to stop, arrest, and detain such person so liable to detention as aforesaid, at any time afterwards, and to carry him before any justice of the peace, to be dealt with as if detained at the time of committing the said offence.(q)

Officers
killing
those who
fly from
arrest.

But where the party does not resist, but merely flies to avoid the arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For in civil cases, and also in the case of a breach of the peace, or any other misdemeanor, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter, according to the peculiar circumstances by which such homicide may have been attended.(r) But if a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide.(s) The rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if in these cases fresh suit be made, and *a fortiori* if hue-and-cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. And the same rule holds, if a felon, after an arrest, break away as he is carrying to goal, and his pursuers cannot retake without killing him.(t)

Where a person is *indicted* for a felony, and will not suffer himself to be arrested by an officer, having a warrant for that purpose, the officer may lawfully kill him if he cannot otherwise be taken; though such person be innocent, and though in truth no felony have been committed.(u) But it seems that this must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority.(v)

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Officers
dispersing
a mob in
case of a
riot, &c.

*In the case of a riot or rebellious^m assembly, the peace officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the riot act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed.(w) And it has been said, that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace.(x)

(q) 3 & 4 Wm. 4, c. 53, s. 52. And more particular provisions contained in the act, as to the arrest and detention of persons committing offences therein enumerated. And see *ante*, Book II., Chap. x., p. 111, *et seq.*

(r) *Ante*, p. 535, 544.

(s) 1 Hale, 489, 490. 1 Hawk. P. C. c. 28, s. 11. Fost. 271. 4 Bla. Com. 179.

(t) *Id.* *ibid.* 1 East, P. C. c. 5, s. 67, p. 298.

(u) 1 Hawk. P. C. c. 28, s. 12.

(v) 2 Hale, 84. Sed vide 1 Hale, 489, 490, and 1 East, P. C. c. 5, s. 68, p. 300, 301, where it is said, that the fact of the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon; and that if the fact of his guilt be necessary for their complete justification, it is conceived that the bill of indictment found by the grand jury would, for that purpose be *prima facie* evidence of the fact till the contrary be proved. Certainly not. See *Rex v. Turner*, *ante*, p. 43. C. S. G.

(w) 1 Hale, 53, 494, 495. MSS. Tracy, 36, cited 1 East, P. C. c. 5, s. 71, p. 304. Riot Act, 1 Geo. 1, st. 2, c. 5, where persons continue together an hour after proclamation. And see *ante*, Book II., Chap. xxv. *Of Riots, &c.*, p. 285, 266.

(x) 1 Hawk. P. C. c. 28, s. 14, and see Fost. 272, Poph. 121. It was so resolved by all the judges in Easter Term, 39 Eliz., though they thought it more discreet for every one in

Gaolers and their officers are under the same special protection as other ministers of justice; and therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the gaoler or his officer, or any person coming in aid of him will be justifiable homicide.^(y)

Gaolers and their assistants killing prisoners.

Sir William Hawkesworth being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute *De malefactoribus in par-*

Malefactoribus in parvis.

cis.^(z) A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger: and if in a conflict between them, he happens to kill, such killing is justifiable.^(a) But it has been holden, that this rule does not apply to any crime unaccompanied *with force, as picking of pockets.^(b) It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt; so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.) that the life of B. is in imminent danger; otherwise his killing the assailant will not be justifiable self-defence.^(c) There must be an intention on the part of the person killed to rob, or murder, or to do some dreadful bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do the act of self-defence.^(d) And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beat-

Homicide in prevention of any forcible and atrocious crime.

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such a case to attend and assist the king's officers in preserving the peace. And, certainly, if private persons interfere to suppress a riot, they must give notice of their intention. See note (l), *ante*, p. 286.

(y) Fost. 321. 1 Hale, 481, 496.

(z) 1 Hale, 40. By the 21 Ed. 1, st. 2, if a forester, parker, or warrener, found any trespassers wandering within his liberty, intending to do damage therein, who would not yield, after hue and cry made to stand unto the peace, but continued their malice, and disobeying the king's peace, did flee or defend themselves with force and arms, if such forester, parker, or warrener, or their assistants, killed such offenders, either in arresting or taking them, they should not be troubled for the same, nor suffer any punishment. The 21 Ed. 1, st. 2, was repealed by the 7 & 8 Geo. 4, c. 27, and 9 Geo. 4, c. 53. And the 3 & 4 Wm. & M. c. 10, by the 16 Geo. 3, c. 30, and the 4 & 5 Wm. & M. c. 23, by the 7 & 8 Geo. 4, c. 27, and the 1 & 2 Wm. 4, c. 32. All further reference to their provisions has therefore been omitted. C. S. G.

(a) Fos. 273. Kel. 126, 128. 1 Hale, 445, 481, 484, *et seq.* 1 Hawk. P. C. c. 28, s. 21, 24. Reg. v. Bull,* 9 C. & P. 22.

(b) 1 Hale, 488. 4 Bla. Com. 180. But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons. 1 East, P. C. c. 5, s. 45, p. 273.

(c) 1 Hale, 484.

(d) Reg. v. Bull,* 9 C. & P. 22, Vaughan and Williams, Js.

* Eng. Com. Law Reps. xxxviii. 19.

ing of him, so far as to make him desist, yet if he kill him, it is manslaughter. (e) But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule. (f) A person who is set to watch a yard or garden by his master, is not justified in shooting any one who comes into it in the night, even if he see him go into his master's hen-roost, and some dead fowls and a crow-bar be found near him; but if from his conduct he has fair ground to believe his own life in actual danger, he is justified in shooting him. (g)

Grounds of suspicion of a felonious design. Levet's case.

Important considerations will arise in cases of this kind, as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One Levet was indicted for killing F. F., under the following circumstances. Levet being in bed and asleep, his servant, who had procured F. F. to help her about the work of the house, and went to the door about twelve o'clock at night to let her out, conceived that she heard thieves about to break into the house: upon which she ran to him, and told him of what she apprehended. Levet arose immediately, took a drawn sword, and, with his wife, went down stairs; when the servant, fearing that her master and mistress should see F. F. hid her in the buttery. Levet with his sword searched the entry for thieves, when his wife, spying F. F. in the buttery, and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, "Here they be that would undo us:" when Levet, not knowing that it was F. F. in the buttery, hastily entered with his drawn sword, and being in the dark, and thrusting before him with his sword, thrust F. F. under the left breast, and gave her a mortal *wound, of which she instantly died. (h) This was ruled to be misadventure: but a great judge appears to have thought the decision too lenient, and that it would have been better ruled manslaughter; due circumspection not having been used. (i) Upon this opinion, however, some observations have been made; and it has been ably argued, upon the peculiar facts and circumstances of the transaction, that the case seems more properly to be one of those mentioned by Lord Hale, (j) where the ignorance of the fact excuses the party from all sort of blame. (k) And in another book of great authority, the case is mentioned as one in which the defendant might have *justified* the fact under the circumstances, on the ground that it had not the appearance even of a fault. (l)

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Apparency of intent.

Questions will also sometimes arise as to the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon

(e) 1 Hale, 485, 486. 1 Hawk. P. C. c. 28, s. 23. Kel. 132. 1 East, P. C. c. 5, s. 44, p. 272.

(f) 1 East, P. C. 5, s. 44, p. 273. In 4 Bla. Com. 180, it is said that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery. 1 Hale, 488. {See *State v. Zellars*, 2 Halstead's Rep.}

(g) *Rex v. Scully*,* 1 C. & P. 319, Garrow, B. The 24 Hen. 8, c. 5, by which persons killing those who were attempting to rob or murder, or commit burglary, were not to suffer any forfeiture of goods, &c., but to be fully acquitted, and which was here referred to in last edition, was wholly repealed by the 9 Geo. 4, c. 31. C. S. G.

(h) Levet's case, Cro. Car. 538. 1 Hale, 42, 474. Jones (W.) 429.

(i) Fost. 299.

(j) 1 Hale, 42.

(k) 1 East, P. C. c. 5, s. 46, p. 274, 275.

(l) 1 Hawk. P. C. c. 28, s. 27.

* Eng. Com. Law Reps. xi. 407.

which Mr. Cope returned a bottle with equal violence: (m) and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand. (n) There seems to have been good reason for Mr. Cope to have supposed that his life was in danger: and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted on having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them: and this was adjudged justifiable homicide. (o) For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems, (there being no compact to fight,) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat. (p) But no assault, however violent, will justify killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent. (q) And it may be further observed, that a man cannot, in any case, justify killing another by a pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; for if he kill any person in defence of an injury done by himself, he is guilty of manslaughter at least: as in the case where a body of people wrongfully detained a house by force, and *killed one of those who attacked it, and endeavoured to set it on fire. (r)

Mawgridge's case.

Ford's case.

Unless a felonious intent be manifested, an assault, however violent, will not justify killing the party.

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Mr. J. Foster was of opinion, that upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a dangerous wound, the legislature, in the case of the Marquis de Guiscard, who stabbed Mr. Harley sitting in council, discharged the parties who were supposed to have given the marquis the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (s)

Where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified. (t) So, where an attempt is made to commit arson, or burglary, in the habitation, any part of the owner's family, or even a lodger, may lawfully kill the assailants, in order to prevent the mischief intended. (u)

(m) Mawgridge's case, Kel. 128, 129, ante, p. 529.

(n) By Lord Holt. Kel. 128, 129.

(o) Ford's case, Kel. 51.

(p) 1 East P. C. c. 5, s. 47, p. 276; and see 1 East, P. C. c. 5, s. 25, p. 243, where Ford's case is observed upon; and it is said that the memorandum in the margin of Kelyng to inquire of this case, and the *quære* used by Mr. J. Foster in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford in the defence of his own possession of the room was justifiable, which under those circumstances, might be fairly questioned: as, on that ground, it might have been better ruled to be manslaughter.

(q) 1 East, P. C. c. 5, s. 47, p. 277.

(r) 1 Hawk. P. C. c. 28, s. 22. 1 Hale, 405, 440, 441.

(s) 9 Anne, c. 16, which was repealed by the 9 Geo. 4, c. 31. Fost. 275.

(t) 1 Hale, 481, 484. Fost. 274. And in *Handcock v. Baker* and others, 3 Bos. & Pul. 265. *Chambre, J.*, said, "It is lawful for a private person to do any thing to prevent the perpetration of a felony."

(u) Fost. 274.

Interference by third persons in cases of mutual combats and affrays.

But, in cases of mutual combats or sudden affrays, a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace, and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable: (v) but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter. (w)†

Time within which homicide will be justifiable.

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified, unless the necessity continue to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made be not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation. (x)

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*CHAPTER THE FOURTH.

OF DESTROYING INFANTS IN THE MOTHER'S WOMB. (A)

Common law offence.

WE have already seen, that an infant in his mother's womb, not being *in rerum naturâ*, is not considered as a person who can be killed within the description of murder. (a) An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanor at common law. (b)

(v) 1 Hale, 484. 1 East, P. C. c. 5, s. 58, p. 290.

(w) 1 East, P. C. c. 5, s. 58, p. 291. *Ante*, p. 590; and see also *ante*, Book II., chap. xxvi. *Of Affrays*, p. 291.

(x) 1 P. C. c. 5, s. 60, p. 293. 4 Bla. Com. 185. 1 Hale, 485.

(a) *Ante*, p. 485.

(b) See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Crim. Law, 798, procured from the Crown Office, Mich. T. 42 Geo. 3.

† [When a person, who is neither assaulted or threatened, gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them, this is murder. *Johnston's case*, 5 Gratt. 660.]

(A) I have met with no American statutes for the punishment of this offence, or which in any manner relate to it. The destroying of infants in the mother's womb, is an offence at common law, and has been proceeded with as such, in the courts of Massachusetts. But it has been decided in that state, that to administer a potion to a pregnant woman with an intent to procure an abortion, is not an indictable offence, unless the woman be quick with child, and an abortion ensue. *Commonwealth v. Bangs*, 9 Mass. Reps. 387. {By the revised statutes of New York, wilful attempts to procure the miscarriage of a pregnant woman, are punishable by imprisonment not more than one year, or by a fine not more than \$500, or both, Vol. II., 694. And administering to a woman pregnant with a quick child, any medicine, drug, &c., or using any instrument or other means, with intent to destroy such child, (unless the same be necessary, or shall be advised by two physicians to be necessary, to preserve the life of the mother,) is punishable as manslaughter in the second degree, Vol. II., 661. The wilful killing of an unborn quick child, by any injury to the mother, which would be murder if it resulted in her death, is punishable as manslaughter in the first degree. *Ib.*}

[It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child. *Commonwealth v. Parker*, 9 Metcalf, 263.]

The 43 Geo. 3, c. 28, made certain acts, intended to procure the miscarriage of a woman with child, highly penal: that statute was repealed by the 9 Geo. 4, c. 31, which is also repealed by the 1 Vict. c. 85,(c) which enacts, by sec. 5, "that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully(*d*) administer to her, or cause to be taken by her, any poison or other noxious thing,(*e*) or shall unlawfully(*ee*) use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By sec. 7, "In the case of every felony punishable under this act every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise in the same manner as the principal in the first degree, is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

By sec. 8, "Where any person shall be convicted of any offence *punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.(*f*)"

The 43 Geo. 3, c. 58, s. 1 & 2, and the 9 Geo. 4, c. 31, s. 13, made an important distinction between the case where the woman was quick with child, and where she was not, or was not proved to be, quick with child. The present act makes no such distinction. It may be well, however, to mention the following cases, which were decided upon the repealed statutes.

Upon an indictment on the 42 Geo. 3, c. 58, s. 1, the woman, in point of fact, was in the fourth month of her pregnancy; but she swore that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men in their examinations, differed as to the time when the *fœtus* may be stated to be quick, and to have a distinct existence; but they all agreed, that in com-

(c) The 1 Vict. c. 85, s. 1, repeals so much of the 9 Geo. 4, c. 31, and the Irish Act, 10 Geo. 4, c. 34, "as relates to any person who shall use any of the ways or means therein mentioned, with intent to procure the miscarriage of any woman, or who shall counsel, aid, or abet, therein, and so much of the same acts as relates to the punishment of accessories after the fact, to such of the felonies punishable under those acts, as are hereinbefore referred to." This seems to be a repeal of sec. 13 of the 9 Geo. 4, c. 31, and sec. 16 of the 10 Geo. 4, c. 34, though the repealing clause is by no means so clear as it ought to be. C. S. G.

(*d*) The word "maliciously" was in the 9 Geo. 4, c. 31, s. 13.

(*e*) The words of the 43 Geo. 3, c. 58, in s. 1, were "any deadly poison or other noxious and destructive substance or thing;" in sec. 2, "any medicine, drug, or other substance or thing whatsoever." The words in the 9 Geo. 4, c. 31, where the woman was quick with child were, "any poison or other noxious thing." Where the woman was not quick with child, "any medicine or other thing." See note (*h*) *post*, p. 672.

(*ee*) "Unlawfully," was not in the 9 Geo. 4, c. 31, s. 13.

(*f*) The act does not extend to Scotland, sec. 12. By sec. 10, offences committed within the admiralty jurisdiction are triable as any other felony committed within that jurisdiction.

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mon understanding, a woman is not considered to be quick with child till she has felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception. And Lawrence, J., said that this was the interpretation that must be put upon the words, "quick with child," in the statute: and as the woman had not felt the child alive within her before taking the medicine, he directed the jury to acquit the prisoner. (g)

An infusion
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The ques-
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An indictment upon the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a *decoction* of a certain shrub called *savin*: and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub. The medical men who were examined stated, that such a preparation is called an *infusion*, and not a *decoction*, (which is made by boiling the substance in the water) upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial: that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. (h)

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It was not
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*In the same case, witnesses having been called on behalf of the prisoner to prove that the shrub he used was not *savin*, the counsel for the prosecution insisted that he might, notwithstanding, be found guilty upon the last count of the indictment, which is charged that he administered a large quantity "of a certain mixture, to the jurors unknown, *then and there being a noxious and destructive thing.*" The prisoner's counsel objected that, unless the shrub was *savin*, there was no evidence that the mixture was "noxious and destructive." Lawrence, J., held, that in an indictment on this clause of the statute, it was improper to introduce these words; and that though they had been introduced, it was not necessary to prove them. And he further said; "it is immaterial whether the shrub was *savin* or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed, at the time, that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge." (i)

(g) *Rex v. Phillips*, Monmouth Sum. Ass. 1812, *cor.* Lawrence, J. 3 Camp. 77.

(h) *Rex v. Phillips*, 3 Camp. 74, 75. And upon an indictment for murder, if the death be laid to have been by one sort of poison, and it turn out to have been another, the difference will not be material. *Ante*, p. 557. And in *Rex v. Coe*,^a 6 C. & P. 403, where the prisoner was indicted on the 9 Geo. 4, c. 31, s. 12, for administering saffron to a female, and his counsel was cross-examining as to her having taken something else before the saffron, and also as to the innocuous nature of the article; Vaughan, B., said, "Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient." It is not stated upon which branch of the section this indictment was framed; if upon the latter, which used the words, "any medicine or other thing;" perhaps the dictum was right. But it should seem that neither this dictum, nor that of Mr. J. Lawrence, in *Rex v. Phillips*, apply to the new act, which uses the words, "any poison or other noxious thing" only, in the case of administering, or causing to be taken; and although a doubt has been suggested in a note to *Rex v. Coe*, as to whether the words "other means" might be applied to other substances than such as are poisonous or noxious; it should seem that the words "other means" cannot be so applied in the new act; first, because they are in an entirely distinct sentence; secondly, because they are governed by the word use, and not by administer; thirdly, because in sound construction "other" refers to the word "instrument," and by "other means" must be understood things of a similar kind to instruments. See *Rosc. Cr. Evid.* 243. C. S. G.

(i) *Rex v. Phillips*, 3 Camp. 76. The prisoner had previously been tried upon the first

^a Eng. Com. Law Reps. xxv. 458.

But it has since been held, on the 43 Geo. 3, c. 58, s. 2, that unless the woman were with child, the offence was not committed, although the prisoner thought she was with child, and administered the drug with intent to destroy the child. The prisoner was indicted for administering ^{But it was necessary that the woman should be with child.} *savin* to a female, with intent to procure her miscarriage. It appeared that he had been connected with her, and gave her a bottle of some liquid to take, saying, he gave it her in order, if she was in the family way, to destroy the little one. The female was not, nor ever had been, pregnant; and, upon a case reserved, the judges held that the 43 Geo. 3, c. 58, did not apply where it appeared negatively that the woman was not with child. (j)

*To constitute an administering, or causing to be taken, it is not necessary that there should be a delivery by the hand. Where, therefore, on an indictment for administering poison and causing poison to be taken, it appeared that the prisoner had mixed poison with coffee, and had told her mistress that the coffee was for her, and the mistress took it, and drank some of it, it was held that this was sufficient. (k) A mere delivery to the woman, however, is not sufficient; the poison must be taken into the mouth, and, it seems, some of it swallowed, to constitute an administering. (l) *674
What is an administering.

As it has been held, that a person who puts a deleterious drug into coffee in order that another may take it, is, if it be taken, guilty of an assault, (m) it should seem that if, upon an indictment under the 1st Vict. c. 85, s. 6, the intent were not proved, the prisoner might be convicted of an assault under s. 11 of that act, if the drug were taken by the woman. And so he might if he used any instrument. If, however, the woman consented to what was done, it should seem that he could not be convicted under sec. 11. (n) But if her consent were obtained by fraud it should seem that he might be convicted of an assault. (o)

section of the statute, for the capital charge, and acquitted. See *ante*, 672. Upon this second indictment he urged that he had given the young woman an innocent draught for the purpose of amusing her, as she had threatened to destroy herself, unless enabled to conceal her shame, and the jury returned a verdict of not guilty.

(j) *Rex v. Scudder*,^a R. & M. C. C. R. 216. S. C., 3 C. & P. 605. Some of the counts alleged the woman to be with child, others omitted such allegation. It is said in *Rosc. Cr. Ev.* 243, The terms of the recent act are, "with intent to procure the miscarriage of any woman," omitting the words, "being then quick with child, &c., and it should seem to be now immaterial whether the woman is or is not pregnant, if the prisoner believing her to be so, administers the drug with the intent of procuring abortion." And in *Jerv. Archb.* 435, 8th ed., there is a similar observation. But this may well be doubted, for the words which are omitted were not introduced for the purpose of limiting the offence to cases where the woman was with child, but for the purpose of punishing the offence where the woman was quick with child with greater severity than where she was not quick with child, and the omission of the words in the new act is fully accounted for by the fact that the new act has done away with that distinction altogether. And it is difficult to conceive that a party could be held to have done an act with intent to effect an object which was physically impossible; and on this ground it is that a boy under fourteen cannot be convicted of an assault with intent to commit a rape. *Reg. v. Phillips*, *post*, p. 666, note (i). C. S. G. See *Rex v. Lyons*, 2 East, P. C. c. 15, s. 12, p. 497.

(k) *Rex v. Harley*,^b 4 C. & P. 369, Park, J. A. J. See this case, *post*.

(l) *Rex v. Cadman*, R. & M. C. C. R. 114. See this case, *post*, and the note to it.

(m) *Reg. v. Button*,^c 8 C. & P. 660, Law Recorder, and Serjt. Arabin.

(n) *Sec Reg. v. Martin*, 2 Moo. C. C. R. 123, *post*, p. 696.

(o) See *Reg. v. Williams*,^d 8 C. & P. 286, *post*, p. 678. See the 1 Vict. c. 85, s. 11, and the cases upon it, *post*, title "*Aggravated Assaults*."

^a Eng. Com. Law Reps. xiv. 478.

^b *Ib.* xix. 423.

^c *Ib.* xxxiv. 573.

^d *Ib.* 392.

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*CHAPTER THE FIFTH.

OF RAPE, AND THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

SECT. I.

Of Rape.(A)

Definition of rape: RAPE has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will.^(a)

Formerly a capital offence. The offence has, for many years past, been justly visited with capital punishment; but it does not appear to have been regarded as equally heinous at all periods of our constitution. Anciently, indeed, it appears to have been treated as a felony, and consequently punishable with death; but this was afterwards thought too hard; and, in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes, which continued till after Bracton wrote, in the reign of Henry III.^(b) The punishment for rape was still further mitigated, in the reign of Edward I., by the statute of Westm. 1, c. 13, which reduced the offence to a trespass, and subjected the party to two year's imprisonment, and a fine at the king's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, in about ten years afterwards, and in the same reign, again to make the offence of forcible rape a felony, by the statute Westm. 2, c. 34. The punishment was still further enhanced by the 18 Eliz. c. 7, s. 1. But these statutes were repealed by the late act, 9 Geo. 4; c. 31: sec. 16 of which enacted, "that every person convicted of the crime of rape shall suffer death as a felon."^(c)

Rape, &c. not to be punishable with death, but transportation for life. But now by the 4 & 5 Vict. c. 56, s. 3, reciting that by the 9 Geo. 4, c. 31, "It was amongst other things enacted, that every person convicted of the crime of rape should suffer death as a felon, and that if any person should unlawfully and carnally know and abuse any girl under the age of ten years, *every such offender should be guilty of felony, and being convicted thereof, should suffer death as a felon: and whereas

(a) 1 Hawk. P. C. c. 41, s. 2. 1 Hale, 627, 628. Co. Lit. 123, b. 2 Inst. 180. 3 Inst. 60. 4 Bla. Com. 210. 1 East, P. C. c. 10, s. 1, p. 434.

(b) 4 Bla. Com. 211. 1 Hawk. P. C. c. 41, s. 11. 1 Hale, 627. Bract. lib. 3, c. 28. Leg. Gul. 1, 1, 19. Wilk. Leg. Anglo-Sax. 222, 290.

(c) The Irish Act, 10 Geo. 4, c. 34, s. 19, is word for word the same as this section.

(A) The crime of rape, and that of the unlawful carnal knowledge and abuse of female children, are punished with various degrees of severity, in the several American States. In Massachusetts and Connecticut, these offences are made capital, and punished with death. In Maryland they are punished with death, or hard labour, at the discretion of the court. They are believed to be capital offences in South Carolina. But by the statute books of most of the other States which I have had the opportunity of examining, it appears that they are punished by confinement and hard labour for certain periods. {See *Commonwealth v. Bennett*, 2 Virginia cases, 235. *Ibid.* 210. *Commonwealth v. Mann*. By the Revised Statutes of New York, rape and carnal knowledge of a female under ten years of age, are punished by imprisonment not less than ten years. Vol. ii. 563.}

PENNSYLVANIA.—It seems that the crime of rape is sufficiently proved, when proof is made of penetration. {1 Virginia cases, 307, *Commonwealth v. Thomas, acc.*} for the essence of this crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission. *Pennsylvania v. Sullivan*, *Addis*. 143.

it is expedient that the said several offences hereinbefore last specified should no longer be punishable with death; be it therefore enacted, that from and after the commencement of this act,^(cc) if any person shall be convicted of any of the said offences hereinbefore last specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited, ordered to be given or awarded against persons convicted of the said last-mentioned offences, or any of them respectively, be liable to be transported beyond the seas for the term of his natural life."^(d)

An indictment for this offence may be prosecuted at any time, and notwithstanding any subsequent assent of the party grieved.^(e)

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women.^(f) And there may be *accessories* before and after in this offence, and such accessories are punishable under the 9 Geo. 4, c. 31, s. 31.^(g)

The law presumes that an infant, under the age of fourteen years, is unable to commit the crime of rape; and, therefore, he cannot be guilty of it;^(h) or of an assault with intent to commit a rape;⁽ⁱ⁾ and if he be under that age, no evidence is admissible to show that, in point of fact, he could commit the offence of rape.^(j) This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear by sufficient circumstances, that he had a mischievous discretion.^(k) [1] So upon an indictment for a rape, such an infant may be convicted of an assault, under the 1st Viet. c. 85, s. 11.^(l) A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract; but he may be guilty as a principal by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another.^(m) Where a party took a woman by force, compelled her

(cc) By sec. 7, the act commenced on the 1st of October, 1841.

(d) This act does not mention the Irish Act, 10 Geo. 4, c. 34.

(e) 1 Hale, 631. 632. 1 East, P. C. c. 10, s. 9, p. 446.

(f) *Rex v. Vide and others*, Fitz. Corone, pl. 86. 1 Hawk. P. C. c. 41, s. 10. Lord Baltimore's case, 4 Burr. 2179. 1 Hale, 528, 633. 1 East, P. C. c. 10, s. 1, p. 435. *Rex v. Burgess and others*, Trin. T. 1813: *post*, 687.

(g) See the section, *post*, p. 691.

(h) 1 Hale, 630. *Reg. v. Brimilow*, 2 Moo. C. C. R. 122. *Rex v. Groombridge*,^a 7 C. & P. 582, Gaselee, J., and Lord Abinger, C. B.

(i) *Rex v. Eldershaw*,^b 3 C. & P. 396, Vaughan, B. *Reg. v. Phillips*,^c 8 C. & P. 736, Patteson, J.

(j) *Reg. v. Phillips*,^d 8 C. & P. 736, Patteson, J. *Reg. v. Jordan*,^e 9 C. & P. 118, Williams, J., *post*, 694.

(k) 1 Hale, 620.

(l) *Reg. v. Brimilow*,^f 2 Moo. C. C. R. 122. S. C. 9 C. & P. 366. See the section and decisions on it, *post*.

(m) Lord Castlehaven's case, 1 St. Tri. 387. 1 Hale, 620. Hutt. 116. 1 Str. 633.

[1] {In *Commonwealth v. Green*, 2 Pick. 380, it was decided (Parker, C. J., dissenting.) that an infant under the age of fourteen years was rightly convicted on the charge of an assault with intent to commit a rape. A contrary doctrine, however, was held by Vaughan, B., in *Rex v. Eldershaw*, 3 Car. & Payne, 396.}

^a Eng. Com. Law Repts. xxxii. 641.

^b Ib. xiv. 367.

^c Ib. xxxiv. 610.

^d Ib.

^e Ib. xxxviii. 63.

^f Ib. xxxviii. 158.

to marry him, and then had carnal knowledge of her by force, it appears to have been holden, that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void, *ab initio*, by a declaratory sentence in the ecclesiastical *court, the offence became punishable, as if there had been no marriage.⁽ⁿ⁾ The forcible taking away and marrying a woman against her will, was, however, made felony, by the 3 Hen. 7, c. 2. And though that statute is repealed, the 9 Geo. 4, c. 31, ss. 19, 20,^(o) makes certain provisions against the forcible or unlawful abduction of females, which will be mentioned in a subsequent chapter.

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Of the persons upon whom rape may be committed.

The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.^(p)† If non-resistance on the part of the prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or from the number of persons attacking her, she considered resistance dangerous, and absolutely useless, the crime is complete.^(q) And it will not be any excuse that she was first taken with her own consent, if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher: for she is still under the protection of the law, and may not be forced.^(r) Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favour of the party accused, especially in doubtful cases.^(s) The notion that if the woman consented it could not be a rape, because she must, in such case, have consented, appears to be quite exploded.^(t)

A person having connection with a married woman, she supposing him to be her husband, is not guilty of a rape.

A question has several times arisen, whether, having carnal knowledge of a married woman, under circumstances which induce her to suppose it is her husband, amounts to a rape. The prisoner broke and entered a house by night, in order to have connection with the owner's wife, if he could pass for her husband, but not meaning to force her if she discovered the fraud; he was in the act of copulation when she made the discovery, and immediately, before completion, he desisted. Upon an indictment for burglary, with intent to commit a rape, the jury found that he entered with the intent to pass for the woman's husband, and to have connection with her if she did not make the discovery, and to desist if she did. Upon a case reserved, four of the judges thought that the having a carnal knowledge of a woman, while she was under the belief of its being her husband, would be a rape; but the other eight

(n) 1 Hale, 629.

(o) *Post*, chap. vii.

(p) 1 Hawk. P. C. c. 41, s. 6. 1 East, P. C. c. 10, s. 7, p. 444.

(q) *Reg. v. Hallett*,^a 9 C. & P. 748, *per* Coleridge, J.

(r) 1 Hawk. P. C. c. 41, s. 7. 1 East, P. C. c. 10, s. 7, p. 444, 445. 4 Bla. Com. 213.

(s) 1 East, P. C. c. 10, s. 7, p. 445.

(t) 1 Hale, 631. 1 Hawk. P. C. c. 41, s. 8. 1 East, P. C. c. 10, s. 7, 445.

† [In an indictment for fornication and bastardy, the witness testified, "He forced me: he worked himself under me, and in that way he forced me: I did not give my consent." Upon a demurrer to this evidence it was held that it was not such as would merge the offence charged in the crime of rape, but that the defendant might be legally convicted. *Commonwealth v. Pace*, 5 Watts & Serg. 345.

A child under ten years of age cannot consent to sexual intercourse so as to rebut the presumption of force. *Stephen v. The State*, 11 Georgia, 225.]

^a Eng. Com. Law Repts. xxxviii. 318.

judges thought that it would not; and Dallas, C. J., pointed out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation. But several of the eight judges intimated that if the case should occur again, they would advise the jury to find a special verdict. (n)†

And it has been held in two late cases, that if a man gets into bed with a married woman, and, by fraud, has connection with her, she believing him to be her husband, and therefore *consenting to the connection, it is not a rape. In the first case, on an indictment for a rape, it appeared that the prosecutrix and her husband had gone to bed, and that she soon fell asleep with her back towards her husband, and that afterwards she was awoke by feeling a hand pass round her, which turned her round; and she, supposing it to be her husband, made no resistance to that, or to the connection which immediately followed; but that while the connection was going on, she perceived by the person's breathing that it was not her husband, and immediately pushed him off her. The husband, having taken physic, had been obliged to go down stairs, where he was a quarter of an hour Gurney, B., (in summing up;) "I am bound to tell you, that the evidence in this case does not establish the charge contained in this indictment, as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband." (uu) In the second case, it was opened that the prisoner had got into bed with the prosecutrix, while she was asleep, and had penetrated her person before she was aware that it was not her husband, and that the prisoner persisted and went on to complete his purpose notwithstanding her resistance, after she had discovered that it was not her husband; and it was submitted, on this state of facts, that this case was distinguishable from *Rex v. Jackson*, (v) as there the prisoner intended to desist if discovered, but that here he was determined, at all events, to effectuate his intention. It appeared, however, from the evidence of the prosecutrix, that the prisoner had got into her bed while she was asleep, and that she had permitted him to have connection with her, believing him to be her husband, and that she did not discover who he was till after the connection was over. Alderson, B., "That puts an end to the capital part of the charge. The case of *Rex v. Jackson* is in point." (w)

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It is agreed that there must be *penetration* or *res in re*, in order to constitute the "carnal knowledge," which is a necessary part of this offence. (x) But a very slight penetration is sufficient. Thus, where it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the

Penetration necessary to constitute the offence.

(u) *Rex v. Jackson*, Tr. T. 1822. Russ. & Ry. 487.

(uu) *Reg. v. Saunders*, 8 C. & P. 265, Gurney, B. In this and the following cases the prisoner was convicted of an assault, under the 1 Vict. c. 85, s. 11, see *post*.

(v) *Supra*, note (u).

(w) *Reg. v. Williams*, 8 C. & P. 286, Alderson, B. The deposition stated the facts as they were opened, and if they had so appeared in evidence, the questions would have been reserved for the opinion of the judges. C. S. G.

(x) 1 Hale, 628. 3 Inst. 59, 60. 1 Hawk. P. C. c. 41, s. 3. Sum. 117. 1 East, P. C. c. 10, s. 3, p. 437. *Rex v. Page*, Dy. 304, a, in *margin*. Cro. Car. 332.

† See *Commonwealth v. Fields*, 4 Leigh, 648.]

* Eng. Com. Law Repts. xxxiv. 383.

† *Ib.* xxxiv. 392.

hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; but it was admitted that the hymen is in some cases an inch, and in others an inch and a half beyond the orifice of the vagina. (xx) Ashhurst, J., left it to the jury to say whether any penetration were proved. And the judges afterwards held, upon a conference, (De Grey *C. J., and Eyre, B., being absent,) that this direction was perfectly right; and that the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. (y)

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It is not necessary that the hymen should be ruptured. Any degree of penetration is sufficient.

Whatever doubts may have been entertained as to the extent of penetration that was necessary since the 9 Geo. 4, c. 31, it is now settled that any penetration is sufficient, although the hymen be not ruptured. On an indictment for abusing a child, under ten years old, where it was proved that the hymen was ruptured, Mr. B. Gurney said, "I think that if the hymen is not ruptured, there is not a sufficient penetration to constitute this offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases; and I have always thought, and still think, that if there is not a sufficient penetration to rupture the hymen, it is not a sufficient penetration to constitute the offence." (z) But in a similar case, where the surgeon was not able, through the great inflammation that existed, to ascertain whether the hymen had been ruptured or not: Bosanquet, J., (Coleridge and Coltman, Js., being present,) said, "It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." (a) So also in a similar case where no evidence was given to show that the hymen had been ruptured, and it was urged, on the authority of *Rex v. Gammon*, (b) that it was essential that the hymen should have been ruptured, in order to constitute sufficient penetration, Williams, J., said, "I am of opinion, as matter of law, that it is not essential that the hymen should be ruptured. In the case of *Rex v. Gammon*, the hymen was ruptured, and the point was not therefore necessary to the decision of that case. I also think that it is impossible to lay down any express rule as to what constitutes penetration. All I can say is, that the parts of the male must be inserted in those of the female: but I cannot suggest any rule as to the extent." (c)

And, lastly, where, on an indictment for a rape, the jury found that there had been penetration, but that the penetration had not proceeded to the rupture of the hymen, Coleridge, J., reserved the point, but on its

(xx) Upon this statement the reporters, in a note to *Reg. v. Hughes*,^a 9 C. & P. 752, observe, "The first proposition appears to be much too strongly put, as several cases are mentioned by Dr. Davis (*Elem. of Midw.* 102), and Dr. Paris, (1 *Par. & Fonb. Med. Jur.* 203), in which the hymen was entire during the pregnancy of the party, and in one case was obliged to be divided by a surgical operation at the time of the accouchment. With respect to the second proposition there may be some doubt, as in all preparations in the museum of the Royal College of Surgeons, in which the hymen is shown, it is not more than a quarter of an inch from the orifice of the vagina.

(y) *Rex v. Russen*, O. B. Oct. 1778, Serjt. Forster's MSS. 1 East, P. C. c. 10, s. 3, p. 438, 439, MSS. Bayley, J. (z) *Rex v. Gammon*,^b 5 C. & P. 321. The prisoner was executed.

(a) *Reg. v. M'Rue*,^c 8 C. & P. 641.

(b) *Supra*, note (z).

(c) *Reg. v. Jordan*,^d 9 C. & P. 118. See also *Reg. v. Allen*,^e 9 C. P. 31.

^a Eng. Com. Law Reps. xxxviii. 350.

^b *Ib.* xxiv. 339.

^c *Ib.* xxxviii. 562.

^d *Ib.* xxxviii. 63.

^e *Ib.* 24.

coming on for argument before the judges, his lordship said, "I reserved this case from respect to my brother Gurney, on account of a dictum of his.(d) There is an express decision on this point by the twelve judges,(e) and my brother Gurney says that he does not now hold the same opinion. There is, therefore, nothing in the case."(f)

But whether or not there must be *emissio seminis*, in order to constitute a rape, is a point which has been much doubted, and upon *which very different opinions have been holden.(ee) The latter cases differ also upon this question. Thus, in a case of sodomy, which is governed by the same principle as rape, six judges held upon a special verdict, finding penetration but the emission out of the body, that both emission and penetration were necessary; while, on the other hand, five judges thought that the *injectio seminis* was not necessary; and they said that injection cannot be proved in the case of a child, or of bestiality, and that penetration may be evidence of emission.(ff) Subsequently to this case, Willes, C. J., presiding at a trial for this offence, adopted the doctrine of the proof of emission being necessary;(g) but that great crown lawyer, Mr. J. Foster, held otherwise, upon a similar occasion,(h) as did Clive, J., upon another trial a few years afterwards.(i) The matter was further considered, in a case where the prosecutrix could not prove any emission; and Bathurst, J., directed the jury, that if they believed that the prisoner had his will of her, and did not leave her till he chose it himself, they should find him guilty, though an emission were not proved; and after the jury had returned a verdict of guilty, he said, that it was always his opinion, that it was not necessary to prove emission; and Smythe, B., who was present at the trial, was clearly of the same opinion.(j) And, in a case which has been before mentioned, where it was agreed that the least degree of penetration was sufficient, it seems that the jury were directed by Ashurst, J., that if the penetration were proved the rape was complete in law.(k) The weight of the authorities, therefore, after these cases had been decided, was supposed to be much against the necessity of the proof of emission as well as penetration.(l)†

But a more recent case appears to have introduced the contrary doctrine. The case which was reserved for the opinion of the judges, stated that the fact of penetration was positively sworn to; but that there was no direct evidence of emission. From interruption, it appeared probable that emission was not effected; and the jury under the direction of the learned judge who tried the prisoner found a verdict of guilty,

(d) In *Rex v. Gammon*, *supra*, note (z). (e) *Rex v. Russen*, *supra*, note (y).

(f) *Reg. v. Hughes*, 9 C. & P. 752.

(ee) 12 Rep. 37. Sum. 117. Stamf. 44. 1 Hawk. P. C. c. 4, s. 2, c. 41, s. 3, that the *emissio seminis* is necessary. 1 Hale, 623, *contra*.

(ff) *Rex v. Duffin*, O. B. 1721, or 1722, Baron Price's MSS. 1 East, P. C. c. 10, s. 3, p. 437, 438. The judges thus differing in opinion, it was proposed to discharge the special verdict, and indict the party for a misdemeanor.

(g) *Rex v. Cave*, O. B. 1747, Serj. Forster's MSS. 1 East, P. C. c. 10, s. 3, p. 438.

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

(i) *Rex v. Blomfield*, Thetford, 1758, Serj. Forster's MSS. 1 East, P. C. *ibid*.

(j) *Rex v. Sheridan*, O. B., 8 Geo. 3, 2 MSS. Sum. 333. 1 East, P. C. c. 10, s. 3, p. 438.

(k) *Rex v. Russen*, *ante*, note (y), p. 680.

(l) 1 East, P. C. c. 10, s. 3, p. 439.

† [In rape, any, the least penetration is sufficient. *Quære*, if evidence of emission be necessary? the fact properly left to the jury. *State v. Le Blanc*, 3 Brevard, 329.]

* Eng. Com. Law Repts. 320.

but said, that they did not find the emission. Upon this case, three of the judge(*m*) held, that the offence was complete by penetration only; but seven of them(*n*) held both emission and penetration to be necessary: they thought, however, that the fact should be left to the jury. One judge was absent:(*o*) and Lord Mansfield only stated, that a great majority seemed to be of opinion that both were necessary. It is said the majority in this case, proceeded upon the ground that carnal knowledge (which *they considered could not exist without emission) was necessary to the consumation of the offence: but that this definition was denied by the others, who observed that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party.(*p*)

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In a late case from the privy council, upon proceedings under a court-martial against a seaman for sodomy, it was stated that there was complete penetration and emission; but the emission was out of the body of the person to whom the sodomy was committed; and upon full consideration, the judges were of opinion, that *injectio seminis* was essential; and they stated as their opinion that upon the authority of what a series of later years has been understood to be the law, and had been acted upon as such, the offence was not complete, and that the prisoner should not have been convicted.(*q*)

Upon the authority of these cases it seems, therefore, that at the present time, the offence would not be considered as complete without some proof of the *emissio seminis*. But this doctrine is not free from considerable difficulty; and appears to be fairly open to the observation, that where the violence has proceeded to the extent of an actual penetration of the unhappy sufferer's body, an injury of the highest kind has been effected. The quick sense of honour, the pride of virtue, which nature, in order to render the sex amiable, has implanted in the female heart, is violated beyond redemption; and the injurious consequences to society are, in every respect, complete.(*r*)

Penetration was *prima facie* evidence of emission.

Supposing, however, that emission is necessary, it seems that penetration is *primâ facie* evidence of it, unless the contrary appear probable from the circumstances.(*s*) Thus, where a woman swore that the defendant had his will with her, and had remained in her body as long as he pleased, but could not speak as to emission, Buller, J., said, that it was sufficient evidence of a rape to be left to a jury.(*t*) And he mentioned a case, which he recollected, of an indictment for a rape, where the woman had sworn that she did not perceive any thing come from the man, and that, though she had had many children, she never was in her life sensible of emission from a man; and that this was ruled not to

(*m*) Lord Loughborough, Buller, J., (who tried the prisoner,) and Heath, J.

(*n*) Skynner, Ld. C. B., Gold, Willes, Ashhurst, Nares, justices, and Eyre and Hotham, Barons.

(*o*) Perryn, B.

(*p*) *Rex v. Hill*, 1781, MSS. Gould and Buller, Justices. 1 East, P. C. c. 10, s. 3, p. 439, 440.

(*q*) *Rex v. Parker*, Hil. T. 1812, MSS. Bayley, J.

(*r*) 1 East, P. C. c. 10, s. 3, p. 436, 437. Fost. 274.

(*s*) The majority of the judges in Hill's case, *ante*, note (*p*), thought the question of emission was a fact for the jury; and see the opinion of Bathurst, J., *ante*, p. 680, and see 1 East, P. C. c. 10, s. 3, p. 449.

(*t*) *Rex v. Harmwood*, Winchester Spr. Ass. 1787. 1 East, P. C. c. 10, s. 3, p. 440. The indictment was for an assault with intent to ravish; and the learned judge ordered the defendant to be acquitted of that charge, upon the evidence appearing to amount to proof of an actual rape.

invalidate the evidence which she gave of a rape having been committed upon her. In a case where the party ravished had died before the trial, her deposition corroborated by other evidence of actual force and penetration, was held sufficient to warrant a conviction, though there did not appear to be any direct evidence of emission. It was left to the jury to determine whether the crime had been completed by penetration and emission; and they were directed that they might collect the fact of emission from the *evidence, though the unfortunate girl was dead, and could not therefore give any further account of the transaction than that which was contained in her deposition before the magistrate.(u)

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If something occur to create an alarm to the party while he is perpetrating the offence, it may be for the jury to say whether he left the body *re infectâ* because of the alarm, or whether he left it because his purpose was accomplished. The prisoner had been in the body of the woman two or three minutes; and then, two men coming in sight, she struggled violently, and he withdrew from her body, but jumped with his knees upon her breast, and held her by the mouth and throat so that she could not speak or stir: but afterwards, upon her seizing an opportunity and calling out, the men came up and secured the prisoner. The woman spoke of him as having seen the men before he withdrew; the men thought he did not see them at that time. Holroyd, J., left the question to the jury, whether the prisoner had completed the crime before he withdrew, and withdrew on that account; and the jury found that he had. And the judges held, that it was a question for the jury, and rightly left to them.(v)

If the party were disturbed it was for the jury to say whether he withdrew *re-infecta* or because he had completed his purpose.

Mr. J. Holroyd is reported to have told the jury in the preceding case, "the law requires that in order to consummate the crime of rape, there must not only be a penetration, but likewise what is called an emission of *semen*. But, although the woman may not perceive the emission, the crime may nevertheless be complete, as where the time is fully sufficient, and there is no interruption, or other circumstance, to raise a contrary presumption. Emission in fact may be presumed, unless where the probability is to the contrary; and the jury may be left to say whether the party left the body *re infectâ*, by reason of a disturbance, or because his purpose was completed. If a person *in actu coitus* be alarmed by the sudden appearance of third persons, and if his withdrawing from the body of the female be contemporaneous with such alarm, it is for the jury to say whether his withdrawing is in consequence of the alarm, or because he had completed his purpose by emission.(w)

But the recent statute 9 Geo. 4, c. 31, s. 18, reciting, that "upon trials for the crimes of buggery and rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escaped by reason of the difficulty of the proof which had been required of the completion of those several crimes, for remedy thereof," enacts "that it shall not be necessary in any of those cases to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete, upon proof of penetration only."

9 Geo. 4, c. 31, s. 18. What shall be deemed sufficient proof of carnal knowledge in rape, &c

There has been much discrepancy of opinion whether the effect of this clause is to alter the crime of rape, or merely the mode of proving that crime. In the earlier cases it was held to have made no difference in

(u) *Rex v. Flemming and Windham*, 2 Leach, 854.

(v) *Rex v. Burrows*, Mich. T. 1828, MSS. Bayley, J., Russ. & Ry. 519.

(w) *Burrow's case*, 1 Lew. 288.

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the crime. Thus where the prisoner was indicted for a rape, and it appeared that he was caught in the commission of the offence by a person, who came to the room-door in which he was, but the prosecutrix swore that he did not immediately desist; Park, *J. A., J. said, "notwithstanding the new statute I should still say, that if it could be shown that a party desisted before he had completed his purpose, it was not a rape; I cannot conceive in my own mind that the mere fact of penetration is sufficient to constitute the offence; but here he did not immediately desist."(x) So in a similar case where the prosecutrix proved penetration clearly, but stated that she did not feel any thing come from the prisoner; Taunton, J., said, "In order to complete the offence it is necessary that he should have had carnal knowledge of her, and that all which constitutes carnal knowledge should have happened. Though the enactment of the statute is such as has been stated, still the jury must be satisfied from the circumstances that emission took place. It is not necessary specifically to prove it, but the circumstances must be such as infer that that fact, and every thing else essential to carnal knowledge, took place. The statute did not intend to make less necessary to complete the offence than before, but merely to prevent the necessity of the indecent exposure resulting from the minute inquiries which usually took place. The jury, therefore, must be satisfied that emission occurred before they can convict."(y) So also in a similar case, where the prosecutrix proved penetration, and that her clothes were wet, Alderson B., thus addressed the jury, "You must be satisfied that the prisoner penetrated her private parts with his; if you are satisfied of that, I shall submit to your consideration another question; according to law it is established, beyond all doubt, that on proof of penetration, a jury may infer the completion of the offence; the offence still consisting of penetration and emission; but doubt has arisen upon a late act of parliament, whether when no emission has taken place, the offence is complete by penetration only. I have no doubt, however, that it is for you, if you are of opinion that there has been penetration, to presume emission, unless the contrary is proved; and it lies on the prisoner to show that emission did not take place. If you are satisfied of penetration, but that no emission did take place, I will reserve the question for the judges; but if you are convinced of penetration, and in doubt or ignorance whether emission took place, I am clear you ought to find the prisoner guilty."(z)

But on a similar indictment, where there was evidence of penetration, but no evidence of emission, Hullock, B., said (in summing up), "if you believe that the prisoner's parts were within the person of the prosecutrix, although there might be no emission, and although they were not withdrawn merely because his lust was satisfied, still the prisoner is equally guilty as if there had been emission, and he had been satisfied; for, as the law now stands, penetration is all that is necessary to be proved to make out the offence."(a) And where on an indictment for abusing a child under the age of ten years; in consequence of *Rex v. Russell*,(b) and *Coulthart's case*,(c) Mr. J. Littledale left the question of

(x) *Rex v. Thomas Baldwin*, Worcester Sum. Ass. 1830.

(y) *Rex v. Russel*, 1 M. & Rob. 122. See the Reporter's note there.

(z) *Coulthart's case*, 1 Lew. 291. Verdict, not guilty.

(a) *Rex v. Jennings*, 4 C. & P. 249. 1 Lew. 290.

(b) *Supra*, none (y).

(c) *Supra*, note (z).

* Eng. Com. Law Repts. xix. 368.

penetration and also of emission to the jury, and desired them, in case they should be of opinion that penetration had taken place, but were uncertain whether *emission had taken place, or not, they should say so, and the jury found the prisoner guilty, and said they were of opinion that penetration took place, but that no emission took place. Upon a case reserved, the judges were unanimously of opinion that the conviction was right.(c) So, where, upon an indictment for sodomy, the prosecutor proved circumstances which were strong to show penetration, and distinctly proved emission, but not during penetration, the prisoner having been interrupted; Gaselee, J., left it to the jury to say whether there had been penetration, stating that if so, the crime was complete under the new act; and the jury were of opinion that there had been, and found the prisoner guilty, and sentence was passed, but in consequence of *Rex v. Jacobs*,(d) and *Rex v. Russell*,(dd) the case was reserved for the opinion of the judges, who held unanimously that the conviction was right.(e) So in a case of bestiality, where the prisoner being interrupted, withdrew from the animal, Park, J. A., J., said, "in the former state of the law, the prisoner would have been entitled to an acquittal, but as the law is now, if there was penetration, the capital offence is completed, although there has been no emission."(f) Where on a trial for rape, the prosecutrix admitted that the prisoner had penetrated but a little way, and that there was no emission; and it was objected that the direct negative being proved, the case failed, and that the 9 Geo. 4, c. 31, had not altered the character of the offence; Patteson, J., said, "The judges have distinctly held in *Cox's case*,(g) that proof of penetration is sufficient, notwithstanding emission be negatived;" and upon its being suggested that *Cox's case* was not argued, and that doubts as to the propriety of the decision were said to be entertained by two judges, who were absent, Patteson, J., said, "It is true that the case was not argued, but still I cannot act against their decision." The learned judge afterwards said that if it should prove necessary, the case should be further considered.(h) And lastly, where on a trial for a rape there was no doubt that there was penetration, but it appeared clear from the admissions of the prosecutrix that the prisoner did not in fact complete his purpose, as she succeeded in extricating herself from him very soon; and it was contended that the evidence showed that the offence was not completed; the words of the indictment were, did ravish and carnally know, and that must mean, did have his will of her, and satisfy his lust while within her person. The object of the 9 Geo. 4, c. 31, was only to render it unnecessary to prove more than penetration, on account of the woman's possible inability to describe what actually took place. The counsel for the crown, in reply, agreed with the counsel for the prisoner, that the act was not intended to do more than enable a jury to say that the offence was committed, when there was only proof of penetration; but that it was not intended to dispense with proof of the *completion

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(c) *Rex v. Cox*,^a R. & M. C. C. R. 337, 5 C. & P. 297, E. T. 1832, Taunton, J., and Gurney, B., *absentibus*. The case was not argued before the judges.

(d) R. & R. 331, *post*.

(dd) *Supra*, note (y).

(e) *Rex v. Reekspere*, R. & M. C. C. R. 342, Taunton, J., and Gurney, B., *absentibus*. The case was not argued before the judges, and seems to have been decided at the same time as *Rex v. Cox*. C. S. G.

(f) *Rex v. Cozins*,^b 6 C. & P. 351, Oxford Spr. Ass. 1834.

(g) *Supra*, note (e).

(h) *Brook's case*, 2 Lew. 267, York Spr. Ass. 1837. The prisoner was acquitted.

^a Eng. Com. Law Repts. xxiv. 328.

^b *Ib.* xxv. 434.

of the offence, when such proof can be given, still less to decide that the offence shall be considered to have been committed in point of law, when the evidence clearly shows that it was not committed in point of fact. Tindal, C. J., "The 9 Geo. 4, c. 31, s. 18, recites, that upon trials of rape, &c., 'offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes.' It was thought that the law was holding itself up to contempt by having those subtle and critical subjects discussed before judges and juries, and the statute therefore goes on to say, 'For remedy thereof, be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed, in order to constitute carnal knowledge; but the carnal knowledge shall be deemed complete upon proof of penetration only.' The only question, therefore, for the jury in such a case is, whether the private parts of the man did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered; however, you must be satisfied that there was actual penetration, and not that it is the case of a person attempting to commit the offence and being disturbed before he had actually penetrated. The prosecutrix may be mistaken as to the extent to which the prisoner had proceeded in the commission of the offence; if, therefore, you feel any doubt whether (and I can use no other words than the statute; I am not here to make the law, but only to expound and declare it,) if, I say, you feel any doubt whether it has been proved to your entire satisfaction that there has been penetration, you will acquit the prisoner of the felony." (i)

(i) Reg. v. Allen,^a 9 C. & P. 31. I have inserted these cases more at length in consequence of great doubts being entertained among the bar as to the correctness of the decision in Rex v. Cox, and the cases that have been decided on the authority of that case. At the time when the 9 Geo. 4, c. 31, passed, it is perfectly clear that in order to constitute the crime of rape, there must have been *both* penetration *and* emission; consequently it lay upon the prosecutor either to give express evidence of actual emission, or to prove such facts as were sufficient to induce the jury to infer that emission had actually taken place. In some cases the woman was unable to prove emission, either because she did not perceive it, (see *ante*, p. 681,) or (as was the case in Rex v. Preston, Stafford Spr. Ass. 1828, where a father was convicted of ravishing two of his daughters) because after penetration she fainted away. In such cases it was the course to leave it to the jury to infer that emission had taken place, as there was nothing to show that the prisoner had not fully completed his purpose; and acquittals sometimes took place because juries were unwilling to infer a fact, which had not been clearly proved, especially when such an inference subjected the prisoner to capital punishment. Such being the state of things, the 9 Geo. 4, c. 31, passed; and the question is, whether that act has altered the crime of rape, so that instead of consisting of *both* penetration and emission, it now consists of penetration alone. According to all the recent decisions (see Rex v. Great Bently,^b 10 B. & C. 520; Williams v. Roberts, 5 Tyrw. 421; Flight v. Thomas,^c 11 Ad. & E. 688), this ought to be determined upon the grammatical construction of the words of the statute alone. In sec. 16, there is a separate substantive clause providing that "every person convicted of the crime of rape shall suffer death as a felon." Now here the crime is treated as one as clearly settled and defined as the crime of murder, *i. e.* as consisting of both penetration and emission. It is, however, upon sec. 18 that the question mainly turns. That section recites, that "upon trials for the crimes (*inter alia*) of rape, offenders" (that is, persons guilty of those crimes) "frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes" (the mischief, therefore, was, that persons who had committed rapes consisting *both* of penetration and emission, had escaped by reason of the difficulty of proving *both* penetration and emission), "for remedy thereof" (that is, to remedy the escape of persons who had committed such rapes consisting of *both* penetration and emission), "be it enacted, that it shall not be necessary in any of those cases to prove the *actual* emission of seed," ("not that emission shall be no part of the crime,") "but that the carnal knowledge" (*i. e.* *both* penetration and emission), "shall be deemed" (presumed) "complete upon proof of penetration only." Now, it is to be observed that there is no intimation whatever of any intention to alter the crime; on the contrary, the clause evidently treats the crime as con-

^a Eng. Com. Law Reps. xxxviii. 24.

^b Ib. xxi. 122.

^c Ib. xxxix. 200.

*It appears always to have been admitted, that *emissio seminis* itself makes neither rape nor sodomy; but it is spoken of as *primâ facie* evidence of penetration. (j) *686

As the absence of previous consent is a material ingredient in the offence of rape, it must be averred in the indictment; where it is usually expressed by stating that the fact was done "against the will" of the party. (k)[1] It is essential to aver, that the offender did feloniously "ravish" the party; and the omission of the word *ravished* will not be supplied by an averment that the offender "did carnally know," &c. (l) It has been considered that the words "did carnally know" are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere*; (m) but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used. (n) The omission of them would not, therefore, be prudent. (o) In an indictment for a rape the words *carnaliter cognovit* were omitted; on a case reserved, six judges out of twelve thought it cured by the verdict, because those words are not in the 9 Geo. 4, c. 31, but they thought it bad before verdict. (p) Where an indictment alleged that the prisoner in and *upon *687

tinuing the same, but is framed to render the means of proving it more easy. It is submitted that upon the true construction of this clause its effect is, that whereas before the passing of the statute the prosecutor was bound not only to prove penetration, but to go further and give such evidence as satisfied the jury that emission had actually taken place, he is now only bound to prove penetration; on proof of which a presumption arises by virtue of the clause that emission has also taken place, but that this presumption is liable to be rebutted by showing that in fact emission did not take place. In other words, all the prosecutor has now to prove is penetration, and upon that the jury ought to convict, unless it be proved by the prisoner that he did not in fact complete his purpose. This is the view which seems to have been taken by Mr. B. Alderson, in *Coulthart's case* (*supra*, note (z), p. 683), and it is submitted is the correct construction of the clause. There are several statutory provisions of a somewhat similar character, as the 23 Geo. 2, c. 11, s. 3, for remedying the difficulties attending prosecutions for perjury, and the statutes which make a certificate of the clerk of assize evidence of a previous conviction, &c., and it is evident that none of these alter the offence, but only facilitate the proof of it. At all events, the clause does not clearly alter the crime, and it is against all the authorities to hold that a felony can be created by any but express and clear words. In *Searle v. Williams*, Hob. 293, it is laid down that "felonies and capital crimes shall never be made by doubtful and ambiguous words." And in *Courten's case*, Hob. 270, it was "resolved clearly that no statute could be extended to life by doubtful and ambiguous words:" and see 1 Hawk. P. C. c. 40, s. 3. In *Rex v. Cale*, R. & M. C. C. R. 11, it was held by a majority of the judges that the 3 Geo. 4, c. 24, s. 3, which provided that the receiving stolen goods should be "*deemed and construed to be felony*," did not create a felony, and although that case be overruled by *Rex v. Solomons*, R. & M. C. C. R. 292, still it is a strong authority to show how clear and distinct the words which create a new felony are required to be, even where the words be such as to leave no doubt that it was intended to create such felony. It may be added, that the decision in *Rex v. Cox* gives a great facility to convict the innocent in those cases, which not unfrequently occur, where the parties being accidentally discovered *in coitu*, the woman makes a false charge in order to save her character. C. S. G.

(j) 1 Hale, 628. 1 Hawk. P. C. c. 4, s. 2. 3 Inst. 63. But *qu.* how far it can be taken as evidence of penetration.

(k) Cro. Circ. Com. 427. 2 Stark. Crim. Plead. 409. 3 Chit. Crim. Law, 815.

(l) 1 Hale, 628, 632. Br. Indict. pl. 7, citing 9 Ed. 4, c. 6.

(m) 2 Inst. 180, and see 2 Hawk. P. C. c. 25, s. 56. Staundf. 81. Co. Lit. 137.

(n) See the precedents referred to, *ante*, note (k).

(o) 1 East, P. C. c. 10, s. 10, p. 448. 2 Stark. Crim. Plead. 409, note (p). 3 Chit. Crim. Law, 812. It is laid down, generally, in some of the books, that the indictment must be *rapuit et carnaliter cognovit*. 1 Hale, 628, 632.

(p) *Rex v. Warren*, M. T. 1831, MSS. Bayley, B. 3 Burn, J., D. & W. 725. See 7 Geo. 4, c. 64, s. 21, which makes the indictment sufficient after verdict, "if it describe the offence in the words of the statute," "where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute."

E. F., "violently and feloniously did make (omitting "an assault"), and her the said E. F., then and there and against her will, violently and feloniously did ravish and carnally know;" upon a case reserved after a verdict of guilty, ten of the judges were of opinion that the judgment ought not to be arrested, because of the omission of the words "an assault."^(g) The indictment usually concludes "against the form of the statute;" but as the offence was anciently, as has been shown,^(r) a capital felony, such a conclusion has been thought to be unnecessary.^(s) The indictment must conclude, as in other cases, "against the peace, &c.;" but where the conclusion was against the peace of our said late lord the king, the offence being in the time of the present king, and no other king had been mentioned, it was held not to be objectionable. The indictment was for a rape, stated to have been committed on the 9th March, 1 Geo. 4, and concluded "against the peace of our said late lord the king;" and, upon the case reserved, the judges were unanimous that "late" might be rejected: and Holroyd, J., thought that if it stood, it was not inapplicable to the existing king, and the prisoner was executed.^(t)

Indictment
against
aiders and
abettors.

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing, and the others as accessories, or that there should have been several appeals, as the ravishing by one would not be the ravishing of the others: it was answered that if two come to ravish, and one by comfort of the other does the act, both are principals, and the case proceeded.^(u) And, in a modern case, the form of an indictment, in a charge of this kind, came under the consideration of the judges. The indictment was against three persons for a rape, charging them all as principals in the first degree, that they ravished and carnally knew the woman; and the prisoners were all found guilty. The judge who tried them (at Chester) doubted whether the charge could be supported; and, at his desire, the case was mentioned by Heath, J., to the other judges, and all who were present, agreed that the charge was valid, though the form was not to be recommended; but they gave no regular opinion, because the case was not regularly before them.^(v)

An indictment in the first count charged Folkes with committing a rape, and Ludds with being present, aiding and assisting; the second count charged Ludds as principal in the first degree, and Folkes as aiding and assisting; the third count charged an ill-disposed person to the jurors unknown, as principal in the first degree, and Folkes and Ludds as aiding and assisting; and the fourth count charged a certain other evil disposed person as principal, and Folkes and Ludds as aiders. Previous

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^(g) Reg. v. Allen, 9 C. & P. 521.

^(r) Ante, p. 675.

^(s) 1 East, P. C. c. 10, s. 10, p. 448; but see 2 Stark. Crim. Plead. 409, note ^(g).

^(t) Rex v. Scott, East. T. 1820, MSS. Bayley, J., Russ. & Ry. 415.

^(u) Rex v. Vide and others, Fitz. Corone, pl. 86. Ante, 30, 676.

^(v) Rex v. Burgess, Trin. T. 1843, Lord Ellenborough, C. J., Mansfield, C. J., and Grose, J., were absent. The case is mentioned as having occurred at the Chester Spr. Ass. 1813, in 5 Evans' Col. Stat. Cl. 6, p. 399, note (12).

know," it is sufficient without charging that the offence was committed forcibly, and against the will of the complainant. 12 Serg. & Rawle, 69, *Harmann v. Commonwealth*. See also 2 Virginia Cases, 235, *Commonwealth v. Bennet*.]

to pleading, the court was urged to quash the indictment on the ground that it was bad for misjoinder of two offences of different nature, and not liable to the same punishment, and that for aiding and abetting no provision was made by the 9 Geo. 4, c. 31. It was also alleged that the indictment contained different transactions, and that the prosecutrix was bound to make an election. The court overruled both objections. Ludds was acquitted and a general verdict of guilty was found against Folkes. It appeared that the prisoner, together with three other men, committed *at the same time and place*, the one after the other, successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn; and the evidence, if believed, was sufficient to sustain the first count, as far as it charged Folkes of principal, as the other counts which charged him as aiding and assisting; and, upon a case reserved, the judges held that the conviction was good on the first count.^(w) Where the first count charged Gray as principal in the first degree, and Wise as present, aiding and assisting: and the second count charged Wise as principal in the first degree, and Gray was present, aiding and assisting; it was moved to quash the indictment, on the ground of misjoinder, as the judgment might be different, and it was said that this objection did not ultimately become material in the preceding case, as one prisoner alone was convicted; but per Coleridge, J., "The 9 Geo. 4, c. 31, s. 16, awards the punishment of death to every person convicted of the crime of rape." Now, I take it, that a principal^(x) in the second degree falls clearly within that provision: and that, therefore, the objection that the judgment might be different entirely fails."

Where an indictment for rape charged that McDonough committed the rape, and that the prisoner was present and feloniously aided and assisted M'Donough in the commission of the said felony; Maule, J., and Rolfe, B., held the indictment good.^(xx)

It is clear that the party ravished is a competent witness: and, indeed, The party ravished is a competent witness. she is so much considered as a witness of necessity, that where a husband has been charged with having assisted another man in ravishing his own wife, the wife has been admitted as a witness against her husband.^(y)

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony.† But her credibility is to be left to the jury upon the Thus, if she be of good fame; if she presently discovered the offence, and made search for the offender;

^(w) *Rex v. Folkes*, R. & M. C. C. R. 354. There is an inaccuracy in the statement of this case: it treats the charge against the principal in the first degree as one count, and the charge against the principal in the second degree as another count; but that it is not so, as both charges only constitute one count, as is plain from the indictments in murder, in which the conclusion, "and so the jurors, &c., say that A., B. and C. murdered," always follows the allegation that B. & C. were present, aiding and assisting. C. S. G.

^(x) *Rex v. Gray*,^a 7 C. & P. 164. See also *Rex v. Parry*,^b 7 C. & P. 836, where an indictment against five charged each as principal in one count, and the others as aiders and abettors.

^(xx) *Reg. v. Crisham*,^c 1 C. & Mars. 187.

^(y) *Rex v. Lord Castlehaven*, 1 St. Tri. 387. 1 Hale, 629. Hutt. 116. 1 Str. 633. *Ante*, p. 676.

† [Although no unreasonable suspicion should be indulged against the complaining witness on the trial of an indictment for rape: yet courts and juries cannot be too cautious in scrutinizing her testimony, and guarding themselves against the influence of undue sympathy in her behalf. *The People v. Hulse*, 3 Hill, 309.]

^a Eng. Com. Law Repts. xxxii. 480.

^b *Ib.* 761.

^c *Ib.* xli. 106.

concurring if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the fact was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which *give greater probability to her evidence.^(z) But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if without being under control, or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed, was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and the like circumstances, afford a strong, though not conclusive, presumption that her testimony is feigned.^{(a)†}

Where the prosecutrix is examined, the fact of her making a complaint is evidence, but the particulars of such complaint are not. It is the usual course in cases of rape, to ask the prosecutrix whether she made any complaint, and, if so, to whom: and if she mentions a person to whom she made complaint, to call such person to prove that fact; but it has been the invariable practice not to permit either the prosecutrix, or the person so called, to state the particulars of the complaint, during the examination in chief.^(b) Upon this practice, in a cause where a witness was proceeding to state the particulars of the complaint, when the prisoner's counsel interposed, Mr. B. Parke observed, "The sense of the thing certainly is, that the jury should in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said. But for a reason which I could never understand, the usage has obtained that the prosecutrix's counsel should only inquire, generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury particulars of that complaint by cross-examination." And the witness was, accordingly, only permitted to prove generally that the prosecutrix complained to her of the ill-treatment she had experienced from the prisoner.^{(c)‡}

(z) 4 Bla. Com. 213. 1 East, P. C. c. 10, s. 7, p. 445.

(a) 4 Bla. Com. 213, 214. 1 East, P. C. c. 10, s. 7, p. 445, 446.

(b) *Rex v. Clarke*,^a 2 Stark. N. P. C. 241. 3 Stark. Evid. 951.

(c) *Reg. v. Walker*, 2 M. & Rob. 212. It should seem that the grounds, upon which the making the complaint may be proved, but not the particulars of it, are, that the making the complaint is a fact, but the particulars of it are mere statements neither made on oath nor in the presence of the prisoner. In *Rex v. Wink*,^b 6 C. & P. 397, Patteson, J., held, that a party who had been robbed might be asked if he named any person as the person who had robbed him to a constable, but that he ought not to be asked what name he mentioned. This seems at variance with *Reg. v. Walker*, because there it appears that the witness was allowed to prove a complaint of the conduct of the prisoner: now, that is proving one particular, and perhaps the most important particular of the whole. The practice, certainly, has been merely to ask whether a complaint was made, and only to permit the witness to answer "yes," or "no." The ground upon which the prisoner's counsel is entitled to ask what the particulars of the complaint were, is that he has a right to inquire into any statement made by the prosecutrix, relative to the transaction, if he think fit, in order to ascertain whether she has, at all times, told the same story. C. S. G.

The observations in this note have since been sanctioned by the following decision. Upon

† [See *State v. De Wolfe*, 8 Conn. 93.]

‡ [Upon an indictment for a rape, where the injured party is examined as a witness, her complaint of the injury, and her narrative of the circumstances connected therewith, made recently after the commission of the offence, are admissible evidence in confirmation of her testimony, and may be proved by the persons to whom such complaint and narrative were made. *Phillips v. The State*, 9 Humph. 246.]

^a Eng. Com. Law Repts. iii. 333.

^b *Ib.* xxv. 456.

And where the party ravished has died before the trial, it is not competent to prove the particulars of a complaint made by her soon after the offence was committed, with a view of showing who the parties were who committed it. Upon a trial for rape, after the death of the prosecutrix, it appeared that as soon as she returned home on the morning, on which it was alleged that the offence was committed, she made a complaint of what had happened to her, it was proposed, on the part of the prosecutrix, to ask the terms of the complaint. Rolf, B., "There is a wide difference between receiving such statements, as confirmatory of a prosecutrix's credibility, *in a charge of rape, on which she is examined as a witness, and in a case like the present, where the complaint is to be received as independent evidence. I entertain very great doubts, indeed, as to the admissibility of such evidence." The evidence was not given: and, in summing up, the learned baron said, "I had a strong feeling that it was not competent to the prosecutor to extract, in detail, the complaint made by the deceased on her return home. In ordinary cases of rape, where a witness describes the outrage in the witness-box, evidence of her complaint, soon after the occurrence of the outrage, is properly admissible, to show her credit, and the accuracy of her recollection. Here, however, the object is to give in evidence the particulars of the complaint, as independent evidence, with a view of showing who were the persons who committed the offence. All that could safely be received was, I think, her complaint that a dreadful outrage had been perpetrated upon her." (d)

Where the party ravished is dead, the particulars of her complaint are not admissible

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So where the prosecutrix is absent, it is not competent to prove that she made complaint soon after the occurrence; for such evidence is merely confirmatory of the story of the prosecutrix, and no part of the *res gestæ*. Upon an indictment for rape, where the prosecutrix did not appear, on the part of the prosecution it was proposed to ask a witness whether the prosecutrix did not complain to her the next day; it was objected that the evidence of recent complaint is to confirm the evidence of the prosecutrix, but as she was away, her evidence was not before the jury to be confirmed. Parke, B.; "In *Brazier's case*, (e) the child who was attempted to be ravished was only five years old, and incapable of taking an oath, and it was there held, that the complaints she made to her mother and another woman, on her coming home, were receivable in evidence, as she herself was not heard on oath. What a man says as complaint to his surgeon in evidence." "I think the safest course will be to reject the evidence, as it is not part of the *res gestæ*, but merely confirmatory evidence. At the time of *Brasier's case*, it seems to have

Where the prosecutrix is absent, evidence of a complaint made by her is not admissible.

an indictment for rape, a witness was asked whether the prosecutrix made any complaint, and was directed to answer "yes" or "no," and on her answering "yes," the witness was asked whether the prosecutrix named any person, and the witness being directed to answer "yes" or "no," answered "yes." It was then proposed, on the part of the prosecution, to ask whose name was mentioned. It was objected that the name was one of the particulars of the complaint, and the rule was, that the *fact* of a complaint having been made was evidence, but not the *particulars* of it. And Creswell, J., held that the question ought not to be put, adding, "I think that the case of *Rex v. Wink* is a direct authority on the point; but I own that my mind is not convinced as to the latter part of that case, as it seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet permit it to be asked whether, in consequence of what was said, the witness apprehended a particular person. I think you ought not to go so far as that." *Reg. v. Osborne*,^a 1 C. & P. Mars. 622.

(d) *Reg. v. Megson*,^b 9 C. & P. 420. See 1 Ph. Ev. 204, 8 ed.

(e) 1 East, P. C. 443. See *post*, p. 695.

^a Eng. Com. Law Repts. xli. 338.

^b Ib. xxxviii. 173.

been considered, that as the child was incompetent to take an oath, what she said was receivable in evidence. The law was not so well settled then as it is now." (*f*)

As to impeaching the character of the prosecutrix.

The character of the prosecutrix, as to general chastity may be impeached by *general* evidence, (*g*) as by showing her general light character, and giving general evidence of her being a street-walker. But, in a case where a question was put to a prosecutrix, "Whether she had not before had connection with other persons; and whether she had not before had connection with a particular person who was named;" an objection taken to this question by the counsel for the prosecution was allowed by the learned judge: who also allowed an objection, made by the counsel for the prosecution, to the admissibility of evidence to prove that the girl had been caught in bed, about a year before this charge was preferred, with a young man who was tendered by the prisoner's counsel to prove that he had had connection with her; and the question as to the admissibility of such evidence being reserved, eight judges, who were present at the discussion, held that both the objections were properly allowed." (*h*)

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A prosecutrix may be asked as to particular criminal acts, &c.

*But it has since been holden, that a prosecutrix may be asked questions as to particular criminal or discreditable acts. As "Were you not walking in the high-street with a common prostitute?" (*hh*) So, also, whether the prisoner had not previously had connection with her, by her own consent? (*i*) So in an action for seduction of the plaintiff's daughter she may be cross-examined as to particular acts of intercourse with other men, and, if she deny them, then such persons may be called to contradict her, and may be asked as to the fact and the time and place of its occurrence. (*j*)

Great caution to be used on the trial of this offence.

The application of these and other rules upon this difficult subject should always be made with due regard to the cautious observations of a great and experienced judge. Lord Hale says, "It is true, that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." (*k*) He then mentions two remarkable cases of malicious prosecution for this crime, that had come within his own knowledge; and concludes, "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherewith the court and jury may, with so much ease be imposed upon without great care and vigilance; the heinousness of the

(*f*) *Reg. v. Gutteridge*,^a 9 C. & P. 471.

(*g*) *Rex v. Clarke*,^b 2 Stark. N. P. C. 241. 3 Stark. Evid. 951.

(*h*) *Rex v. Hodgson*, December, 1811, Russ. & Ry. 211.

(*hh*) *Rex v. Barker*,^c 3 C. & P. 589, Park, J. & J., and Parke, J. J.

(*i*) *Rex v. Martin*,^d 6 C. & P. 562, Williams, J., saying he never could understand *Rex v. Hodgson*. And the prisoner may show that she has been previously connected with him. *Rex v. Aspinwall*, *cor. Hullock*, B., York Spr. Ass. 1827 3 Stark. Evid. 952.

(*j*) *Verry v. Watkins*,^e 7 C. & P. 308. See also *Andrews v. Askey*,^f 8 C. & P. 7, Tindal, C. J.

(*k*) 1 Hale, 635.

† [On an indictment for an assault with intent to commit a rape, evidence that the person charged to have been injured is in fact a common prostitute, or evidence of reputation that she is a woman of ill-fame, may be submitted to the jury to impeach her credibility and disprove her statement that the attempt was forcible and against her consent. *Camp v. The State*, 3 Georgia, 419.]

^a Eng. Com. Law Reps. xxxviii. 188.

^d 1b. xxv. 544.

^b 1b. iii. 333.

^e 1b. xxxii. 620.

^c 1b. xiv. 467.

^f 1b. xxxiv. 270.

offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes of malicious and false witnesses." (l)

It has already been shown that this offence is now punishable by transportation for life. (ll) By the 9 Geo. 4, c. 31, s. 31, "Every accessory before the fact, to any felony punishable under this act, for whom no punishment has been hereinbefore provided shall be liable at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned with or without hard labour, in the common goal or house of correction, for any term not exceeding three years; and every accessory after the fact to any felony punishable under this act, (except murder,) shall be liable to be imprisoned, with or without hard labour, in the common goal or house of correction, for any term not exceeding two years." (m)

Upon an indictment for a rape, a prisoner may be convicted under the 1 Vict. c. 85, s. 11, of an assault, and may be imprisoned for three years, and by sec. 8, kept to hard labour in the common goal or house of correction, and in solitary confinement, not exceeding one month at a time, and not exceeding three months in any one year, as to the court shall seem meet. (n)

Where an indictment for rape charges one as principal in the first degree, and others as present, aiding and assisting, they may all be convicted of an assault under this section, if the rape be not proved. (o) Where it turns out upon an indictment for rape, that the woman was induced by fraud to consent, supposing the prisoner to be her husband, the prisoner may be convicted of an assault under this section; for if resistance be prevented by fraud, that is sufficient. (p) So a boy under fourteen, indicted for a rape, may be convicted of an assault under this section. (q)

It may be as well to observe, that by the 4 & 5 Vict. c. 56, s. 6, the crime of rape shall not "be tried, or triable, before any justices of the peace, at any general or quarter sessions of the peace." (r)

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape had been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish: which offence, though only a misdemeanor, yet is one of a very aggravating nature, and has, in many instances, been visited with exemplary punishment. (r) But this

(l) 1 Hale, 636.

(ll) *Ante*, p. 676.

(m) As a rape is now no longer punishable under the 9 Geo. 4, c. 31, it may be doubtful whether accessories to that crime are punishable under this section. If they are not punishable under this section, they would seem to be punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5, as for a felony for which no punishment is expressly provided: see note (b), p. 106. C. S. G.

(n) See the sections and cases on them, *post*, tit. "Aggravated Assaults."

(o) *Reg. v. Finchard and others*, Stafford Spr. Ass. 1840, Gurney, B., MSS. C. S. G.

(p) *Reg. v. Williams*, 8 C. & P. 286, Alderson, B. *Reg. v. Saunders*, 8 C. & P. 265, Gurney, B.

(q) *Reg. v. Brimilow*, 2 Moo. C. C. R. 122. S. C. 9 C. & P. 366.

(r) To the extent of fine, imprisonment and pillory, and finding sureties for good behaviour for life, 1 East, P. C. c. 10, s. 4, p. 441. The punishment of the pillory could not now be imposed for such offence, in consequence of the 56 Geo. 3, c. 138; and with respect to sureties for good behaviour for life, it is observed, that such part of the sentence is not consonant to the practice of our present constitution in the appointment of discretionary punishment; as tending to imprisonment for life. East, P. C. ibid.

* Eng. Com. Law Repts. xxxiv. 392.

b Ib. xxxiv. 383.

c Ib. xxxviii. 158.

proceeding should not be adopted where there is any probability that the higher offence will be proved: as where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, a learned judge directed an acquittal, on the ground that the misdemeanor was merged in the felony.(s)[1]

In order to convict of such an assault, the jury must be satisfied that the prisoner intended to gratify his passions on the person of the prosecutrix, at all events, and notwithstanding any resistance on her part. Upon an indictment for an assault, with intent to commit a rape, Patterson, J., in summing up, said, "In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."(t)†

It was held by the same very learned judge, in the same case, that evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix was not admissible, to show the prisoner's intent.(u)

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Under a count for an assault, with intent to commit a rape, a *prisoner may be convicted of a common assault.(v) But on an indictment, containing a count for an assault with intent to commit a rape, and a count for a common assault, if the prisoner be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he cannot be convicted on the count for a common assault; for to support that count such an assault must be proved as could not be justified if an action were brought for it, and leave and license pleaded.(w)

Punishment of assault, with intent to commit a rape.

By the 9 Geo. 4, c. 31, s. 25, in case of assault with intent to commit a rape, "the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

If on an indictment containing counts for assaulting with intent to ravish, and for a common assault, the jury find the defendant guilty "of the said misdemeanor and offence," he may be sentenced to hard labour, for the term misdemeanor is *nomen collectivum*.(ww)

Assaults by taking indecent liberties with females, though without actual force or violence will be mentioned in a subsequent chapter.(x)

(s) *Rex v. Harmwood*, cor. Buller, J., Winchester Spr. Ass. 1787, 1 East, P. C. c. 8, s. 5, p. 411, and c. 16, s. 3, p. 440. *Ante*, p. 681.

(t) *Rex v. Lloyd*,^a 7 C. & P. 318, Patterson, J.

(u) *Ibid.*

(v) *Per* Hullock, B., in 1 Lewin, 16.

(w) *Reg. v. Meredith*,^b 8 C. & P. 589, Lord Abinger, C. B.

(ww) *Rex v. Powell*,^c 2 B. & Ad. 75.

(x) *Post*, chap. x, s. 1.

[1] {This doctrine was recently denied by the court in Connecticut. 7 Conn. Rep. 54, *State v. Sheppard*. In this case it was held that proof of a rape would sustain an indictment for an attempt—the former offence being necessarily included in the latter. It was also held that a former conviction on an indictment for an attempt to commit a rape was a bar to an indictment for a rape.}

[On an indictment for an assault with intent to commit a rape, evidence of previous assaults on the prosecutrix are admissible, to show the intent with which the assault in question was committed. *Tom v. The State*, 8 Humph. 86.]

† [*Reg. v. Stanton*, 1 C. & K. 415. Eng. C. L. xlvi. 415.]

^a Eng. Com. Law Repts. xxxii. 523.

^b *Ib.* xxxiv. 539.

^c *Ib.* xxii. 26.

SECT. II.

Of the unlawful Carnal Knowledge of Female Children.

IN rape, as we have seen, the carnal knowledge must be *against the will* of the party; but by the 18th Eliz. c. 7, carnal knowledge of any woman child under the age of ten years, was made felony without benefit of clergy, and this without any reference to the consent or non-consent of the child, which was therefore considered as immaterial.

The carnal knowledge of a child under ten years, was felony by 18 Eliz. c. 7, repealed. The carnal knowledge of a child above ten and under 12 years old, was a misdemeanor by stat. of Westm. 1, c. 13.

It appears at one time to have been thought, that the carnal knowledge of a child above the age of ten and under twelve years, was rape, though she consented; twelve years being the age of consent in a female, and the statute Westm. 1, c. 13, which enacted, "that none do ravish any maiden *within age*, neither by her own consent nor without," being admitted to refer, by the words "within age," to the age of twelve years. (y) It was, however, afterwards well established, that if the child was above ten years old it was not a rape, unless it was against her consent. (z) But children above that age, and under twelve, were within the protection of the statute of Westm. 1, c. 13, the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2, c. 34, or 18 Eliz. c. 7. The statute Westm. 1, c. 13, made the deflowering a child above ten years old, and under twelve, though with her own consent, a misdemeanor punishable by two years' imprisonment, and a fine at the king's pleasure. (b)

These statutes have been repealed by the 9 Geo. 4, c. 31; the 17th section of that act substitutes the following provisions, and enacts, **"that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. (q) And if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned with or without hard labour in the common goal or house of correction, for such term as the court shall award."*

9 Geo. 4, c. 31, s. 17. Carnal knowledge of a girl under ten, the like of a girl above 10, and below 12. *694

It was said, that an indictment on the 18 Eliz. c. 7, for deflowering a child under ten years of age, ought to conclude "against the form of the statute," because the crime, as well as the punishment, was created by that statute. (r) And that, on the same account, it was necessary for the indictment to pursue the words of the act, and charge that the defendant feloniously, unlawfully, and carnally, knew, and abused the party, being under the age of ten years, without adding the word *ravished*. (s) These observations seem equally applicable to an indictment on the present statute.

Indictment on 18 Eliz. c. 7.

Clear and distinct evidence ought to be given that the child is under ten years of age. Thus, where the offence of carnally knowing a child

Proof of the age of the child.

(y) 1 Hale, 631. 2 Inst. 180. 3 Inst. 60.

(z) Sum. 112. 4 Bla. Com. 212. 1 East, P. C. c. 10, s. 2, p. 436.

(b) 4 Bla. Com. 212. 1 East, P. C. c. 10, s. 2, p. 436.

(q) But see now the 4 & 5 Vict. c. 56, s. 3, by which the present punishment is transportation for life, *ante*, p. 675.

(r) 1 East, P. C. c. 10, s. 10, p. 448.

(s) *Id.* *ibid.*

under ten years of age was charged to have been committed on the 5th of February, 1832, and the only evidence of the age of the child was given by the father, who stated that in February, 1822, he went from home for a few days, and that his wife had not then been confined, and that on his return on the 9th of the same month, he found the child had been born, and he was told by his wife's mother that it had been born the day before; the grandmother was alive at the time of the trial, but the mother was dead. It was held that the evidence was not sufficient, and that the grandmother ought to have been called, for in a matter of so much importance the best evidence ought to be adduced.^(t) So, on a similar indictment, evidence by the child herself that she was ten years old on a particular day, her mother being ill at home, and her father being unable to state the precise time of her birth, has been held insufficient.^(u) A boy under fourteen years of age cannot be convicted of this offence, and evidence is not admissible to prove that he has arrived at the full state of puberty.^(v)

Testimony
of the
child.

Upon prosecutions for this offence, it is an important consideration how far the child, upon whom the injury has been committed, is a competent witness. In former times, the competency appears to have been made to depend upon the age of the child; and when the rule prevailed that no children could be admitted as witnesses under the age of nine years, and very few under ten,^(w) the testimony of the injured child must have been for the most part excluded. A more reasonable rule has, however, been since adopted; and it appears now to be well established, that a child of *any age, if capable of distinguishing between good and evil, may be examined upon oath: but that, whatever may be its age, it cannot be examined unless sworn.^(x) By such capability of distinguishing between good and evil, must be understood a belief in God, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood ^(y)

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It appears to have been allowed, that the fact of the child's having complained of the injury recently after it was received, is confirmatory evidence:^(z) but where the child is not fit to be sworn, it is clear that any account which it may have given to others ought not to be received.^(a) Thus, on an indictment for a rape on a child of five years of age, where the child was not examined, but on account of what she had told her mother about three weeks after the transaction, was given in evidence by the mother; and the jury convicted the prisoner principally, as was supposed, on that evidence: the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned.^(b)

(t) *Rex v. Wedge*, 5 C. & P. 298, MSS. C. S. G. Taunton and Littledale, Js.

(u) *Reg. v. Day*, 9 C. & P. 722, Coleridge, J.

(v) *Reg. v. Jordan*, 9 C. & P. 118, Williams, J.

(w) *Reg. v. Travers*, 1 Str. 700. *Rex v. Dunnel*, 1 East, P. C. c. 10, s. 5, p. 442. 1 Hale, 302. 2 Hale, 278.

(x) Brazier's case, Reading Spring Ass. 1779. 1 East, P. C. c. 10, s. 5, p. 443, 444. 1 Leach, 199, S. C. Powell's case, 1 Leach, 110. Bull. N. P. 293. 4 Bla. Com. 214. Anon. Dy. 304 a. See per Alderson, B., *Reg. v. Perkins*, 2 Moo. C. C. R. 135.

(y) White's case, 1 Leach, 430, 431, and the cases cited, ib. 431, note (a), and see *post*, Book on Evidence.

(z) Brazier's case, *ante*, note (x).

(a) 1 Phil. on Evid. 6. See *Reg. v. Gutteridge*, *ante*, p. 690, note (f).

(b) *Rex v. Tucker*, 1808. 1 Phil. on Evid. 6.

a Eng. Com. Law Reps. xxiv. 329.

b Ib. xxxviii. 306.

c Ib. 63.

In all cases of this kind, it is undoubtedly much to be wished that in order to render the evidence of the child credible, there should be some concurrent testimony of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. (c) But no general rule can be laid down on the subject; and as a prisoner may be legally convicted on such evidence, alone and unsupported, the degree of corroboration which the account given by the witness requires, is a question exclusively for the jury, from all the circumstances of the case, and especially from the manner in which the child has given its evidence. That evidence may be such as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses. (d)

Where a criminal prosecution was coming on to be tried, and the learned judge found that the principal witness was a female infant wholly incompetent to take an oath, he postponed the trial till the following assizes: and ordered the child to be instructed in the mean time, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. (e) And at the next assizes the prisoner was put upon his trial; and the infant, being found by the court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. (f) But in a late case where it appeared that the material witness, though an adult, and of sufficient intellect, had no idea of a future state of rewards and punishments, and the learned judge had on that account stopped the case, and discharged the jury, in order that the witness might have an opportunity of being instructed upon that subject, before the next assizes; the judges were of opinion that the discharge of the jury was improper, and that an acquittal should have been directed. (g)

Upon an indictment for carnally knowing and abusing a girl under ten years of age, where there was consent, the prisoner cannot be convicted of an assault under the 1 Vict. c. 85, s. 11. (h) Upon an indictment, the first count of which charged the prisoner with carnally knowing and abusing a girl above ten and under twelve years of age; and the second count with an assault with intent carnally to know and abuse, and the third count with a common assault: the jury negatived the first count, as there was no proof of penetration: it was contended for the prisoner that supposing the fact to have been done by the consent of the prosecutrix, no conviction could take place on the second and third counts. The jury found that the prosecutrix had consented, and Mr. B. Alderson directed a verdict of guilty, on the ground that the prosecutrix was by law incapable of giving her consent to what would be a misdemeanor by statute: but upon a case reserved, all the judges thought that the proper charge was of a misdemeanor in attempting to commit a statutable

(c) 4 Bla. Com. 214.

(d) 1 Phil. on Evid. 7.

(e) Anon. cor. Rooke, J., at Gloucester. Mr. J. Rooke mentioned the case on a trial at the Old Bailey, in 1796; and added, that upon a conference with the other judges, on his return from the circuit, they unanimously approved of what he had done. See note (a) to White's case, 1 Leach, 430; and 2 Bac. Abr. 577, in the notes.

(f) Id. ibid.

(g) Rex v. Wade, East. T. 1825. Ry. & Mood. C. C. 86. An application for a pardon was recommended.

(h) Rex v. Banks, 8 C. & P. 574, Patteson, J. In Reg. v. M'Rue, 8 C. & P. 641, the prisoner was indeed convicted of an assault under that section on a similar indictment, but the point does not seem to have been noticed. C. S. G.

^a Eng. Com. Law Reps. xxxvi. 531.

^b Ib. 562.

offence, and that the conviction was wrong.(i) "The ground on which the judges went in the preceding case was, that although a child between ten and twelve cannot by law consent to have connection, so^{as} to make that connection no offence, yet where the essence of the offence charged is an assault, (and there can be in law no assault, unless it be against consent,) this attempt, though a criminal offence, is not an assault; and the indictment must be for an *attempt* to commit a felony, if the child is under ten years old, and for an attempt to commit a misdemeanor, if the child is between the ages of ten and twelve; for it is perfectly clear that every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor.(j)†

Where on an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, the first count was abandoned, there having been so much delay in the disclosure of the transaction that it could not be contended that the child had not consented; but as she was between the ages of ten and twelve, it was proposed to go upon the second count only, as it was a misdemeanor to carnally know and abuse a child between those ages, and an imposition of hands for the purpose of committing that misdemeanor was contended to be an assault; it was held that the prisoner must be acquitted, for to support a charge of assault it must be proved that there was such an assault, as could not be justified if an action were brought, and leave and license pleaded.(k)

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As to the difference between consent and submission in children of tender age.

*There is a great difference between consent and submission, especially in the case of a girl of tender years, when in the power of a strong man, and mere submission in such a case by no means shows such a consent as will justify in point of law. Upon an indictment for attempting to abuse a child under the age of ten, containing a count for a common assault, no proof was given of the child being under ten years of age, but it appeared that the prisoner made an attempt on her, without any violence on his part, or actual resistance on hers, and it was contended that as she offered no resistance, it must be taken that she consented, and therefore the prisoner must be acquitted. Coleridge, J., "There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say

(i) Reg. v. Martin,^a 2 Moo. C. C. R. 123, S. C. 9 C. & P. 213.

(j) Per Patteson, J., Reg. v. Martin, 9 C. & P. 215.

(k) Reg. v. Meredith,^b 8 C. & P. 589, Lord Abinger, C. B. It is to be observed, that in all these cases it appeared that the prosecutrix consented, but it should seem that if she did not consent, the prisoner could not be convicted of an assault upon an indictment for carnally knowing a child under ten years of age, the words of sec. 11 of the 1 Vict. c. 85, being "any felony whatever, where the *crime charged* shall include an assault against the person," and here the crime charged does not include an assault, because the indictment is proved, although it appear that the child consented. C. S. G.

† [Where the prisoner decoyed a female, under ten years of age, into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure: held, that though there was no evidence of his having actually touched her, he was properly convicted of an *assault with intent to commit a rape*. The consent of a female of that age, or even her aiding the prisoner's attempt, is no defence. *Hays v. The People*, 1 Hill, 351.]

^a Eng. Com. Law Reps. xxxviii. 85.

^b Ib. xxxiv. 539.

whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.”(l)

On an indictment for an assault with intent to abuse and carnally know, the defendant may be found guilty of the intent to abuse only.(m)

Where an indictment in the first count charged the prisoner with having assaulted E. R., “an infant above the age of ten and under the age of twelve years,” with intent to carnally know and abuse her, and in the second count charged that the prisoner unlawfully did put and place the private parts of him against the private parts of the said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R., it was held that the second count was bad, because it did not aver that the said E. R. was between the ages of ten and twelve, and that the word “said” did not help it, as it did not incorporate the description of E. R. contained in the first count; but that if the second count had contained the words “the said E. R. then and there being above the age of ten years, and under the age of twelve years,” it would have been sufficient.(n)

By the 4 & 5 Vict. c. 56, s. 6, the crime of carnally knowing and abusing any girl under the age of ten years shall not “be tried or triable before any justice of the peace at any general or quarter sessions of the peace.”

*CHAPTER THE SIXTH.

*698

OF SODOMY.

IN treating of the offence of sodomy, *peccatum illud horribile, inter Christianos non nominandum*, it is not intended to depart from the reserved and concise mode of statement which has been adopted by other writers.

It appears from different authors, that in ancient times the punishment of this offence was death:(a) but it had ceased to be so highly penal, when the 25 Hen. 8, c. 6, again made it a capital offence. The 9 Geo. 4, c. 31, s. 1, repeals this act, but enacts by sec. 16, “that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon.”

The offence consists in a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast.(b)† With

(l) Reg. v. Day,^a 9 C. & P. 722, Coleridge, J.

(m) Rex v. Dawson,^b 3 Stark. N. P. C. 62.

(n) Reg. v. Martin,^c 9 C. & P. 215, Patteson, J. See Rex v. Cheere,^d 4 B. & C. 902. 7 D. & R. 461, that the word “said” does not incorporate a previous description.

(a) But the books differ as to the mode of punishment. According to Britton, a sodomite was to be burnt, Britt. lib. 6, c. 9. In Fleta it is said, *pecorantes et sodomites in terra vivi confodiantur*. With this the Mirror agrees; but adds, “*issint que memoire seont restraine, pur le grand abomination del fait*.” thereby consigning them, with just indignation, to shameful and eternal oblivion, Mirr. c. 4, s. 14. About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence. 3 Inst. 58.

(b) 1 Hale, 669. Sum. 117. 3 Inst. 58, 59. 1 Hawk. P. C. c. 4. 6 Bac. Abr. tit.

† [A man, who as pathic, committed sodomy with a boy of the age of twelve years, was convicted of that offence, and the judges held the conviction right. Reg. v. Allen, 2 C. & K. 869. Eng. C. L. 869.]

^a Eng. Com. Law Reps. xxxviii. 306.

^b Ib. xiv. 163.

^c Ib. xxxviii. 87.

^d Ib. x. 466.

respect to the carnal knowledge necessary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to the preceding chapter.(c)

In this offence as well as in rape, it has been held since the 9 Geo. 4, c. 31, that the crime is complete on proof of penetration, and even if emission be expressly negatived.(d)

To constitute this offence, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute that offence.(e) An unnatural connection with an animal of the fowl kind is not sodomy; a fowl not coming under the term "beast;" and it was agreed clearly not to be sodomy, when *the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt.(f)

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Of aiders
and acces-
sories.

Those who were present aiding and abetting in this offence, are all principals:(g) but if the party on whom the offence is committed be within the age of discretion, namely, under fourteen;(h) it is not felony in him, but only in the agent.(i) There may be accessories before and after in this offence, as the statute makes it felony generally.(j)

Indict-
ment.

The indictment must charge the offender *contrâ naturæ ordinem rem habuit veneream, et carnaliter cognovit.*(k) But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term "buggery," the indictment should also charge *peccatumque illud sodomiticum Anglica dictum buggery adunc et ibidem nequiter, felonice, diabolice, ac contrâ naturum, commisit ac perpetravit.*(l)

Evidence.

That which has been before stated with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved, the offence well merits strict and impartial punishment; but it is from its nature so easily charged and the negative so difficult to be proved that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable.(m)

Accom-
plices.

A party consenting to the commission of an offence of this kind, whether man or woman, is an accomplice, and requires confirmation. On the trial of an indictment for an unnatural offence by a man upon his own wife, she swore that she resisted as much as she could. Patteson, J., 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 also consent of non-con-

Sodomy. 3 Bla. Com. 215. 3 Burn. Just. tit. *Buggery.* 1 East, P. C. c. 14, s. 1, p. 480. Wiseman's case, Fortesc. 91. As to the offence by man with woman, if the case should occur, it may be proper to inquire whether the doctrine in the text is sufficiently supported by the authorities cited.

(c) *Ante*, p. 678, *et seq.*

(d) *Rex v. Reeksphear*, R. & M. C. C. R. 342. *Rex v. Cozins*,^a 6 C. & P. 351, Park, J. See *Rex v. Cox*, R. & M. C. C. R. 337, *ante*, p. 683.

(e) *Rex v. Jacobs*, East. T. 1817. Buss. & Ry. 331.

(f) *Rex v. Mulreaty*, Hil. T. 1812, MSS. Bayley, J.

(g) 1 Hale, 670. 3 Inst. 59. Fost. 422, 423.

(h) *Ante*, 2, 3.

(i) 1 Hale, 670. 3 Inst. 59. 1 East, P. C. c. 14, s. 2.

(j) 1 Hale, 670. Fost. 422, 423.

(k) 1 Hawk. P. C. c. 4, s. 2. 3 Inst. 58, 59.

(l) Fost. 424, referring to Co. Ent. 351, *b*, as a precedent settled by great advice.

(m) 4 Bla. Com. 215. *Ante*, p. 691.

^a Eng. Com. Law Repts. xxv. 434.

sent 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."⁽ⁿ⁾

Upon an indictment for bestiality, the prisoner if acquitted of the capital charge cannot be convicted of an assault under the 1 Viet. c. 85, s. 11, as that section only applies to "assaults against the person."^(o)

*It is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence.^(p)

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In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment for an assault with intent to commit an unnatural crime. And it should be observed that the mere soliciting another to the commission of this crime has been treated as an indictable offence.^(q)

Attempts
to commit
felony.

*CHAPTER THE SEVENTH.

*701

OF THE FORCIBLE ABDUCTION AND UNLAWFUL TAKING AWAY OF FEMALES; AND OF CLANDESTINE MARRIAGES.

It appears to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law.^(a) But if children be taken from their parents or guardians, or others entrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, it appears that such criminal means, will render the act an offence at common law, though the parties themselves may be consenting to the marriage.^(b) And *seduction* may be attended with such circumstances of combination and conspiracy as to make it an indictable offence. A case is reported where Lord Grey and others were charged, by an in-

Offences at
common
law.

⁽ⁿ⁾ Reg. v. Jellyman,^a 8 C. & P. 604. Perhaps it may be doubtful whether a wife, who consented, would be a competent witness against her husband. The cases, in which she has been held competent as a witness against him in criminal proceedings, are cases of injuries inflicted upon her against her consent. G. S. G.

^(o) Reg. v. Eaton,^b 8 C. & P. 417, Vaughan and Bolland, Bs., and Patteson, J. It may be doubted whether, upon an indictment for sodomy, a party could be convicted of an assault under this section, even where, as in Rex v. Reckspear, *ante*, p. 698, it was against the will of the other party, as the crime charged would be proved even if there were consent. Reg. v. Martin, 2 M. C. C. R. 123, seems to show that if there were consent there could be no conviction of an assault under this section. C. S. G.

^(p) Rex v. Cole. Buckingham Sum. Ass. 1810, and by all the judges, M. T. following, MSS. C. C. R. I. 1 Phil. Evid. 499.

^(q) See a precedent of an indictment for such solicitation, 2 Chit Crim L. 50. And for the principals and cases upon which such an indictment may be supported, see *ante*, 46, 47.

^(a) 1 East, P. C. c. 11, s. 9, p. 458.

^(b) *Id. ibid.* p. 459. And see 3 Chit. Crim. L. 713, a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations.

^a Eng. Com. Law Reps. xxxiv. 547.

^b *Ib.* xxxiv. 457.

formation at common law with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c., of her father,) and soliciting her to desert her father, and commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and further, the defendants were charged that, in prosecution of such conspiracy they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, and to the evil example, &c. The defendants were found guilty, though there was no proof of any force; but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure, and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house: but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control.(c)

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Forcible abduction of a woman on account of her fortune with intent to marry her, &c.

*The forcible abduction of a woman from motives of lucre is an offence of the degree of felony, by the 9 Geo. 4, c. 31, which repeals several former statutes upon this subject.(d) It enacts by sect. 19, that "where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

39 Eliz. c. 9. Accessories.

It was made a question of considerable doubt, whether persons "receiving wittingly the woman so taken against her will, and knowing the same," were ousted of clergy by the statute of Elizabeth, when that statute was in existence.(e) But it was agreed that those who received *the offender*, knowingly, were only accessories after the fact, according to the rule of the common law.(f) With respect to those who were only privy to the marriage, but in no way parties, or consenting to the forcible taking away, it was holden that they were not within the statute.(g)

Where the woman had nothing, and was not heir apparent, the case was not within the statute.(h) Thus where a man worth 5,000*l.* in lands and goods, had a son and daughter, and the daughter was enticed

(c) *Rex. v. Lord Grey and others*, 3 St. Tri. 519. 1 East, P. C. c. 11, s. 10, p. 460.

(d) 3 H. 7, c. 2. 39 Eliz. c. 9. 1 Geo. 4, c. 115. 4 & 5 Ph. & M. c. 8.

(e) 1 Hale, 661. 1 East, P. C. c. 11, s. 2, p. 452, 453.

(f) 1 Hale, 661. 1 Hawk. P. C. c. 41, s. 9. 3 Inst 61. St. P. C. 44. 1 East P. C. c. 11, s. 2, p. 452, 453.

(g) *Fulwood's case*, Cro. Car. 488, 489. 1 Hawk. P. C. c. 41, s. 10.

(h) 12 Co. 100.

from his house, forced into the country, and there married; a bill being exhibited against the husband for this conduct, it was referred to the Chief Justice and Hobart, whether this was within the statute, and so not examinable in the star chamber: and on conference with all the judges, they held that it was not within the statute; because the daughter had no substance of her own, and was not heir apparent, and it was only to women having substance of their own, or being heirs apparent, that the statute applied.(i)

It was no sort of excuse that the woman was at first taken away with her own consent, if she afterwards refused to continue with the offender, and was forced against her will; for till the time when the force was put upon her, she was in her own power; and she might from that time as properly be said to be taken against her will, as if she had never given any consent.(j) Getting a woman inveigled out by confederates, and then detaining and taking her away, was a taking within the statute. Thus, where a confederate of the prisoner's inveigled a girl of fourteen, having a portion of 5,000*l.*, to go with her and a maid servant in a coach into the Park, where the prisoner got into the coach, and the two women got out; and the *prisoner detained the girl while the coach took them to his lodgings in the Strand; and the next morning he prevailed upon her, (having threatened to carry her beyond sea if she refused,) to marry him, and (though he was apprehended on the same day,) there was evidence that she was deflowered; the prisoner was convicted and executed.(k) The taking alone, did not constitute the offence under the repealed statute, and it was necessary that the woman taken away should have been married or defiled by the misdoer, or by some others with his consent. Where, therefore, an heiress was fraudulently taken away against her will in England, but the marriage took place in Scotland, an indictment upon the repealed statute could not be supported.(l) But the new enactment makes the taking away or detaining a woman with intent to marry or defile her, a complete offence. And under the repealed statute it was decided, that if a woman were under force at the time of taking, it was not at all material whether she were ultimately married or defiled with her own consent or not; on the ground that an offender should not be considered as exempted from the provisions of the statute, by having prevailed over the weakness of a woman, whom he got into his power by such base means.(m) And it was also decided that a marriage would be sufficient to constitute the offence though the woman was in such fear at the time that she knew not what she did. Sarah Cox, an orphan, having 1300*l.*, was forced from her house in Islington into Surrey, and there married. The indictment against the two men who carried her away, and one of whom married her was in Surrey, and the taking was alleged there. She was examined as a witness, and swore that when she was married she was in such fear that she knew not what she said or did. Several objections were made. It was urged that the taking being in Middlesex, the indictment should not have been in Surrey, no

Construction of the statute 3 Hen. 7, c. 2.

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Taking away with intent to marry or defile sufficient under 9 Geo. 4, c. 31

(i) *Burton v. Morris*, Hob. 182, and see *Cro. Car.* 485.

(j) 1 *Hawk. P. C.*, c. 41, s. 7. *Cro. Car.* 485.

(k) *Rex v. Brown*, 1 *Ventr.* 243.

(l) *Wakefield's case*, 2 *Lew. 1.* The parties were convicted of a conspiracy to commit a violation of the repealed statutes, 3 *Hen. 7, c. 2*, and 4 & 5 *P. & M. c. 8.*

(m) 1 *Hale*, 660. 1 *Hawk. P. C.* c. 41, s. 8. *Fulwood's case*, *Cro. Car.* 485, 493. *Swendsen's case*, 5 *St. Tri.* 450, 464, 468.

force having been proved there: but the court said it was a continuing force into Surrey; and therefore a forcible caption there. Then it was said that the marriage was null, because the woman did not know what she said or did: but the court held, that though this might avoid the marriage, yet it was a marriage *de facto*, and sufficient within the statute. Further it was urged, that an intent to marry or defile was not alleged in the indictment, but the court said it was not necessary. (*n*)

Of the county in which the offence shall be said to have been committed.

Upon the same repealed statute, where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled, with her own consent, it was holden that the fact was not indictable in either county; on the ground that the offence was not complete in either, but that if by her being carried into the second county, or in any other manner, there was a continuing force in that county, the offender might be indicted there, though the marriage or defilement ultimately took place with the woman's own consent. (*o*) The enactment of the *late statute, 7 Geo. 4, c. 64, s. 12, would have applied to this objection. (*p*)

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Case of Lockhart Gordon and Loudon Gordon. There must have been a continuance of the force into the county where the defilement took place under the repealed statute.

The doctrine that there must have been a continuance of the force into the county where the defilement took place, was recognized and acted upon in a case of recent occurrence, and one by which a great deal of public interest was excited. The prisoners, Lockhart Gordon, a clergyman, and Loudon Gordon, his brother, were indicted upon the repealed statute, for the forcible abduction of Rachel A. Lee, under the following circumstance. The prosecutrix, Mrs. Lee, a natural daughter of Lord Le De Spencer, and entitled by his lordship's will to a considerable fortune, married, in the year 1794, and when she was about the age of twenty, a Mr. M. A. Lee, from whom she shortly afterwards separated, and continued to live apart from him, in the receipt of an income of 900*l.* per annum, secured to her separate use. In the month of December, 1803, when she was living in Bolton-row, Picadilly, the prisoner, Loudon Gordon, under the care of whose mother she had been placed for some time when a girl, introduced himself to her by means of her medical attendant, as an old acquaintance, and some short time afterwards, the other prisoner, Lockhart Gordon, also called upon her; and both of them being recognized by her, they continued, but more especially Loudon Gordon, occasionally to visit her house. Loudon Gordon called four or five times in the month of December, and several times in the following January, previous to the transaction in question. Mrs. Lee stated that their conversations, on these visits, were chiefly upon books, as her habits were studious; but that upon Loudon Gordon taking leave after his first visit he saluted her; and that on his second visit she warned him against entertaining any attachment for her, which she thought a likely thing to happen, as he was a young man; and that upon her giving this caution, he said he had an attachment, and that his happiness was in her hands. By way of changing the conversation, she then read to him an account of a dream which she had had, and requested him to interpret it, which he afterwards did, by sending to her an interpretation, which was clever and ingenious. The third time he called he proposed a tour into Wales, which she did not agree to,

(*n*) Fulwood's case, Cro. Car. 482, 484, 488, 493. The prisoners were found guilty, and sentenced to be hanged.

(*o*) Fulwood's case, Cro. Car. 485, 488. 1 Hale, 660. 1 Hawk. P. C. c. 41, s. 11. 1 East, P. C. c. 11, s. 3, p. 453.

(*p*) See the section, *ante*, p. 549.

either then or at any time; but she admitted that she did not give such an absolute refusal as to prevent his mentioning the subject again, and that in a letter which he wrote to her, about the 12th of January, (and which contained strong declarations of attachment,) he alluded to the tour; but she expressly stated, that she did not know of any plan for going with him any where, nor ever consented to any such plan; though when it was mentioned by him on the same day on which she received his letter, she said, "We will talk of it." A letter from Lockhart Gordon was received by her, together with that from Loudon, in which he also mentioned the proposed tour as likely to conduce to her happiness; described himself as having a head to conceive, a heart to feel, and a hand to execute whatever might be for her advantage; and declared that if his brother ever deceived her he would blow his brains out. A short time before Sunday, the 15th of January, Mrs. Lee invited Loudon Gordon to dine with her on that day, and requested that *he would bring his brother Lockhart with him; and they came accordingly. This was the time at which the offence was alleged to have been committed. According to Mrs. Lee's account of the material transactions at that time, it appeared that after dinner she said to Lockhart Gordon, "What do you think of the extraordinary plan your brother has proposed?" To which he replied, "If he loves you, and you love him, I think it will tend to your mutual happiness; and you will gain two friends." That she did not recollect any thing more being said upon the subject till Lockhart Gordon pulled out his watch, said it was near seven o'clock, and that the chaise would soon be there; and said further, "You must go with Loudon to-night." She thought this a joke; as no mention had been previously made of leaving London, or of any chaise; and she knew of no preparations having been made for her leaving London. About this time Loudon Gordon came towards Mrs. Lee with a ring, and attempted to put it on her finger; but she drew away her hand, and the ring was left upon the table. She then attempted to go up stairs, but Lockhart Gordon said she should not, and placed himself against the door; and either at that time, or soon afterwards, he produced a pistol; she, however, after having rung the bell violently, got out at the door, and went up stairs, where she said to her female servant, "There is a plan to take me out of the house; they are armed with pistols; say no more, but watch." She described herself as having felt quite panic-struck at the time. Soon afterwards the prisoners came up stairs, and Lockhart Gordon said, "I am determined you shall go;" this was not said in a threatening manner; but soon afterwards, upon her saying to him, "What right have you to force me out of my house?" he said, "I am desperate," and looked as if he was so. Mrs. Lee described herself as then getting into a very wretched and confused state of mind, not absolutely stupid, but unable to recollect what passed. But it appeared from the evidence of her servants, that Loudon Gordon first came down stairs, and sent the footman to call a coach, who went accordingly; and that the only servants then in the house were two females; that Loudon returned up stairs, when a scuffle was heard almost immediately, and Mrs. Lee called out, "I am determined not to go out of my own house;" to which Lockhart Gordon replied, "I am desperate, Mrs. Lee." The female servants went immediately up stairs, and found Lockhart pushing Mrs. Lee out of the drawing-room, with his arm round her waist, and Loudon near them.

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Mrs. Lee was in a thin muslin dress, with a small crape handkerchief about her head, as she was dressed for dinner, and without any hat or bonnet. One of the servants put her arms round Mrs. Lee's waist, to drag her away, but Lockhart Gordon produced a pistol, and swore that he would shoot the servant, by which she was so much alarmed that she desisted. The other servant then took Mrs. Lee by the hand, but quitted it upon Lockhart Gordon's threatening also to shoot her, and presenting a pistol. Lockhart Gordon then laid hold of one of the servants, and both of them being so much alarmed as to make no further resistance, Loudon Gordon put his arm round Mrs. Lee's waist, and took her down stairs, and out at the street door; when Lockhart Gordon immediately followed. It appeared by other witnesses that a post-chaise, which the prisoners had ordered in the course of the morning, was *at that time waiting at the end of Bolton-row: that Mrs. Lee was taken to it by Loudon Gordon: that Lockhart Gordon followed; and that it drove off immediately on the road to Uxbridge. Mrs. Lee's account was, that though she remembered but imperfectly what took place at the time she was taken away, she was certain that she went from the house against her will, but that no manual force was used to get her into the chaise. She described herself in a state of partial stupefaction; and several of the witnesses spoke of her as being of a very nervous frame, easily agitated, and subject to depression of spirits to such an extent as to be occasionally in a state of great mental misery.

As soon as Mrs. Lee and the two prisoners got into the chaise, it drove off at a smart pace towards Uxbridge, Mrs. Lee sitting in the middle between the prisoners; and it appeared that, after changing horses at Uxbridge and at Wycombe, the party arrived at Tetsworth, about twelve miles from Oxford, between one and two o'clock in the morning. Mrs. Lee stated, that she frequently remonstrated with the prisoners in the course of the journey; and particularly told Lockhart Gordon that it was "a most infernal measure and a breach of hospitality;" and repeatedly asked him for a chaise to take her back to London; making the application principally to him, because he seemed to have taken the lead in the whole business. But it appeared, as well from her own admissions, as from the evidence of the post-boys, that she never called for assistance at the inns, turnpike-gates, or other places; and one of the post-boys stated, that, at Wycombe, one of the prisoners asked her, whether she would stay there or go on to Tetsworth or Oxford, and that her answer was, "I don't care." Mrs. Lee also admitted that a ring was put upon her finger in the course of the journey by Loudon Gordon; and that, during the journey, but whether before they got to Uxbridge or afterwards she could not tell, she took a steel necklace, with a camphire bag attached to it, from her neck, and threw it out of the window of the chaise, saying, "That was my charm against pleasure; I have now no occasion for it." She said, that she used the word "charm," as alluding to the supposed medical property of camphire in quieting the nerves, and calming the passions, particularly the passion which a person of one sex feels for the person of the other; and that she was in the habit of wearing it as a sedative; that at the time she used the expression she gave herself up, but that she afterward expostulated. And she also admitted, that during the journey she made some inquiries concerning Loudon Gordon's health; and might, perhaps, have inquired how long it was since he had been acquainted with a person of her own sex.

At Tetsworth the parties got out of the chaise, and supper and beds were ordered to be prepared. Mrs. Lee stated, that she eat a good supper, and that there was a good deal of cheerful conversation after the repast: the whole of which she did not recollect, but that part of it related, as she believed, to Egyptian hieroglyphics and architecture. A question was then put to her, whether the whole of what passed might not have induced Loudon Gordon to have believed that he might approach her bed; to which she answered, "It might; I was in desperation." She admitted, that she might have told Loudon Gordon to see that the sheets were well aired; but said that if she had had the perfect exercise of her *judgment, and her mind had been free from force, she should have been more inclined to have ordered a chaise than to have gone to bed. After she had gone up stairs into the bed-room, the chambermaid asked her when she should be in bed, and when the gentleman should come up; to which she replied, "In ten minutes." Upon this statement of Mrs. Lee's, in her examination, the following question was put to her: "What induced you to send such a message?" and it was objected to by the counsel for the prisoners on the ground that it was not a question as to a fact, but to something existing in the mind of the witness. Lawrence, J., overruled the objection; but said, that whether the answer would be evidence or not, must depend upon the nature of it; that if Mrs. Lee should answer, "I thought my life in danger; for Lockhart Gordon told me, if I did not let Loudon Gordon come to bed to me, he would blow my brains out;" such answer would certainly be evidence, though the apprehensions of the witness unsupported by words used by the prisoners, or facts, would not. The question was then put; and Mrs. Lee answered, "I was under the impression that my life was in danger from Lockhart Gordon; and I was apprehensive of some serious scuffle at the inn, in which lives might be lost." Mrs. Lee stated, that shortly after the chambermaid left the room, Loudon Gordon came to bed to her, and remained with her all the night; and that the intercourse took place between them which usually takes place between husband and wife.

These were the material facts of the case, with the addition, that it was proved by the woman with whom the prisoners lodged in London, that, previous to the time when this transaction took place, Lockhart Gordon was pressed for money, and backward in his payments, and that Loudon Gordon had admitted to her that he was in distressed circumstances. The learned counsel for the prisoners was proceeding in his cross-examination of Mrs. Lee, to question her as to her religious principles; and she had just admitted, that she seldom went to any place of worship, and was inclined to doubt the Christian religion, when Lawrence, J., after having inquired of the counsel for the prosecution, whether they had any further evidence to offer of force in the county of Oxford, and had been told by them that they had not, said, that he was of opinion the case should not proceed any further. The learned judge then addressed himself to the jury, and told them, that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred; that in the present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house, yet it appeared also, that in the course of the journey she consented; as she

did not ask for assistance at the inns, turnpike-gates, &c., where she had opportunities; and that, as she was unable to fix times or places with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners. (k)

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On an indictment under the 9 Geo. 4, c. 31, it must be proved that the prisoner took the woman away from motives of lucre. His expressions relative to her property are evidence that he did so.

Upon an indictment for abduction on the 9 Geo. 4, c. 31, s. 19, it *must be proved that the prisoner took away the woman from motives of lucre, but his expressions relative to her property are evidence that he was actuated by such motives. Upon an indictment for having feloniously and from motives of lucre taken away and detained M. E. against her will, she having a future interest in certain personal property, containing a count with intent to marry, and a count with intent to defile, it appeared that the prisoner had taught M. E. music, and had paid his addresses to her, which were favourably received by her, but which her relatives insisted upon her breaking off, and by their advice she wrote to the prisoner to tell him that the intimacy must cease forever. One day when she was walking out, the prisoner came in a gig, got out, came behind her, and having placed his hand on her shoulder, carried her in his arms to the gig, she struggling and screaming all the time he was doing so. He then drove away with her, but was pursued and overtaken at a distance. She was cross-examined with a view to show that she had consented to the abduction. M. E. would on her attaining the age of twenty-one, be entitled to the sum of 2100*l.*, and the prisoner had said that he knew she would be entitled to 200*l.* a-year. It was contended that if the prisoner carried her off, even against her own consent, to make her his wife from affection to her person, and not as a means of getting at her property, the offence was not proved. In *Rex v. Wakefield*,^(a) the parties had no previous intimacy, and therefore all inducements to the act arising from real passion and affection was out of the question; and the abduction in that instance, as well as almost every other which had been the subject of penal inquiry, could be accounted for on no other grounds than those of cold and sordid calculation, to get possession of a lady's property by first obtaining possession of her person. Parke, B. "I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *Rex v. Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument, that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre, is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of the charge of felony. It is clearly made out that Miss Ellis is entitled to personal property, and that the prisoner took her away with the intention of marrying her; and I think that the other count may be entirely laid out of your consideration, as there is no evidence of it whatever. You will therefore say, whether the prosecutrix being a lady entitled to property, the prisoner either took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty of the felony. With respect to the motives of the prisoner, evidence has been

(k) *Rex v. Lockhart and Loudon Gordon*, cor. Lawrence, Oxford Lent Ass. 1804. As find this case frequently referred to in the text-books, I have thought it better to retain in this edition. C. S. G.

(a) *Post*, page 710.

given of expressions used by the prisoner respecting the property of Miss Ellis, such as his having told one of the witnesses that he had seen Mr. Whitwell's will, and that she would be entitled to 200*l.* a year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not. Unless you are satisfied that such a motive prompted him to take away the prosecutrix against her will, he is entitled to be acquitted of the felony; and you *will then consider whether he used any force to her person in taking her away, and took her away against her consent; for if he did, and he is not guilty of the felony, you may under the present indictment, convict him of the assault. (r) *709

This case also shows that if the prisoner be acquitted of the felony, he may be convicted of an assault under the 1 Vict. c. 85, s. 11, if he used force to the person of the female in taking her away; under that section and the 8th the prisoner may be imprisoned for three years with or without hard labour in the common gaol or house of correction, and may be kept in solitary confinement for any portion or portions of such imprisonment or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year. (s)

It was resolved, that an indictment for this offence upon the repealed statute ought expressly to set forth that the woman taken away had lands or goods, or was heir apparent, and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statement being necessary to bring a case within the preamble of that statute, to which the enacting clause clearly referred in speaking of persons taking away a woman "so against her will." (t) But it was said not to have been necessary to state in the indictment, that the taking was with an intention to marry or defile the party, because the words of the statute did not require such an intention, nor did the want of it any way lessen the injury. (u) In an indictment, however, upon the 9 Geo. 4, c. 31, the allegation as to the intent will be necessary.

Where an indictment charged that the prisoner unlawfully took an unmarried girl under the age of sixteen years out of the possession and against the will of her father, and it appeared that the father was induced to part with the girl on the false representation of the prisoner that she was to go and live with a lady; and it was contended that the charge was made out, because the consent of the father having been obtained by the fraudulent representation of the prisoner, was no consent at all; Gurney, B., left the case to the jury, who convicted the prisoner, and the point would have been reserved for the consideration of the judges, but the prisoner was convicted and sentenced for another offence. (uu)

It appears to have been considered as clear, that a woman taken away and married might be a witness against the offender, if the force were continuing upon her till the marriage: and that she might herself

(r) Reg. v. Barratt,^a 9 C. & P. 387, Parke, B.

(s) See these sections and the cases upon them, *post*, tit. "Aggravated Assaults."

(t) 1 Hawk. P. C. c. 41, s. 4. 1 Hale, 660. 4 Bla. Com. 209. 12 Co. 21, 100.

(u) Fulwood's case, Cro. Car. 488, *ante*, 703. It is said, however, in 1 Hale, 660, that the words *ea intentione ad ipsam maritandum* are usually added in indictments on this statute, and that it was safest so to do.

(uu) Reg. v. Hopkins,^b 1 C. & Mars. 254.

^a Eng. Com. Law Repts. xxxviii. 167.

^b *Ib.*, xli. 143.

away and
married.

prove such continuing force; (v) for though the offender was her husband *de facto*, he was no husband *de jure*, in case the marriage was against her will. (w) It seems, however, to have been questioned, how far the evidence of the inveigled woman would be allowed in cases where the actual marriage was good, by her consent having been obtained after forcible abduction. (x) But other authorities appear to agree that it should be admitted, even in that case; esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage which was a principal ingredient of his crime, should (by a forced construction of law,) be made use of to stop the mouth of the most material witness against him. (y) And where the *marriage was against the will of the woman at the time, there does not seem to be any good ground upon which her competency could be objected to, though she might have given her subsequent assent. (z) It also appears to have been ruled upon debate, in a modern case, that a wife was a competent witness for, as well as against her husband, on the trial of an indictment for this offence, although she had cohabited with him, from the day of her marriage. (a)

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A wife is
competent
against her
husband in
all cases
affecting
her liberty
and person.

And it has been since held, that a wife is competent against her husband, in all cases affecting her liberty and person. An heiress was obtained possession of by means of a fraudulent letter, and carried by a circuitous route to Gretna Green, where, by means of false representations, she was prevailed upon to go through the ceremony of a Scotch marriage, and consent to become the wife of one of the persons who had carried her away. Upon an indictment for conspiring to commit a violation of the 3 Hen. 7, c. 2, and 4 & 5 Ph. & M. c. 9, (now repealed,) it was proposed to call her as a witness for the prosecution, and she was objected to on the ground that the marriage was valid, and consequently she was incompetent. (b) She was, however, examined, and afterwards a member of the Scotch bar, who stated that it was a valid marriage, according to the law of Scotland. Hullock, B., "A wife is competent against her husband, in all cases affecting her liberty and person. This was decided in *Lord Audley's case*, (c) having been before that time for a long while doubted; but it has since been established, by a long series of cases, that she may prosecute, exhibit articles of the peace, &c." "I am not convinced, by what has been said, that this marriage is valid in

(v) Fulwood's case, Cro. Car. 488. Brown's case, 1 Ventr. 243. Sweden's case, 5 St. Tri. 459.

(w) 1 Hale, 660, 661. 4 Bla. Com. 209.

(x) 1 Hale, 661, where the author observes, upon Brown's case, (*ante*, note (v)), that some of the reasons why the woman was sworn and gave evidence were, that there was no cohabitation, and that there was concurring evidence to prove the whole fact; but that if she had freely and without constraint, lived with the person who married her for any considerable time, her examination in evidence might have been more questionable.

(y) 4 Bla. Com. 209.

(z) 1 East, P. C. c. 11, s. 5, p. 454.

(a) Perry's case, Bristol, 1794. 1 Hawk. P. C. c. 41, s. 13, and in 1 East, P. C. c. 11, s. 5, p. 455, the learned author says, "I conceive it to be now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other;" And see *post*, Book on Evidence. In Perry's case no force was used, see *per* Hullock, B., Wakefield's case, 2 Lew. 280.

(b) It was contended that her incompetency might be shown either by examining her on the *voir dire*, or by other witnesses, and for the defendant it was proposed to show her incompetency by other witnesses. Hullock, B., ruled that as this was a point of practice, and he saw some inconvenience in not calling her, which would not exist if she were called, she should be called.

(c) 3 How. St. Tri. 413.

Scotland. If it is not, the witness is admissible, of course. If not, I still think her so." (cc)

The unlawful abduction of a girl under the age of sixteen from her parents, or person having the charge of her, is an offence of the degree of misdemeanor by the 9 Geo. 4, c. 31, s. 20, which enacts, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award." 9 Geo. 4, c. 31, s. 20. Unlawful abduction of a girl from her parents or guardians.

The construction upon some parts of the repealed statute, 4 & 5 Ph. & M. c. 8, may still be worthy of observation.

It was decided, that the taking away a *natural daughter* under sixteen years of age, from the care and custody of her putative father, *was an offence within the statute. (d) It was also holden that a mother retained her authority, notwithstanding her marriage to a second husband; and that the assent of the second husband was not material. (e) In the last case it was also ruled, that the fourth section of the statute extended only to the custody of the father, or to that of the mother where the father had not disposed of the custody of the child to others. (f) In a *711 Points upon the construction of the 4 & 5 Ph. & M. c. 8, now repealed.

(cc) Wakefield's case, 2 Lew. 279, Hullock, B.

(d) Rex v. Cornforth, 2 Str. 1162. 1 Hawk. P. C. c. 41, s. 14. Rex v. Sweeting, 1 East, P. C. c. 11, s. 6, p. 457. The 4 & 5 Ph. & M. c. 8, s. 2, enacted, "that it shall not be lawful to any person or persons to take or convey away, or cause to be taken or conveyed away, any maid, or woman child unmarried, being under the age of sixteen years, out of or from the possession, custody, or governance, and against the will of the father of such maid or woman child, or of such person or persons, to whom the father of such maid or woman child, by his last will and testament, or by any other act in his lifetime, hath or shall appoint assign, bequeath, give, or grant the order, keeping, education, or governance of such maid or woman child, except such taking and conveying away as shall be had, made, or done, by or for such person or persons, as without fraud or covin be, or then shall be, the master or mistress of such maid or woman child, or the guardian in socage, or guardian in chivalry, of or to such maid or woman child."

By sec. 3, "If any person or persons above the age of fourteen years, shall unlawfully take or convey, or cause to be taken or conveyed, any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, and against the will of the father or mother of such child, or out of or from the possession and against the will of such person or persons as then shall happen to have, by any lawful ways or means, the order, keeping, education, or governance of any such maiden or woman child; that then every such person and persons so offending, being thereof lawfully attained or convicted by the order and due course of the laws of this realm, (other than such of whom such person taken away shall hold any lands or tenements by knight's service) shall have and suffer imprisonment of his or their bodies, by the space of two whole years, without bail or mainprize, or else shall pay such fine for his or their said offence, as shall be assessed by the council of the Queen's highness, her heirs or successors, in the Star Chamber at Westminster."

By sec. 4, "If any person or persons shall so take away, or cause to be taken away, as is aforesaid, and deflower any such maid or woman child as is aforesaid, or shall against the will, or unknowing of or to the father of any such maid or woman child, if the father be in life, or against the will, or unknowing of the mother of any such maid or woman child (having the custody or governance of such child, if the father be dead) by secret letters, messages, or otherwise contract matrimony with any such maiden or woman child, except such contracts of matrimony as shall be made by the consent of such person or persons, as by the title of wardship shall then have, or be entitled to have, the marriage of such maid or woman child: that then every such person or persons so offending, being therefor lawfully convicted as is aforesaid, shall suffer imprisonment of his or their bodies, by the space of five years, without bail or mainprize, or else shall pay such fine for his or their said offence as shall be assessed by the said council in the said Star Chamber; the one moiety of all which forfeitures and fines shall be to the king and queen's majesties, her heirs and successors, the other moiety to the parties grieved."

(e) Ratcliffe's case, 3 Co. 39.

(f) Id. ibid.

case where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female friend, who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she attained the age of sixteen, and without the consent of her mother, who was her guardian; it was holden, that in order to bring the offence within the statute, it must appear that some artifice was used: that the elopement was secret: and that the marriage was to the disparagement of the family. (*g*) But in this case it has been remarked, that no stress appears to have been laid upon the circumstances of the mother having placed the child under the care of the friend, by whose procurement the marriage was effected; and that it deserves good consideration before it is decided that an offender, *acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, was not within the statute; for that then every schoolmistress might dispose, in the same manner, of the children committed to her care. (*h*) It has been said that there must be a continued refusal of the parent or guardian; and that if they once agree it is an assent within the statute, notwithstanding any subsequent dissent; (*i*) but this was not the point in judgment; and it has been observed that it wants further confirmation. (*j*)

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It seems that it was no legal excuse for this offence that the defendant, being related to the lady's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the lady secretly to elope and marry him, if it appeared that the father intended to marry her to another person, and so that the taking was against his consent. (*k*)

And the prohibition being general, the want of a corrupt motive was no answer to the criminal charge. (*l*) It seems that if an indictment or information upon this statute stated, that the defendant "*being* above the age of fourteen years, took one A., then being a virgin unmarried, possessed of movable goods, and seised of lands of great value, out of the custody of her mother," &c., the words *being* was a sufficient averment of the facts which follow. (*m*)

4 Geo. 4, c. 76, s. 21. Many of the provisions of the Marriage Act, 4 Geo. 4, c. 76, have been already stated. (*n*) The twenty-first section enacts, "That if any Persons solemnizing matrimony in any other place than a church, &c., or at an improper time, or without banns or license, or not being in holy banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special license from the Archbishop of Canterbury; or shall solemnize matrimony without due publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same; or if any person falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully

(*g*) Hicks v. Gore, 3 Mod. 84. 1 Hawk. P. C. c. 41, s. 11.

(*h*) 1 East, P. C. c. 11, s. 6, p. 457.

(*i*) Calthrop v. Axtel, 3 Mod. 169.

(*j*) 1 East, P. C. c. 11, s. 6, p. 457

(*k*) Rex v. Twisleton and others, 1 Lev. 257, S. C. 1 Sid. 387. 2 Keb. 32. 1 Hawk. P. C. c. 41, s. 10.

(*l*) 1 East, P. C. c. 11, s. 9, p. 459. And see the principles stated, *ante*, p. 46.

(*m*) Rex v. Moor, 2 Lev. 179, S. P. Rex v. Boyal, 2 Burr, 832. 1 Hawk. P. C. c. 41, s. 9.

(*n*) *Ante*, p. 192, *et seq.*

convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years, according to the laws in force for transportation of felons, provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed.”(o) orders, to be guilty of felony.

*By the marriage act, 6 & 7 Wm. 4, c. 75, s. 39, “every person who after the said first day of March (1837) shall knowingly and wilfully solemnize any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony, except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, (according to the usages of the Jews,) and every person who in any such registered building or office shall knowingly and wilfully solemnize any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony: and every person who shall knowingly and wilfully solemnize any marriage in England after the said first day of March, (except by license,) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, or if the marriage is by license, within seven days after such entry, or after three calendar months after such entry, shall be guilty of felony.”(p) *713 6 & 7 Wm. 4, c. 85. Persons unduly solemnizing marriage guilty of felony.

By sec. 40, “Every superintendent registrar who shall knowingly and wilfully issue any certificate for marriage after the expiration of three calendar months after the notice shall have been entered by him as aforesaid, or any certificate for marriage by license before the expiration of seven days after the entry of the notice, or any certificate for marriage without license before the expiration of twenty-one days after the entry of the notice, or any certificate, the issue of which shall have been forbidden as aforesaid, by any person authorized to forbid the issue of the registrar’s certificate, or who shall knowingly and wilfully register any marriage herein declared to be null and void, and every registrar who shall knowingly and wilfully issue any license for marriage Superintendent registrars unduly issuing certificates guilty of felony.

(o) This section seems incidentally repealed by the 6 & 7 Wm. 4, c. 85, except as to the offence of pretending to be in holy orders and solemnizing matrimony according to the rites of the Church of England. See Lonsd. Cr. L. 140. The 4 Geo. 4, c. 76, contains no provision for the punishment of principals in the second degree and accessories; see, therefore p. 713, note (p). The act does not extend to the marriages of any of the royal family (s. 30), nor to any marriages amongst Quakers or Jews, where both the parties, to any such marriage, shall be Quakers or Jews (s. 32). And it extends only to that part of the United Kingdom called England (s. 33). And see further as to the provisions of this act, *ante*, p. 192, *et seq.*

(p) This is a felony for which no punishment is provided, it is therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8, (*ante*, p. 38,) and sec. 9, and 1 Vict. c. 90, s. 5, (*ante*, p. 65, note (t)). The principals in the second degree are punishable in the same manner as the principals in the first degree, (*ante*, p. 65, note (t)), and as there is no provision for the punishment of accessories, they are punishable under the same clauses as the principals in the first degree. The result is that the principals in the first and second degree, and the accessories, are all punishable alike, with transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and the offender may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labor, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet; and if a male, may be once, twice or thrice whipped (if the court shall so think fit), in addition to such imprisonment. C. S. G.

after the expiration of three calendar months after the notice shall have been entered by the registrar as aforesaid, or who shall knowingly and wilfully solemnize in his office any marriage herein declared to be null and void, shall be guilty of felony.”(q)

By sec. 41, “Every prosecution under this act shall be commenced within the space of three years after the offence committed.”

Marriages void if unduly solemnized with the knowledge of both parties.
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By sec. 42, “If any person shall knowingly and wilfully intermarry after the said first day of March, under the provisions of this act, in any place other than the church, chapel, registered building, *or office, or other place specified in the notice and certificate aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, in case a license is necessary under this act, or in the absence of a registrar or superintendent registrar, where the presence of a registrar or superintendent registrar is necessary under this act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void; provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an act passed in the fourth year of his late majesty George the Fourth, intituled, ‘An act for amending the laws respecting the solemnization of marriages in England.’”

4 Geo. 4, c. 76.

In cases of fraudulent marriages, the guilty party to forfeit all property accruing from the marriage, as in 4 Geo. 4, c. 76.

By sec. 43, “If any valid marriage shall be had under the provisions of this act, by means of any wilfully false notice, certificate, or declaration made by either party to such marriage, as to any matter to which a notice, certificate, or declaration is herein required, it shall be lawful for his majesty’s attorney-general or solicitor-general to sue for a forfeiture of all the estate and interest in any property accruing to the offending party by such marriage; and the proceedings thereupon and consequences thereof shall be the same as are provided in the like case with regard to marriages solemnized by license before the passing of this act according to the rites of the Church of England.”

Superintendent registrars unduly issuing licenses, &c., guilty of felony.

By the 1 Vict. c. 22, sec. 4, “Every superintendent registrar, who shall knowingly and wilfully issue any license for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar, as provided by the said act for marriages,(r) or who shall knowingly and wilfully solemnize, or permit to be solemnized in his office any marriage in the last recited act declared to be null and void, shall be guilty of felony.”(s)

12 Geo. 3, c. 11. Marriages of the royal family not to be had without the consent of the king, &c.

The 12 Geo. 3, c. 11, confirms the prerogative of the crown to superintend and approve of the marriages of the royal family.(ss) The first section enacts, “That no descendant of the body of King George the Second, male or female, (other than the issue of princesses who may have married, or may hereafter marry, into foreign families,) shall be capable of contracting matrimony without the previous consent of his majesty, his heirs or successors, signified under the great seal and declared in council; (which consent, to preserve the memory thereof, is hereby directed to be set out in the license and register of marriage, and to be entered in the books of the privy council,) and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.” Provision is then made for a marriage, without the royal

(q) See note (p), *supra*, and see the other provisions of this act, *ante*, p. 197, *et seq.*

(r) 6 & 7 Wm. 4, c. 85.

(s) See note (p), *supra*, p. 743.

(ss) 1 East, P. C. c. 13, s. 7, p. 478.

consent, of any such descendant, being above twenty-five years of age, after notice to the privy council, and the expiration of twelve months after such notice; in cases the two houses of Parliament do not before that time expressly declare their disapprobation of the marriage. (t) The third section of the statute enacts, "That every person who shall knowingly or wilfully presume to solemnize, or to *assist, or to be present at the celebration of any marriage, with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above-mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties, ordained and provided by the statute of provision and *præmunire* made in the sixteenth year of the reign of Richard the Second."

Except under particular circumstances.

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Marrriages without such consent, where such consent is necessary.

It may be useful to notice some Irish statutes, relating to the subject of this chapter. Irish statutes.

The 9 Geo. 2, c. 11, enacts that persons of full age marrying, or contracting to marry, persons under the age of twenty-one without the consent of the father, guardian, or Lord Chancellor, shall forfeit 500*l.*, if the estate of the person married is of the value of 10,000*l.*; and shall forfeit 200*l.* if the estate of the person married is under 10,000*l.*: and shall suffer a year's imprisonment. (tt) 9 Geo. 2, c. 11.

The 10. Geo. 4, c. 34, which relates to Ireland only, by sec. 22, enacts that, "If any person shall by force take or carry away any woman or girl against her consent, with intent that such person or any other person shall marry or defile her, every such offender, and every accessory before the fact to such offence shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon, and every accessory after the fact to such offence, shall be guilty of felony; and being convicted thereof, shall be liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years." 10 Geo. 4, c. 34. Foreible abduction of women in Ireland.

By sec. 23, "When any unmarried girl under the age of eighteen shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall fraudulently allure, take or convey away, or cause to be allured, taken, or conveyed away, such girl out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, and shall contract matrimony with her, or shall defile her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to such imprisonment not exceeding the term of three years, as the court shall award, and shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such girl; and such property shall, upon such conviction, be vested, from the time of such marriage, in such trustees as the lord chancellor, lord keeper or commissioners for the custody of the great seal in Ireland shall appoint, for the sole and separate use of such girl, in the like manner as if such marriage had not taken place." Abduction of an unmarried girl under 18 years of age in Ireland.

By sec. 24, "If any person shall unlawfully take or cause to be taken any unmarried girl under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person" Abduction of an unmarried girl under

(t) Sec. 2.

(tt) 5 Ev. Col. Stat. 341, referring to 2 Gabbett, 913, 916. The forfeitures are to be recovered by popular action.

sixteen in Ireland. having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award."

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*CHAPTER THE EIGHTH.

OF KIDNAPPING, AND CHILD STEALING.

SECT. I.

Of Kidnapping.

Carrying away or secreting any person. **THE** stealing and carrying away, or secreting of any person, sometimes called *kidnapping*, is an offence, at common law, punishable by fine and imprisonment. (a)

Forcible abduction of persons, and sending them into other countries. The forcible abduction or stealing and carrying away of any person, by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is properly called kidnapping, and is an offence of a very aggravated description. Its punishment at common law is, however, no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes, in the place of many others which are there to be found. (b)

31 Car. 2, c. 2, s. 12. The sending persons prisoners, out of England, &c., made punishable by disability to hold office, and by the pains of *præmunire*, &c. The 31 Car. 2, c. 2, (the celebrated *Habeas Corpus* act) makes provision against any inhabitant of Great Britain being sent prisoner to foreign countries. The twelfth section enacts, that no subject of this realm, being an inhabitant or resident of England, Wales, or the town of Berwick upon Tweed, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, within or without the dominions of his majesty. Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party with treble costs, and damages not less than five hundred pounds. The section then proceeds thus:—"And the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison or transport, any person or persons, contrary to this act, or be any ways advising, aiding, or *assisting therein," being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust and profit within England, &c., or the dominions thereunto belonging, and shall incur the pains, &c., of the statute of *præmunire*, 16 R. 2, and shall be incapable of any pardon from the king of such forfeitures or disabilities. There are some exceptions in the act relating to the transportation of felons and the sixteenth section provides, that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. The seven-

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(a) 1 East, P. C. c. 9, s. 3, p. 429, 430. *Rex v. Grey*, T. Raym. 473. Comb. 10. The pillory was also part of the punishment before the 56 Geo. 3, c. 138. The 43 Eliz. c. 13, mentioned here in the last edition, was wholly repealed by the 7 & 8 Geo. 4, c. 27.

(b) 1 East, P. C. c. 9, s. 4, p. 430.

teenth section enacts, that prosecutions for offences against the act must be within two years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

The 11 & 12 Wm. 3, c. 7, s. 18, related to the forcing men on shore, or refusing to bring them again to their own country, by masters of merchant vessels. But it was repealed by the 9 Geo. 4, c. 31; and by sec. 30 of that statute, "if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies, or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment, or by information at the suit of his majesty's attorney-general, in the court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex; and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information."^(c)

9 Geo. 4, c. 31, s. 30. Punishment for the master of a merchant vessel forcing his seamen on shore, or refusing to bring them home.

Mode of trial, &c.

The 5 & 6 Wm. 4, c. 19, s. 40,^(cc) reciting, "that great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts who have thus been reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf," enacts, "that if any master of a ship belonging to any subject of the United Kingdom, shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind, on shore or at sea, in any place in or out of his majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer such punishment by fine or imprisonment, or both, as to the court before which he shall be convicted shall seem meet; and the said offence may be prosecuted by information at the suit of the attorney-general on behalf of his majesty, or by indictment or other *proceeding in any court having criminal jurisdiction in his majesty's dominions at home or abroad, where such master, or other person as aforesaid, shall happen to be, although the place where the offence may be therein averred to have been committed (which averment is hereby required to be substantially according to the fact,) shall appear to be out of the ordinary jurisdiction of such court; and such court is hereby authorized to issue a commission or commissions for the examination of any witnesses who may be absent, or out of the jurisdiction of the court; and at the trial the depositions taken under such commission or commissions, if such witnesses shall be then absent, shall be received in evidence."

5 & 6 Wm. 4, c. 19, s. 40. Forcing on shore, or leaving behind any person belonging to the crew.

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(c) The Irish Act, 10 Geo. 4, c. 34, s. 39, is precisely similar, except that for the words "at Westminster in the county of Middlesex," it has "in the county of the city of Dublin."

(cc) This is an act of the United Kingdom.

By sec. 52. "Every person having the charge or command of any ship belonging to any subject of the United Kingdom shall, within the meaning and for the purposes of this act, be deemed and taken to be the master of such ship; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall in like manner be deemed and taken to be a seaman within the meaning and for the purposes of this act; and the term 'ship' shall be taken and understood to comprehend every description of vessel navigated on the sea.

SECTION II.

Of Child Stealing.

9 Geo. 4, c. 31. Child stealing. THE 9 Geo. 4, c. 31, s. 24, enacts, "that if any person shall maliciously, either by force or by fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender and every person counselling, aiding and abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment: provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."(d)

Not to extend to fathers taking their illegitimate children.

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*CHAPTER THE NINTH.

OF ATTEMPTS TO MURDER; OR MAYHEM, OR MAIMING; AND OF DOING OR ATTEMPTING SOME GREAT BODILY HARM.(A)

Offences at common law.

ATTEMPTS to commit murder appear to have been considered as felonies in the earlier ages of our law; but that doctrine did not long prevail; and such attempts became, and still remain at common law, punishable only as high misdemeanors.(a) Where an indictment is preferred

(d) The Irish Act, 10 Geo. 4, c. 34, s. 25, is word for word the same as this section.

(a) Staund. 17. 1 East, P. C. c. 8, s. 5, p. 411. Rex v. Bacon, 1 Lev. 146. 1 Sid. 230,

(A) MASSACHUSETTS.—In the case of the *Commonwealth v. Newell and al.*, 7 Mass. Rep. 245, it was decided that mayhem is no felony either at common law or by the statute of 1804, c. 123. The defendants were indicted for feloniously and burglariously breaking and entering the dwelling-house of one Dixon, with intent feloniously to assault him, and cut off his right ear, and thereby to maim and disfigure him; and the indictment further alleged

for an assault with an intent to murder, it seems that the attempt as laid must be fully established, in order to support the indictment; thus, where a defendant was so charged in the first count of the indictment, Lord Kenyon, C. J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count. (b)

where the defendant having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced to fine and imprisonment, the finding surety for his good behaviour for life, and acknowledging his offence at the bar of the Court of Chancery. And see two precedents of indictments at common law, for misdemeanours in attempting to murder by poison, 3 Chit. Crim. L. 796.

(b) *Rex v. Mitton*, Adjourned Sittings at Westminster, Oct. 1778. 1 East, P. C. c. 8, s. 5, p. 411. And see Stark. Evid. tit. "Assaults," and the cases there cited.

the fact, to wit, that the defendants did unlawfully and feloniously cut off the right ear of the said Dixon, with intention him to maim and disfigure, &c. To this indictment there was a demurrer, and the general objection to the indictment was, that the facts therein found did not amount to a felony. The following positions were laid down by the court: "When our ancestors emigrated to this country, they brought with them but a very small part of the common law defining crimes and their punishment. Mayhem was never deemed by them a felony, but only an aggravated trespass at common law, for which the offender was answerable to the party injured in an action of trespass, and to the government upon an indictment for a misdemeanor. No statute provision, during the existence of the colonial and provincial charters, recognizes mayhem as a distinct offence from trespass, or as constituting a specific felony." "Since the revolution the legislative provisions consider and punish this offence as a misdemeanor. If, therefore, the statute of 1804, c. 123, has declared the maliciously cutting off an ear, with intent to maim and disfigure, a mayhem, we cannot thence infer that it is a felony. The statute, however, has not made that declaration, and only enacts, that the person guilty of cutting off an ear, &c., shall be punished by solitary imprisonment and confinement to hard labour. The word mayhem, is used in the statute in the popular sense of mutilating, and not as synonymous with the technical word mayhem. The cutting off an ear is not called a maim, but is created an offence, when done with intent to maim and disfigure, and punished as a misdemeanor. The fifth section of the statute, which provides that a person guilty of mayhem shall be punished as a 'felonious assaulter,' is descriptive of the character, disposition, and temper of the offender, and not of the legal nature of the offence; therefore the offence described in this indictment is not a felony, either by our common law, or by any statute."

The statute for the punishment of maims (and other offences therein specified), was passed March 15, 1805. Metcalf's edition, 2 vol. p. 121. Statute 1804, c. 123.

CONNECTICUT.—By the sixth section of "an act for the punishment of divers capital and other felonies," it is enacted, "that if any person, on purpose and with malice aforethought, and by lying in wait, shall cut or disable the tongue; or put out an eye or eyes, so that the person is thereby made blind; or shall cut off all or any of the privy members of any person, or shall be aiding or assisting therein, such offender or offenders shall be put to death."

PENNSYLVANIA.—The first clause of the act of Assembly of April 22, 1784, s. 6, is borrowed from the words of the British statute of 22 and 23 Car. II., c. 1, s. 7. It pursues the same language, except that the act of Pennsylvania particularly enumerates the cutting off "the ear," and mildly varies the mode of punishment. Under the statute of Charles II., commonly called the Coventry Act, it has been adjudged not necessary that either the malice aforethought, or lying in wait, should be expressly proved to be on purpose to maim or disfigure. Leach, 193, (*Tickner's case*). And also that he who intends to do this kind of mischief to another, and, by deliberately watching an opportunity, carries that intention into execution, may be said to lie in wait on purpose. Ibid. 194, (*Mills's case*). Under the first clause of the act of Assembly, no intent to maim or disfigure in a particular manner is necessary. But on the second clause, a specific intent to pull out, or put out the eye must be shown. The malice and lying in wait may be a matter of inference from the circumstances. This clause was evidently introduced to prevent the infamous practice of gouging. *Respublica v. Langeake & al.*, 1 Yeates, 415. It has also been decided that an indictment for mayhem under the first clause of section 6th of the act of April 22, 1794, (3 Smith's Laws, 188,) which does not contain the words "lying in wait," is bad. So also if the indictment omits the words "voluntary," under the second clause of that action. *Respublica v. Keiker*, 3 Yeates, 282.

On an indictment for feloniously assaulting and beating with intent to disfigure, it has been held that stronger circumstances of malice aforethought must be proved, than on an indictment for murder; and that express proof of the intent to disfigure must be made. *Pennsylvania v. M' Birnie*, Addis. 30.

UNITED STATES.—For the punishment of mayhem, see Ing. Digest, 156. {1 U. S. Laws, 85, 86, (Story's ed.) 3 ib. 2006.}

Mayhem. *Mayhem*, or the maiming of persons, was probably at one time an offence at common law of the degree of felony; as the judgment was *membrum pro membro*.(c) But this judgment afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated.(d) The offence, therefore, appears, to have been considered, in later times, as in the nature of an aggravated trespass: and the only judgment which now remains for it at common law is fine and imprisonment.(e) It is, however, a misdemeanor of the highest kind, and spoken of by Lord Coke as the greatest offence under felony.(f)

720 A bodily hurt whereby a man is rendered less able, in fighting, to defend himself or to annoy his adversary, is properly a maim at common law.(g) Therefore, the cutting off, or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims; but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him.(h)† In order to found an indictment of mayhem the act must be done maliciously, though it matters not how sudden the occasion.(i)

A person maiming himself may be punished.

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be

(c) 3 Inst. 118. 1 Hawk. P. C. c. 55, s. 3. 4 Bla. Com. 206.

(d) 4 Bla. Com. 206.

(e) *Id. ibid.* 1 Hawk. P. C. c. 55, s. 3. 1 East, P. C. c. 7, s. 1, p. 393. But it is observed, that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony. 4 Bla. Com. 206.

(f) Co. Lit. 127, a.

(g) Staund. P. C. 3. Co. Lit. 126. 3 Inst. 62, 118. 1 Hawk. P. C. c. 55, s. 1. 4 Bla. Com. 205. 1 East, P. C. c. 7, s. 1, p. 393.

(h) 1 Hawk. P. C. c. 55, s. 2. 4 Bla. Com. 205, 206. 1 East, P. C. c. 7, s. 1, p. 393. Bac. Ab. *Mayhem*, (A).

(i) 1 East, P. C. c. 7, s. 1, p. 393.

{NEW YORK.—See Revised Statutes, Vol. ii. 664, 665, 666.}

[*Commonwealth v. Barlow*, 4 Mass. Rep. 439.]

A person indicted for an assault and battery with intent to murder, may be found guilty of a simple assault and battery. *The State v. Kennedy*, 7 Blackford, 233. *Gardenkin v. The State*, 6 Texas, 348. When the defendant, on his trial for an assault with intent to murder, proposed to ask a witness "if he did not know that Dill (the party assaulted) had threatened to drive the defendant from the place or take his life," it was held to be competent evidence to be submitted to the jury for their judgment either as a justification or to rebut the presumption of malice. *Hovell v. The State*, 5 George, 48.

To sustain a verdict of guilty or an indictment for an assault with intent to commit murder, the evidence must show that if death had ensued it would have been murder. *McCoy v. The State*, 3 Eng. 451.

To support an indictment for an assault with intent to murder, positive proof that the defendant actually intended to kill at the time of the assault need not be proved; but the jury may infer such intent when the evidence shows that had death ensued the crime would have been murder. *Cole v. The State*, 5 Eng. 318. *Sharp v. The State*, 19 Ohio, 369.]

† [The offence of mayhem may be committed without an entire mutilation of the member; but the biting off a small portion of the ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention was directed to it, is not mayhem under the statute. *The State v. Abram*, 10 Alabama, 928.

The putting out an eye is mayhem. *Chick v. The State*, Humphreys, 164.

On an indictment for an assault with intent to commit mayhem, the defendant may be convicted of the assault and acquitted of the intent charged. *M'Bride v. The State*, 2 Eng. 374.]

indicted; and on conviction, fined and imprisoned. (k) For as the life and members of every subject are under the safeguard and protection of the king; so they are said to be *in manu regis*, to the end that they may serve the king and country when occasion shall require. (l)

It should seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject. (m) For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals. (n) It does not appear to have been anywhere supposed, that there can be accessories after the fact in mayhem. (o)

Attempts to murder, maiming, and the doing or attempting great bodily harm, were made highly penal by the enactments of several statutes now repealed. The 9 Geo. 1, c. 22, commonly called the *Black Act*, and which made the maliciously shooting at any person a capital offence, and the 26 Geo. 2, c. 19, s. 1, relating to the beating or wounding persons shipwrecked with intent to kill them, &c., or putting out false lights to bring a ship into danger, were repealed by the 7 & 8 Geo. 4, c. 27. The 5 Hen. 4, c. 5, relating to cutting tongues and putting out eyes; the 22 & 23 Car. 2, c. 1, called the *Coventry Act*, by which malicious maiming was made a capital offence; the 9 Anne, c. 16, which made it capital to attempt to kill, assault, wound, &c., a privy counsellor, and also the 43 Geo. 3, c. 58, commonly called *Lord Ellenborough's Act*, were repealed by the 9 Geo. 4, c. 31, which is also repealed, as far as relates to the subjects contained in this chapter, by the 1 Vict. c. 85, (p) which came into operation on the 1st of October, 1837.

*Sec. 2 enacts, "That whosoever (q) shall administer or cause to be taken by any person any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder (r) shall be guilty of felony, and being convicted thereof shall suffer death."

(k) 1 Hawk. P. C. c. 55, s. 4, and Co. Lit. 127, a, where Lord Coke says, "In my circuit anno 1. Jacobi regis, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined and ransomed."

(l) Co. Lit. 127, a. Bract. lib. 1, fol. 6. Pasch. 19, ed. 1, cor. Reg. Rot. 36, North.

(m) Lord Hale states that there are no accessories before in mayhem, but that they are in the same degree as principals. 1 Hale, 613. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. 2 Hawk. P. C. c. 29, s. 5. In 1 East, P. C. c. 7, s. 7, p. 401, there is a learned argument to show that the latter opinion proceeded on a mistake.

(n) *Ante*, p. 34.

(o) 1 Hawk. P. C. c. 55, s. 13, and 2 Hawk. P. C. c. 29, s. 5. 1 East, P. C. c. 7, s. 7, p. 401.

(p) The 1 Vict. c. 85, s. 1, repeals so much of the 9 Geo. 4, c. 31, and of the 10 Geo. 4, c. 34, Irish Act, "as relates to any person who shall unlawfully and maliciously administer or attempt to administer to any person, or who shall cause to be taken by any person, any poison or other destructive thing, or who shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or who shall counsel, aid, or abet therein; and so much of the same acts or either of them as relates to any person who shall unlawfully and maliciously shoot at any person, or who shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or who shall unlawfully and maliciously stab, cut, or wound any person, or who shall unlawfully and maliciously throw or cast at or upon or otherwise apply to any person any corrosive or noxious liquid or substance, with any of the intents in the same acts mentioned, or who shall counsel, aid or abet therein; and so much of the same acts as relates to the punishment of accessories after the fact to such of the felonies punishable under those acts as are hereinbefore referred to."

(q) "Unlawfully and maliciously" in the 9 Geo. 4, c. 31, s. 11, are here omitted.

(r) "To murder such person" in the 9 Geo. 4, c. 31, s. 11.

Punishment for offences with intent to commit murder, though no bodily injury effected.

By sec. 3, "Whosoever(s) shall attempt to administer to any person any poison or other destructive thing, or shall(s) shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall(s) attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder(t) shall, although no bodily injury shall be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Punishment for cutting and maiming with intent to disfigure

By sec. 4, "Whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person, or shall(u) stab, cut, or wound any person, with intent in any of the cases aforesaid to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person,(v) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."(w)

Punishment for sending explosive substances, or throwing destructive matter with intent to do bodily harm.

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By sec. 5, "Whoever shall unlawfully and maliciously send or deliver to or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person any corrosive *fluid or other destructive matter, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burnt, maimed, disfigured, or disabled, or receive some other grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."(x)

Punishment of accessories.

By sec. 7, "In the case of every felony punishable under this act every principal in the second degree, and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

(s) "Unlawfully and maliciously" were in the 9 Geo. 4, c. 31, s. 12.

(t) "To murder such person" in the 9 Geo. 4, c. 31, s. 11.

(u) "Unlawfully and maliciously" in 9 Geo. 4, c. 31, s. 12, are here omitted.

(v) "Of the party so offending, or of any of his accomplices for any offence for which he or they may respectively be liable by law to be apprehended or detained," in the 9 Geo. 4, c. 31, s. 12.

(w) "Provided always that in case it shall appear on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony," was in the 9 Geo. 4, c. 31, s. 12.

(x) This section was probably introduced in consequence of *Rex v. Mountford*, R. & M. C. C. R. 441, *post*, p. 726.

By sec. 8, "Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

Offences punishable by imprisonment.

By sec. 9, "On the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years."

Court empowered to imprison for three years in certain cases.

By sec. 10, "Where any felony punishable under this act shall be committed within the jurisdiction of the Admiralty of England or of Ireland, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction." (y)

Offences within jurisdiction of Admiralty.

The following cases which were decided upon the former statutes, may be here mentioned. It was said, that upon an indictment on the 9 Geo. 1, c. 22, it was necessary to show that the instrument was loaded with gunpowder, and also with a bullet, slug, or other deadly substance; but that it was sufficient if such facts appeared from the general circumstances of the case. (z) In a case where it did not appear whether the wounds which the prosecutor had received in his neck and chin were given by the wadding, or by a *ball from a pistol, except that the prisoner, who was endeavouring to effect an escape at the time, exclaimed with an oath, "Let me pass, or I will blow your brains out," and immediately fired, and the prosecutor said, that he apprehended the wounds must have been given by a ball, from the sensation he felt at the time, and because it took him in one place; and another witness said, that the report was very strong, for so small a pistol: it was contended that there was not sufficient evidence that the pistol was loaded with a leaden bullet. But the court thought that there was sufficient evidence of that fact to go to the jury: and the jury found the prisoner guilty. (a) It was necessary also, under the same act, that the shooting should be with an instrument levelled at the party. So that where the prosecutor, who was landlord of the premises occupied by the prisoner, had come in the night to bring provisions for a man whom he had put into possession of the prisoner's goods under a distress for rent, and had got over the pales of the garden for that purpose, but, upon being met by the prisoner and severely beaten, was making his retreat, in the dark, over another part of the pales, more than five yards distance from the place at which he

The instrument must have been loaded with a bullet, &c., and levelled at the party.

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The gun must have been levelled at the party.

(y) The act does not extend to Scotland, but it does to Ireland. By the Irish act, 10 Geo. 4, c. 34, s. 8, "all persons conspiring, confederating, or agreeing to murder any person, shall be guilty of felony, and being convicted thereof shall suffer death as felons." By sec. 9, "every person who shall solicit, encourage, persuade, or endeavour to persuade, or who shall propose to any person, to murder any other person, shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

(z) 1 Hawk. P. C. c. 55. *Of Shooting, &c.*, s. 9, citing *Rex v. Elliott*, Old Bayley, 1787.

(a) *Weston's case*, 1 Leach, 247.

entered, when the prisoner levelled a gun at the place where the prosecutor got into the garden, and immediately fired it off; the gun being thus fired in a different direction from that in which the prosecutor was going, the court held that it was not a shooting at the prosecutor within the meaning of the statute. (b)

Shooting was within the 43 Geo. 3, c. 58, though the gun was only loaded with powder and paper, if fired so near as to be likely to kill.

Shooting was within the 43 Geo. 3, though the instrument was loaded with powder and paper only, if it was fired so near the person, and in such a direction, as to be likely to kill, &c. In a case where the prisoner was indicted for shooting at the prosecutor with a loaded pistol, and Le Blanc, J., had told the jury, that if it was loaded with powder and paper only, but fired so near, and in such a direction, that it would probably kill or do other grievous bodily harm, and with intent that it should do so, the case was within the act; and the jury had convicted, saying, they were satisfied that the pistol was loaded with some other destructive material besides powder and paper, there was a petition to the crown, on the ground that the pistol was loaded with powder and paper only: and the opinion of the judges being asked, whether, if that were so, the direction was right, they held that it was. (c)

The arms must be so loaded as to be capable of doing the mischief intended.

But to constitute the offence of attempting to discharge loaded fire arms, they must be so loaded as to be capable of doing the mischief intended. So that if part of the loading has fallen out, though without the prisoner's knowledge, and that which remains is inadequate to effect the mischief, the case is not within the act. And it seems, that a case is not within the act, if there is not such a loading at the time as is likely to produce a discharge, though it is possible it may produce it. The prisoner was indicted for attempting to discharge a loaded blunderbuss at J. S. The evidence was, that it had been loaded and primed a fortnight before, and that the prisoner levelled it at J. S., and drew the trigger; that the flint struck fire in the pan, but that nothing caught fire there. The blunderbuss was afterwards discharged without any fresh priming; but the powder might in the interim have been shaken through the touch-hole from the barrel into the pan. The prisoner was convicted: but the jury found that the blunderbuss was not primed at the time. Upon a case reserved, a great majority of the judges considered this equivalent to a finding that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn; and if not, that it was not loaded within the meaning of the act; and a pardon was recommended. (d) In a case prior to this decision, it appeared that the prisoner had a loaded gun; but that, in his struggle with the prosecutor, it was probable all the powder had fallen out: he afterwards levelled it at the prosecutor, and drew the trigger. Abbott, J., told the jury, that if they thought the powder was all out before the prisoner drew the trigger, the gun could not be considered as loaded at the time; and on that ground, though with reluctance, the prisoner was acquitted. (e)

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If every count alleges a pistol to be loaded with ball there must be

If all the counts of an indictment under the 9 Geo. 4, c. 31, s. 11, for shooting at a person with intent to murder, alleged that the pistol was loaded with powder and a leaden bullet, it must have been proved that the pistol was loaded with a bullet. Upon an indictment against a man as principal in the first degree, for shooting at a woman with intent to

(b) Empson's case, 1 Leach, 224. 1 Hawk. P. C. c. 55. *Of Shooting, &c.*, s. 10. See Reg. v. Lovell, 2 Moo. & Rob. 39, *post*, p. 741.

(c) Rex v. Kitchen, Mich. T. 1805, MSS. Bayley, J., and Russ. & Ry. 95

(d) Rex v. Carr, Hil. T. 1819, MSS. Bayley, J., and Russ. & Ry. 377.

(e) Anon. 1817, MSS. Bayley, J.

murder her, and against her as principal in the second degree, in which all the counts alleged that the pistol was loaded with powder and a leaden bullet, it appeared that a person being awakened by the report of fire arms in the room where the prisoners were, went into the room, and discovered both prisoners lying on the floor bleeding : on their being asked what was the matter, and who fired, the man said, "I fired one pistol at her, and the other at myself." He afterwards said, "he could feel the ball somewhere in his cheek." The woman had said she wished the man to shoot her. A surgeon proved that both prisoners were bleeding from the ear, the bones of which were shattered ; but no bullet could be found internally or externally, either in the man or the woman, and he thought the wound was either from a ball or the wadding of a pistol, and that wadding, if rammed down tight, might have produced the effect without any ball ; search was made in the room, but no ball found. Bolland B., having consulted Park, J. A. J., and Parke, J., who was present, said to the jury, "The offence is charged in every count of the indictment, as having been committed with a pistol, loaded with a leaden bullet. If the question had arisen with respect to the pistol fired by the man at himself, I should have felt it my duty to leave it to you, on his declaration that he thought he felt the ball in his cheek ; but he might have intended to kill himself, being weary of life, though he might not have intended to kill a woman, notwithstanding her request. I have consulted with my learned brothers, and it is our opinion, that the indictment is not sufficiently proved to justify you in a verdict of guilty." (f)

evidence that it was so loaded.

So where a similar indictment on the same statute, in different counts, alleged a gun to have been loaded with shot and various destructive materials, and it appeared that a watcher of *game, being out in the night, saw the prisoner crouching under a wall, and said he knew him, when he instantly raised a gun to his shoulder, and levelled it at him ; he stooped to avoid it, and the gun went off, and the charge, whatever it was, struck a hairy cap he had on his head, and singed the hair. There was evidence of previous ill-will, and the prisoner after his apprehension had said, "I did it, and I rued it the instant I had pulled the trigger." A small bag of shot was found in the prisoner's pocket after he was apprehended. It was objected that there was no evidence to show that the gun was loaded with shot or any of the destructive materials charged in the indictment, and Patteson, J., was strongly of opinion that the objection ought to prevail ; and after consulting Alderson, J., he directed an acquittal. (g)

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If the indictment alleges that a gun was loaded with shot and other destructive materials, there must be evidence that it was so loaded.

Where an indictment for treason alleges that the prisoner discharged a pistol loaded with powder and a bullet, the jury must be satisfied that the pistol was a loaded pistol, and had something in it beyond powder and wadding ; but it seems that it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet. An indictment for treason stated that the prisoner "discharged a certain pistol loaded with gunpowder and a certain bullet"

Where an indictment alleges that the pistol was loaded with powder and bullet, the jury must be satisfied

(f) *Rex v. Hughes*, 5 C. & P. 126.^a The two prisoners had apparently agreed to commit suicide together.

(g) *Whitley's case*, 1 Lew. 123. In *Blake v. Barnard*,^b 9 C. & P. 626, where a count in trespass for an assault, stated that the defendant presented a pistol "loaded with gunpowder, ball, and shot" at the plaintiff, and there was no evidence that the pistol which the defendant presented at the plaintiff was loaded ; Lord Abinger, C. B., said, "It is stated in the declaration that the pistol was loaded with gunpowder, ball, and shot, and it is for the plaintiff to make that out, and he has not done so."

^a Eng. Com. Law Reps. xxiv. 241.

^b *Ib.* xxxviii. 259.

that it was loaded with something beyond powder and wadding, but it seems not necessary to prove that it was loaded with a bullet, a ball will suffice.

at the queen; it appeared that the prisoner had discharged two pistols at the queen, and two witnesses proved that at the time the pistols were discharged, they heard something whiz by them; the prisoner had bought caps and balls before, and balls and bullet-moulds were found in his box; and he had said to a person, "if your head had come in contact with the ball, you would have found there was a ball in the pistol." Lord Denman, C. J., to the jury, "The questions for your consideration are, whether the prisoner did fire the pistols or either of them, at her majesty, and whether those pistols or either of them, were or was loaded with ball at the time when they were so fired." "One witness says, 'The prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention, and I heard a distinct whizzing or buzzing before my eyes, between my face and the carriage.' And another witness says, 'It seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what, I could not say.' This is the only direct evidence; I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it and couple it with the other facts of the case." "You will consider whether the prisoner discharged a loaded pistol." A juryman, "Loaded with a bullet?" Lord Denman, C. J., "Or a ball." Alderson, B., "Not with powder and wadding only." (h)

A pistol with its touch-hole plugged up, although loaded with powder and balls, was not "loaded arms" within the 9 Geo. 4, c. 31.

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A pistol loaded with powder and balls, but its touch-hole so plugged up that it could not possibly be fired, was not "loaded arms," within the 9 Geo. 4, c. 31, ss. 11 & 22. Upon an indictment charging the prisoner with attempting to discharge a loaded *pistol, by drawing the trigger with intent to murder, it appeared that the prisoner pointed the pistol, which was loaded to within half an inch of its muzzle with gunpowder, paper and two balls, at the head of the prosecutor, within four inches of his ear, and pulled the trigger; the lock went down, and the prosecutor saw a single spark from it; no mischief was done; there was no priming found in the pan, but it might have dropped out in the struggle to take the pistol from the prisoner. The prisoner's defence was, that he always kept a piece of paper in the pan, and another piece of paper twisted tightly, and run into the touch-hole, so as to prevent its being fired, and the prisoner's son was called to prove that it had been in that state the day before. Patteson, J., (in summing up), "If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, I think that the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms, within the meaning of this act." (i)

Mountford's case.

A tin box filled with gunpowder and peas, was not a loaded arm within the meaning of the 9 Geo. 4, c. 31, s. 11. The prisoner sent to the prosecutor a package of the shape and size of a cigar-box, containing a tin box with three pounds of powder and some peas in it. The box had a lid to it, to put on and pull off. The object of the prisoner was, that the prosecutor should set fire to the powder in the act of opening the box, by exploding two fulminating matches which were fixed to the top and bottom of the box. Upon a case reserved upon the question whether the thing in question came within the description of loaded arms, the

(h) Reg. v. Oxford,^a 9 C. & P. 525.

(i) Rex v. Harris,^b 5 C. & P. 159.

^a Eng. Com. Law Reps. xxxviii. 208.

^b Ib. xxiv. 254.

judges were unanimously of opinion that the means used were not loaded arms within the act. (j)

It was a sufficient "shooting" within the 9 Geo. 4, c. 31, to discharge the barrel of a gun, when separated from the stock, by means of striking the percussion cap with a knife. Upon an indictment for shooting with intent to murder, it appeared that the prisoner, being caught poaching, ran away and was pursued by the prosecutor, who caught him, and took the stock and locks of a gun from one of his pockets: the prisoner then took the barrels from another pocket, and struck the percussion-cap with something, which the prosecutor supposed to be a knife, and thereby fired one of the barrels and shot the prosecutor: it was objected that the act only applied to shooting with a complete fire-arm; that the statute first provided for the actual shooting, and secondly against all attempts to discharge loaded arms, and as the latter clause was limited to attempts with loaded arms, which could only apply to *complete* arms, so must the former clause; but it was held that the case was within the statute. (k)

*Upon an indictment under the 1 Vict. c. 85, for attempting to discharge loaded fire-arms at a person, there must be some act shown to have been done by the prisoner to prove that he did attempt to discharge the fire-arms, and merely presenting them is not sufficient. Upon an indictment for attempting to discharge a blunderbuss with intent to murder, &c., it appeared that the prisoner went to the house of the prosecutor, and asked him for some title deeds which he held as a security. The prosecutor told him he could not let him have them; the prisoner said, "Then you are a dead man;" unfolded a great coat, which he had on his arm, and took out a blunderbuss. A person who was near him seized him by the two arms, and he was secured; the muzzle of the blunderbuss was towards the side of the room where the prosecutor was, but was not pointed at him; the prisoner's intention, whatever it was, was prevented by the person laying hold of him; the blunderbuss was primed, and very heavily loaded, but it had no flint in it; the flint was found beneath the lining of the coat from which the prisoner took the blunderbuss. Arabin, Serjeant, after consulting Patterson, J., told the jury that they were both of opinion that, to sustain the indictment, there must be something more than the mere presenting of the blunderbuss, and that some act must be shown to have been done by the prisoner, to satisfy the jury that he did in fact attempt to discharge the blunderbuss. (l)

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Some act must be done to prove an attempt to discharge fire-arms.

Merely presenting them is not sufficient.

The object of the act was to punish *proximate* attempts; that is, The object

(j) *Rex v. Mountford*, R. & M. C. C. R. 441. 7 C. & P. 242.* A further question, which was not decided by the judges, was whether as the explosion was intended to have been, and must have been effected (if at all) by the agency of another, it was an attempt to discharge loaded arms at the prosecutor within the meaning of the act; upon this Alderson, B., said, "The principle is laid down by Holroyd, J., in *Hott v. Wilks*,^b 3 B. & A. 315. If one person makes use of another who is a mere instrument to do an act, the thing done is the act not of him who is merely the instrument, but of the person who uses him as an instrument." Probably section 5 of the new act was introduced in consequence of this decision; but it should seem that such a case is not provided for by it, because that section only applies where some bodily harm is actually done. C. S. G.

(k) *Rex v. Coates*,^c 6 C. & P. 394, and MSS. C. S. G. Patteson, J. His lordship consulted several other judges who agreed with him in opinion, otherwise the case would have been reserved.

(l) *Reg. v. Lewis*,^d 9 C. & P. 523.†

† [*Reg. v. James*, 1 C. & K. 530. Eng. C. L. xlvii. 530.]

* Eng. Com. Law Reps. xxxii. 502. ^b *Ib.* v. 300. ^c *Ib.* xxv. 455. ^d *Ib.* xxxviii. 207.

of the act was to punish those attempts which immediately lead to the discharge of loaded arms.

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those attempts which immediately lead to the discharge of loaded arms. The words, "in any other manner" mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Upon an indictment on the 1 Vict. c. 85, ss. 3 & 4, for attempting to discharge a pistol loaded with powder and ball, with intent to murder, &c., some counts of which charged the attempt to have been made by drawing the trigger, others by putting the finger and thumb upon the trigger, and others simply charged that the prisoner did attempt to discharge the pistol; a witness said, "The prisoner took out a small pistol, and said, 'I will settle you,' or 'I will do you;' the prisoner either half or full cocked the pistol, and pointed the muzzle at my brother, and against his trowsers. I rushed at the pistol, and put my right hand over the muzzle of the pistol, and my other hand over the cock; I found the prisoner's finger pulling; his finger was on the trigger; I plainly felt the finger of his right hand on the trigger, and my hand did not allow the trigger to go back; the people interfered and they were separated." Parke, B., "It appears to me that the charge of felony cannot be supported, as it is not proved that the prisoner drew the trigger. The words 'in any other manner,' in the statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Suppose, for instance, you had a matchlock, and put a match to it, and the gun did not go off, that would be a case within the act of parliament; but here there is no proof that the prisoner drew the trigger, though he put his finger to it: and he cannot, therefore, be convicted on those counts which charge him with so doing, or which charge him with a felonious attempt to discharge the pistol, for it must be an attempt **ejusdem generis*; the consequence is, he cannot be convicted of a felony." It was then urged for the prosecution that the clause in this act said, that if a party should attempt, by drawing the trigger, or in any other manner, to discharge a loaded arm, he should be guilty of the offence. If, therefore, a man put his hand on a trigger, in order to fire the pistol, and could not do it, because the pistol happened to be at half-cock, that would be within the meaning of the statute. Parke, B., "Here was a trigger to be drawn, and it is not drawn. It seems to me that the object of this act was to punish proximate attempts, that is, those attempts which immediately lead to the discharge of loaded arms; therefore, if a person drew the trigger and the gun was loaded, in that case the offence would be complete, though the gun did not go off, and though it did not happen to strike the percussion cap; and the act also provides for the case of fire-arms which do not go off with the ordinary lock. Suppose, therefore, a man was to come with a matchlock, and attempt to discharge it, by putting a fusee or a brimstone match to the touch-hole, that would be an attempt to discharge it within the meaning of this act; and so since the newly invented fire-arms, if a man with a hammer were to strike the cap, that would be a felony under this act of parliament; and, as I thought a point of this kind would be taken, I have availed myself of an opportunity which I had of consulting my brother Williams, who agrees with me in opinion." (m)

As to the words *stab* or *cut*.

The words "*stab* or *cut*" in the statute relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly a wound with a pointed instrument, and cutting being a

(m) Reg. v. St. George, 9 C. & P. 483.

^a Eng. Com. Law Repts. xxxviii. 193.

wounding with an instrument having a sharp edge. And if the indictment be for cutting, evidence of a stab will not support the charge; for as the statute uses the words in the alternate, "stab or cut," so as to distinguish between them, the distinction must be attended to in the indictment. (*n*) And though a striking over the face with the sharp claw or part of a hammer has been holden to be a sufficient cutting within the act, yet it would have been otherwise, if the striking had been with the blunt end. (*o*) A blow with a square iron bar, which inflicted a contused or lacerated wound, has been holden not to be a cutting within the act. (*p*) And where a similar wound was given on the head, by a blow with the metal scabbard of the sword of a member of a corps of yeoman cavalry, (the sword being in the scabbard at the time,) it was ruled not to be a cutting within this statute. (*q*) And it was ruled, that a blow with the handle of a windlass, was not a cutting within the act, though it made an incision. (*r*) But if a cutting is inflicted, the case is within the statute, though the instrument be not intended for cutting, nor ordinarily used to cut, but generally used to force open drawers, doors, &c.; and though the intention was not to cut, but to inflict some other mischief. The prisoner was indicted for cutting and stabbing. It appeared that he was seized for a robbery; and, in order to escape, struck the prosecutor on the *head with an iron crow, which cut out part of his skull. The instrument was sharp at one end, so as probably to cut. A case was reserved, because this was an instrument to force open doors, drawers, &c., and not to cut; and because that the prisoner meant to break or lacerate the head, not to cut it; but the conviction was held right. (*s*)

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Cutting a child's private parts, so as to enlarge them for the time, may be considered as doing her grievous bodily harm; and as done with that intent, though the hymen is not injured, the incision is not deep, and the wound eventually is not dangerous. The prisoner cut a female child, ten years old, in her private parts, probable to enlarge them to admit his entrance, but he was interrupted and fled; the wound was small, but bled a good deal; and when a surgeon saw it, four days afterwards, he found it near an inch in length, not deep nor dangerous, because below the hymen; but if it had entered the hymen it would have been dangerous. Graham, B., left it to the jury to say, whether this was not a grievous bodily injury; and if so, then, though there might have been an ulterior intention to commit a rape, yet if there was an intent to do grievous bodily harm, the case was within the act: and that the intention might be inferred from the cutting. The jury found the prisoner guilty, and the judges held the conviction right. (*t*)

In order to obviate the difficulties which arose under the 43 Geo. 3, Wounding. c. 58, upon the construction of the words "cut or stab," the 9 Geo. 4, c. 31, introduced the word "wound," which is also contained in the 1 Vict., c. 85.

In order to constitute a wound, the continuity of the skin must be

(*n*) *Rex v. M'Dermot*, East, T. 1818, MSS. Bayley, J., and Russ. & Ry. 356.

(*o*) *Atkinson's case*, York Spr. Ass. East, T. 1806. 4 Bla. Com. 208, (ed. 1809,) note (1). MSS. Bayley, J., and Russ. & Ry. 104.

(*p*) *Adams's case*, cor. Lawrence, J., Old Bailey, Jan. Sess. 1808.

(*q*) *Rex v. Whitfield*, cor. Bayley, J., Salop. Sum. Ass. 1822, MSS.

(*r*) *Anon. cor. Dallas, C. J., and Burton, J., at Chester*, 5 Evans's Col. Stat., Part V., cl. iv., p. 334, note (2).

(*s*) *Rex v. Hayward*, Mich. T. 1805, MSS. Bayley, J., and Russ. & Ry. 78.

(*t*) *Rex v. Cox*, East. T. 1818, MSS. Bayley, J., and Russ. & Ry. 262.

In order to constitute a wound the continuity of the skin must be broken.

broken, and it is not sufficient that bones are broken, the skin not being broken. Upon an indictment for wounding, under the 9 Geo. 4, c. 31, s. 12, it appeared that the prisoner had struck the prosecutor with an iron bar, and an iron hammer, and that the collar bone had been broken, and the end of the bone much injured by violence, and upon a case reserved all the judges, except Bayley, B., and Park, J. A. J., thought that there was no wound within the act. (u)

A great judge has said, that "the definition of a wound, in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, it is a wound." (v) Upon an indictment for cutting and wounding, with intent to murder, it appeared that the prisoner threw a hammer at the prosecutor, and hit him over his right eye and nose, and made a wound on the eye, and by the side of the nose; his head was very bloody; the hammer was a blacksmith's finishing hammer; one end of it round, and the surface flat, the other end sharp, to draw out with. Upon a case reserved, the judges were unanimously of opinion that the injury stated in the case amounted to a wound within the statute. (w)

The external surface of the body must be divided.

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There must be a division of the external surface of the body to make a wound. Therefore a scratch is not a wound. Upon an indictment for wounding, it appeared that the prisoner attacked the prosecutor with a butcher's knife, and drawing him backwards, attempted to cut his throat, an injury (which the prosecutor described as a slight scratch,) was inflicted on the throat. Parke, B., "Nothing which can properly be called a wound has been inflicted in this case. A scratch is not a wound within the statute: there must, at least, be a division of the external surface of the body. (x)

A separation of the cuticle or upper skin is not sufficient.

There must be a separation of the whole skin; a separation of the cuticle, or upper skin, only is not sufficient. Upon an indictment for wounding, a medical man stated that there was a slight abrasion of the skin, not exactly a wound, but an abrasion of the cuticle; it did not penetrate further than that; the cuticle is the upper skin: blood would issue, but in a different manner, if the whole skin was cut. Coleridge, J., (Bosanquet, J., and Coltman, J., being present,) told the jury, "It is essential for you to be quite clear that a wound was inflicted. I am inclined to understand, and my learned brothers are of the same opinion, that if it is necessary to constitute a wound that the skin should be broken, it must be the whole skin; and it is not sufficient to show a separation of the cuticle only. You will, therefore, have to say on the first three counts, whether there was a wounding in the sense in which I have stated, viz.: was there a wound—a separation of the whole skin?" (y)

If the skin be broken internally, but not externally, it is a wound.

If the skin be broken internally, and not externally, it is a wound. Upon an indictment, on the 1 Vict. c. 85, for wounding, a surgeon stated, "That the lower jaw on the left side was broken in two places; the skin was broken internally, but not externally; there was not a great deal of blood; one fracture was near the chin, and the other near the ear." The prisoner had struck the prosecutor with a hammer on the left side of the face, but there was no wound on the outside of the

(u) *Rex v. Wood*,^a 1 R. & M. C. C. R. 278. 4 C. & P. 381.

(v) *Lord Lyndhurst, C. B., in Moriarty v. Brooks*,^b 6 C. & P. 684.

(w) *Rex v. Withers*,^c 1 R. & M. C. C. R. 294. S. C. 4 C. & P. 446.

(x) *Rex v. Beckett*, 1 Moo. & R. 526.

(y) *Reg. v. M Loughlin*,^d 8 C. & P. 635.

^a Eng. Com. Law Reps. xix. 430. ^b *Ib.* xxv. 597. ^c *Ib.* xix. 406. ^d *Ib.* xxxiv. 561.

face. It was objected that this was not a wounding. Park, J. A. J., "When I first read the deposition I thought there might be some doubt. In consequence of this, I consulted with my lord chief justice, and considered the question very much in my own mind, and we are of opinion that it is a wounding within the meaning of the act." Lord Denman, C. J., "If it is the immediate effect of the injury, we think we cannot distinguish this from the cases which have been already decided." Park, J. A. J., in summing up, "A question was very properly put to us, as to whether we thought there was a wound within the meaning of the statute. We were of opinion that there was a wound; and upon consideration I am more strongly of that opinion than I was at the outset. There must be a wounding; but if there be a wound, (that is if the skin is broken, whether there be an effusion of blood or not,) it is within the statute, whether the wound is internal or external." (z)

It was evidently the intention of the legislature, according to the words of the statute, that the wounding should be inflicted with some instrument, and not by the hands or teeth. (a) Where, therefore, a prisoner had bit off the end of a finger, it was held, on a case *reserved, that this was not a wounding within the statute. (b) So it has been held that biting off the nose is not a wounding. (c) So it has been ruled, on an indictment under the 1 Vict. c. 85, s. 4, that biting off the prepuce of a child three years of age is not a wounding, because the word wound is used concurrently with "cut and stab," and inasmuch as a stab or cut must be made with an instrument, the legislature intended by the word "wound," an injury (not being a stab or cut) which was made by an instrument also. (d) So where on an indictment under the 9 Geo. 4, c. 31, s. 12, for maliciously wounding, it was proved that the prisoner had thrown a quantity of concentrated sulphuric acid, commonly called oil of vitriol, into the face of the prosecutor; and the jury found, upon the evidence of the surgeons that the effect of such act was a wound upon the face of the prosecutor; it was held, on a case reserved, that there being no instrument used, nor any immediate wound produced, the conviction was wrong. (e)

But any kind of instrument whatever is sufficient, as a bludgeon, (f) a blacksmith's finishing hammer, (g) an iron hammer, (h) a stone bottle, (i) a hedge stake, or half a rail, (j) a gun, (k) a stick or club, (l) and even a shoe whether off or on the foot. (m)

(z) Reg. v. Smith, ^a 8 C. & P. 173, Lord Denman, C. J., and Park, J. A. J.

(a) *Per* Patteson, J., Rex v. Harris, ^b 7 C. & P. 446.

(b) Rex v. Stevens, R. & M. C. C. R. 409, decided on the 9 Geo. 4, c. 31, s. 12.

(c) Rex v. Harris, ^c 7 C. & P. 456, Patteson, J., decided on the 9 Geo. 4, c. 31, s. 12.

(d) *Jenning's case*, 2 Lew. 130, Alderson, B.

(e) Rex v. Murrow, R. & M. C. C. R. 456. See Rex v. Owens, R. & M. C. C. R. 205, as to maiming a mare with nitric acid. (f) Rex v. Payne, ^d 4 C. & P. 558. Patteson, J.

(g) Rex v. Withers, R. & M. C. C. R. 294, *supra*, note (w), p. 729.

(h) Reg. v. Smith, ^e 8 C. & P. 173, *supra*, note (z), p. 730.

(i) Reg. v. M'Loughlin, ^f 8 C. & P. 635, *supra*, note (y), p. 730.

(j) Rex v. Briggs, R. & M. C. C. R. 318.

(k) Rex v. Sheard, ^g 7 C. & P. 846, *infra*, note (n).

(l) Rex v. Lancaster, 2 Stark. Ev. 692, note.

(m) Rex v. Shadbolt, ^h 5 C. & P. 504, Lord Denman, C. J., and Vaughan, B. Rex v. Briggs, R. & M. C. C. R. 318. And *per* Lord Tenterden, C. J., a wound from a shoe in the hand would be within the act; and a blow from a shoe on the foot would be likely to inflict a more deadly wound than a blow from a shoe in the hand. Rex v. Briggs, 3 Burn., J., D. & W. 542. It does not seem settled whether the teeth of a dog, which has been set to bite

^a Eng. Com. Law Repts. xxxiv. 341.

^b Ib. xxxii. 578.

^c Ib.

^d Ib. xix. 526.

^e Ib. xxxiv. 341.

^f Ib. 561.

^g Ib. xxxii. 766.

^h Ib. xxiv. 430.

Clothing intervening.

And it makes no difference that there is some part of the clothing intervening between the body and the instrument with which the injury is inflicted. Upon an indictment for wounding, it appeared that the prisoner struck the prosecutor with an air gun twice on the left side of a thick hat that he had on his head; the prosecutor had a contused wound on the left side of his head, which was made by the hard rim of the prosecutor's hat, by the violence with which the hat was struck by the prisoner, and was not occasioned by the gun alone, as the prosecutor said the gun had never come directly in contact with the head: and upon a case reserved upon a doubt whether, as the wound must in fact have been caused by the hat, and not by the gun barrel, the prisoner ought to have been convicted, the conviction was held right.⁽ⁿ⁾

A wound received by striking a knife in warding off an attack.
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The wound must be inflicted by the prisoner; if, therefore, the prosecutor, in attempting to defend himself from an attack made upon him with a knife, strike his hand against the knife, and thereby receive a wound, it is not within the act. Upon an indictment *on the 9 Geo. 4, c. 31, s. 11, for wounding, it appeared that the prisoner attacked the prosecutor with a butcher's knife; the prosecutor succeeded in warding off all hurt except a slight scratch on his throat, by lifting his two hands up to his throat, but in doing this his hands struck against the knife and were cut. Parke, B., "A scratch is not a wound within the statute; there must at least be a division of the external surface of the body; the cuts on the hands are indeed wounds; but it appears that they were inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack; those cuts, therefore, cannot be considered wounds inflicted by the prisoner with intent to murder or maim the prosecutor."⁽ⁿ⁾

Formerly it was a defence to an indictment for cutting, &c., that if death had ensued it would not have been murder.

The 9 Geo. 4, c. 31, s. 12, contained a proviso, that if it appeared that the acts of shooting, attempting to discharge loaded arms, or stabbing, cutting or wounding, with intent to maim, &c., were committed under such circumstances, that if death had ensued, the same would not have been murder, the prisoner should be acquitted,^(o) and a similar proviso was contained in the 43 Geo. 3, c. 58. The introduction of this proviso caused many persons, who deserved very severe punishment, to escape, and in order to remedy that mischief the proviso is entirely omitted in the new act.

Under the 1 Vict. it is no defence.

Under the 1 Vict. c. 85, therefore, it is no defence that the offence would not have been murder if death had ensued. Upon a case reserved upon the question, whether since the 1 Vict. c. 85, it is a defence to an indictment for wounding with intent to maim, &c., that if death had ensued the offence would not have been murder but manslaughter; all the judges thought that it is no defence, except Lord Denman, C. J., and Littledale, J., who doubted.^(p) So where on an indictment for wounding, it appeared that the prisoner had wounded the prosecutor under

a person, can be considered as instruments within these statutes. In *Elmsly's case*, 2 Lew. 126, Alderson, B., thought that the bite of a dog would be within the 9 Geo. 4, c. 31; it did not, however, become necessary to decide the point, otherwise the case would have been reserved. In *Rex v. Hughes*, 2 C. & P. 420, Park, J. A. J., held that severe wounds inflicted on a sheep by a dog which the prisoner had set at it, was not a wounding within the 4 Geo. 4, c. 54, s. 2.

⁽ⁿ⁾ *Rex v. Sheard*, 7 C. & P. 846.

⁽ⁿ⁾ *Rex v. Beckett*, 1 M. & Rob. 526.

^(o) See the proviso, *ante*, p. 721, note ^(w).

^(p) Anonymous, 2 Moo. C. C. R. 40.

such circumstances, that if he had died it would only have been manslaughter. Alderson, B., held the case within the act, saying, "if this had been a case under the former act of Parliament, the prisoner would have been entitled to his acquittal, because if death had ensued there would only have been a bad case of manslaughter; but under the law as it now stands, it is only necessary that the offence should have been committed maliciously, and with some of the intents laid in the indictment: however, by the term 'maliciously,' is not meant with malice aforethought; that would constitute a still more grave offence, as that would show an intent to murder." (g)

*It has been held, that upon an indictment for attempting to drown, it must be shown clearly that the acts were done with intent to drown, and an indictment on the 9 Geo. 4, c. 31, s. 11, alleged that the prisoner assaulted G. T. and J. C., and with a boat-hook made holes in a boat in which they were, with intent to drown them. G. T. and J. C., two little boys, were attempting to land out of a boat they had punted across the Ouse, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. If he had wished it, the boat was so near he might easily have got into the boat and thrown them into the water; instead of which he confined his attack to the boat itself, as if to prevent their landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion, that an assault in fact upon the two boys ought to have been proved, seeing that the prisoner had the opportunity of attacking them personally, which he did not do, and the means by which he attacked the boat indicating an intention rather to prevent their landing than to do them an injury. (r)

A mere delivery into the hand did not constitute an administering of poison within the 43 Geo. 3, c. 58; and it seems that taking it into the mouth was not sufficient, but that some part of the poison must have been actually swallowed. The prisoner was indicted under the 43 Geo. 3, c. 58, for administering white arsenic and sulphate of copper, with intent to murder. It appeared that the prisoner pulled a white bread cake out of his pocket, and pinched off a bit from the outside of it, and gave it the prosecutrix to eat, and she took it and put it in her mouth, but spit it out again, and did not swallow any part of it; it was proved that the cake contained arsenic and sulphate of copper: it was objected

(g) Reg. v. Griffiths, 8 C. & P. 248. It does not appear that in either of these cases any authorities on any previous statutes were referred to: but in Reg. v. Nicholls, 9 C. & P. 267, where Gurney, B., expressed a similar opinion; the cases on the Black Act, the 9 Geo. 1, c. 22, were relied upon as in point. It was held that the words of that act, "If any person or persons shall wilfully and maliciously shoot, &c., made malice an essential ingredient in the offence; and, therefore, that no act of shooting amounted, under that act to a capital offence, unless the crime would have been murder if death had ensued. Gasteinaux's case, 1 Leach, 417, where the court said the word "maliciously" constituted the very essence of the crime. 1 Hawk. P. C. c. 55, s. 7, where the learned author says, "For otherwise the absurdity might follow, that the offender might be convicted of a capital crime, although the party is living, and of a single felony, viz., manslaughter, though the party were killed." 1 East, P. C. c. 8, s. 6, p. 412. 4 Bla. Com. 207, note (2). It is worthy of observation, that the words, "unlawfully and maliciously" are omitted in ss. 2 & 3, where the intent is to commit murder. They are in the first clause, in s. 4, but are omitted before "stab, &c." They are found in s. 5, but "maliciously" is omitted in s. 6. See the sections and notes upon them, ante, p. 721. C. S. G.

(r) Sinclair's case, 2 Lew. 49.

a Eng. Com. Law Reps. xxxiv. 374.

b Ib. xxxviii. 114.

that it ought to be proved that the poison was swallowed by, or taken into the stomach of the person intended to be poisoned; and upon a case reserved, the judges seemed to think swallowing not essential; but they were of opinion, that a mere delivery to the woman did not constitute an administering; and that upon a statute so highly penal they ought not to go beyond what was meant by the word administering, and a pardon was therefore recommended. (s)

Administering or causing to be taken.

*734

If a person mix poison with coffee, and tell another that the coffee is for her, and she take it in consequence, it seems that this is an administering; and, at all events, it is causing the poison to be taken. Upon an indictment under the 9 Geo. 4, c. 31, s. 11, some counts of which charged that the prisoner "administered," and others, that she "caused to be taken," poison, with intent to murder, &c., it appeared that a coffee-pot, which was proved to contain *arsenic, mixed with coffee, was standing by the side of the grate; the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and in about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it, was not sufficient to constitute an administering; and *Rex v. Cadman* (t) was relied on, as showing that the delivery of the poison to the hand of the party is the main ingredient of the offence: that there was no count which did not require an agency on the part of the prisoner. A "causing to be taken" included an act, and so did an attempt to administer." Park, J., A. J., "There has been much argument whether, in this case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Messrs. Ryan and Moody's Reports, goes that way; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential; but my recollection is, that the judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering, it is not necessary that there should be a delivery by the hand. With respect to the question, whether the prisoner 'did cause the poison to be taken' by Mrs. S., it has been proved, that she said that she put the coffee-pot down for Mrs. S., and that upon this Mrs. S. drank some of the coffee: and if you believe the evidence of Mrs. S., I am of opinion that this is a 'causing to be taken,' within the act of Parliament." (u)

As to the intention with which the act was done.

Mr. Starkie, in his excellent work on evidence, (v) makes the following observations: "upon an indictment for shooting or cutting another, with intent to murder or maim him, or to do him some grievous bodily

(s) *Rex v. Cadman*, R. & M. C. C. R. 114. But in Carr. Supp. 237, where the same case is reported, it is said, that the judges held that it was no administering, unless the poison was taken into the stomach; and in *Rex v. Harley*,^a 4 C. & P. 369, Park, J. A. J., said, that his note of this case was, "That the judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth;" and this, certainly, is confirmed by the fact, that a pardon was recommended, which would be correct according to this view of the decision; but incorrect, if it was sufficient to prove that the poison was taken into the mouth, as that was proved to have been done. C. S. G.

(t) *Ante*, p. 733, note (s).

(u) *Rex v. Harley*,^b 4 C. & P. 369

(v) 2 Vol. 691, *et seq.*

^a Eng. Com. Law Repts xix. 423.

^b *Ib.* xix. 423.

harm whether the act was done by the prisoner, with the particular intention wherewith it is charged to have been done, is, as in other cases of specific malice and intention, a question for the jury. Their inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and, above all, on the nature and extent of the violence and injurious means he has employed to effect his object. In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does. If, with a deadly weapon, he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results, that his mind and intention was to destroy. It is not however essential to the drawing such an inference, that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple *and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal, provided the criminal intention can be clearly inferred from other circumstances."(*w*)

*735

Where upon an indictment for cutting and wounding, it appeared that the prosecutor received a blow and was severely wounded, and immediately robbed of his money, and there was evidence that there were two persons present, but no evidence to show which of them struck the prosecutor; Coleridge, J., directed the jury, that if they believed that the prisoner inflicted the wound on the prosecutor with intent to rob him, but had, at the same time, an intent to do him some grievous bodily harm in order to effectuate such his intention of robbing, then, in point of law, the prisoner ought to be convicted on this indictment, although his ultimate object might have been to rob the prosecutor. And that even if the prisoner did not with his own hand inflict the wound, he might be convicted upon this indictment, if the jury were satisfied that the prisoner and the other person were engaged in a common purpose of robbing the prosecutor, and that the other person's was the hand that inflicted the wound. (*ww*)

The cutting must be expressly laid with the intent stated in the act; as it has been holden that an indictment for cutting with intent to do some grievous bodily harm, without saying, "in so doing," or "by means thereof," was not sufficient. (*x*) Thus, if the intent be to prevent the prisoner's lawful apprehension, and be so found by the jury, an indictment stating a different intent will not be supported. A sexton and others surprised two body stealers, and attempted to take them; one of them cut the sexton's assistant with a sabre; and was indicted on the

The intent must be properly laid.

(*w*) *Rex v. Case*, York Sum. Ass. 1820. 2 Stark. Ev. 692, note (*h*), *cor.* Park., J., who said, that it had been so held by the judges. It is obvious, that a case may fall both within the letter and the spirit of the statute, although from accident or from ignorance, the prisoner had not succeeded in reaching a vital part. Note by Mr. Starkie.

(*ww*) *Reg. v. Bowen*, * 1 C. & Mars. 149.

(*x*) *Anon. cor. Dallas, C. J.*, and *Burton, J.*, at *Chester*, 5 *Evans' Col. Stat.*, Pt. v., Cl. iv., p. 334, note (3).

Intent to
disable.

34 Geo. 3, c. 53, for cutting, with the intent to murder, disable, or do some other grievous bodily harm. The jury found, that he cut with the intent to resist and prevent their apprehension, and for no other purpose. Upon a case reserved, the judges held that the case would not have been within the act unless the apprehension would have been lawful; and that if the cutting was to resist or prevent a lawful apprehension, it should have been so stated, this being one of the intents mentioned in the act; and that, as the jury had negatived the intent stated, the conviction could not be supported.^(y) If the intent laid be to disable, it will be understood as of a permanent disability, and not merely one which may be temporary, as a disability until an offender likely to be apprehended may escape. The prisoner had broken into a shop in the night; and, in order to prevent a watchman apprehending him there, gave the watchman two severe cuts with the sharp part of a crow bar. The indictment was for cutting, with intent to murder, maim, and disable: and there was no count charging the prisoner with the intent of preventing his own lawful apprehension: and the jury found that he cut to disable till he could effect his own escape. Upon a case reserved, ten judges (Graham, B., and Garrow, B., being absent,) held the conviction wrong; for by the finding of the jury, the prisoner intended to produce only a temporary disability, till he could escape, not a permanent disability.^(z)

Where on an indictment for cutting and wounding, it appeared that the prisoner struck the prosecutor on the head with the edge of an axe and inflicted a cut; Parke, B., told the jury there was no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor; it would have been otherwise, if it had been aimed at his arm to prevent him from being able to use it.^(zz)

If the main
intent be to
prevent ap-
prehension,
but in order
to effect
that there
was an in-
tent to do
bodily
harm, that
is suffi-
cient.

*736

But although the intent laid, be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was to prevent his lawful apprehension, yet he may be convicted, if, in order to effect the latter intent, he also intended to do grievous bodily harm. The prisoner was engaged in poaching, and had fired his gun at one of the three keepers, who, being on the watch for poachers, suddenly sprung up, and were rushing forward to seize him. The jury were of opinion, that the prisoner's motive was to prevent his lawful apprehension: but that, in order to effect that purpose, he had also the intention of doing *the keeper some grievous bodily harm. Upon objection taken, the learned judge was of opinion, that if both intents existed, the question, which was the principal, and which was the subordinate intention, was immaterial; and upon the point being submitted to the consideration of the judges, it was holden, that if both the intents existed, it was immaterial which was the principal, and which the subordinate one; and that the conviction was therefore proper.^(a)

If a person
wound in
order to
enable him
to rob, he

So if a person wounded for the purpose of accomplishing a robbery, he might be convicted under the 9 Geo. 4, c. 31, s. 12, if the jury found that he intended to disable or do grievous bodily harm. Upon an indictment containing counts for wounding with intent to prevent his law-

^(y) *Rex v. Duffin and Marshall*, East, T. 1818, MSS. Bayley, J., and Russ. & Ry. 365.

^(z) *Rex v. Boyce*, Trin. T. 1824, MS. Bayley, J., and Ry. & Mood. Cr. Cas. 29.

^(zz) *Reg. v. Sullivan*,^a 1 C. & Mars, 209.

^(a) *Rex v. Gillow*, East, T. 1825. Ry. & Mood. C. C. 85. *Rex v. Davis*,^b 1 C. & P. 306, S. P. Garrow, B.

^a Eng. Com. Law Repts. xli. 116.

^b *Ib.* xi. 401.

ful apprehension, with intent to disable, and with intent to do grievous bodily harm, it appeared that the prisoner threw the prosecutor down, tried to take his watch by pulling at the chain, the prosecutor put down his hand to prevent him, the prisoner kicked him in the mouth several times with violence; he bled very much from the mouth and nose, and the skin of his face was cut near the lips. Lord Denman, C. J., (Vaughan, B., being present,) left it to the jury to say, whether the prisoner's intent was either to disable the prosecutor, or to do him some grievous bodily harm by the violence which he used. Nothing was more likely to accomplish the robbery which he had in view than the disabling which such violence would produce. The intent in the first count could hardly be said to be proved, as no endeavour to apprehend was made at the time. (b)

Although upon an indictment for cutting, stabbing, or wounding, with intent to maim, disfigure, disable, or do some grievous bodily harm, it is now no defence that the wound was inflicted under such circumstances, that if death had ensued it would not have amounted to the crime of murder, yet as it is usual to insert a count charging an intent to murder, under which the punishment is still capital, it may often become very material to decide whether the case would have been murder if death had ensued; in this view the following cases are still important. (c)

Where the offence is charged to have been committed with intent to obstruct, &c., a lawful apprehension, it must be shown that the offender had some notification of the purpose for which he was apprehended before he inflicted the wound. Upon an indictment on the 43 Geo. 3, c. 58, it appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one Spilsbury; and that the wheat being soon after found concealed in an adjoining field, Spilsbury, Webb, and others, watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued; and Webb seized the prisoner, without desiring him to surrender, or stating for what reason *he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. Upon these facts, Lawrence, J., held that, as Webb did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute; for if death had ensued, it would only have been manslaughter. But he said, that if a proper notification had been made before the cutting, the case would have assumed a different complexion. The prisoner was accordingly acquitted. (d)

But where, in a case somewhat similar, the goods had been concealed by the thief in an outhouse, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and

(b) *Rex v. Shadbolt*, 5 C. & P. 504.

(c) See also the cases collected in the chapter on "*Resisting Officers and Others.*" *Ante*, p. 592.

(d) *Rex v. Ricketts*, Worcester Sum. Ass. 1811, *cor.* Lawrence, J., 3 Camp. 68. The prisoner was afterwards found guilty of larceny in stealing the wheat. It seems to me that this decision may well be doubted, as the facts must have told the prisoner for what he was apprehended. See the cases on this subject, *ante*, p. 623, 624. C. S. G.

another came at night and removed the goods from the place where they were deposited, and upon an attempt to apprehend them, the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice, "Stop thief!" and on being overtaken, the prisoner drew a knife, with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed.(e)

So where upon a count of an indictment which charged the prisoner with maliciously wounding the prosecutor with intent to resist his apprehension for an offence for which he was liable to be apprehended, *viz.*, for wilfully and maliciously committing damage upon certain plants and roots growing in a certain garden, it appeared that the prosecutor, a constable of the Metropolitan Police Force, while on duty, found the prisoner in the night-time in an enclosed garden, stooping down close to the ground, on which the prisoner ran away, and the prosecutor ran after him, and caught him getting over a hedge, and he was then in the garden; he caught him by the collar of the jacket, on which the prisoner drew a knife, and cut the prosecutor on the forehead between the eyes, and, in a scuffle which ensued, in several other places. The prisoner when found was cutting or plucking some pickatees and carnations. The jury found that the prisoner had wilfully and maliciously plucked and cut flowers from plants or roots in the garden, with intent to steal the flowers, and that he was found by the prosecutor, who belonged to the police force, committing that offence, but that the prosecutor did not inform the prisoner by word of mouth, that he did belong to the police force; and the prisoner had the knife in his hand at the time, with which he had been cutting the flowers; and found him guilty on the above count. Littledale, J., reserved the question upon this count whether, considering the finding of the jury, the offence committed by the prisoner fell within the 42nd or 43rd sections of the 7 & 8 Geo. 4, c. 29, or the 22nd, 23rd, or 24th sections of the 7 & 8 Geo. 4, c. 30. Supposing the offence fell within either of these statutes, there did not appear to the learned judge much doubt as to the authority of the prosecutor to apprehend him under the 63rd section of the one act, or the 28th of the other, as the case might *be, so as to prove this count; and upon consideration the judges held the conviction right upon this count.(f)

*738

Evidence of two distinct acts of malicious shooting admitted as part of the transaction and to show that the act of shooting charged

In a case where a point was made, whether the shooting with which the prisoner was charged was by accident or design, it was held, that proof might be given that the prisoner at another time shot intentionally at the same person. Pearce, the prosecutor, who was a game-keeper, proved that he met the prisoner sporting upon his manor, and remonstrated with him for so doing; and proposed that the prisoner should go with him to the steward, saying, that if the steward would pardon him he should have no objection. The prisoner assented to go with him, and they walked together until they came near to the game-keeper's horse, which was about sixty yards off, when Pearce went on before him

(e) *Rex v. Robinson, cor. Wood, B., Lancaster.* 2 Stark. Ev. 693, note (k).

(f) *Rex v. Fraser, R. & M. C. C. R.* 419. It should be observed, that the count was framed on the 7 & 8 Geo. 4, c. 30, s. 21, for maliciously committing damage upon the plants, but the jury found that the prisoner cut the flowers with intent to steal them, which is an offence within the 7 & 8 Geo. 4, c. 29, s. 42. It may be doubted, therefore, whether the evidence supported the count. Another question arose on another count as to the construction of the 10 Geo. 4, c. 44, s. 7, the Metropolitan Police Act, but upon that no opinion was given. C. S. G.

towards the horse; and when he was at a short distance from the prisoner, the prisoner fired at his back, but said nothing. Pearce attempted to turn round, and saw the prisoner running, and attempted to run after him; but his back seemed to be broken, and he could not follow. He then turned back to the horse; and, after getting upon it, was making his way home to a place about two miles off, and had got about half a mile on the road, at a place where there was a hedge on each side, when he saw the prisoner again in the lowest part of one of the hedges; and the moment he looked round at him the prisoner again fired his gun, the discharge from which beat out one of Pearce's eyes and several of his teeth, but did not cause him to fall from his horse. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested, that the prosecutor ought not to give evidence of two distinct felonies; but the learned judge thought it unavoidable in this case, as it seemed to him to be one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned judge thought such evidence proper. The counsel for the prisoner, by his cross-examination of Pearce, had endeavoured to show, that the gun might have gone off the first time by accident; and, although the learned judge was satisfied that this was not the case, he thought that the second firing was evidence to show that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt if any existed, in the minds of the jury. The prisoner having been convicted, the matter was submitted to the consideration of the judges, who were of opinion, that the evidence was properly received, and the prisoner rightly convicted.^(g)

was not
accidental.

In a case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible.^(h)

It was also necessary, in proceeding upon the same clause of the 43 *Geo. 3, c. 58, to show that the person apprehended acted under proper authority. For, in a case where it appeared that the prisoner having previously cut a person on the cheek, several others who were not sent when the transaction took place, went to his house to apprehend him without any warrant, and that upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded; Le Blanc, J., was of opinion, that the prosecution could not be sustained. He said, that to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence is committed, or he must be armed with a warrant; and that this branch of the statute was intended to protect officers, and others armed with authority, in the apprehension of persons guilty of robberies or other felonies.⁽ⁱ⁾

In a case, where the intent charged in three of the counts was, an intent to prevent a lawful apprehension; and, in the fourth, an intent to do the prosecutor some grievous bodily harm; and, from the nature of

Dyson's
case.
*739

Where the
wounding
is charged
with intent
to obstruct
lawful ap-
prehen-
sion, neces-
sary to
show the
person ap-
prehending
acted under
proper
authority.

Intent to
do grievous
bodily
harm,

(g) *Rex v. Voke*, Mich. T. 1823, Russ. & Ry. 531.

(h) 2 Stark. Ev. 692. No authority is cited for this position, but see *Rex v. Mogg* 4 C. & P. 364, where on an indictment for administering poison to horses with intent to kill them, Park, J. A. J., held other acts of administering admissible to prove the intent. C. S. G.

(i) *Rex v. Dyson*, cor. Le Blanc, J., York Spr. Ass. 1816, 1 Starkie, N. P. R. 246. See the cases as to the authority to apprehend, collected in the chapter on *Resisting Officers and others*, ante, p. 592, et seq.

though not
accom-
plished.

General
malice is
sufficient.

A person
detected in
the night in
an attempt
to commit
a felony,
may be
detained
without a
warrant
until he can
be carried
before a
magistrate.

the facts, the case turned upon the last count only, a point was made on behalf of the prisoner, that no grievous bodily harm was done, as the cut was upon the wrist, and did not appear to have been dangerous, as it got well in about a week; and the prisoner's counsel relied upon a doubt expressed by Bayley, J., (j) whether the injury done was a grievous bodily harm contemplated by the act, the wound not being in a vital part. Another objection was also taken upon the facts: from which it appeared, that the prisoner having been apprehended by one Headley in an attempt to break into his stable in the night, and taken into Headley's house, threatened Headley with vengeance, and endeavoured to carry his threat into effect with a knife which had been laid before him, in order that he might take some refreshment; and, in so doing, cut the prosecutor, Cambridge, one of Headley's servants, who, with Headley, was trying to take away the knife; the act happening in that struggle, and perhaps not designedly, as against Cambridge. Upon these facts, it was objected that there was no evidence of malice against the prosecutor Cambridge, but against Headley only: and that upon the 43 Geo. 3, c. 58, general malice was not sufficient, as in the case of murder, and that malice against the particular individual was necessary. (k) A further objection was made, that the prisoner was not lawfully in custody, there being no warrant; and an attempt to commit felony being only a misdemeanour. The jury who found the prisoner guilty, stated that the thrust was made with intent to do grievous bodily harm to any body upon whom it might alight, though the particular cut was not calculated to do so. Upon the case being submitted to the consideration of the judges, they were of opinion that, if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done; that general malice was sufficient under the 43 Geo. 3, c. 58, without any particular *malice against the person cut; and that, as the prisoner was detected in the night attempting to commit a felony, he might be lawfully detained without a warrant, until he could be carried before a magistrate. (l)

*740

Aken-
head's case.
As to the
words
"grievous
bodily
harm," and
the sort of
injury con-
templated
by the 43
Geo. 3, c.
58.

A reported case upon the 43 Geo. 3, c. 58, states the following circumstances; The prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill, and said that she deserved to be ducked in a trough which was near; but it did not appear that they intended to duck her. The prisoner who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, "I have got a good knife," rushed immediately to the place where she was, entered among the crowd, and instantly struck the prosecutor on the shoulder with a knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought some time, the prisoner dropped his knife and ran away. The wound upon the prosecutor's shoulder was about seven inches long, and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. Upon this evidence the counsel for the prisoner objected, that the first count of the indictment, which stated an attempt to murder, &c., and the second count, which

(j) *Rex v. Akenhead*,^a Holt, N. P. C. 470. *Post*, p. 740.

(k) *Curtis v. The Hundred of Godley*,^b 3 B. & C. 248, was cited a case upon the Black Act.

(l) *Rex v. Hunt, East*, T. 1825. Ry. & Moo. C. C. 98. *Rex v. Griffith*,^c 1 C. & P. 298. S. P. as to bodily harm. *Park, J. A. J.* See *Rex v. Howarth, ante*, p. 608.

^a Eng. Com. Law Reps. iii. 159.

^b *Ib.* x. 67.

^c *Ib.* xi. 298.

stated an attempt to maim, disfigure, and disable, could not be supported; and that the only question was upon the third count, which stated an attempt to do some grievous bodily harm. And upon this question, he submitted, that the wounds were not of that kind from which grievous bodily harm could ensue; that the transaction was a scuffle, in which a knife was used accidentally, without any settled design to "maim, disfigure, or disable," or to do "other grievous bodily harm" to the prosecutor; and also that the wounds were not inflicted in a part of the body which could produce such a consequence. Bayley, J., entertained some doubts on the case: which appear to have proceeded principally on the grounds, that the wound were not in a vital part; and that it was questionable whether the injury done was a grievous bodily harm contemplated by the act; and whether, if death had ensued, the crime would have been more than manslaughter. And taking all the circumstances of the case into consideration, he directed the jury to acquit the prisoner.^(m)

Where an indictment under the 9 Geo. 4, c. 31, charged the prisoner with shooting at A, with intent to murder A., the prisoner could not be convicted if the jury found that he shot at A., intending to shoot at B., and that he did not intend to A. any harm. An indictment charged the prisoner, in one set of counts, with shooting at Hill, with intent to murder Hill; and in another set with shooting at Lee, with intent to murder Lee: and it appeared that the prisoner having ill will against Lee, went to his house, and called to him to come out and be killed; and Hill, who was in the parlour with Lee, went into the hall, and the prisoner instantly fired a pistol at him, but without doing him any injury; it was objected that the prisoner must have shot at a person with intent to kill that person, and that here there was no intent to injure Hill. On the part *of the crown, *Rex v. Hunt*,^(mm) was cited. Littledale, J., "If it had not been for the case of *Rex v. Hunt*, I should have felt little difficulty. The question I shall leave to the jury is, whether the prisoner intended to injure Mr. Hill. But I shall tell them, that a man must be taken to intend the consequences of his acts." His lordship said, in summing up, "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different, on the construction of this act of parliament. There is no doubt that the prisoner shot at Mr. Hill, and that if death had ensued, the offence would have amounted to murder; and then it will be for you to say, whether the prisoner intended to do Mr. Hill some grievous bodily harm. It certainly appears that he did not so intend in point of fact. However the law infers that a party intends to do that which is the immediate and necessary effect of the act which he commits." The foreman of the jury: "We find him guilty of shooting at Mr. Hill, with intent to do Lee some grievous bodily harm." Littledale, J., "There is no count for that. Do you find him guilty of shooting at Lee?" The foreman: "No: he fired at Hill, intending to fire at Lee." Littledale, J., "Do you find that he intended to do harm to Hill?" The foreman: "We find that he did not intend to do any harm to Hill." Littledale, J., "A verdict of not guilty must be recorded."⁽ⁿ⁾

^(m) *Rex v. Akenhead*,^a Northumberland, 1816, 1 Holt's N. P. R. 469.

^(mm) *Supra*, note ^(l).

⁽ⁿ⁾ *Rex v. Holt*,^b 7 C. & P. 518. Littledale, J., considered the second set of counts quite

^a Eng. Com. Law Repts. iii. 159.

^b *Ib.* xxxii. 609.

Shooting at one person and hitting another.

But in the following case a different opinion was given. Upon an indictment on the same statute, in the first count for shooting at Lockyer, and in the second for shooting at Hole, it appeared that Hole, who was a gamekeeper, and Lockyer came up to some poachers, when the prisoner levelled his gun at Hole, who was in advance, but missed him and hit Lockyer. The counsel for the prosecution had elected to proceed on the count charging the shooting at Lockyer. The counsel for the prisoner contended, that the prisoner could not be convicted in point of law of shooting at Lockyer with intent to injure him, inasmuch as the person aimed at, according to the evidence, was another, and Lockyer was only struck accidentally. Gurney, B., in summing up, told the jury it was perfectly immaterial for whom the shot was intended. If a man laid poison for one person, and another took it and died, it would be murder: so a blow aimed at one person and killing another, would make the party equally answerable. (o)

Where poison is sent to one person and taken by another.

Under the 9 Geo. 4, c. 31, s. 11, it was held, that if a party sent poison with intent to kill one person, and another person took that poison, it was just the same as if the poison had been intended for the person who took it. Upon an indictment on the 9 Geo 4, c. 31, s. 11, for administering poison to E. Davis, it appeared that a parcel of sugar and tea, with poison in it, directed "to be left at Mrs. Daws, Fownhope," was left at a shop counter, and afterwards delivered to a Mrs. Davis, who used some of the sugar, and was made very ill by it. Gurney, B., "The question is, whether the *prisoner laid this poison on the shop counter, intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis, and she takes it, the crime is as much within this act of parliament as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person." (p)

*742

Where the intent is laid to be to poison A., it seems that such intent must be proved. But it seems enough to lay the intent "to commit murder" generally since the 1 Vic. c. 85.

But the correctness of this ruling has been doubted, and it has been considered that where an indictment under the 1 Vict. c. 86, states an administering of poison to a person, with intent to murder *such person*, it must be proved that the prisoner did intend to murder *such person*; but that it is sufficient, under that act, to state that the prisoner administered poison "with intent to commit murder" generally. An indictment on the 1 Vict. c. 85, charged the prisoner with causing poison to be taken by G. Power, with intent to murder the said G. Power; but it appeared that the prisoner's intention was to murder Catharine Power, and that G. Power had accidentally swallowed the poison, and the prisoner was found guilty. Parke, B., afterwards said he had spoken to Alderson, B., on the subject, and that they both much doubted whether the verdict could be supported, the averment of the intention not being proved as laid. He was aware that there was a case (q) where, under the old law, (9 Geo. 4, c. 31, s. 11,) a conviction had taken place, though there was a similar defect in the evidence, but he doubted the propriety of that decision; and to provide for any such case, the language of the new statute, under which the prisoner was tried, (1 Vict. c. 85, s. 2,)

out of the question. His lordship said, in the course of the case, "Suppose this had been laid at common law as an assault with intent to murder A., would that charge be proved by showing that the prisoner intended to murder B. ? Perhaps that is almost *idem per idem*."

(o) *Rex v. Jarvis*, 2 M. & Rob. 40.

(p) *Rex v. Lewis*, 6 C. & P. 161.

(q) *Rex v. Lewis*, *supra*.

had been altered; for under that section it was sufficient to allege that the prisoner did the act "with intent to commit murder" generally. The prosecutor had here unnecessarily described the intention more particularly than he need have done, but having so described it, it appeared to the learned baron that the prosecutor was bound to prove the intention as laid. His lordship, therefore, desired a fresh indictment to be prepared, alleging the intent to have been "to commit murder" generally, under which the prisoner was tried and convicted, and sentenced to be transported for life. (r)

*"It is a very important question, whether on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder had death ensued." (q) and this question does not seem to be completely settled. In a case where a man was indicted for inflicting an injury dangerous to life on a child, with intent to murder it, and his wife as principal in the second degree, for aiding and abetting him, where it appeared that the prisoners had inflicted great violence on the child, Patteson, J., told the jury, "Before you can find the prisoner, T. C., 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."

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As to whether on an indictment charging an intent to murder, such intent must exist in the prisoner's mind at the time of the act done.

(r) Reg. v. Ryan, 2 M. & Rob. 213. It seems probable that the intention of the legislature in providing, by the 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31, for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder; and the proviso in those statutes, that if the acts were committed under such circumstances that if death had ensued it would not have amounted to the crime of murder, the prisoner should be acquitted, tends to show that the legislature so intended. The tendency of the cases, however, seems to be, that an actual intent to murder the particular individual injured must have been shown under those statutes, and also under the 1 Vict. c. 85, where the intent is so laid. Where a mistake of one person for another occurs, the cases of cutting, &c., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots; it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut another under mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In Rex v. Mister, Salop Spr. Ass. 1841, cor. Gurney, B., the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case he can have no actual intent to injure the person. These difficulties, however, seem to be obviated by the 1 Vict. c. 85, which, instead of using the words "with intent to murder such person," has the words "with intent to commit murder." It may perhaps be doubted, whether this alteration was not intended to enable the prosecutor to charge a shooting at one person with intent to murder another person; and doubts may perhaps be entertained, notwithstanding the very great weight due to any opinion of the very learned barons, who considered this point in Reg. v. Ryan, whether a count, stating a shooting with intent to commit murder, would not be bad on demurrer, in arrest of judgment, and on error, for not stating the person intended to be murdered. It is true that it would follow the words of the act; but in many cases that is not sufficient. Thus in Reg. v. Martin,^a 8 Ad. & E. 481, 3 Nev. & P. 472, it was held, that an indictment for obtaining goods by false pretences was bad on error, on the ground that it did not state that the goods obtained were the property of any person. In all cases of doubt as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him; another "with intent to commit murder;" and a third for shooting at A. with intent to murder the person really intended to be killed; and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown. C. S. G.

(q) Verba, Patteson, J. Reg. v. Jones,^b 9 C. & P. 258.

^a Eng. Com. Law Reps. xxxv. 443.

^b Ib. xxxviii. 109.

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."^(r) But in another case, where the first count charged the prisoner with shooting with intent to murder, and the facts were such as only to amount to manslaughter, the same very learned judge said in summing up, "It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. V. had died, this would have been a case of murder."^(s)

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In judging of the intent the questions are, whether the instrument was likely to cause death, and if not, whether it was so used as to be likely to cause death.

*Upon an indictment for wounding with intent to murder, &c., it appeared that the prosecutor had given evidence against some wood-stealers, with whom the prisoner was intimate; the prisoner struck him with a tin can four times on the head, knocked him about, and said he would break his neck; and there were two cuts on the prosecutor's scalp which laid his skull bare. Alderson, B., in summing up, said, "You will have to consider in this case whether, if death had ensued, the prisoner would have been guilty of murder; and in giving your judgment on that question, you will have to consider whether the instrument employed was, in its ordinary use, likely to cause death: or though an instrument unlikely, under ordinary circumstances, to cause death,—whether it was used in such an extraordinary manner as to make it likely to cause death either by continued blows or otherwise. A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say whether he did this merely to hurt the prosecutor and give him pain, as by giving him a black eye or a bloody nose, or whether he did it to do him some substantial grievous bodily harm. The former enactments on this subject were confined to cutting instruments, and perhaps wisely; but now the matter is much more vague, and cases ought therefore to be watched carefully. When a deadly weapon, such as a knife, a sword or gun is used, the intent of the party is manifest; but with an instrument like the present, you must consider whether the mode in which it was used, satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it."^(t)

Firing a gun into a room with

Firing a gun into a room of A. B.'s house, with intent to shoot A. B., whom the prisoner supposes to be in the room, did not support a charge

^(r) Rex v. Cruse,^a 8 C. & P. 541.

^(s) Reg. v. Jones,^b 9 C. & P. 258. Patteson, J.

^(t) Rex v. Howlett,^c 7 C. & P. 274.

^a Eng. Com. Law Reps. xxxiv. 522.

^b Ib. xxviii. 109.

^c Ib. xxxii. 508.

of shooting at A. B. under the 9 Geo. 4, c. 31, s. 12, if A. B. were not shown to be in the room or within reach of the shot. Upon an indictment for maliciously shooting at G. C., it appeared that the prisoner fired into a room of C.'s house where he supposed C. was; C., however, was in another part of the house, where he could not by possibility be reached by the shot; upon this Gurney, B., asked whether the indictment could be supported? A man could scarcely be said to be shot at, who was not near the place where the gun was fired. *Rex v. Bailey*,^(u) was cited for the prosecution, where on an indictment for shooting at H. T., who was wounded with grape-shot out of a gun fired at a ship in which he was, Lord Eldon told the jury that he was of opinion, that if they thought the guns were fired at the vessel, and those on board her generally, that the guns might be considered as shot at each individual on board her, and therefore at H. T., the person named in the indictment: Gurney, B., "That case is perfectly distinguishable from the present: cannon-shot fired into a ship more or less endangers every individual in it; every part of the ship may be penetrated by cannon shot; but that cannot be said of shot fired from a gun into a room where it is proved no individual then was."^(v)

If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to *avoid being taken, the others are not to be considered principals in such act. The two prisoners, White and Richardson, were breaking into a house in the lower division of Lamb's Conduit-street; but, upon alarm and pursuit, Richardson ran into Ormond-street, and White towards the Foundling. Randall seized White just by the house which they were breaking into, and White cut him with an iron crow. Graham, B., told the jury, that if the prisoners came with the same illegal purpose, and both determined to resist, the act of one would fix the guilt on both; and that it might be part of the plan to take different ways to divide the force against them. The jury found both the prisoners guilty: but the judges thought the conviction as to Richardson was wrong.^(w)

But where a party is present, aiding, &c., it is not necessary that his should be the hand by which the mischief is inflicted. The first three counts of an indictment alleged, in the usual form, that J. T. did shoot at A. B., and went on to state that M. and N. were present aiding and abetting; the second and third counts varying from the first only in the allegations of the intent: the three last counts (varying in like manner as to the intent) stated, that, an unknown person shot at A. B., and that the said J. T. and M. and N., were present aiding and abetting the said unknown person, the felony aforesaid, in manner and form aforesaid, to do and commit, and were then and there knowing of and privy to the committing of the said felony, against the statute, &c., but did not charge them with being *feloniously* present, &c. The jury found J. T. guilty; but stated, in answer to a question put to them, that they did not find that J. T. was the man who fired at A. B. Upon which an objection was taken in arrest of judgment, that the three last counts were defective, on account of the omission of the word *feloniously*; and that no judgment could be entered on the three first counts, as the jury had negatived that J. T. was the man who fired. The learned judge over-

intent to shoot A. B., who is not in the room, or any place where the shot can reach him is not sufficient.

Principals aiding, &c. *745

Principal in the second degree.

(u) R. & R. C. C. R. I.

(v) *Rex v. Lovell*, 2 M. & Rob. 39.

(w) *Rex v. White and Richardson*, Hil. T. 1806, MSS Bayley, J., and Russ. & Ry. 99 *Ante*, p. 27.

ruled the objection, which he considered as founded upon a supposed difference in the act of shooting, &c., and being present, &c., at the act; whereas the statute had made no such distinction. And he held the plain meaning and necessary construction of the statute to be, that if parties are present, &c., knowing, &c., the charge of feloniously shooting applies to every one of them. He reserved the point, however, for the consideration of the judges, who were all of opinion that the conviction was right. (x)

Shooting in a duel.

It has been suggested, that where an ineffectual exchange of shots took place in a deliberate duel, both the parties might be guilty of the offence of maliciously shooting within the 43 Geo. 3, c. 58, and the seconds be also guilty as principals in the second degree: but this is mentioned as not having been any where expressly decided. (y)

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Of the indictment. It must state that the act was done unlawfully.

*An indictment under the 9 Geo. 4, c. 31, s. 12, must have stated that the prisoner "unlawfully cut, &c.," and it was not sufficient to allege that the prisoner feloniously, wilfully and maliciously cut, &c. An indictment for maliciously wounding, charged that the act was done "feloniously, wilfully and maliciously;" it was objected in arrest of judgment that the indictment was bad, as it did not allege the act to have been done "unlawfully and maliciously," and, upon a case reserved, the judges held unanimously that the judgment ought to be arrested. (z)

For administering must state the thing to be poisonous or destructive.

An indictment for administering a poisonous or destructive thing, must aver that the thing administered was poisonous or destructive. The prisoner was indicted for having mixed a quantity of sponge, cut into small pieces, with milk, and given it to her husband, with intent to poison him; it was objected that the indictment was bad, as it did not state that the sponge was of a deleterious or poisonous nature, and Alderson, B., was of opinion that the objection was good, and the prisoner was acquitted. (a) An indictment under the 1 Vict. c. 85, s. 2, for causing to a person a bodily injury dangerous to life, need not specify the injury. An indictment charged that the prisoner feloniously did assault C. H., and that he did cause unto the said C. H., a certain bodily injury dangerous to life, by striking and beating her with his hands and fists on her head and back, by kicking her on the back, by seizing and lifting her, and striking her head against a wooden beam of a ceiling, by casting throwing and flinging her against a brick floor, with intent to murder her. It was proposed to demur to this indictment, on the ground that the nature of the bodily injury dangerous to life should have been stated with certainty. Patteson, J., thought the point well deserving of consideration, but suggested that the prisoner should plead, he reserving to him the same benefit as if he had demurred:

A bodily injury dangerous to life need not be specified.

(x) *Rex v. Towle and others*, Mich. T. 1816. Russ. & Ry. 314. S. C. 2 Marsh. 466. And see *ante*, p. 27.

(y) 3 Chit. Crim. L. 848, note (w). As it is now immaterial whether in case death ensued the crime would have been murder or manslaughter, under sec. 4 of the 1 Vict. c. 85, it should seem that the shooting or attempting to shoot, in all cases of duels, is punishable under that section; and it is presumed that it was on this ground that the indictment was preferred against the Earl of Cardigan. C. S. G. See *Reg. v. Douglass*,^a 1 C. & Mars. 198.

(z) *Rex v. Ryan*,^b 2 Moo. C. C. R. 15. S. C. 7 C. & P. 854. See *Rex v. Turner*, R. & M. C. C. R. 239.

(a) *Rex v. Powles*,^c 4 C. & P. 571. The case was decided on the 9 Geo. 4, c. 31, the words "any poison or other destructive thing," in that act, are also in the 1 Vict. c. 85.

^a Eng. Com. Law Reps. xli. 109.

^c *Ib.* xix.

^b *Ib.* xxxii. 768.

^d *Ib.* xxxiv. 522.

which was done, and after a learned argument upon a case reserved, the judges held the indictment sufficient. (b)†

The instrument or means by which the wound is inflicted, need not be stated in the indictment, and if they are stated, the prosecutor is bound to prove a wound by such means. On an indictment which charges a wound to have been inflicted by striking with a stick, and kicking with the feet, proof that the wound was caused either by a blow from a stick, or a kick, will be sufficient, though it be uncertain by which of the two it was caused. Upon an indictment under the 9 Geo. 4, c. 31, s. 12, for wounding with a stick, and with the feet, it appeared that one of the prisoners struck the prosecutor with a hedge-stake, or half rail, on the head, and knocked him off his horse, and two other persons struck him with their fists, and kicked him over the head and body, so that he became senseless. He received a cut on the mouth, and a severe contused wound on the crown of the head. The medical witnesses were of opinion that the wound, from its position, could not have been caused by a fall from horseback, and that it was occasioned either by a blow from a stick, or a kick of a heavy shoe, when the prosecutor was on the ground. The jury found the prisoners guilty, but said they could not tell whether the wound was caused by a blow of the stick, or a kick with the shoe. It was objected that a wound given by the foot, with a shoe on it, was not within the act; and, if it was, the mode of wounding was not properly described in the indictment, which stated it to have been done with the feet only. But upon a case reserved, the judges unanimously held that the means by which the wound was inflicted, need not have been stated; that it was mere surplusage to state them; and that the statement did not confine the crown to the means stated, but might be rejected as surplusage, and that whether the wound was from a blow with a stick, or a kick from a shoe, the indictment was equally supported. (c)

An indictment for maliciously shooting may, in one set of counts, lay the shooting at one person, with intent to murder that person, and in another set of counts, the shooting at another person, with intent to murder such other person. One set of counts of an indictment alleged, that the prisoner shot at Hill, with intent to murder, &c., Hill; another set of counts that he shot at Lec, with intent to murder Lec. It was objected that the indictment must be quashed, as it charged two distinct felonies. Littledale, J., "It seems to me that these counts may well be joined. It is all one act, though differently charged. It is like the case

(b) *Reg. v. Cruse*,^a 2 Moo. C. C. R. 53, S. C. 8 C. & P. 541. It was necessary to take the objection by demurrer, or to get the point reserved as if it had been taken on demurrer, for after the verdict the objection would not have availed, as the 7 Geo. 4, c. 64, s. 21, makes an indictment good after verdict, "if it describe the offence in the words of the statute." See as to this, *Reg. v. Martin*,^b 8 A. & E. 481. 3 N. & P. 472. The means of inflicting the injury are stated in this indictment, but it should seem that it was not necessary to state them. See *Rex v. Briggs*, *infra*, note (c).

(c) *Rex v. Briggs*, R. & M. C. C. R. 318. In Erle's case, 2 Lew. 133, Coleridge, J., also decided that an indictment upon the 1 Vict. c. 85, need not state the instrument used.

† [An assault with intent to kill must be charged to have been made with a deadly weapon. *Ainsworth v. The State*, 5 Howard, 242.

An indictment for an assault with intent to kill and murder should not only charge the intent to have been malicious and unlawful, but the felonious intent and the extent of the crime intended to be perpetrated should be distinctly set forth. *Curtis v. The People*, 1 Scammon, 285.]

^a Eng. Com. Law Reps. xxxiv. 522.

^b Ib xxxv. 443.

of forgery, where different intents are laid; here there is one act of shooting charged, with several different intents." (d) And where such counts are so joined, the prosecutor will not be compelled to elect on which he will proceed. The prisoner fired a gun in the direction of a man and his wife, and one count charged the intent to be to kill the wife, and the other to kill the husband; it was held that it was not a case in which the prosecutor ought to be put to his election, inasmuch as it was one and the same transaction, upon which both the counts were framed. (e) An indictment under the 1 Vict. c. 85, for maliciously cutting and wounding, may contain counts framed on sec. 2, with intent to murder, and also counts framed on sec. 4, with intent to maim, disable, and do grievous bodily harm. (f)

Conviction
for assault
under sec.
11 of 1 Vic.
c. 85.

Upon an indictment for shooting at, cutting, stabbing, wounding, or doing any grievous bodily harm, and indeed for most, if not all, the other offences contained in this chapter, if the prisoner be acquitted of doing the act with intent to murder, maim, disfigure, disable, or do some grievous bodily harm, he may be convicted of an assault under the 1 Vict. c. 85, s. 11, and may by that section, and section 8, be imprisoned for any term not exceeding three years, either with or without hard labour, and may be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding *one month at a time, and not exceeding three months in any one year. (g)

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It has been held, that if there be a verdict of not guilty of felony on all the counts of an indictment for wounding with intent to maim, &c., but a verdict of guilty of an assault on the last count, that the prisoner may be sentenced under this statute, although the last count be bad. (h)

Conspiring
or persuad-
ing to
murder in
Ireland.

This chapter may be concluded with the mention of the 10 Geo. 4, c. 34, relating to Ireland, by which the conspiring to murder any person, and the proposing, soliciting, encouraging, persuading, or endeavouring to encourage or persuade to murder, are made capital felonies. (i)

Persons
wilfully
shooting,
stabbing,
strangling,
&c., in
Scotland,
punishable
with death.

The 10 Geo. 3, c. 38, an act for the more effectual punishment of attempts to murder in Scotland, after repealing the 6 Geo. 4, c. 126, enacts, by sec. 2, that "If any person shall, within Scotland, wilfully, maliciously, and unlawfully shoot at any of his majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his majesty's subjects, and attempt, by drawing a trigger or in any other manner, to discharge the same at or against his or their person or persons; or shall wilfully, maliciously, and unlawfully stab or cut any of his majesty's subjects, with intent, in so doing or by means thereof, to murder or to maim, disfigure or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his majesty's subject or subjects; or shall wilfully, maliciously, and unlawfully administer to or cause to be

(d) *Rex v. Holt*,^a 7 C. & P. 518.

(e) *Butler's case*, 1 Lew. 86, Parke, J.

(f) *Reg. v. Strange*,^b 8 C. & P. 172, Lord Denman, C. J., and Park, J. A. J.

(g) See the sections, *ante*, p. 722, and the sections and cases upon them, *post*, tit. "Aggravated Assaults."

(h) *Reg. v. Nicholls*,^c 9 C. & P. 267, Gurney, B. See this case, *post*, tit. "Aggravated Assaults."

(i) See the sections in note (y), *ante*, p. 722.

^a Eng. Com. Law Repts. xxxii. 609.

^b *Ib.* xxxiv. 341.

^c *Ib.* xxxviii. 114.

administered to or taken by any of his majesty's subjects any deadly poison, or other noxious and destructive substance or thing, with intent thereby, or by means thereof, to murder or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his majesty's subject or subjects; or shall wilfully, maliciously, and unlawfully attempt to suffocate, or to strangle, or to drown any of his majesty's subject or subjects, with the intent thereby, or by means thereof, to murder or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his majesty's subject or subjects; such person so offending, and being lawfully found guilty, actor or art and part of any one or more of the several offences hereinbefore enumerated, shall be held guilty of a capital crime, and shall receive sentence of death accordingly."

By sec. 3, "If any person in Scotland shall, from and after the passing of this act, wilfully, maliciously, and unlawfully throw at, or otherwise apply to any of his majesty's subject or subjects any sulphuric acid, or other corrosive substance, calculated by external application to burn or injure the human frame, with intent in so doing, or by means thereof to murder or maim, or disfigure or disable such his majesty's subject or subjects, or with intent to do some other grievous bodily harm to such of his majesty's subject or subjects, and where, in consequence of such acid or other substance *being so wilfully, maliciously, and unlawfully, thrown or applied with intent as aforesaid, any of his majesty's subjects shall be maimed, disfigured, or disabled, or receive other grievous bodily harm, such persons being thereof lawfully found guilty, actor, or art and part, shall be held guilty of a capital crime, and shall receive sentence of death accordingly."

Throwing sulphuric acid, &c., punishable with death.

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By sec. 4, "If it shall appear upon the trial of any person accused of any of the several offences hereinbefore enumerated, that under the circumstances of the case, if death had ensued, the act or acts done would not have amounted to the crime of murder, such person shall not be held guilty of a capital crime, or be subject to the punishment aforesaid."

Proviso if the acts done would not have amounted to murder.

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*CHAPTER THE TENTH.

*750

OF COMMON AND AGGRAVATED ASSAULTS.

—◆—
SECT. I.

Of Common Assaults.(A)

AN assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at another with a stick or other

Definition of an assault.

(A) VERMONT.—When an assault and battery has been made upon two in the same affray, and both are wounded by the same stroke, and the offender has been legally convicted before a court of competent jurisdiction for the assault and battery upon one, an indictment cannot afterwards be sustained against him, for an assault and battery upon the other. But redress may be obtained by each of them by private actions. 2 Tyler's Rep. 387. *State v. Damon*.

NEW YORK.—Upon an application for a *mandamus* to the court of sessions, to compel them to proceed to the trial of an indictment for assault and battery, because that court refused to proceed solely on the ground that a private suit was pending for the damages for the same

weapon or without a weapon though the party striking misses his aim.† So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault.(a)

(a) 1 Hawk. P. C. c. 62, s. 1. Bac. Abr. tit. "Assault and Battery," (A). 3 Bla. Com. 120. Burn. Just. tit. "Assault and Battery," 1. 1 East, P. C. c. 8, s. 1, p. 406. Bull. N. P. 15. Selw. N. P. tit. "Assault and Battery," 1.

assault and battery, it was refused. The pendency of such an action may be good cause for suspending judgment, but not for postponing the trial of the indictment. The court says, "the court of sessions were probably misled by what is said in Espinasse's Digest, (1 Esp. Dig. part 2, p. 184, Gould's edit.) that it is the practice in New York, in such cases, to stay the criminal suit until the decision in the private action. We are not aware of any such practice; nor do we think it warranted, if anything more is intended than a stay of judgment after conviction. The rules and principles which govern the granting of informations are not applicable to the trial of indictments. *The People v. The General Sessions, &c., in the county of Genesee*, 13 Johns. Rep. 85. See the case quoted below from 1 Bay's Rep. 166, and the authorities there cited.

SOUTH CAROLINA.—Where a prosecutor for an assault has commenced his civil action for damages, and at the same time persists in going on *criminaliter*, the court will oblige him to make his election; otherwise the attorney-general will enter a *nolle prosequi*; because it would be unjust to lend the aid of the court to the prosecutor for the purposes of oppression and revenge, when he was about appealing at the same time to a jury of his country for damages for the same injury; and because, as it is very properly laid down in *Fielding's case*, (2 Burr. 719, 20,) it would be giving the prosecutor an unfair advantage over the defendant, by discovering the nature of the evidence that he would be able to bring forward in the civil action before it was tried. This point has been so ruled in the cases of *Muller v. Smith*, and *Martin v. Santee Club*, and sundry others. *The State v. Blyth*, 1 Bay's Rep. 166, 7. See also the case of *The State v. Smith and Cameron*, 1 Bay's Rep. 62, in which it was ruled, that circumstances in mitigation, but not in justification of the charge, could not be given in evidence to the jury on the trial of the issue, but that witnesses might be compelled to attend on the sentence day to give their testimony to circumstances in extenuation, after the conviction of the defendant.

Though a man may put another out of his house, who persists in remaining, yet he may not inflict a violent battery. A person having business to transact with another, has a right to enter his house; and if he remains after being ordered to depart, he may be put out of the house, the owner making use of no more violence than is necessary for the accomplishment of that object, and showing that this was his object. But if the beating be cruel and excessive, not calculated either from its extent or manner to produce the pretended object of getting the party out, but on the contrary rather to prevent him from going, such conduct cannot be justified upon any principle of law. While the law permits men to defend their persons, or preserve the immunities of their dwellings, it is careful to restrain the indulgence of an ungovernable and revengeful spirit. *The State v. Jacob Lazarus*, 1 South Carolina Rep. 34.

[*U. States v. Ortega*, 4 Wash. C. C. Rep. 534. *State v. Davis & al.*, 1 Hill's Rep. 46. *State v. Beck & al.*, Id. 363.]

† [An assault is an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person. It is not essential to constitute an assault that there should be a *direct attempt* at violence. *Hays v. The People*, 1 Hill, 321.]

There must be force or threats, or demonstration of force towards the party, to constitute an assault. Thus where A., having the right to immediate possession of a house, entered the same, and forcibly took away the windows of the room in which B. was sick in bed, without evidence that A. knew that B. was in the house, does not constitute an assault. *Meador v. Stone & al.*, 7 Metcalf, 147. No doubt an assault may be committed on one in a house, who is not seen or known to be there; as if one were wantonly to fire a loaded gun, and the ball should pass through a house where persons were, it might be an assault on all of them. *Ibid.* 151.]

When the evidence disclosed that the defendant presented a gun within shooting distance of and against the prosecutor, who was then armed with a knife and about to attack the defendant, this is no assault if there was no attempt to use the gun, or intention to use it,

But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault. (b) And the words used at the time may so explain the intention of the party as to qualify his act, and prevent it from being deemed an assault: as where A. laid his hand upon his sword, and said, "If it were not the assize time, I would not take such language from you," it was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that the man's intention must operate with his act in constituting an assault. (c)

It has been laid down by a very learned judge, notwithstanding a contrary opinion in an earlier case, (d) that if a person present a pistol, purporting to be a loaded pistol, so near as to produce danger *to life if the pistol had gone off, it is an assault in point of law, although in fact the pistol be unloaded. The learned judge said, "My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party this is an empty pistol, then that would be no assault, for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." (e)

However, where in action for an assault, and presenting a loaded pistol at the plaintiff, it appeared that the defendant cocked a pistol and presented it at the plaintiff's head, and said that if he was not quiet he would blow his brains out; but there was no evidence that the pistol was loaded; Lord Abinger, C. B., held, that if the pistol was not loaded it would be no assault. (f)

It is not every threat, where there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. If therefore a party be advancing in a threatening attitude, e. g., with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and be then stopped, it is an assault in law, if his intent were to strike such person, though he was not near enough at the time to have struck him. (g) †

(b) 1 Hawk. P. C. c. 62, s. 1. Bac. Abr. tit. "Assault and Battery," (A).

(c) *Tuberville v. Savage*, 1 Mod. 3. S. C. 2 Keb. 545. {*Commonwealth v. Eyre*, 1 Serg. & Rawle, 347.}

(d) Anonymous, cor. *Erskine, J.*, mentioned by Ludlow, Serjt., in *Reg. v. St. George*,^a 9 C. & P. 492.

(e) *Reg. v. St. George*,^b 9 C. & P. 483, Parke, B.; for the facts of this case see *ante*, p. 728.

(f) *Blake v. Barnard*,^c 9 C. & P. 626.

(g) *Stephens v. Myers*,^d 4 C. & P. 349, Tindal, C. J.

unless first assailed with the knife. *The State v. Blackwell*, 9 Alabama, 79. To ride a horse so near to one as to endanger his person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault. *The State v. Sims*, 3 Strobb. 137.

Where one presents a pistol at another and threatens to shoot, and finally lowers the pistol and it is not loaded, the man is guilty of an assault, and he is bound to show that the pistol is not loaded; but whether that fact would excuse him or not, without also proving that the other person knew it was not loaded, *quære*. *The State v. Cherry*, 11 Iredell, 475.

On the trial of an indictment for an assault and battery, when there was a question which party was the aggressor, it was held, that the fact that the defendant went to the place where the other party was, and called him out for the purpose of having a difficulty with him, did not of itself render him guilty of the assault and battery, unless he carried his intention into effect. *Yoes v. The State*, 4 Engl. 42.]

† [If a person present a pistol at another, purporting to be loaded, so near as to have

^a Eng. Com. Law Reps. xxxviii. 183.

^b *Ib.*

^c *Ib.* xxxviii. 193.

^d *Ib.* ix. 414.

The plaintiff was walking on a footpath by a road side, and the defendant who was on horseback, rode after him at a quick pace; the plaintiff then ran away into his own garden, and the defendant rode up to the gate, and shook his whip at the plaintiff, who was about three yards off; it was held, that if the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault. (*h*)

Of a battery.

A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law. (*i*) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. (*j*) It should be observed that every battery includes an assault. (*k*)

The injury need not be direct from the hand of the party assaulting. *752

The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c., against the carriage of another person, and *thereby causing bodily injury to the persons travelling in it. (*l*) And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a light squib into a market-place, which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. (*m*) And the same has been holden where a person pushed a drunken man against another, and thereby hurt him: (*n*) but if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable. (*o*)

Where a defendant put some cantharides into some coffee, in order that a female might take it, and she did take it, and was made ill by it, it was held to be an assault. (*p*)

There may be an assault also by exposing a person to the inclemency

(*h*) *Martin v. Shoppee*, 3 C. & P. 373, Lord Tenterden, C. J.

(*i*) Bac. Abr. tit. "Assault and Battery," (B). 1 Hawk. P. C. c. 62, s. 2.

(*j*) 4 Bla. Com. 120.

(*k*) *Termes de la ley*, "Battery." 1 Hawk. P. C. c. 62, s. 1. Bac. Abr. tit. "Assault and Battery," (A).

(*l*) See the precedents for assaults of this kind, Cro. Circ. Comp. 82. 3 Chit. Crim. L. 823, 824, 825, 2 Starkie, 388, 389.

(*m*) *Scott v. Shepherd*, 2 Blac. Rep. 892, by three judges; Blackstone, J., *contra*, 3 Wils. 403, S. C.

(*n*) *Short v. Lovejoy, cor. Lee*, C. J., 1752. Bul. Ni. Pri. 16.

(*o*) *Id. ibid.*

(*p*) *Reg. v. Button*, 8 C. & P. 660, Arabin, Serjt., after consulting the Recorder. But *qu.* whether this be correct, as there was no force either directly or indirectly used by the defendant, and the act which caused the injury was the act of the party taking the coffee. C. S. G.

been dangerous to life, if the pistol being loaded had gone off, this is an assault in law, though the pistol were not in fact loaded. *The State v. Smith*, 3 Humphreys, 457.

An offer to strike by one person rushing upon another, will be an assault, though the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow unless he strikes in self-defence. *State v. Davis*, 1 Iredell, 125.]

* Eng. Com. Law Reps. xiv. 355.

* *Ib.* xxxiv. 573.

of the weather. Thus in a case where an indictment against a mistress for not providing sufficient food and sustenance for a female servant, whereby the servant became sick and emaciated, was ruled to be bad, because it did not allege that the servant was of tender years, and under the dominion and control of her mistress; it was suggested that the indictment also charged that the defendant exposed the servant to the inclemency of the weather; and it was holden that such exposure was an act in the nature of an assault, for which the defendant might be liable, whatever was the age of the servant.^(q)

Assault by exposing another to the inclemency of the weather.

But if one has an idiot brother, who is bedridden in his house, and he keeps him in a dark room without sufficient warmth or clothing, this is not an assault or imprisonment, as it is an omission without a duty, which will not create an indictable offence.^(r) Where parish officers, by force and against her consent, cut off the hair of a young woman who was an inmate of a workhouse, it was held an assault.^(s)

If a master take indecent liberties with a female scholar without her consent, he is liable to be punished for an assault: though she did not resist. A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers; she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape, and also of a common assault; and the judges thought the finding as to the latter clearly right.^(t) And making a female patient strip naked, *under pretence that the defendant, a medical practitioner, cannot otherwise judge of her illness, if he himself takes off her clothes, is an assault. A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits by which she was afflicted; he said he would cure her, and bid her come again the next morning; she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off every thing; she told him she did not like to be stripped in that manner. When she was naked he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary; and they were told that the making her strip and pulling off her clothes might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty; and upon a case reserved, it was held that the conviction was right.^(u)

Assault by indecent liberties with females.

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Where a prize fight takes place, and a number of persons are assembled to witness it, if they have gone thither for the purpose of seeing the combatants strike each other, and were present when they did so, they are all in point of law guilty of an assault; and there is no distinction between those who concur in the act and those who fight;^(v) and it is

Persons present at a prize fight.

^(q) *Rex v. Ridley, cor. Lawrence, J., Salop Lent Ass. 1811. 2 Campb. 650, 653.* The counsel for the prosecution admitted that they could not prove this charge in the indictment to any extent; and the defendant was accordingly acquitted. That negligence and hard usage may be means of committing murder, see *ante*, 489.

^(r) *Rex v. Smith, 2 C. & P. 449, Burrough, J.*

^(s) *Forde v. Skinner, 4 C. & P. 239, Bayley, J.*

^(t) *Rex v. Nichol, Mich. T. 1807. MSS. Bayley, J., and Ry. & Ry. 130.*

^(u) *Rex v. Rosinski, East. T. 1824. MSS. Bayley, J., and Ry. and Moo. C. C. 19, S. C. 1 Lew. 11.*

^(v) *Rex v. Perkins, 4 C. & P. 537, Patteson, J.*

^a Eng. Com. Law Reps. xii. 215.

^b *Ib.* xix. 364.

^c *Ib.* xix.

not at all material which party struck the first blow, for if several are in concert, encouraging one another and co-operating, they are all equally guilty, though only one committed the actual assault. (*w*)

Act done
with con-
sent.

Where the act is done with the consent of a party it is not an assault: for in order to support a charge of assault such an assault must be proved as could not be justified if an action were brought for it, and leave and license pleaded; attempting, therefore, to have connection with a girl between the ages of ten and twelve, or under twelve years of age, if done with the girl's consent, is not an assault. (*x*)

Fraud.

But if resistance be prevented by fraud it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault. (*y*)

An assault
may be by
an unlaw-
ful impris-
onment.

An *unlawful imprisonment* is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the king's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society. (*z*)† To constitute the injury of false imprisonment, there must be an unlawful detention of the *person. With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison, or in a private house, or by a forcible detaining in the public streets, will be sufficient. (*a*) And such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some warrant of a legal officer, having power to commit under his hand and seal, and expressing the cause of such commitment; or arising from some other special cause sanctioned, for the necessity of the thing, either by common law or by act of parliament. (*b*) And the detention will be unlawful, though the warrant or process, upon which it is made be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the king's court. (*c*) Especial provision is made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the statute 7 Anne, c. 12, which makes any process against them, or their goods and chattels, altogether void; and provides that the person prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment,

(*w*) Anonymous, ^a 1 Lewin, 17, *Per* Bayley, J.

(*x*) *Reg. v. Meredith*, 8 C. & P. 589, Lord Abinger, C. B. *Reg. v. Banks*, *ibid.* 574, Pateson, J. *Reg. v. Martin*, ^b 9 C. & P. 213. 2 Moo. C. C. R. 123. See these cases, *ante*, p. 696.

(*y*) *Reg. v. Williams*, ^c 8 C. & P. 286. *Reg. v. Saunders*, *ibid.* 265. See these cases, *ante*, p. 678.

(*z*) 1 Hawk. P. C. c. 60, s. 7. 4 Bla. Com. 218. And see precedents of indictments for assaults and false imprisonment, Cro. Circ. Comp. 79. 2 Stark. 385, 386. 3 Chit. Crim. L. 835, *et seq.* As to such false imprisonment as amounts to kidnapping, &c., see *ante*, 716, *et seq.*

(*a*) 2 Inst. 589. Com. Dig. tit. "*Imprisonment*," (G). 3 Bla. Com. 127.

(*b*) 3 Bla. Com. 127.

(*c*) *Id. ibid.* 29 Car. 2, c. 7. And see further as to unlawful imprisonments, Com. Dig. tit. "*Imprisonment*," (H). Bac. Abr. tit. "*Trespass*," (D) 3. 2 Selw. N. P. tit. "*Imprisonment*."

† [No actual force is necessary to constitute a false imprisonment. If a man is restrained of his personal liberty by fear of a personal difficulty, that amounts to a false imprisonment. *Smith v. The State*, 7 Humphreys, 43.]

^a Eng. Com. Law Reps. xxxiv. 539.

^b *Ib.* xxxviii. 85.

^c *Ib.* xxxiv. 392.

as the lord chancellor, and the two chief justices, or any two of them, shall think fit. But no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, or public minister, is to be privileged or protected by this act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of the principle secretaries of state, and by him transmitted to the sheriffs of London and Middlesex, or their under-sheriffs or deputies.(d)

It has been supposed that every imprisonment includes a battery;(e) but this doctrine was denied in a recent case, where it was said by the court that it was absurd to contend that every imprisonment included a battery.(f)

Whether the act shall amount to an assault must, in every case, be collected from the intention.† Thus, in an action for an assault, where it appeared that the defendant and another person were fighting, when the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, upon which the defendant beat the plaintiff, it was objected to the counsel for the plaintiff, when offered to enter into this evidence, that it ought to have been specially stated in the replication to the plea of *son assault demesne*: but the objection was overruled, on the ground that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, and that it was the *quo animo* which constituted an assault, which was matter to be left to the jury.(g) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer, that this is the man he wants, is said to be no battery.(h) And if the injury committed were accidental and undesigned, it will not amount to a battery. Thus, if one soldier hurts another by discharging a gun in exercise, it will not be a battery.(i) And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man.(j) So where upon an in-

Every imprisonment does not include a battery.

The intention with which the act is done is material in the inquiry whether it will amount to an assault.

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(d) See as to the occasion of passing this act, 1 Bla. Com. 254, 255, 256; and, as to the construction of it, the cases collected in 2 Evans's Cl. Stat. Part IV., Cl. iii, No. 21.

(e) Bull. N. P. c. 4, p. 22; and the opinion was adopted by Lord Kenyon, in *Oxley v. Flower* and another, 2 Selw. N. P. tit. "Imprisonment," I.

(f) *Emmet v. Lyne*, 1 New Rep. 255.

(g) *Griffin v. Parsons*, Gloucester Lent Ass. 1754. Selw. N. P. tit. "Assault and Battery," 26, (1), 7 edit.

(h) 1 Hawk. P. C. c. 62, s. 2. Bac. Abr. tit. "Assault and Battery," (B).

(i) *Weaver v. Ward*, Hob. 134. 2 Roll. Ab. 548. Bac. Abr. tit. "Assault and Battery," (B). But if the act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured; for no man will be excused from a trespass, unless it be shown to have been caused by inevitable necessity, and entirely without his fault. *Dickenson v. Watson*, Sir T. Jones, 205. *Underwood v. Hewson*, 1 Str. 595 2 Blac. R. 896. Selw. N. P. tit. "Assault and Battery," 27.

(j) *Gibbons v. Pepper*, 4 Mod. 405. But if the horse's running against the man were occasioned by a third person whipping him, such third person would be the trespasser. Bac. Abr. tit. "Assault and Battery," (B). But upon the principles which have been before mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to a felony. *Ante*, p. 636.

† [It is not sufficient to constitute an assault, that a man of ordinary firmness should believe that he was about to be stricken; but if it can be collected from the circumstances, that, notwithstanding appearances to the contrary, there was not a present purpose to do an injury, there is no assault. *State v. Crow*, 1 Iredell, 376.

When the defendant, at the time he raised his whip and shook it at the prosecutor, though within striking distance, made use of the words, "Were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault. *State v. Crow*, 1 Iredell, 376.

When A., being within striking distance, raises a weapon for the purpose of striking B.,

dictment for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence, that the wind blew the skin out of the way, and the injury was caused by this circumstance, the defendants were acquitted. (k) It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity. (l)

If one or two persons who are fighting, strike at the other, and hit a third person unintentionally, this is a battery, and cannot be justified on the ground that it was accidental. (m)

Cases where the force used may be justified, and will not amount to an assault.

In some cases force used against the person of another may be justified, and will not amount to an assault and battery. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child; † or a master his servant, being actually in his service at the time; ‡ or a schoolmaster his scholar; or a gaoler his prisoner: or if one confine a friend who is mad, and bind and beat him, &c., in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault and battery will be committed by such acts. (n) So if A. beat B. (without wounding him, *or throwing at him a dangerous weapon,) who is wrongfully endeavoring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim, one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery. (o) § It has been holden that a master may

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(k) *Rex v. Gill and another*, 1 Str. 190.

(l) *Bac. Ab. tit. "Assault and Battery,"* (B), referring to *Dalt. c. 22. Bro. Coron. 229.* But in the notes to *Bac. Ab. ubi supra* the case of *Boulter v. Clarke*, *Abingdon Ass. cor. Parker, C. B. Bul. N. P. 16*, is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fight itself being unlawful; and the case of *Matthew v. Ollerton*, *Comb. 218*, is referred to as an authority, that if one license another to beat him, such license is no defence, because it is against the peace. And see *ante*, 638, *et seq.* as to the criminality of such games or sport.

(m) *James v. Campbell*, 5 C. & P. 572, *Bosanquet, J.* As the blow, if it had struck the party at whom it was aimed, would have been a battery, so it was thought it struck another person; just in the same way as if a blow intended for A. hit and killed B., it will be murder or manslaughter, according as it would have been murder or manslaughter, if the blow had hit A. and killed him. C. S. G.

(n) 1 *Hawk. P. C. c. 60, s. 23*; *Bac. Ab. tit. "Assault and Battery,"* (C). {6 Connecticut Rep., *Baldwin v. Hayden et al.*}

(o) 1 *Hawk. P. C. c. 60, s. 23*, and the numerous authorities there cited. *Bac. Ab. tit. "Assault and Battery,"* (C).

and at the same time declares that if B. will perform a certain act he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault in A. *State v. Morgan*, 3 *Iredell*, 186.]

† [If a parent, in chastising his child, exceed the bounds of moderation, and inflict cruel and merciless punishment, he is a trespasser and liable to be punished by indictment. *Johnson and Ex. v. The State*, 2 *Humphreys*, 283.]

‡ [A master has no right to correct his hired servant. *Commonwealth v. Bird*, 1 *Ashmead's Rep.* 267.]

§ [If a father makes an assault without sufficient provocation on a third person, and his

* *Eng. Com. Law Repts.* xxiv. 367.

justify an assault in defence of his servant, because he might have an action for the loss of his service : (p) but a different opinion has been entertained on this point ; (q) and in a modern case Lord Mansfield said, "I cannot say that a master interposing when his servant is assaulted, is not justifiable under the circumstances of the case ; as well as a servant interposing for his master ; it rests on the relation between master and servant." (r) It is said, that a servant may not justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son ; and that for the like reason a tenant may not beat another in defence of his landlord. (s) A wife may justify an assault in defence of her husband (t). †

There is no doubt that *son assault demesne* is a good defence to an indictment. (u) If, therefore, the plaintiff first lifted up his staff, and offered to strike the defendant, it is a sufficient assault to justify the defendant striking the plaintiff, and he need not stay till the plaintiff has actually struck him. (v) It is not, however, every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel or malignant intention, or after the blood was heated in the scuffle, but it must appear that the assault was in some degree proportionable to the mayhem. (w) If a party raise up a hand against another, within a distance capable of the latter being struck, the other may strike in his own defence, to prevent him, but he must not use a greater degree of force than is necessary. (x) For if the violence used be more than was necessary to repel the assault, the party may be convicted of an assault. (y)

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 danger is past he strikes a blow not necessary for his defence, he commits an assault and battery. (yy) ‡

It has been holden that a defendant may justify even a *mayhem* if done by him as an officer in the army, for disobeying orders ; and that he may give in evidence the sentence of a council at war, upon a peti-

(p) *Leward v. Basely*, 1 Ld. Raym. 62. 1 Salk. 407. Bull. N. P. 18.

(q) 1 Hawk. P. C. c. 60, s. 24.

(r) *Tickel v. Read*, Lofft, 215.

(s) 1 Hawk. P. C. c. 60, s. 24.

(t) *Leward v. Basely*, 1 Ld. Raym. 62.

(u) 1 Hawk. P. C. c. 62, s. 3.

(v) Bull. N. P. 18.

(w) 1 East, P. C. c. 7, s. 9, p. 402.

(x) *Per Parke, B.* Anonymous, 2 Lew. 48.

(y) *Reg. v. Mabel*, 9 C. & P. 474, Parke, B. *Rex v. Whalley*, 7 C. & P. 245, Williams, J. See *post*, p. 758.

(yy) *Reg. v. Driscoll*, 1 C. & Mars. 214. Coleridge, J.

son comes into the affray, on an indictment against the son for an assault with intent to murder, the jury cannot, in the absence of evidence of a different intent, consider his relation to his father, nor the circumstances of peril in which his father was placed. *Sharp v. The State*, 19 Ohio, 379.]

† [A husband has a right to use compulsion, if necessary, to enable him to regain the possession of his wife from one in whose society he finds her, and who he has good reason to believe either has committed or is about to commit adultery with her. *State v. Crater*, 6 Iredell, N. C. 164.]

‡ [Proof that the prisoner struck the first blow will not justify an enormous battery. *State v. Quin*, 3 Brevard, 515. Where a woman asked a man, as he was riding along on horseback, why he had been talking about her, and threw a stone and then a stick at him, and he got off and took up a stick and hit her on the head, he was held to be guilty of an assault and battery. One committing an assault is only justifiable when it is committed in self-defence. *State v. Gibson*, 10 Iredell, 214.]

^a Eng. Com. Law Reps. xxxviii. 188.

^b *Ib.* xxxii. 502.

^c *Ib.* xli. 110.

tion against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favour of the defendant.(z)

Officers ar-
resting, &c.
*757

In cases where officers have authority to arrest, their laying hands upon persons in order to do so is no battery in law. So if a justice *make a warrant to J. S. to arrest J. D., and J. N. comes in aid of J. S. and gently puts his hands on the shoulders of J. D., and says this is the man, this is no battery.(a) There may be cases in which a person may justify laying hands upon another in order to serve him with civil process.(aa)

Officers
must only
use as great
force as is
necessary.

But in all such cases the force used must be only so great as is necessary for the purpose of effecting the object in view, and if there be an excess of violence, the officer will be guilty of an assault. If, therefore, a constable is preventing a breach of the peace, and any person stands in the way with intent to prevent him from so doing, the constable is justified in taking such person into custody, but not in striking him(b) So where one of the marshals of the city of London whose duty it was, on the day of a public meeting in Guildhall, to see that a passage was kept for the transit of the carriages of the members of the corporation and others, directed a person in the front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him, it was held, that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the marshal had been guilty of too violent an exertion of his authority.(c)

An officer is entitled to the possession of the warrant under which he acts, and if he deliver it to the party against whom it is issued, and he refuses to re-deliver it, the officer may use so much force as is necessary to get possession of it again. An officer having a warrant to search for an illegal still in the defendant's house, the defendant asked to see the warrant, and it was given him, and he then refused to return it, upon which the officer endeavoured by force to retake it, and a scuffle ensued, it was held, that the officer was justified in using so much violence as was necessary to retake the warrant, and no more.(d)

Of magis-
trates and
coroners.

Where a magistrate is making a preliminary inquiry for the purpose of ascertaining whether there is sufficient ground to commit a party for trial, no person has a right to be present, and consequently the magistrate may justify laying hands upon a person who refuses to leave the room where the inquiry is being made, in order to turn him out.(e) So where a coroner is holding an inquest, which is a preliminary investigation only, he may justify turning any person out of the room where the inquest is held.(f) But where the proceedings before magistrates are of a judicial nature, as in the case of summary convictions, all persons have a right to be present, and, therefore, a magistrate cannot jus-

(z) Lane v. Degberg, 11 Wm. 3, per Treby, C. J. Bull. N. P. 19.

(a) Wilson v. Dodd, 2 Roll. Ab. 546.

(aa) Harrison v. Hodgson, 10 B. & C. 445. See 2 Roll. Ab. 546.

(b) Levy v. Edwards, 1 C. & P. 40, Burrough, J.

(c) Imason v. Cope, 5 C. & P. 193, Tindal, C. J.

(d) Rex v. Milton, 4 Moo. & Mal. 107, Lord Tenterden, C. J. S. C. 3 C. & P. 31.

(e) Cox v. Coleridge, 1 B. & C. 37.

(f) Garnett v. Ferrand, 6 B. & C. 611.

^a Eng. Com. Law Reps. xxi. 109.

^b Ib. xi. 306.

^c Ib. xiv. 274.

^d Ib. xiv. 196.

^e Ib. viii. 20.

^f Ib. xiii. 277

tify laying hands upon a person to turn him out of the room. (g) But on the hearing of an information, the magistrates have the discretionary power to regulate the proceedings of their own courts, and may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them; if, therefore, an attorney insist upon acting as an attorney in such a case, where it is not the practice of the *magistrates to permit any person to appear as an advocate, they may justify laying hands upon him to turn him out of the room. (h) *758

It should be observed, with respect to an assault by a man on a party Where endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where actual violence is committed, as it is lawful in such case to oppose a force to force; therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. (i) If a person enters another's house with force and violence, the owner of the house may justify turning him out, (using no more force than is necessary,) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request. (j) So, if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request. (k) But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist; and, if that is refused, should, gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance. (l)† Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated, that he first requested the plaintiff to be uncovered, and that the plaintiff refused. (m) And in all cases where the force used is justified, as not amounting to an assault, under the particular circumstances of the case, it must appear that it was not necessary

(g) *Daubney v. Cooper*, 10 B. & C. 237. (h) *Collier v. Hicks*, 2 B. & Ad. 663.

(i) *Green v. Goddard*, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart; at least, if the force applied be more than would be justified under a *molliter manus imposuit*; for in a case of assault and battery, where the defendant pleaded *son assault demesne*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad: and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession. *Leward v. Baseley*, 1 Lord Raym. 62.

(j) *Tullay v. Reed*, 1 C. & P. 6, Park, J. A. J. And see *Mead's case*, 1 Lew. 184, ante, p. 663. *Wild's case*, 2 Lew. 214, ante, p. 664.

(k) *Green v. Goddard*, 2 Salk. 641.

(l) *Weaver v. Bush*, 8 T. R. 78. 1 Selw. N. P. tit. "Assault and Battery," 39, 40.

(m) *Hawe v. Planner*, 1 Saund. 13.

† [*Acc. Baldwin v. Hayden et al.*, 6 Conn. Rep. 453. It is held in one case that all necessary force may be used short of an actual striking. *Wartrous v. Steel*, 4 Verm. 629. And in another case, that though an assault and battery may be justified in defence of possession, yet a wounding cannot; though it may be if the intruder commit an assault upon the possessor or his family, when the latter undertakes to remove him. *Shain v. Markham*, 4 J. J. Marshall (Ken.) Rep. 578.]

* Eng. Com. Law Reps. xxi. 64.

† Ib. xxii. 161.

• Ib. xi. 297.

must be used.

greater than was reasonably necessary to accomplish the lawful purpose intended to be effected.⁽ⁿ⁾† Therefore, though an offer to strike the defendant, first made by the prosecutor, is a sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet, even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence, whether the retaliation by the defendant were excessive, and out of all proportion to the necessity or provocation received.^(o)

Indictment.
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The party injured may proceed against the defendant by action and indictment for the same assault: and the court in which the *action is will not compel him to make his election to pursue either the one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures,^(p) but the Court of Queen's Bench have refused to sentence a party convicted of an assault, while an action was pending for the same assault.^(pp)‡

One indictment for assaulting two persons.

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence.^(q) But the case has been subsequently treated

(n) 1 East, P. C. c. 8, s. 1, p. 406.

(o) Bull. N. P. 18. 1 East, P. C. c. 8, s. 1, p. 406. See *ante*, p. 756.

(p) Jones v. Clay, 1 Bos. & Pul. 191. 1 Selw. N. P. tit. "Assault and Battery," 27, note

(2). 1 Hawk. P. C. c. 62, s. 4. Bac. Abr. tit. "Assault and Battery," (D).

(pp) Rex v. Mahon,^a 4 Ad. & E. 575, and see *ex parte*, *ibid*, note, and Reg. v. Gwilt,^b 11 Ad. & E. 587.

(q) Rex v. Clendon, 2 Lord Raym. 1572. 2 Str. 870.

† [Though a man may put another out of his house, who persists in remaining, yet he may not inflict a violent battery. *State v. Lazarus*, 1 Mill's Const. Rep. 12.

On the trial of a defendant for an assault and battery, where there was contradictory evidence as to the degree of force used towards the defendant by the complainant, on the defendant's refusal to remove from the complainant's premises, after being requested to do so, the judge refused the prayer of the defendant to instruct the jury that if the complainant committed a battery on the defendant, it was not a proper kind of force to remove the defendant, and that the complainant thereby committed the first assault. But the judge instructed the jury that the complainant had a right, after requesting the defendant to remove and his refusal, to use proper and reasonable force to remove him, and that the jury must determine, from the testimony, how much and what kind of force the complainant used towards the defendant; and that if, in their opinion, he used more force than was necessary, or if the force was not appropriate and adapted to effect the purpose of removing the defendant, then they should consider the complainant as having committed the first assault; but if the jury considered the force, thus used, as necessary and proper, and also appropriate and adapted to effect the purpose of removing the defendant, then the complainant would be justified and would not have committed the first assault: *held*, that the judge rightly refused the instructions requested, and that the instructions which he gave were conformable to the rules of law. *Commonwealth v. Clark*, 2 Metcalf, 23.

On the trial of an indictment for an assault and battery, alleged to have been committed by firing a pistol bullet at the prosecutor, evidence having been introduced, on the part of the government, tending to prove the commission of the offence as charged, the defendant introduced evidence tending to prove that at the time of the supposed assault the prosecutor was at the front door of the defendant's house committing an offensive nuisance; that the defendant ordered him to go away, which he refused to do; that the defendant thereupon beat the prosecutor with the handle of a broom until the same was broken, when the defendant thrust at him with one of the pieces; and the defendant then went back into his house and returned with a pistol, but did not discharge the same: the jury having been instructed "that the facts proved were no justification of the assault and battery," it was held that the instruction was erroneous; and that the facts should have been submitted to the jury with instructions as to what would and what would not amount to a justification. *The Commonwealth v. Goodwin*, 3 Cush. 154.]

‡ [The prosecutor will not be compelled to elect, where a prosecution and a civil action have both been instituted for the same assault; nor will the court order the attorney-general to enter a *nolle prosequi*. *State v. Frost*, 1 Brevard, 385.]

^a Eng. Com. Law Repts. xxxi. 140.

^b Ib. xxxix. 177.

as one which was not well considered; and the court said, “ Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one ?” (r)

In a case where an indictment preferred before the grand jury consisted of two counts, one for a riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and indorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that the grand jury should have found by the grand jury a true bill as to the assault, the *ignoramus* as to the riot, held good. Two counts one for riot, the other for an assault; found by the grand jury a true bill as to the assault, the *ignoramus* as to the riot, held good.

Whatever is a legal justification or excuse for an assault or imprisonment, such as *son assault demesne*, the arrest of a felon, &c., may, upon an indictment, be given in evidence under the general issue. (t)

A case has been decided, relating to the course of proceeding, where a defendant indicted for an assault has entered into a recognizance to appear, *enter* and try his traverse. The defendant was in the first instance apprehended for an assault, carried before a magistrate, and admitted to bail, on the condition of his appearing at the ensuing assizes, to answer such indictment as might be preferred against him, which condition he performed: and a bill of indictment being found against him at such assizes, he was arraigned, pleaded “ Not guilty,” and entered into a recognizance to appear, *enter*, and try his traverse, at the then next assizes. On the day before the opening of the commission for the next assizes, he surrendered himself to prison in discharge of his bail; and to avoid paying for the issue book, the entry of his traverse, and all other court fees, he endeavoured to be tried under the commission of gaol delivery; but his trial under this commission was opposed by the officers of the court, on the ground that, by omitting to enter his traverse, he had not performed the condition of his recognizance. The learned judge entertaining some doubts whether, as the defendant was in custody, he could refuse to try him, directed him to be tried, as in the case of any common gaol traverse; but in order to settle the practice in future, he afterwards

*submitted the matter to the judges for their consideration. They were unanimously of opinion, that the defendant ought not to have been tried, as he had not performed the condition of the recognizance. But they all thought that he might have come in and moved to withdraw his plea of “ Not guilty,” and have pleaded “ Guilty,” without entering his traverse, either on agreement with the prosecutor, or on giving him proper notice of his intention so to do. And they likewise agreed, that if before he had come in to plead he had given the prosecutor ten days’ notice that he would at the same time try his traverse, he might have done so. (u)

As every battery includes an assault, (v) it follows that on an indictment

(r) *Per Cur.* in *Rex v. Benfield and Saunders*, 2 Burr. 994.

(s) *Rex v. Fieldhouse*, Cowp. 325.

(t) 1 Hawk. P. C. c. 62, s. 3. Bac. Abr. tit. “ *Assault and Battery*.” 1 East, P. C. c. 8, s. 1, p. 406, and c. 9, s. 1, p. 428.

(u) *Rex v. Fry*, *cor. Nares, J.*, Southampton Ass., and considered of by the judges, Hil. T. 1776, 1 Leach. 111. See *Reg. v. Featherstonehaugh*, 8 C. & P. 109.

(v) *Ante*, p. 751.

Verdict of
guilty of
battery
only.

Punish-
ment.

9 Geo. 4, c.
31, s. 27.
Conviction
by two mag-
istrates
for common
assaults.

Fine.

How ap-
plied.

Commit-
ment on
non-pay-
ment.

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Certificate
for dismis-
sal of the
complaint.
Certificate
of convic-
tion a bar
to further
proceed-
ings.

ment of assault and battery, in which the assault is ill-laid, if the defendant be found guilty of the battery it is sufficient. (w)

This offence is punishable as a misdemeanor; and the punishment usually inflicted is fine, imprisonment, and the finding of sureties to keep the peace. (x) But as the offence, though undoubtedly in some degree concerning the public, principally and more immediately affects an individual, the defendant is frequently permitted by the court to *speak with the prosecutor*, after conviction and before any judgment is pronounced; and if the prosecutor declares himself satisfied, a trivial punishment, generally a fine of a shilling, is inflicted. (y)

By the 9 Geo. 4, c. 31, s. 27, it is enacted, "That where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs, (if order,) the sum of five pounds, which fine shall be paid to some one of the *overseers of the poor or to some other officer* of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division, in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate: and the evidence of any inhabitant of the county, riding or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby: and if such fine as shall be awarded by the said justices, together with the costs, (if ordered,) shall not be paid, *either* immediately after the conviction, or within such period as the said justices shall, at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be *imprisoned* for any term not exceeding two calendar months, unless such fine and costs be sooner paid: but if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith (a) make out a certificate under their hands, stating *the fact of such dismissal, (b) and shall deliver such certificate to the party against whom the complaint was preferred."

By sec. 28, "If any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or, having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for the non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

(w) 1 Hawk. P. C. c. 62, s. 1.

(x) 4 Bla. Com. 217. 1 East, P. C. c. 8, s. 1. p. 406, and c. 9, s. 1, p. 428.

(y) *Ante*, p. 132.

(a) It has been held that this word makes it necessary that the certificate should be given before the justices separate. *Reg. v. Robinson*,^a 12 A. & E. 672, Q. B., M. T. 1840. But in *Thompson v. Gibson*, 8 M. & W. 281, this decision was doubted, and it seems to deserve further consideration. C. S. G.

(b) The certificate must state on which of the three grounds the complaint was dismissed. *Skuse v. Davis*,^b 10 A. & E. 635; and must be specially pleaded in an action, *Harding v. King*,^c 6 C. & P. 427.

^a Eng. Com. Law Repts. xl. 158.

^b Ib. xxxvii. 202.

^c Ib. xxv. 470.

By sec. 29, "In case the justices shall find(c) the assault or battery complained of to have been accompanied by an attempt to commit felony, or shall be of opinion that the same is, from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act, provided also, that nothing herein contained shall authorize any justice of the peace to hear and determine any case of assault or battery in which any question shall arise, as to the title to any lands, tenements, or hereditaments, or any interest therein on accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

These provisions not to apply to aggravated cases.

SECT. II.

Of Aggravated Assaults.

ATTEMPTS to murder, or to do some great bodily harm,(a) and assaults with intent to ravish,(b) or to commit an unnatural crime,(c) have been already noticed. Also assaults occurring in the obstruction of officers executing process,(d) in effecting a rescue,(e) in the obstruction of revenue officers,(f) and in the hindering the exportation or circulation of corn,(g) have been mentioned in the course of the work. The aggravated assaults which remain to be noticed in this place, are principally such as have been made the subject of particular legislative provision; and the peculiar aggravation appears to arise, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected.

The 5 and 6 Edw. 6, c. n, relates to disturbances in churches and churchyards; and the second section enacts, "that if any person *or persons shall smite, or lay violent hands upon any other, either in any church or churchyard," every person so offending shall be deemed excommunicate.(gg)

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5 & 6 Edw. 6, c. 4, s. 2.
Smiting, or laying violent hands in a church or church-yard.

Some points upon the construction of this statute have been mentioned in a former part of this work; where it was stated, that cathedral churches and churchyards are within it; that it will be no excuse for a person who strikes another in a church, &c., to show that the other assaulted him; and that the churchwardens, and perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands upon those who disturb the performance of any part of divine

(c) It seems that although the charge may be of an assault with intent to commit a felony, the magistrates may, upon the evidence, find that it was only a common assault, and convict for that offence. Anonymous, a 1 B. & Ad. 382. S. C. as Rex v. Virgil, 1 Lew. 16, note.

(a) Ante, chap. ix.

(b) Ante, p. 692.

(c) Ante, p. 700.

(d) Ante, p. 408, et seq.

(e) Ante, p. 291, 433, et seq.

(f) Ante, p. 111, et seq.

(g) Ante, p. 121, et seq.

(gg) The 9 Geo. 4, c. 31, repealed so much of this act as related "to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned." So that sec. 2 seems not to be repealed. C. S. G.

service, and turn them out of the church, are not within the meaning of the statute. *(h)*

Striking in the king's palaces.

Contempts against the *king's palaces* have always been looked upon as high misprisions; and, by the ancient law before the conquest, fighting in the king's palaces, or before the king's judges, was punished with death. *(i)* The 33 Hen. 8, c. 12, provided severe punishment for all malicious striking by which blood was shed within any of the king's palaces or houses, or any other house, at such time as the royal person happened to be there abiding; but these provisions were repealed by the 9 Geo. 4, c. 31, s. 1.

Drawing a weapon, or striking in the King's courts of justice.

Striking in the king's superior *courts of justice* in Westminster-hall, or in any other place, while the courts are sitting, whether the Court of Chancery, Exchequer, King's Bench, or Common Pleas, or before justices of assize, or oyer and terminer, is made still more penal than even in the king's palace; perhaps for the reason that, those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more, namely, the disturbance of public justice. *(j)* So that, though striking in the king's palace was not punished with the loss of the offender's hand, unless some blood were drawn, nor even then with the loss of lands and goods, the drawing of a weapon only upon a judge or justice in such courts, though the party strike not, is a great misprison, punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels. *(k)* And a party is liable to a similar punishment, if, in the same courts, and within their view, he strike a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot: but he is not liable to such punishment if he make an assault only, and do not strike. *(l)* And one who is guilty of this offence cannot excuse himself by showing that the person so struck by him gave the first offence. *(m)*

Lord Thanel's case, *Noli prosequi* entered by the attorney-general as to the judgment of amputation, &c.
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In a case of modern occurrence, the three first counts of the information set forth a special commission for the trial of Arthur O'Connor and others for high treason: and that, pending the sessions, *after the acquittal of O'Connor, and before any order or direction had been made by the court, for his discharge, the defendants, in open court, &c., made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions in open court, and in the presence of the said justices and commissioners, riotously, &c., make an assault on one J. R., and did then and there *beat, bruise, wound,* and ill-treat the said J. R., and thereby impede and obstruct the said justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the justices in the holding of the session, and the other for a common riot. *(n)* Two of the defendants having been found guilty generally, considerable doubt was intimated by Lord Kenyon, whether the court were not bound to pass the judgment of amputation, &c., for the

(h) *Ante*, 299.

(i) 4 Bla. Com. 124.

(j) 3 Inst. 140. 4 Bla. Com. 125.

(k) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21, s. 3. 4 Bla. Com. 125. 1 East, P. C. c. 8, s. 3, p. 408.

(l) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21, s. 3. 4 Bla. Com. 125. 1 East, P. C. c. 8, s. 3, p. 408.

(m) 1 Hawk. P. C. c. 21, s. 4.

(n) See the precedent of this information, 2 Chit. Crim. L. 208, *et seq.*

offence, as laid in the three first counts : and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the attorney-general said, that he had received the royal command and warrant under the sign manual, whereby he was authorized to enter a *noli prosequi*, as to those parts of the information on which any doubt had arisen, or might arise, whether the judgment thereon were discretionary in the court, and pray judgment only on such charges as left the judgment in their discretion ; and, accordingly, a *noli prosequi* was entered on the three first counts ; and on the others the court gave judgment against the defendants, of fine, imprisonment, and sureties.(o)

A person who rescues a prisoner from any of the courts which have been mentioned, without striking a blow, is punished with perpetual imprisonment and forfeiture of goods, and of the profit of lands during life : for this offence is, in its nature, similar to the other ; but as it differs in this, that no blow is actually given, the amputation of the hand is excused.(p) And for the like reason, an affray or riot near the said courts, but out of their actual view, is punishable by fine and imprisonment, during pleasure, but not with the loss of the hand.(q)

Though an assault in any of the king's inferior courts of justice would not subject the offender to lose his hand :(r) yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered matter of great aggravation. And any affray or contemptuous behaviour in those courts, is punishable with a fine, by the judges there sitting.(s)

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the king, or of the justices.(t) And it seems also that in order to warrant such judgment, the indictment ought expressly to charge a stroke ; though it does not appear whether any technical word be necessary to be used for that purpose.(u)

Amongst the principal of these assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to commit a robbery, and nearly allied to this, is a demand of property effected by menaces or force, and with the intent of stealing such property. These offences were made felonies by the 4 Geo. 4, c. 54, s. 5, which repealed the 7 Geo. 2, c. 21, an act for the more effectual punishment of assaults with intent to commit a robbery, but the 4 Geo. 4, c. 54, was repealed by the 7 & 8 Geo. 4, c. 27, and the 7 & 8 Geo. 4, c. 29, s. 6, which introduced provisions for this offence, was also repealed by the

(o) *Rex v. Lord Thanet and others*, B. R. Trin. 39 Geo. 3. 1 East, P. C. c. 8, s. 3. p. 408, 409, 410. In *Rex v. Davis*, Dy. 188 a, 188 b, and the notes thereto, are various instances of the judgment having been executed to the full extent. One of them is remarkable for the speedy justice which appears to have been administered. "Richardson, Chief Justice of C. B., at the Assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brickbat at the said judge, which narrowly missed ; and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the court."

(p) 1 Hawk. P. C. c. 21, s. 5. 4 Bla. Com. 125.

(q) 1 Hawk. P. C. c. 21, s. 6. 4 Bla. Com. 125. *Ante*, 291.

(r) 3 Inst. 141. 1 Hawk. P. C. c. 21, s. 10.

(s) 4 Bla. Com. 126. 1 Hawk. P. C. c. 21, s. 10.

(t) 1 East, P. C. c. 8, s. 3, p. 410. 1 Hawk. P. C. c. 21, s. 3.

(u) 1 East, P. C. c. 8, s. 3, p. 408, referring to 1 Sid. 211.

1 Vict. c. 87, s. 1, which contains the following new enactments on this subject. (v)

By sec. 3, "whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob, any person, or shall, together with one or more person or persons, rob, or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By sec. 6, "whosoever shall assault any person, with intent to rob, shall be guilty of felony, and being convicted thereof, shall (save and except in the cases where a greater punishment is provided by this act,) be liable to be imprisoned for any term not exceeding three years."

By sec. 7, "whosoever shall, with menaces or by force, demand any property of any person, with intent to steal the same, shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years."

By sec. 9, "in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

*765 By sec. 10, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, *it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

By sec. 13, "offences committed within the admiralty jurisdiction, may be tried in the same manner as any other felony committed within that jurisdiction."

The assault must have been made upon the person intended to be robbed, under the 7 Geo. 2, c. 21.

Some of the cases upon the former acts may be here properly introduced. Upon the repealed act 7 Geo. 2, c. 21, it was decided, that the assault therein described must be made upon the person intended to be robbed. The prisoner was indicted for assaulting one John Lowe with an offensive weapon, with intent to rob him. Mr. Lowe's evidence was, that between ten and eleven o'clock at night he was travelling along the road in a post-chaise, when the chaise suddenly stopped, and he saw a man with his arm extended towards the *post-boy*, and he heard him swear many bitter oaths with great violence, but did not hear him make any demand of money; and the *post-boy* swore, that the pri-

(v) The provisions of this act extend to Ireland, but not to Scotland. Sec. 1 repeals so much of the 7 & 8 Geo. 4, c. 29, and of the 9 Geo. 4, c. 55, relating to Ireland, as relates to robbery, assault with intent to commit robbery, and demanding property with menaces or by force. See *post*, the *Chapter on Robbery*, for the other sections of this statute. C. S. G.

soner followed the chaise for some time, and at last presented a pistol *at him*, and bid him stop, using at the same time many violent oaths; that he immediately stopped the chaise, and the prisoner turned towards it, but perceived that he was pursued, and immediately rode away without saying or doing any thing to Mr. Lowe, who was in the chaise. The court held that this evidence did not support the indictment, which charged an intent to rob Mr. Lowe, the gentleman in the chaise. Another indictment was then preferred against the prisoner, laying the assault with intent to rob the *post-boy*; but the same evidence being again given on the second trial, the court held that it would not maintain the indictment; that it was clear that the prisoner did not mean to rob the post-boy, for when he presented the pistol to him, and bid him stop, he made no demand upon him, but went towards the person in the chaise. (*w*)

A case is reported, which would rather lead to the conclusion that it was at one time considered to be necessary in support of the offence in the repealed act 7 Geo. 2, of an assault with an offensive weapon with intent to rob, to show such intention to rob by proving an *actual demand* of money, &c., to have been made by the prisoner. The indictment was for assaulting the prosecutor with a pistol, with intent to rob him; and by the evidence it appeared that the prosecutor, a coachman, was driving his coach along the road, and that the prisoner presented a pistol at him while he sat on his box, and called out to him to stop; but did not expressly make any demand of money. And upon this it is said, that the court held that the case was not within the meaning of that act; that a demand of money or other property must be made, to constitute *the offence; and that though a demand may be made by action as well as speech, as by a deaf and dumb man stopping a carriage, and putting his hat into it with one hand, and holding at the same time a pistol offensively with the other, yet the action must be plain, and unequivocally import a demand; and that in the case then under consideration no motion or offer to demand the prosecutor's property was made. (*x*) But this case was doubted; (*y*) and it was observed upon it, that the words of the 7 Geo. 2, c. 21, were in the *disjunctive*; and that upon proof of the prisoner having assaulted the prosecutor with a felonious intent to rob him (which was a question for the jury) the case was brought expressly within the words as well as the spirit of that act. (*z*) It has been suggested also, upon this case, that as the prosecutor was a *coachman*, and the indictment charged an intent to rob *him*, it might have appeared to the court that he was not the party intended to be robbed; (*a*) and have seen that it was considered to be necessary that the assault should be made on the person intended to be robbed. (*b*) Other cases, however, appear to put the construction of the repealed act 7 Geo. 2, in this matter, beyond doubt, and show that an actual demand of money, &c., was not necessary upon the clause of that act relating to

But no actual demand of money, &c. is necessary upon the charge of assault with intent to rob.

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(*w*) Thomas's case, O. B. 1784. 1 Leach, 330. 1 East, P. C. C. 8, s. 11, p. 418, where it is observed, that perhaps this may be agreeable to the strict construction of the statute, which has the word of reference *such*. And in 1 Hawk. P. C. c. 55, s. 4, Thomas's case is cited, and the expression *such person* relied upon in support of the same construction. The 1 Vict. c. 87, *ante*, p. 764, does not contain the words "such person." This decision, therefore, seems not applicable to that act. C. S. G.

(*x*) Parfait's case, O. B. 1740. 1 Leach, 19. 1 East, P. C. c. 8, s. 11, p. 416, 417. 1 Hawk. P. C. c. 55, s. 3.

(*y*) 1 East, P. C. c. 8, s. 11, p. 417.

(*z*) *Id. ibid.*

(*a*) 1 East, P. C. c. 8, s. 11, p. 418.

(*b*) Thomas's case, *ante*, p. 765.

the assault with intent to rob. Two men were indicted for a felonious assault upon the prosecutor, with a certain offensive weapon called a pistol, with a felonious intent to rob him. The prisoner rushed out of a hedge upon the prosecutor, who was the driver of a returning chaise, as he was passing along the road; and one of them presenting a pistol to him, bid him stop, which he did, but called out for assistance; upon which one of the prisoners threatened to blow his brains out if he called out any more: but he continued to call, and presently obtained assistance, and took the men, *who had made no demand of money*. Upon this evidence the prisoners were convicted and transported.(c) In a subsequent case the indictment against the prisoner charged him with having, with an offensive weapon, feloniously made an assault upon the prosecutor, with a felonious intent to rob him. The evidence was, that while the prosecutor and another person were riding together in the highway, the prosecutor received a violent blow from a great stone, which was thrown by the prisoner from the hedge: that the prisoner then ran across a field, and was followed by the prosecutor, who asked him how he could be such a villain as to throw the stone; on which the prisoner threatened the prosecutor, ran to him, and struck him violently with a staff, till at length the prisoner was overcome and secured. The prisoner's face was blackened, and he denied his name: but on being questioned afterwards as to his motive, he said he was very poor, and wanted half a guinea to pay his brewer. *He did not ask for money or goods*. This case was submitted to the judges, upon a question relating to the form of the indictment, and they held the conviction proper; but no objection was taken on behalf of the prisoner, on the ground *of its being necessary to prove an actual demand of money or other property.(d)

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Where a person was decoyed into a house, and then chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds, the papers on which he wrote not being his property, but remaining in his hands half an hour while he was chained down to the seat, it was held that this was not an assault with intent to rob within the 7 & 8 Geo. 4, c. 29, s. 6.(e)

The intent to rob is a material part of the offence, and should be properly alleged in the indictment.

The intent to rob is a material part of the offence described in the 1 Vict. c. 87, and should be properly alleged in the indictment. In a case upon the repealed act, 7 Geo. 2, c. 21, where the indictment stated the assault to have been made with a certain offensive weapon called a wooden stick, with intent, the goods, moneys, &c., of the prosecutor, "from his person and against his will feloniously to steal, take, and carry away," it was holden to be bad, as it did not contain a statement of force and violence. The prisoner was accordingly discharged from this indictment; and a new one was preferred against him, laying the assault as before, but stating the intent to be, the moneys of the prosecutor, "from his person and against his will, feloniously and violently to steal, take, and carry away:" upon which indictment he was convicted.(f) So, in a case of a commitment for an offence against the same repealed act, one of the objections upon which it was moved that the prisoner might be bailed, was, that the commitment did not charge

(c) *Rex v. Trusty and Howard*, O. B. 1783. 1 East, P. C. c. 8, s. 11, p. 418, 419.

(d) *Sharwin's case*, Oakham, 1785, *cor.* Gould, J. 1 East, P. C. c. 8, s. 13, p. 421.

(e) *Rex v. Edwards*,^a 6 C. & P. 521, *Bosanquet and Patteson*, Js.

(f) *Monteth's case*, O. B. 1795. 2 Leach, 702. 1 East, P. C. c. 8, s. 12, p. 420, 421.

the defendant with a felonious intent to rob, but merely with an intent feloniously to steal, take, and carry away.(g)

An indictment for an assault with intent to rob, which charges that the prisoner in and upon R. Blantem feloniously did make an assault "with an intent the moneys, goods and chattels of the said R. B., from the person and against the will of the said R. B., then and there feloniously and violently to rob, steal, take, &c., carry away, against the form of the statute, &c.," is good (gg)

In prosecutions under the 1 Vict. c. 87, where the prisoner is charged with *demanding* money, &c., by menaces, &c., with intent to steal, it should seem that an actual or express demand by words is not necessary. In proceeding upon indictments framed upon the second clause of the repealed act 7 Geo. 2, c. 21, for assaulting, and by menaces, or in and by any forcible and violent manner *demanding* money, &c., with a felonious intent to rob, it was the better opinion, that an express demand of money by words was not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, was, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It was observed, that the unfortunate sufferer understood the language but too well; and the question was put, "Why must courts of justice be supposed ignorant of that which common experience makes notorious to all men?"(h) And in one case upon that act, the court appear to have considered that an *actual demand* was not necessary; and that whether there was a demand or not was a fact for the consideration of the jury under all the circumstances.(i)

But the indictment must aver *from whom* the money, &c., was demanded: and if the indictment be for threatening to accuse, &c., it must allege *who* was the person threatened. One count of an indictment stated, that the prisoners, feloniously, by menaces, did demand the moneys of one J. Axx, with intent the said moneys of the said J. Axx, then and there feloniously to steal, &c. Another count stated, that the prisoners feloniously did threaten to accuse the said J. Axx of the crime of *buggery*, being a crime punishable by law with death, with a felonious intent to extort money from the said J. Axx, and the said money, then and there, feloniously to steal, &c. It was objected, in arrest of judgment, that the first of these counts did not state that any demand of money was made *upon J. Axx*: that although the moneys of J. Axx were alleged to have been demanded, it was not stated *from what person* they were demanded: that it was not inconsistent with this count to suppose that the menace was offered to the wife, the child, or the servant of the said J. Axx, or that the demand was made on his wife, child, or servant; and it was urged, that a demand of the moneys of the said J. Axx, made upon any other person than J. Axx, and accompanied with a threat to any other person, would not be an offence within the statute; and even if such a demand upon any other person were within the act, still it was said that there ought to be a distinct and precise averment as to the person on whom the demand was made, that the party accused might know with certainty the charge on which he was to be tried. To the last count it was objected, that it did not state that

Where a demand must be proved, it seems that an actual or express demand by words is not necessary.

*768 The indictment must aver from whom the money, &c. was demanded. And an indictment for threatening to accuse, &c., must state who was threatened.

(g) Rex v. Remnant, 5 T. R. 169. 2 Leach, 583. 1 Hawk. P. C. c. 55, s. 8.
 (gg) Reg. c. Huxley, 1 C. & Mars. 596. Patteson, J., and Creswell, J.
 (h) 1 East, P. C. c. 8, s. 11, p. 417.
 (i) Rex v. Jackson and Randall, 1 Leach, 267.

* Eng. Com. Law Repts. xli. 324.

the prisoners *threatened the said J. Axx* to accuse him of the crime: and it was submitted for reasons similar to those mentioned in the objection to the other count, that the omission of such a material averment was fatal. Judgment was respited upon these objections; and the case was submitted to the consideration of the judges, who held both objections valid; and the judgment was accordingly arrested. (*j*)

There appears to be some doubt whether, where the money is actually obtained by threats, a count for demanding money with menaces under sec. 7, is supported, as the evidence proves another offence. In a case where the indictment included counts for robbery, and also for demanding money with menaces, and it appeared that the money was actually obtained, the recorder held that if menaces were used to obtain the money the count for demanding money with menaces was sustained, although the money was actually obtained, but the prisoner was sentenced on the count for robbery, and not upon this count. (*k*)

If money be demanded with menaces, that is sufficient, though the party menaced have none with him at the time.

If a person with menaces demanded a sum of money of another, and that other did not give it him, because he had it not with him, that was within the repealed clause in the 7 & 8 Geo. 4, c. 29; but if the person demanding the money knew that the money was not in the possession of the party, and only intended to obtain an order for the payment of it, it was otherwise. The prosecutor was forced by the prisoners into a retired place in a house, and fastened down on a bench with a chain, and his legs fastened with cords, and then told that he should not stir from the spot till he paid 1,200*l.*; the prosecutor said the money was in a bank, and if he were permitted to write to his family, he would send for the *required sum. This was refused, and paper, pens and ink, were brought, and the prosecutor wrote a cheque for 800*l.*; the prosecutor had money about his person, but it was not taken or demanded by the prisoners. It was held that these facts did not support an indictment containing a count for demanding with menaces and by force the money of the prosecutor, and a count for an assault with an intent to rob the prosecutor of his money, Patteson, J., "If a man with menaces demands a sum of money of another, and the person does not give it him, because he has it not with him, the offence is the same; but if it turns out as in this case, that a sum of money, known to be not then in his possession, was demanded, the case is different. The prisoners do not take any thing from Mr. Gee: they got an order for the delivery of the deeds, and that was all they wanted." (*l*)

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11 & 12 Wm. 3, c. 7. Laying hands on commander of ship, &c. 9 Geo. 4, c. 31, s. 23. Arresting a clergyman during divine service.

The 11 & 12 Wm. 3, c. 7, s. 9, enacts that, "If any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his 'trust,' he shall be adjudged to be a pirate, felon, and robber: and being convicted, shall suffer death and loss of lands, goods, &c., as pirates, felons, and robbers upon the seas, ought to suffer." (*m*)

The following enactments concerning aggravated assaults, are contained in the 9 Geo. 4, c. 31; by section 23, "If any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with a knowledge of such person, be going to

(*j*) *Rex v. Dunkley and others*, East. T. 1825. Ry. & Mood. C. C. 90.

(*k*) *Reg. v. Norton*, 8 C. & P. 671. See this case, *post*, in the *Chapter on Robbery*.

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(*l*) *Rex v. Edwards*, 6 C. & P. 515, *cor.* Bosanquet and Patteson, Js.

(*m*) See this statute more at large, *ante*, p. 95, 99.

* Eng. Com. Law Reps. xxxiv. 577.

† *Ib.* xxx. 522.

perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or both, as the court shall award."

By sec. 24, "If any person shall assault and strike, or wound any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for such term as the court shall award."

Punishment for assault on officers, &c., endeavouring to save shipwrecked property.

By sec. 25, "Where any person shall be charged with, and convicted of any of the following offences as misdemeanors: that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

Assault with intent to commit a felony; assaults on peace officers, &c.; in pursuance of a conspiracy to raise wages.

*By sec. 26, "If any person shall unlawfully, and with force, hinder any seaman, keelman, or caster, from working at or exercising his lawful trade, business or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal or malt, whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned, and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months: provided always, that no person, who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

*770 Assault on any seaman, &c., to prevent him from working; to obstruct the buying or selling of grain, its free passage.

By the 1 & 2 Wm. 4, c. 41, s. 1, two or more justices, upon information upon oath, that disturbances are likely to take place, may appoint special constables of the house-holders, or other persons (not legally exempt, from serving the office of constable,) residing in any parish, township, or place wherein disturbances are likely to occur, or in the neighborhood thereof; and by sec. 5, every special constable, so appointed, shall not only within the parish, township or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices appointing him, have, exercise, and enjoy all such powers, authorities, advantages and immunities, and be liable to all such duties

1 & 2 W. 4, c. 41. Special constables.

and responsibilities as any constable duly appointed now has within his constablewick, by virtue of the common law of this realm, or of any statute or statutes.

A special constable, appointed under this act, continues such, and has all the authority of an ordinary constable, until his services are either suspended or determined under sec. 9, of the act, although eight years may have elapsed since his appointment.⁽ⁿ⁾

5 & 6 W.
4, c. 43.

The 5 & 6 Wm. 4, c. 43, s. 1, makes all persons, willing to act as special constables, capable of being appointed, although they may not be resident in the parish, township, or place, or in the neighborhood thereof, and gives such persons all the same powers, &c., when appointed as the special constable appointed under the 1 & 2 Wm. 4.

2 & 3 Vic.
c. 93, Rural
Police.

The Rural Police Act, 2 & 3 Vict. c. 93, s. 8, enacts, that the chief constable, and other persons appointed under the act "shall be sworn as constables before a justice of the county, and shall have all the powers, privileges, and duties throughout the county, and also in all liberties and franchises, and detached parts of other counties locally situate within such county, and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick, by virtue of the common law, or of any statute made or to be made." And the 3 & 4 Vict. c. 88, s. 16, which provides for the *appointment of local constables for parishes, &c., gives such local constables similar powers, &c., but they are not *bound* to act beyond the parish, &c., for which they are appointed.^(o)

3 & 4 Vic.
c. 88.
*771

Constables,
&c.

Evidence
of acting as
such is
sufficient

As prosecutions for assaulting constables, and other peace officers are by no means uncommon, it may be well to introduce in this place some of the authorities, which may be useful in such prosecutions. In the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments, and that even in a case of murder,^(p) and this rule extends to constables and watchmen appointed under local acts.^(q)

Their pow-
ers in keep-
ing the
peace.

Constables, and other peace officers, are invested with large powers and extensive authority at common law, for the purpose of preserving the peace, preventing the commission of crimes and misdemeanors, apprehending offenders, and executing the warrants of justices of the peace. Every high and petty constable, within the limits of their hundreds and districts, are conservators of the peace at common law.^(r) It is their duty, therefore, to do all that they can to preserve the peace within their respective constablewicks: and for this purpose, they not only may, but ought to apprehend, any person who shall make an affray or assault upon another in their presence, or who shall threaten to kill, beat, or hurt another, or shall be ready to break the peace in their presence, and may take such persons before a justice of the peace, in order that they may find surety for the peace.^(s) So also by the common law, the sheriff, under sheriff, constable, or any other peace officer may and ought to do all that in them lies towards the suppressing of a

⁽ⁿ⁾ Reg. v. Porter, 9 C. & P. 778, Coleridge, J., *ante*, p 593.

^(o) Many local acts also authorize the appointment of constables and watchmen, and give the same powers as ordinary constables. See also the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 76 and 83.

^(p) 2 Vict. tit *Evidence*, c. 3, s. 2, Gordon's case, 1 Leach, 515.

^(q) Buter v. Ford, 1 C. & M. 162. 3 Tyrw. 677. See also M'Gahey v. Alston, 2 M. & W. 206.

^(r) Dalt. c. 1.

^(s) Dalt. c. 1, and see *ante*, p. 294.

* Eng. Com. Law Reps. xxxviii. 334.

riot.(t) And in order the better to enable peace officers to preserve the peace, they have authority to command all other persons to assist them, in endeavouring to appease such disturbances as take place in their presence.(u)

In all cases of felony, a peace officer has not only authority to apprehend a felon, while committing the felony, but also upon pursuit, or information at any time afterwards;(v) and he may even justify apprehending an innocent person, if he have reasonable ground to suspect that he is guilty of felony, and this although no felony have been committed.(w) In all cases of misdemeanor, a peace officer may apprehend the party while committing the offence;(x) and it should seem, upon fresh and immediate pursuit, in some instances.(y) But the general rule is, that if a misdemeanor be committed in the absence of a peace officer he cannot afterwards apprehend the party who committed it.(z)

It has been said, that a constable may take those before a justice, who were arrested by such as were present at an affray, but this may well be *doubted.(a) But a constable may arrest, if a witness to an affray gives one of the affrayers in charge to the constable on the spot where it was committed, and whilst there is a reasonable apprehension of its continuance.(b) So a constable may apprehend a person while attempting to commit a felony;(c) or it should seem, even upon fresh pursuit, after he has desisted from the attempt.(d)

If an officer hear a disturbance in a public house in the night, and the door be open, he may enter.(e) But he has no authority to turn any one out of a public house, unless the party had committed some offence punishable by law.(f) Nor to prevent a guest from going into a room in such house, unless a breach of the peace was likely to occur.(g) But if a person makes such a disturbance in a public house as is calculated to alarm the neighborhood, a policeman may apprehend him.(h)

It is to be observed, that the authority of a constable, or other peace officer, to act without a warrant, is confined by the common law to the district for which he is an officer, and consequently he cannot legally act as an officer in any other district.(i)

The constable is the proper officer to the justice of the peace, and bound to execute his warrants; and, therefore, where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to execute such warrant;(j) and inasmuch as the office of constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself.(k)

(t) *Ante*, p. 285, 286, and note, *ibid*.

(v) *Ante*, p. 593, *et seq*.

(x) *Ante*, p. 598.

(y) *Ante*, p. 295, and p. 598, *et seq*.

(z) *Timothy v. Simpson*, 5 *Tyrw.* 244, *ante*, p. 294.

(a) *Rex v. Hunt*, *ante*, p. 594.

(b) *Rex v. Smith*, 6 *C. & P.* 136, *Tindal*, C. J.

(c) *Wheeler v. Whiting*, 9 *C. & P.* 262, *ante*, p. 602.

(d) *Reg. v. Mabel*, 9 *C. & P.* 474, *ante*, p. 603.

(e) *Howell v. Jackson*, 6 *C. & P.* 723, *ante*, p. 603.

(f) *Ante*, p. 644.

(g) 2 *Hawk. P. C.* c 10, s. 36, and cases there cited.

(u) *Ante*, p. 285. *Dalt. c.* 1.

(w) *Beckwith v. Philby*, 6 *B. & C.* 638, *ante*, p. 595.

(v) *Ante*, p. 607.

(a) *Ante*, p. 295.

(d) *Rex v. Howarth*, *ante*, p. 608.

(j) 2 *Hawk. P. C.* c 10, s. 35.

* *Eng. Com. Law Reps.* xiii. 287.

^b *Ib.* xxv. 319.

^c *Ib.* xxxviii. 111.

^d *Ib.* 189.

^e *Ib.* xxv. 617.

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At common law, where a warrant was directed to officers as *individuals*, they might execute it any where within the extent of the magistrate's jurisdiction who granted it; but where it was directed to persons, *by the name of their office*, it was confined to the districts in which they were officers.^(l) If, therefore, a warrant was directed to "the constable of the parish of S," such constable had no authority at common law to execute it out of the parish of S.; and if he attempted so to do, he was a trespasser.^(m) But now, by the 5 Geo. 4, c. 18, a constable, in such a case, may execute a warrant out of his precinct at any place within the jurisdiction of the magistrate who granted it.⁽ⁿ⁾

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If a warrant be good upon the face of it, and for an offence within the jurisdiction of the justice, the falsity of the charge will not prevent the execution of the warrant from being legal.^(o) But if the warrant be bad upon the face of it, as if the name of the person on whom it is to be executed be insufficiently stated, or the name of the *officer who is to execute it be inserted after the warrant is issued, the officer will not be justified in acting under it.^(p) So a constable cannot justify an arrest by virtue of a warrant, which appears on the face of it to be for an offence, whereof a justice of the peace has no jurisdiction, or to bring the party before him, at a place out of the county for which he is a justice,^(q) or by virtue of a blank warrant.^(r) A constable in executing a warrant must act in strict conformity with the warrant, otherwise he is a trespasser. He cannot, therefore, justify apprehending Richard H., under a warrant to apprehend John H.^(s) So in executing a search warrant he cannot justify seizing any goods except the goods specified in the warrant, unless perhaps in a case where they would furnish evidence of the identity of the goods stolen.^(t)

The right of officers to break open doors or windows in order to make an arrest has already been considered,^(u) as has also the necessity of giving due notice of the officer's business,^(v) and so have the cases of officers taking opposite sides in an affray.^(w)

Officers
guilty of
access.

In all cases where officers are authorized to act, they must exercise their authority in a proper manner, and if they exceed the reasonable bounds of what is required for the due performance of their duties, they become wrong doers. Thus if a constable arrest a man upon suspicion of felony, he must take him as soon as he reasonably can before a magistrate for examination, and if he keep him in custody for an unreasonable time, as, for instance, three days before he does so, he becomes a trespasser.^(x) So a constable is bound to treat a prisoner, while in his custody, with no greater severity than is necessary to prevent his escape; if, therefore, he handcuff a prisoner where it is not necessary in order to prevent his escape, or where he has not attempted to escape, he is a

^(l) *Ante*, p. 615.^(m) *Ante*, p. 615.^(p) *Ante*, p. 618, *et seq.*^(q) 2 Hawk. P. C., c. 13, s. 10. See the 28 Geo. 3, c. 49, as to justices who act for two or more adjoining counties.^(r) *Ante*, p. 619, *et seq.*^(m) *Rex v. Wier*,^a 1 B. & C. 288, *ante*, p. 615.^(o) *Ante*, p. 617.^(s) *Hoye v. Bush*, *ante*, p. 619.^(t) *Crozier v. Cundey*,^b 6 B. & C. 232. See *Parton v. Williams*,^c 8 B. & Ald. 330. *Smith v. Wiltshire*,^d 2 B. & B. 619. *Theobald v. Crichmore*, 1 B. & A. 227, and other cases decided on the 24 Geo. 2, c. 44, which protects officers executing warrants where they act strictly in obedience to the warrant, and where the justice still remains liable.^(u) *Ante*, p. 629, *et seq.*^(v) *Ante*, p. 623, *et seq.*^(w) *Ante*, p. 604.^(x) *Wright v. Court*,^e 4 B. & C. 596.^a Eng. Com. Law Reps. viii. 79.^b *Ib.* xiii. 154.^c *Ib.* v. 307.^d *Ib.* vi. 285.^e *Ib.* x. 412.

trespasser.(y) So although a constable may be justified in removing from church a person who attempts to read a notice in the church, and detaining him until the service is over, he cannot legally detain him afterwards in order to take him before a magistrate.(z)

The following cases have been decided as to assaults upon collectors Collectors of taxes. of taxes, and peace officers called in to assist them in the execution of their duties. In order to justify a distress for assessed taxes under the 43 Geo. 3, c. 99, s. 33, it is not necessary that there should have been a personal demand by the collector, or a personal refusal by the party distrained upon. Nor is it essential that the demand to which the refusal applies, should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. If a count for assaulting a party in possession of goods distrained for assessed taxes states the sum for which they were distrained, and a different sum is proved, this is a fatal, *variance; but if a count mention no sum the defendant may be convicted, if the party be proved to have been lawfully in possession for any amount. Upon an indictment, the first count of which charged the defendants with assaulting J. S., then being in lawful possession of goods seized for 6*l.* 15*s.* 6*d.*, arrears of assessed taxes, and the second count with a common assault, it appeared that the goods of one Ford had been distrained on his premises for taxes due from him and J. S. had been left in possession. In order to show that the taxes had been regularly demanded before putting in the distress, it was proved that the collector had gone to Ford's house on the 23d of January, and Ford not being at home, had demanded the taxes of a female who was there, and said that he had called often before, and would distrain on the following day if they were not paid. The woman answered that Ford had been told before of the collector's coming for taxes, but said he could not pay; the collector left a letter with the woman, requesting Ford to call on him; which Ford afterwards did, and stated that he was very poor and could not pay; it was objected that this was not sufficient evidence of a demand and refusal within the terms of the 43 Geo. 3, c. 99, s. 33; but Lord Denman, C. J., held that it was not necessary to show a refusal given by the householder himself, or to the collector personally; but that it was sufficient, if the circumstances showed that the householder, from poverty or otherwise, would not pay, and if the party meeting with the refusal was one authorized to act for him; and he left it to the jury to say whether they were satisfied that there had been a refusal; his lordship also held that as the first count specified a particular amount of arrears, and a different one was proved, that count was not maintainable; but upon the second which mentioned no sum, that there might be a verdict against the defendants, if the prosecutor was lawfully in possession for any amount; and upon a motion for a new trial the court held that the motion should be refused: by the statute a distress is to be taken only if there shall have been a demand and refusal of the taxes, but nothing is said to apply that provision to particular individuals, or particular sums; it is sufficient if there has been a demand of the taxes, which the party has understood, and he has not objected to the amount, but has refused to pay.(a)

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(y) *Wright v. Court*, 4 B. & C. 596.(z) *Williams v. Glenister*,^a 2 B. & C. 699, and see *Imason v. Cope*, *ante*, p. 577. *Levy v. Edwards*,^b 1 C. & P. 40, *ibid.*, and *Stocken v. Carter*,^c 4 C. & P. 477.(a) *Rex v. Ford*,^d 2 A. & E. 588.^a Eng. Com. Law Reps. ix. 227.^b *Ib.* xi. 306.^c *Ib.* xix. 482.^d *Ib.* xxix. 163.

A collector of land tax is not authorized to take a constable with him, unless he apprehends a breach of the peace.

A collector of land-tax is not entitled, under the provisions of the 38 Geo. 3, c. 5, s. 17, or under the general authority, to take a constable with him into the house of a person from whom he is demanding payment of the arrears of land-tax. But if he has reasonable ground (from past or present circumstances,) to apprehend violence from such person, he may call in constables to assist in keeping the peace, and such constables are justifiable in staying while the collector remains to be paid, as long as there is reason to expect violence, and if the owner of the house use violence to remove them, he is indictable for assaulting a peace officer in the execution of his duty. Such a collector has a general authority, under the act to distrain, and a special warrant is not necessary; and he need not have his warrant or the book of assessments with him at the time he distrains. Clark and Austen were indicted for assaulting Grinder, a peace officer in the execution of his duty, and for a common *assault. Tipper, a collector of land-tax, had applied on the 28th of October to Clark for arrears of land-tax due from him, which had been repeatedly demanded before; Clark said, "I suppose if I do not pay it you are going to distrain?" Tipper replied that he probably should. Clark answered, "If you put your hand upon any thing I will split your skull." Collins, a constable, was with Tipper on this occasion. On the 29th of November following, Tipper went to Clark's house, with Collins, Grinder, and a third constable: he desired the two last to remain outside, and to be on the alert, lest there should be a row; he and Collins entered a room, and again demanded the arrears: as soon as the demand was made Clark quitted the room, and directly afterwards he was heard to fasten the house door; upon this Collins, by Tipper's order, unfastened the door, and brought in Grinder and the other constable. Clark soon afterwards returned into the room, with bank notes in his hand, accompanied by ten or twelve men, among whom was Austen. Clark asked what Grinder did there; and Collins answered that Grinder was there to aid and assist if required; upon this Clark said, "I will not pay the taxes until the thief-catcher has left the room." Grinder refused to depart, upon which Clark desired Austen to put him out, saying that he would be answerable; Austen then attempted to force Grinder out of the room, and, in so doing, committed the assault in question. Clark afterwards paid the taxes with the notes in his hand. It was left to the jury to say, whether Tipper introduced Grinder for the purpose of keeping the peace, and if they thought he did so, they were directed to find a verdict of guilty; the jury found in the affirmative of the question left, and convicted both defendants. Upon a motion for a new trial, it was contended that the collector had no right to take a constable with him; that it ought to have been shown that the collector had a warrant to distrain, or the book of assessment with him; but it was held that it was not necessary that the collector should have either the warrant or the book of assessment with him; and although the statute was applicable only to cases where a house or chest was to be broken open, and therefore the collector had no right to take Collins or any other person with him for the purpose of demanding the money; yet as the collector had good ground, from what had passed at that time and on the previous occasion, to apprehend violence, he was perfectly justified in introducing Grinder and the other constable to keep the peace, and that Grinder was justified in remaining to prevent violence, and consequently was assaulted whilst in the execution of his duty. And although the collector had

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no right to take Collins into the house on either occasions, yet as no objection was made to his presence, it did not vary the case.(b)

It seems to be settled, that an arrest unlawfully made by a constable, without a warrant, cannot be made good by a warrant taken out afterwards.(c) Also it has been held, that if a constable, after he has arrested a party by force of a warrant, suffer him to go at large upon his promise to return at such a time, and find sureties, he cannot afterwards arrest him again by virtue of the same *warrant.(d) However, if the party return, and put himself again under the custody of the constable, it seems that it may probably be argued that the constable may lawfully detain him, and bring him before a justice in pursuance of the warrant.(e)

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An indictment for assaulting an officer in the execution of his duty, under a warrant, must clearly show that he is such an officer as is authorized to execute the warrant; and if it do not, the defendant cannot be sentenced upon it for a common assault. A count for assaulting A., in the execution of his office, imprisoning him, and preventing him from arresting a person, as he was commanded, by a writ issued by the court of record of a town and county, merely described A. as one of the "serjeants-at-mace of the said town and county," and the judgment was arrested, because it did not appear that A. was a legal officer of the court out of which the writ issued; for a serjeant-at-mace, *ex vi termini*, means no more than a person who carried a mace for somebody, and the indictment did not show for whom; and, taking the whole count together, the jury in effect, had found that there was an assault and imprisonment, but committed under circumstances which justified the defendant, and therefore there was not sufficient to sustain the judgment, as for a common assault, or for an imprisonment.(f)

The 7 & 8 Geo. 4, c. 53, and act to consolidate the laws relating to the management and collection of the excise, by sec. 40 enacts, "That if any person armed with any offensive weapon whatsoever, shall with force or violence assault or resist any officer of excise, or any person employed in the revenue or excise, or any person acting in the aid or assistance of such officer or person so employed, who in the execution of his office or duty, shall search for, take or seize, or shall endeavour or offer to search for, take, or seize, any goods or commodities forfeited under or by virtue of this act, or any other act or acts of parliament, relating to the revenue of excise or customs, or who shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods or commodities, or who shall arrest, or endeavour or offer to arrest, any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest, then and in every such case, it shall be lawful for every such officer and person so employed, and person acting in such aid and assistance as aforesaid, who shall be so assaulted or resisted, to oppose force to force, and by the same means and methods by which he is so assaulted or resisted, or by any other means or methods, to oppose such force and

(b) *Rex v. Clark*, 3 A. & E. 287.

(c) 2 Hawk. P. C. c. 13, s. 9.

(d) *Id. ibid.*(e) 2 Hawk. P. C. *ibid.*(f) *Rex v. Osmer*, 5 East, 304, *ante*, p. 409. There does not appear to have been any count for a common assault in this indictment. C. S. G.

violence, and to execute his office or duty, and if any person so assaulting or resisting such officer as aforesaid, or any person so employed, or any person acting in such aid and resistance as aforesaid, shall in so doing, be wounded, maimed, or killed, and the said officer or person so employed, or person acting in such aid and resistance as aforesaid, shall be sued or prosecuted for any such wounding, maiming, or killing, it shall be lawful for every such officer, or person so *employed, or person acting in such aid and assistance, to plead the general issue, and give this act and the special matter in evidence in his defence; and it shall be lawful for any justice or justices of the peace, or other magistrate or magistrates before whom any such officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be brought for, or on account of any such wounding, maiming, or killing as aforesaid, and every such justice of the peace and magistrate is hereby directed and required to admit to bail every officer, and every person so employed, and every person acting in such aid and assistance as aforesaid, any law, usage, or custom to the contrary thereof in any wise notwithstanding.”(g)

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Venue.

By sec. 43, for the better and more impartial trial of any indictment or information for any such violent assault, as aforesaid, “every such offence shall and may be required of, examined, tried, and determined in any county in England, if such offence shall have been committed in England or in any of the islands thereof, or in any county in Scotland, if the same shall have been committed in Scotland or in any of the islands thereof, or in any county in Ireland, if the same shall have been committed in Ireland or in any of the islands thereof, in such manner and form as if the same offence had been committed in such county respectively; (h) and that whenever any person shall be convicted of any such violent assault or resistance as aforesaid, it shall be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit,) sentence of imprisonment, with hard labour, for any term not exceeding the term of three years, either in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon any such offender, and every such offender shall thereupon suffer such sentence in such place, and for such term as aforesaid, as such court shall think fit to direct.”(hh)

Punishment.

7 & 8 Geo. 4, c. 33. Assaults on officers in Millbank Penitentiary.

By the 7 & 8 Geo. 4, c. 33, s. 1, “If any convict in the general Penitentiary at Millbank, shall assault the governor thereof or any officer or servant employed therein, the committee appointed for the management of the said Penitentiary, under and by virtue of the acts for the regulation of the said penitentiary, may order him or her to be prosecuted

(g) By sec. 41, persons against whom indictments or informations have been found or filed for such assaults, are to be bound with two sureties to answer the same, and in default to be committed: by sec. 42, if any offender be in prison for want of bail, a copy of the indictment or information may be delivered to the gaoler with a notice of trial and proceedings had thereon.

(h) This provision would probably be held to extend only to assaults upon officers when in the execution of their duty. If, therefore, upon an indictment containing counts for assaulting an officer in the execution of his duty, and for a common assault, the jury were to acquit on all the counts except on that for the common assault, the judgment would be arrested if the venue were laid in any county except that in which the assault was committed. *Rex v. Cartwright*, 4 T. R. 490, *ante*, p. 120.

(hh) Some of the provisions of this act are repealed by the 4 & 5 Wm. 4, c. 51, and the 4 & 5 Vict. c. 20, but not the provisions above set forth. C. S. G.

for the said offence, and, upon conviction thereof, such offender shall be liable to be confined in the said Penitentiary for any term not exceeding two years, in addition to the term for which, at the time of committing such offence, he or she *was subject to be confined, and shall be liable (if a male,) to be publicly or privately whipped, if the court shall so think fit.”(i)

Formerly upon an indictment for felony, the prisoner must either have been convicted of a felony or entirely acquitted;(j) but the 1 Vict. c. 85, has introduced a very important alteration in cases where the crime charged includes an assault.

By sec. 11 of that act, “on the trial of any person for any of the offences hereinbefore mentioned,(k) or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years.”

By sec. 8, “where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.”

Under section 11, a prisoner may be convicted of an assault, although the offence for which he is tried was committed before the 1 Vict. c. 85, came into operation. Upon an indictment under the 9 Geo. 4, c. 31, for maliciously wounding with intent to murder, &c., on the 23rd of September, 1837, which was tried on the 31st of October following, it was held, that the prisoner might be acquitted of the felony, and convicted of an assault under the 1 Vict. c. 85, s. 11.(l)

All persons convicted of assaults under sec. 11, upon indictments for felonies, may be sentenced to hard labour under sec. 8. On an indictment for a rape in the common form, the prisoner was found guilty of an assault. This being an offence at common law, and not punishable under the 1 Vict. c. 85, Mr. B. Parke and Mr. B. Holland thought they had no power to sentence to hard labour, and the sentence was accordingly only imprisonment for three years: but it appearing that other judges had acted differently, the opinion of the judges was asked upon

(i) By sec. 3, any such offender may be tried, either where the offence was committed, or where he was apprehended, and the order of the Secretary of State for the confinement of the party in the penitentiary, together with proof of his identity, and the register of the penitentiary in which his commitment and his having been received under the said order is entered, is made sufficient evidence of all the facts inserted in such registry, without producing the record of such conviction, or proof that such convict had been convicted of felony, and legally ordered to be confined in the said penitentiary.

(j) Except in those cases where, on an indictment for murder, the jury might find the prisoner guilty of endeavouring to conceal the birth.

(k) This is for any of the offences against the 1 Vict. c. 85, mentioned in the chapter iv., ante, p. 671, and chapter ix., ante, p. 719.

(l) *Rex v. Hagan*,^a 8 C. & P. 167, Bolland, B., and Coltman, J.

^a Eng. Com. Law Repts. xxxiv. 335.

this question, and they were unanimously of the opinion that hard labour might be added. *(m)*

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To what cases the statute extends.

*It has been held, that a prisoner may be convicted of an assault under this section upon an indictment for rape, *(q)* and this, although he be under fourteen, and therefore incompetent to commit a rape, *(r)* or although it turn out that the prosecutrix consented, supposing the prisoner to be her husband. *(s)* So a prisoner may be convicted upon this section upon an indictment for murder; *(t)* or on an inquisition for manslaughter; *(u)* or upon an indictment for abduction, if the jury are not satisfied that the prisoner took the female away from motives of lucre, but he used force to her person in taking her away, *(v)* or upon an indictment under the 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, *(w)* or for stabbing with intent to maim, &c. *(ww)*

It has been held that a prisoner may be convicted of an assault upon an inquisition for manslaughter, alleging the death to be caused by striking, although there be no evidence of the cause of death. Upon an inquisition by which the prisoner was charged with killing the deceased by striking and beating him, on the part of the prosecution it was proposed to offer no evidence, as the cause of the death could not be sufficiently ascertained. Gurney, B., "Taking that to be so, we should have evidence of the blows, because on this inquisition the prisoner may be convicted of an assault under 1 Vict. c. 85, s. 11." No evidence of any assault, however, was produced, and the prisoner was acquitted. *(x)*

Where the jury negative any intention to commit a felony.

It has been held, upon an indictment for robbery, if the jury find the prisoner guilty of an assault, but without any intention to commit a felony, that he may be sentenced under this section. Upon an indictment under 1 Vict. c. 87, s. 3, for a robbery, accompanied by violence, the prosecutor stated that the prisoner spit in his face, and knocked him down, that he was stunned, and when he came to his senses he found his pocket turned inside out, and his watch gone; contradictory evidence was, however, given on the part of the prisoner; and the jury found the prisoner guilty of an assault, but without any intention to commit a felony. It was contended that the prisoner could not be convicted of the assault; the meaning of the section was, that a prisoner might be convicted of the attempt to commit, though not of the actual and complete commission; and here the finding of the jury disconnected the assault from the robbery. Alderson, B., said that the words "the crime charged," were intended to signify the charge as stated in the indictment.

(m) Anonymous, 2 Moo. C. C. R. 40. The learned Barons also submitted the further question, whether it would not be advisable for the future to direct that indictments for felonies, including assaults, should state the assault to have been with intent to commit the felony, in which case the prisoner might be sentenced to hard labour; but no opinion as to this is mentioned in the report. C. S. G.

(q) Anonymous, 2 Moo. C. C. 40.

(r) Reg. v. Brimlow, 2 Moo. C. C. R. 122. 9 C. & P. 366.

(s) Reg. v. Saunders, 8 C. & P. 265, Gurney, B. Reg. v. Williams, 8 C. & P. 286, Alderson, B., *ante*, p. 678.

(t) Reg. v. Gould, 9 C. & P. 364, Tindal, C. J., and Parke, B. Reg. v. Phelps, Coltman, J., Gloucester Sum. Ass. 1841, MSS. C. S. G. S. C. 1 C. & Mars. 180.

(u) Reg. v. Pool, 9 C. & P. 728.

(v) Reg. v. Barratt, 9 C. & P. 387, Parke, B., *ante*, p. 709.

(w) Reg. v. Cruse, 8 C. & P. 541, Patteson, J., and all the judges, 2 Moo. C. C. R. 58.

(ww) Reg. v. Nichols, 9 C. & P. 267.

(x) Reg. v. Pool, 9 C. & P. 728.

^a Eng. Com. Law Reps. xxxviii. 158.

^b Ib. xxxiv. 383.

^c Ib. xxxiv. 393.

^d Ib. xxxviii. 156.

^e Ib. xli. 103.

^f Ib. xxxviii. 309.

^g Ib. xxxviii. 167.

^h Ib. xxxiv. 522.

ⁱ Ib. xxxviii. 114.

^j Ib. xxxviii. 309.

ment; and that, in all cases of felony, where an assault was stated as part of the charge, the jury were at liberty to acquit of the felony, and fine the party guilty of a common assault. His *lordship added, that the point had been reserved by Mr. Baron Parke, for the opinion of the fifteen judges, who had decided the question in the way he had mentioned, and did not express any doubt on the subject. And it was held that the jury could convict the prisoner of the assault.(y)

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It has been held that if a prisoner be indicted for a felony which includes an assault, he may be convicted of an assault, if the indictment contain one good count, although the jury may not find their verdict on that count. Upon an indictment containing counts for wounding with intent to maim, disfigure, disable, and do some grievous bodily harm; the case was left to the jury on the count with intent to do grievous bodily harm only, and the jury found the prisoner guilty of an assault. It was moved, in arrest of judgment, that the last count was bad, and therefore no judgment for assault could be given upon it. Gurney, B., "If there is any one count good, and there is an acquittal upon all, still judgment may be given for an assault. If the record were drawn up, there would be no error on the face of it." It was submitted that if the record were drawn up, it would state that the jury found that if the prisoner was not guilty altogether on the first three counts, and not guilty of maliciously cutting, but guilty of an assault on the last count, and then if the last count were bad, judgment would be reversed on error. Gurney, B., "I am clearly of opinion that the objection is not valid."(z)

Upon an indictment for felony, the jury cannot convict of an assault, which is a completely separate and distinct assault. On an indictment for a rape, it appeared that the prisoners had assaulted and ill-used the prosecutrix, at different times in the evening, and previous to the time when the rape was alleged to have been committed, and it was contended that on this indictment the jury ought not to convict the prisoners of such separate and independent assaults. Parke, B., "I quite agree with the learned counsel, that on an indictment for felony, you ought not under the late statute, to convict of a completely independent and distinct assault, but only of such an assault as is connected with the felony charged."(a) It must be an assault involved in, and connected with the felony charged. Where, upon an indictment for attempting to discharge a loaded pistol at the prosecutor, it appeared that the prisoner had committed several assaults with his hands on the prosecutor, by pulling his nose and otherwise, before he pulled out the pistol, which he attempted to discharge; Parke, B., said, "My idea is, that the prisoner can only be found guilty under this act of parliament of that assault which was involved in, and not connected with, the *presentation of a

The jury cannot convict of an entirely separate and distinct assault.

It must be an assault involved in, and connected with the felony charged.

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(y) Reg. v. Ellis,^a 8 C. & P. 654, Park, J. A. J., and Alderson, B. See note (f) post, p. 782. Park, J. A. J., said there was a case before him on the last Norfolk circuit, in which a man was charged with a rape, and when the case had proceeded to a certain point, all on a sudden the counsel on both sides agreed that the rape was not satisfactorily made out, and the man was found guilty of an assault only.

(z) Reg. v. Nicholls,^b 9 C. & P. 267. But see Reg. v. Cruse,^c 8 C. & P. 541, where an objection was proposed to be taken on demurrer, but at the suggestion of Mr. J. Patteson, the point was reserved as if taken on demurrer, and the prisoners convicted of an assault; and Mr. J. Patteson said he should still reserve the case (and did so), because "if the demurrers are well founded the prisoners ought not to have been tried at all."

(a) Reg. v. Gutteridge,^d 9 C. & P. 471.

^a Eng. Com. Law Repts. xxxiv. 570. ^b Ib. xxxviii. 114. ^c Ib. xxxiv. 22. ^d Ib. xxxviii. 188.

loaded pistol. Suppose there was a common assault committed in the course of a dispute between the prisoner and the prosecutor, I do not think that the prisoner could be found guilty of that assault on an indictment charging him with felony. I had occasion to lay down the same rule in a case in Worcester,^(a) which was the case of an assault upon a female. There was some question about the crime itself having been committed, but there was no doubt that a great number of assaults had been committed in the course of the same evening; the learned counsel for the prisoner suggested that if the jury were not satisfied of the assault which was connected with the felony charged, the prisoner could not be found guilty of other assaults committed on the same evening, which were unconnected with the crime, and I was of that opinion. It appears to me that the prisoner can only be found guilty of the assault involved in the felony charged."^(b) So where upon an indictment for murder against Phelps, Southan, and Smith, it appeared that Phelps had struck the deceased violently with his fist several times, and the evidence tended to show that he then went away, and was not present at the time the fatal blow was struck, which might have been a quarter of an hour afterwards; and the only evidence against Southan and Smith was, that Southan had said something to encourage Phelps to strike the deceased, and that Smith had said he had given the deceased a kick, and that they might both have been present at the time when the fatal blow was struck; but there was no evidence to show who struck it. Coltman, J., told the jury, that if they thought Phelps had gone away before the fatal blow was struck, they might convict him of an assault, but that they must either convict Southan and Smith of manslaughter, or entirely acquit them, as the same evidence that tended to show that they assaulted the deceased, tended to show that they caused his death; and the jury found Phelps guilty of an assault, but acquitted Southan and Smith altogether; whereupon it was objected, that as the finding of the jury must have proceeded upon the ground that Phelps was absent at the time the fatal blow was given, he could not be convicted of an assault; that the assaults committed by him were just the same as if they had been committed the day before, and the two preceding cases were relied upon; Coltman, J., after taking time to consider till the next day, reserved the point, and the judges held that the conviction was wrong, and Phelps was discharged.^(c)

The prisoner cannot be convicted of an assault under this section, upon an indictment for carnally knowing and abusing a child under the age of ten years,^(d) or for carnally knowing and abusing a child between the age of ten and twelve years, where the child consented.^(e) The jury

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can only convict where the crime charged *includes an assault against

^(a) Reg. v. Gutteridge,^a 9 C. & P. 471.

^(b) Reg. v. St. George,^b 9 C. & P. 483.

^(c) Reg. v. Phelps, Gloucester Sum. Ass. 1841, MSS. C. S. G. & M. T. 1841. The case was reduced to manslaughter. See *ante*, p. 606.

^(d) Reg. v. Banks,^c 8 C. & P. 574, Patteson, J., *ante*, p. 696.

^(e) Reg. v. Martin,^d 2 Moo. C. C. R. 123, S. C. 9 C. & P. 213, *ante*, 696. It should seem that if the offence charged in the indictment would be proved, although there were consent, as in these two cases, the prisoner could not be convicted of an assault, because the "crime charged" would not in such case "include an assault," and though the indictment might allege an assault, that would not render it part of the crime charged within the meaning of this section. C. S. G.

^a Eng. Com. Law Reps. xxxviii. 188. ^b *Ib.* 195. ^c *Ib.* xxxiv. 531. ^d *Ib.* xxxviii. 88.

the person. They cannot, therefore, convict of an assault upon an indictment for an unnatural crime committed upon an animal.^(f)

Where a count in an indictment for manslaughter stated that the prisoner made an assault upon the deceased, and caused him to work for unreasonable times, and beat him, by means whereof he died, and a surgeon proved that the deceased died of consumption, and that over-work, and ill-usage might have accelerated the death, but he could not say that it had done so, and there were bruises on the legs of the deceased, which could not have contributed to his death, and it appeared that the prisoner had beaten the deceased with a small cane about five weeks before the death. Patteson, J., after reading *Reg. v. Gutteridge*, *Reg. v. St. George*, *Reg. v. Phelps*, from this edition, page 780, 781, said, "I think the prisoner cannot be convicted of an assault. In order to convict a person of an assault under the 1 Viet. c. 85, s. 11, it must be an assault which is the subject-matter of the charge, and which is embodied in the felony charged, and which, but for the circumstances, would be the felony. It could never be held that the mere charging of an assault in the indictment should be sufficient, because that would include cases of assault which had nothing to do with the felony charged. I think that no assault is included in a charge of manslaughter, which does not conduce to the death of the deceased, although the death itself be not manslaughter."^(g)

The burglariously breaking and entering a dwelling-house with intent to commit a rape, if not a crime which includes an assault, and therefore on an indictment for such a burglary the prisoner cannot be convicted of an assault under the 1 Viet. c. 85, s. 11.^(h)

^(f) *Reg. v. Eaton*,* 8 C. & P. 417. It may admit of some doubt whether the construction of sec. 11 of the 1 Viet. c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed; but if such were the intention the words do not so clearly express it as they ought, as they authorize the jury to convict "of assault," on any indictment for felony, "where the crime charged shall include an assault." These words are so general that they might include an assault, whether at the time of the felony charged or not: and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned baron in *Rex. v. St. George*, namely, that the assault must be an assault involved in and connected with the felony charged; and it is submitted that it must be such an assault as is essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises whether an assault, where the jury negative any intention to commit a felony, is within the section; and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner whatsoever. It is true that an assault is included in the felony, but it is an assault coupled with an intent, and if the jury negative the intent, such assault in no way tends to prove the felony: and it certainly would be a great anomaly if the prisoner were indicted for a felony, and the jury found that he had no intention of committing a felony, that he might be sentenced to three years' imprisonment and hard labour, while if he had been indicted for the offence of which he really was guilty, he could only be sentenced to imprisonment without hard labour. *Reg. v. Ellis*, ante, p. 789, therefore, seems deserving of reconsideration, and the more so as it was decided before *Reg. v. Gutteridge*, *Reg. v. St. George*, and *Reg. v. Phelps*, ante, p. 781. The intention, no doubt, was to punish attempts to commit felonies, including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment. C. S. G.

^(g) *Reg. v. Crumpton*,^b MSS. C. S. G., 1 C. & Mars. 597.

^(h) *Reg. v. Watkins*,^c 1 C. & Mars. 264. All the judges on a case reserved.

* Eng. Com. Law Repts. xxxiv. 475.

^b Ib. xli. 325.

^c Ib. 148.

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*CHAPTER THE ELEVENTH.

OF MAIMING, ETC., BY THE FURIOUS DRIVING, ETC., OF STAGE
COACHMEN.

Where any person is injured by the wanton and furious driving, or wilful misconduct of the coachman of any public carriage, such wanton driving, &c., is declared to be a misdemeanor.

THE 1 Geo. 4, c. 4, enacts, "that if any person whatever shall be maimed or otherwise injured by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage coach or public carriage, such wanton and furious driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is hereby declared to be a misdemeanor, and punishable as such by fine and imprisonment: provided always, that nothing in this act contained shall extend or be construed to extend to hackney coaches, being drawn by two horses only, and not plying for hire as stage coaches."

By the 2 & 3 Wm. 4, c. 120, s. 34, a penalty is imposed for carrying a greater number of passengers than is authorized by the license, of 5*l.* for each passenger above the number.

By the 7 & 8 Geo. 4, c. lxxv. s. 38, every person convicted of working or navigating any wherry, boat, or other vessel licensed to carry persons or passengers on the river Thames, in which any greater number of persons or passengers shall be taken or carried than are allowed to be carried therein, in case any one or more of them shall by reason thereof be drowned, besides being liable to be punished for a misdemeanor, is disfranchised and not allowed by any time thereafter to work, row, or navigate any wherry, boat, or other vessel, or to enjoy any of the privileges of a freeman of the company of "The Master, Wardens, and Commonalty of Watermen and Lightermen of the river Thames."

*CHAPTER THE TWELFTH.

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OF SETTING SPRING GUNS, ETC.

THE 7 & 8 Geo. 4, c. 18, s. 1, enacts and declares, "That if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm, upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor."

Persons setting or placing spring guns, man traps, &c., guilty of a misdemeanor.

By sec. 2, "Nothing herein contained shall extend to make it illegal to set any gin or trap, such as may have been or may be usually set with the intent of destroying vermin."

Proviso for traps for destroying vermin.

By sec. 3, "If any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine as aforesaid, which may have been set, fixed, or left in any place, then being in, or afterwards coming into his or her possession or occupation, by some other person or persons to continue so set or fixed, the person so permitting the same to continue, shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid."

Persons permitting guns, traps, &c., set by others, to continue, deemed to have set the same.

By sec. 4, "Nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sun-set to sun-rise, any spring gun man trap, or other engine, which shall be set, or caused or continued to be set in a dwelling house, for the protection thereof."

Proviso for protection of dwelling houses.

By sec. 5, the act is not to affect proceedings touching any matter or thing done or committed previous to its passing. And by sec. 6, the act is not to extend to Scotland.

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*BOOK THE FOURTH.

OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

CHAPTER THE FIRST.

OF BURGLARY.(A)

Definition
of the
offence.

It is laid down in the more ancient authorities, that the offence of burglary may be committed by the felonious breaking and entering of a church, and the walls and gates of a town, in time of peace, as well as by the felonious breaking and entering of a private house.(a) But the more material inquiry at the present day relates to the breaking and entering of private houses, or, in the language of the books, the mansion-houses of individuals: and this species of the offence appears to be well described, as—*A breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.*(b)

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

(b) 3 Inst. 63. 1 Hale, 549. Sum. 79. 1 Hawk. P. C. c. 38, s. 1. 4 Bla. Com. 224. 2 East, P. C. c. 15, s. 1, p. 484. Burn. Just. tit. *Burglary*, s. 1. The word *burglar* is supposed to have been introduced from Germany by the Saxons; and to be derived from the German, *burg*, a house, and *larron*, a thief; the latter word being from the Latin, *latro*.

(A) NEW YORK.—The breaking open in the night time of a store at the distance of twenty feet from a dwelling-house, but not connected with it by fence or inclosure, is not burglary. and *per curiam*, “the store was not within the *curtilage*, as there was no fence or yard inclosing the dwelling-house and store, so as to bring them within one inclosure.” This brings the case within that of the *King v. Garland*, (Leach, 130,) and distinguishes it from *Gibson's case*, (Leach, 287). *The People v. Parker*, 4 Johns. Rep. 224.

{See Revised Statutes, Vol. ii. 668, 669.}

NEW JERSEY.—The following points were decided in the case of the *State v. Wilson*, Cox's Rep. 489.

1. If a man lifts up the latch of an outward door, or if the outward door being open, he enters and unlatches or unlocks a chamber door, it is such a breaking as is necessary to enter into the crime of burglary.

2. If all the doors are open, and a thief enters, though he should afterwards break open a chest or cupboard, it is not such a breaking as to constitute burglary.

3. Before one can be convicted of burglary, there ought to be evidence to prove that the doors were shut, and were opened by the prisoner, or by his concurrence.

4. If one takes the goods of another out of the place where they were put, though he is detected before they are actually carried away, the larceny is complete.

PENNSYLVANIA.—In an indictment for burglary, the word mansion-house, is a good description of the premises: the court say, “the house is sufficiently described as a dwelling-house, by the word mansion.” *Commonwealth v. Pennock*, 3 Serg. & R. 299.

MASSACHUSETTS.—Burglary was a capital offence in this State until the statute of 1805, Chap. 101: by which statute the punishment was reduced to hard labour for life, when committed by a person without being armed with a dangerous weapon, or without arming himself in the house with a dangerous weapon, and without committing an assault upon any person lawfully being in such house. When the offence is committed with the circumstances of aggravation, it is still punished capitally.

{CONNECTICUT.—Breaking and entering the cabin of a vessel, in the night time, with intent to commit a felony, is burglary by statute. 5 Day, 131, *State v. Carrier*.}

*Pursuing the order of this definition, we may consider, I. Of the breaking and entering: II. Of the mansion-house: III. Of the time—namely, the night: IV. Of the intent to commit a felony. *786

I. Notwithstanding some loose opinions to the contrary, which may have been formerly entertained, it is now well settled that both *a breaking and entering* are necessary to complete the offence of burglary. *(c)* A breaking and entering are both necessary.

With respect to the breaking, it is agreed that it is not every entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of the indictment, *felonice et burglariter fregit.* *(d)* Thus, if a man enter into a house by a door or window, which he finds open, or through a hole which was made there before, and steal goods: or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary. *(e)* There must either be an actual breaking of some part of the house, in effecting which more or less of actual force is employed; or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

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

An actual breaking of the house may be by making a hole in the

Burn. Just. tit. *Burgl.* s. 1. 2 East, P. C. c. 15, s. 1, p. 484. But Sir H. Spelman thinks that the word *burglaria* was brought here by the Normans, as he does not find it amongst the Saxons; and he says that *burglatores*, or *buglatores*, were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius efringunt, et deprædantur.* The crime, however, appears to have been noticed in our earliest laws, in the common genus of offences denominated *Hamsucken*, and by the ancient laws of Canutus, and of Hen. I, to have been punishable with death. Ll. Canuti, c. 61. Hen. 1, c. 13. 1 Hale, 547, citing Spelm. Gloss. tit. *Hamsucken*, and *ibid.* tit. *Burglaria*. Originally the circumstance of *time*, which is now the very essence of the offence, does not seem to have been material; and the malignity of the crime was supposed to consist merely in the invasion on the right of habitation to which the laws of England have always shown an especial regard, herein agreeing with the sentiments of ancient Rome, as expressed in the words of Cicero: *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium? Hic arce sunt, hic foci—hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit.* The learned editor of Bacon's Abridgement says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence; but that it must have been so settled before the reign of Ed. 6, as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, *nisi ou lefreiender del meason est per noctem*, (Bro. tit. *Corone*, pl. 185,) and that, two years before, *per noctem* is introduced (Id. pl. 180,) as of course in the mention of the offence. 1 Bac. Abr. tit. *Burglary*, 539 (ed. 1807). And see 3 Inst. 65.

(c) 1 Hawk. P. C. c. 38, s. 3. 1 Hale, 551. 4 Bla. Com. 226.

(d) 3 Inst. 64. 1 Hawk. P. C. c. 38, s. 4. 1 Hale, 551, 552.

(e) *Id.* *ibid.* For if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein it is no burglary. 4 Bla. Com. 226.

(f) *Rex v. Lewis*, 2 C. & P. 628, Vaughan, B.

(g) *Rex v. Spriggs*, 1 M. & Rob. 357.

* Eng. Com. Law Repts. xii. 292.

*786 wall; by forcing open the door; by putting back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window either by taking out the nails or other fastening, or by drawing or bending them back, or by *putting back the leaf of a window with an instrument. And even the drawing or lifting up the latch, *(h)* where the door is not otherwise fastened; and turning the key where the door is locked on the inside: or the unloosing any other fastening which the owner has provided, will amount to a breaking. *(i)*

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

Opening windows.

So where a window opening upon hinges is fastened by a wedge, so that pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. The prisoner got into the prosecutor's cellar, by lifting up a heavy grating, and into his house by forcing open a window which opened on hinges, and was fastened by two nails which acted as wedges, but would open by pushing: upon a case reserved the judges held the forcing open the window to be a sufficient breaking. *(k)* So pulling down the sash of a window is a breaking, though it has no fastening, and it is only kept in its place by the pulley weight: and it makes no difference that there is an outer shutter which is not closed. The prisoner entered a house by pulling down the upper sash of a window, which had no fastening, and was kept in its place by the pulley weight only. There was an outer shutter, but it was not put to. A case was reserved upon the question, whether the pushing down the sash was a breaking, and all the judges were unanimous that it was. *(l)* [1]

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

But if a window be partly open, but not sufficiently so as to admit a person, the raising it higher so as to admit a person, is not a breaking. The prisoner was seen very near a window, which in the morning had been shut quite down, but when the prisoner was seen, was raised about a couple of inches, and he immediately afterwards threw the sash quite up, and entered; and upon a case reserved the judges were unanimous that this was not a breaking. *(n)* But where a square of glass

(h) Owens's case, 1 Lewin, 35, per Bayley, J., whether it be an outer or inner door, and see *Rex v. Lawrence*,^a 4 C. & P. 231, and *Rex v. Jordan*,^b 7 C. & P. 432.

(i) 1 Hale, 552. 3 Inst. 64. Sum. 80. 1 Hawk. P. C. c. 38, s. 6. 2 East, P. C. c. 15, s. 3, p. 497.

(j) *Reg. v. Bird*,^c 9 C. & P. 44, Bosanquet, J.

(k) *Rex v. Hall*, East. T. 1818. Russ. & Ry. 355.

(l) *Rex v. Haines & Harrison*, East. T. 1821. Russ. & Ry. 451.

(m) *Rex v. Hyams*,^d 7 C. & P. 441, Park, J. A. J., and Coleridge, J.

(n) *Rex v. Smith*, R. & M. C. C. R. 178. H. T. 1828.

[1] {Cutting and tearing down a netting of twine which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it was not shut, constitute a sufficient breach and entry. 8 Pick. 354, *Commonwealth v. Stephenson*.}

{To constitute burglary there must be a breaking, removing, or putting aside of something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion. If a door or window be shut, however, it is sufficient, though it be not bolted or fastened. *The State v. Boon*, 13 Iredell, 244.]

^a Eng. Com. Law Reps. xix. 360. ^b Ib. xxxii. 572. ^c Ib. xxxviii. 29. ^d Ib. xxxii. 572.

in a kitchen window, through which the prisoner entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement: Mr. J. Alderson and Mr. J. Patteson, entertaining a doubt from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing, from the *enlarging an aperture, by lifting up further the sash of a window, in the preceding case, submitted the case to the judges, who were unanimously of opinion that this was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window.(o) *788

It was doubted, on one occasion, whether a thief, getting into a house by creeping down the chimney, could be found guilty of burglary, as the house being open in that part, could not be said to have been actually broken;(p) but it was afterwards agreed, that such an entry into a house will amount to a breaking, on the ground, that the house is as much closed as the nature of things will permit.(q) Entering by a chimney.

Getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house. The prisoner got in at the top of a chimney, and got down to just above the mantel-piece of a room on the ground-floor. A case was reserved upon the question, whether this was a breaking and entering of the dwelling-house; and two of the judges thought it was not, because the party could not be considered as being in the dwelling-house; not having got below the chimney-piece; but the ten other judges held otherwise, on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself by the party was an entry within the dwelling-house.(r)

A case is reported, in which the breaking was holden to be sufficient, though there was no interior fastening to the doors which were opened. The place which the prisoner entered was a mill, under the same roof, and within the same curtilage as the dwelling-house: through the mill there was an open entrance, or gateway, capable of admitting wagons, and intended for the purpose of loading them more easily with flour by means of a large aperture or hatch, over the gateway, communicating with the door above; and this aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. The prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour; and this was holden to be a sufficient breaking by the learned judge who tried the prisoner; and the prisoner was accordingly convicted of burglary:(s) Brown's case. Breaking where there were no interior fastenings.

(o) *Rex v. Robinson*, R. & M. C. C. R. 327. II. T. 1832.

(p) 1 Hale, 552, where the learned author says that he was doubtful whether it was burglary, and so were some others; but that upon examination it appeared that in the creeping down of the prisoner, some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question; and the direction was given to find it burglary.

(q) *Crompt*. 32, (b.) *Dalt*. 253. 1 Hawk. P. C. c. 38, s. 6. 2 East, P. C. c. 15, s. 2, p. 485. (r) *Rex v. Brice*, East. T. 1821. Russ. & Ry. 450.

(s) *Brown's case*, *Winton Spring Ass.* 799, *cor. Buller*, J. 2 East, P. C. c. 15, s. 3, p. 487.

Callan's case.

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Where the fastening of a trap-door or flap of a cellar was only such as was caused by the compression of its natural weight; it was doubted whether the opening it constituted a sufficient breaking.

But doubts were entertained whether lifting up the trap-door or flap of a cellar, which was kept down solely by its own weight, was a sufficient breaking; such trap-door or flap being used for the purpose only of taking in liquors to the cellar, and not as a common entrance for persons. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. The wine was taken from a bin, in a cellar of the house, which was a public house, and removed by the prisoner from the bin to the trap-door or flap of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street, only by the flap, which had bolts belonging to it, for the purpose of bolting it on the outside, and was of considerable size, being made to cover the opening through which the liquors consumed in the public house were usually let down into the cellar. The flap was not bolted on the night in question; but it was proved to have been down; in which situation it would remain, unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap; and upon an attempt being made to lay hold of him, he made a spring, got quite out, and ran away, when the flap fell down, and closed in its usual way, by its own weight. Upon this evidence it was doubted whether there was a sufficient breaking to constitute the crime of burglary; and the prisoner having been convicted, the question was saved by the learned judge who presided at the trial, for the opinion of the twelve judges, who were divided in opinion as to this being a sufficient breaking.^(t)

But it has been since held sufficient.

But it has since been held, that lifting up the flap of a cellar, which was kept down by its own weight, is a sufficient breaking, although such flap may have been occasionally fastened by nails, and was not so fastened at the time the entry was made. The prisoner entered into a cellar, by raising up a flap-door, which let down, and had from time to time been fastened with nails, when the cellar was not wanted to keep coals in: and the jury found upon the evidence that it was not nailed down on the night the prisoner entered; and it was held, on a case reserved, that there was a sufficient breaking.^(u)

Breaking a wall, built about a house for its safeguard.

The book, 22 Assiz. 95, in which burglary is defined as the breaking of houses, churches, walls, courts, or gates, in time of peace, is referred to by Lord Hale, as seeming to lead to the conclusion, that where a man has a wall about his house for his safeguard, if a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary; though it would be otherwise if the thief should get over the wall of the court, and so enter through the open doors of the house.^(v) But upon this it has been remarked, that the doctrine referred to by Lord Hale was anciently understood only as relating to the walls or gates of a city; and did not, therefore, support his conclusion, when he applied it to the wall of a private house.^(w) And the distinction between breaking and coming in over the gate or wall is spoken of by an able writer, as being over-refined; for if, as he observes, the gate or wall be a part of the mansion, and be inclosed as much as the nature of the thing will admit of, for the

(t) Callan's case, *cor.* Lord Ellenborough, C. J., O. B. November, 1809. Mich. T. 1809. MSS. Bayley, J., and Russ. & Ry. 157. This case approaches very closely to Brown's case, *ante*, p. 788.

(u) *Rex v. Russell*, East. T. 1832, R. & M. C. C. R. 377. This case seems to overrule *Rex v. Lawrence*, *infra*, p. 792.

(v) 1 Hale, 539.

(w) Note (n), 1 Hale, 559, ed. 1800.

purpose of burglary, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same *consideration as the case of a chimney; and that if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial, as in neither case will it amount to burglary.(x) *790

A door, wall, or other fence, forming part of the outward fence of the curtilage and opening into no building, but into the yard only, was held not to be such a part of the dwelling-house as that the breaking thereof would constitute burglary; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house and within the curtilage, were over the gateway, and that there was a hole in the ceiling of the gateway, for taking up goods into the building above. The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard; the entrance into the yard was through a pair of gates, which opened into a covered way; over this way were some of the warehouses, and there was a loophole and crane over the gates, to admit of goods being craned up; and there was also a trap-door in the roof of the covered way; there was free communication from the warehouses to the dwelling-house; the prisoners broke open the gates in the night, with intent to steal, and entered the yard, but did not enter any of the buildings; and upon a case reserved, the judges were unanimous, that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house.(y) So an area gate, opening into the area only, is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners opened an area gate in a street in London, and entered the house through a door in the area, which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of 39s., a question was made, whether the breaking the area gate was breaking the dwelling-house so as to constitute burglary; and as there was no free passage in time of sleep from the area into the house, the judges held unanimously that the breaking was not a breaking of the dwelling-house.(z)

When the prisoner broke open a box, used as a shutter-box, which partly projected from the wall of the house, and adjoined one side of the window of the shop, which side of the window was protected by wooden panneling, lined with plates of iron; it was held that the shutter-box was no part of the dwelling-house.(a) A shutter box.

The breaking requisite to constitute a burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if A. enter the house of B. in the night *time, the out-
ing may be of an inner door of the house. *791

(x) 2 East, P. C. c. 15, s. 3, p. 488.

(y) Rex v. Bennett and another, Hil. 1815. MSS. Bayley, J., and Russ. & Ry. 289.

(z) Rex v. Davis and another, Hil. 1817. MSS. Bayley, J., Russ. & Ry. 322.

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

ward door being open, or by an open window, and, when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (b) So where the prisoners went into the house of the cook at Serjeant's Inn, in Fleet street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was agreed that the picking open the lock of a chamber door, ousted them of their clergy, though the breaking open the chest would not have done so. (c) And it will also amount to burglary if the servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's door, with such evil intent. (d) But it has been questioned whether, if a lodger in an inn should, in the night time, open a chamber door, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the inn-keeper's house. (e)

Qu. As to the breaking of cupboards, &c., fixed to the freehold.

It is clear that the breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house. (f) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the freehold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears that they were divided upon the question. (g) But Lord Hale says that such breaking is not burglary at common law. (h) And Mr. J. Foster thinks that, with regard to cupboards, presses, lockers, and other fixtures of the like kind, a distinction should be taken, in favour of life, between cases relative to mere property, and such wherein life is concerned. He says, "In questions between the heir or devisee, and the executor, those fixtures may, with propriety enough, be considered as annexed to, and parts of the freehold. The law will presume that it was the intention of the owner, *under whose bounty the executor claims*, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures which merely supply the place of chests, and other ordinary *792 utensils of household, should be considered in no other *light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use." (i)

(b) 1 Hale, 553. 1 Hawk. P. C. c. 38, s. 6. Johnson's case, Mich. T. 1786, 2 East, P. C. c. 15, s. 4, p. 488.

(c) Anon. 1 Hale, 424.

(d) 1 Hale, 553, 554. 4 Bla. Com. 227. Bingle's case, 2 W. & M. MSS. Denton, cited 2 East, P. C. c. 15, s. 4, p. 488. Gray's case, 1 Str. 481. Sum. 82, 84. Bac. Abr. tit. *Burglary* (A).

(e) 1 Hale, 554. But upon this it is observed, that if another person should open such lodger's door burglariously, it must be laid to be the mansion of the house-keeper, and that a guest may commit larceny of the things delivered to his charge. 2 East, P. C. c. 15, s. 4, p. 488, and see Reg. v. Wheeldon, *post*, 792, note (k).

(f) 1 Hale, 523, 524, 425. 1 East, P. C. c. 15, s. 5, p. 488, 489.

(g) Fost. 108, citing MSS. Denton. The meeting of the judges was in January, 1690.

(h) 1 Hale, 527.

(i) Fost. 109. And see 2 East, P. C. c. 15, s. 5, p. 489.

Though it was said to be the law, that the entering into the house of a person, without breaking it with an intent to commit some felony, and afterwards breaking the house in the night time to get out, was burglary; yet the doctrine was questioned by great authority:(j) and it was thought expedient to remove the doubt by legislative enactment. This was done by the 12 Anne, stat. 1, c. 7, s. 3, now repealed by the 7 & 8 Geo. 4, c. 27; and the 7 & 8 Geo. 4, c. 29, s. 11, declares that "if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house, shall commit any felony, and shall in either case break out of the said dwelling-house in the night time, such person shall be deemed guilty of burglary."

Of a breaking out of the house.

If a person commits a felony in a house, and breaks out of it in the night time, this is a burglary, although he might have been lawfully in the house; if, therefore, a lodger has committed a larceny in the house, and in the night time even lifts a latch to get out of the house with the stolen property, this is a burglariously breaking out of the house.(k)

By lodgers.

It has been held that getting out of a house by pushing up a new trap-door, which was merely kept down by its own weight, and on which fastenings had not at that time been put, but the old trap-door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house.(l)

Where a servant pretended to concur with two persons who proposed to him to unite with them in robbing his master's house; and the master being out of town the servant communicated with the police, and, acting under their instructions, a little after nine o'clock at night, let in one of the persons by lifting the latch of a door, but before that person had taken any property, he was seized by the police, and placed in confinement. And afterwards the servant went out and fetched the second person, and let him in the same manner, and this person was seized with a basket of plate in his hand, which he had carried from the kitchen part of the way up stairs. Maule, J., and Rolfe, B., held that there was no such breaking as to constitute the crime of burglary, as under the circumstances the door must be considered to have been lawfully open; but that the one who had taken the plate might be convicted of stealing in a dwelling-house, and the other as accessory before the fact to such stealing.(m)

Having mentioned these points relating to an actual breaking, we may now inquire concerning a breaking by construction of law, where an entrance is obtained by threats, fraud or conspiracy.

Of a breaking by construction of law.

Where in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to breaking in law:(n) for which some have

By threats.

(j) By Lord Holt and Trevor, C. J. in Clarke's case, O. B. 1707. 2 East, P. C. c. 15, s. 6, p. 490. And the question is also stated in 1 Hale, 554, where he says, "If a man enter in the night time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape: this, I think, is not burglary, against the opinion of Dalt. p. 253 (new edit. p. 487.) out of Sir Francis Bacon; for *fregit et exivit, non fregit et intravit.*" Lord Bacon thought it was burglary. Elem. 65.

(k) Reg. v. Wheeldon, 8 C. & P. 748, Erskine, J.

(l) Rex v. Lawrence, 4 C. & P. 231, Bolland, B. Unless a breaking out of a house can be distinguished from a breaking into a house, this case seems overruled by Rex v. Russell, ante, p. 789, note (u). See Jervis's Archb. 8 ed. 309. C. S. G.

(m) Reg. v. Lawton, 1 C. & Mars. 218.

(n) Crompt. 32, (a), 1 Hale, 553. 2 East, P. C. c. 15, s. 2, p. 486.

* Eng. Com. Law Reps. xxxiv. 617.

b 1b. xix. 330.

c 1b. xli. 123.

*793

given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands.⁽ⁿ⁾ [And in a late case, where the evidence was, that the family within the house were forced by threats and intimidation to let in the offenders, Thompson, B., told the jury, that although the door was, literally, opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns, if under these circumstances the persons within were *induced to open the door, it was as much a breaking by those who made use of such intimidations to prevail upon them so to open it, as if they had actually burst the door open.^(o) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be a burglary;^(p) though if the money were taken up in the owner's presence, it is admitted that it would be robbery.^(q) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence could not, it should seem, be burglary, though certainly robbery.^(r)

By fraud.

Where an act is done, *in fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable, and rob the owner, it is burglary.^(s) And, upon the same principle, the getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein.^(t) So if a man go to a house under pretence of having a search warrant, or of being authorized to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering to constitute burglary, or if done in the day-time, house-breaking.^(u)

If admission to a house be gained by fraud, not carried on under the cloak of legal process, as by a pretence of business, it will also amount to a breaking by the construction of law. Accordingly it was adjudged, that where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary.^(v) And so where some persons took lodgings in a

(n) 1 Hawk. P. C. c. 38, s. 7.

(o) *Rex v. Swallow and others*, cor. Thomson, B. York, January, 1013, MSS. Bayley, J. The prisoners were convicted and executed.

(p) 1 Hawk. P. C. c. 38, s. 3.

(q) Sum. 81. 2 East, P. C. c. 15, s. 2, p. 486.

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

(s) 3 Inst. 64. 1 Hale, 552, 553. Sum. 81. Crompt. 32, b. Kel. 44, 82. 1 Hawk. P. C. c. 38, s. 10. 4 Bla. Com. 526.

(t) Earle's case, Kel. 43.

(u) *Per Cur.* in Gascoigne's case, 1 Leach, 284.

(v) *Le Mott's case*, Kel. 42. 1 Hawk. P. C. c. 38, s. 8.

house, and afterwards, at night, while the people were at prayers, robbed them: and it was considered, that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. (w) For the law will not endure to have its justice defrauded by such evasions. (x) †

*A case is also reported, where the entrance to the house was gained by deluding a boy who had the care of it. It appeared upon the evidence, that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and, by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and when he was gone, robbed the house, and went away. And this being *in the night time*, it was adjudged that the prisoner was clearly guilty of burglary. (y)

The breaking may also be by conspiracy. Thus were a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement, opened the door or window in the night time, and let him in; this, according to the better opinion, was considered to be burglary in both the thief and the servant. (z) And this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary; and, upon the evidence, it appeared, that one of them was a servant in the house where the offence was committed; that in the night time he opened the street door, let in the other prisoner, and showed him the sideboard, from whence the other prisoner took the plate; that he then opened the door, and let the other prisoner out; did not go out with him, but went to bed. And upon these facts being found specially, all the judges were of opinion, that both the prisoners were guilty of burglary; and they were accordingly executed. (a)

It may be here mentioned, that in the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seem to have been considered, that the question whether such act will amount to a breaking must depend upon the point, whether the door might have been opened by the servant in the course of his trust and employment. Thus, it is

(w) *Cassy and Cotter*, (case of) *Kel.* 62, 63. 1 *Hawk. P. C. c.* 38, s. 9, referred to by the court, in giving judgment in *Semple's case*, 1 *Leach*, 424.

(x) 1 *Hawk. P. C. c.* 38, s. 9. 4 *Bla. Com.* 227. 2 *East, P. C. c.* 15, s. 2, p. 485.

(y) *Rex v. Hawkins*, *O. B.* 1704, 1 *East, P. C. c.* 15, s. 2, p. 485, cited from *MSS. Tracy* 80, and *MSS. Sum.*

(z) 1 *Hale*, 553. 1 *Hawk. P. C. c.* 38, s. 14. 4 *Bla. Com.* 277. In *Dalt. c.* 99, p. 253, (later ed. p. 487), it is supposed only to be larceny in the servant; but, Lord Hale says, it seems to be burglary in both, for if it be burglary in the thief, it must needs be so in the servant, because he is present and aiding the thief to commit a burglary.

(a) *Cornwall's case*, 2 *Str.* 881. 1 *Hawk. P. C. c.* 38, s. 14. 49 *St. Tri.* (*Howell*) 782 in the note.

† [There cannot be a constructive breaking so as to constitute burglary by enticing the owner out of his house by fraud and circumvention and thus inducing him to open the door, unless the entry of the trespasser be immediate, or in so short a time that the owner or his family has not the opportunity of re-fastening the door. Thus, where the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house without breaking any part, but through the unfastened door, with intent to commit felony, it was held that this was not burglary. *The State v. Henry*, 9 *Iredell*, 463.]

said, that if a servant unlatch a door, or turn a key in a door of his master's house and steal property out of the room; such opening of the door, being within his trust, is not a breaking; but that if a servant break open a door, whether outward or inward, (as a closet, study, or counting house,) and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling-houses in the day time, or within the law of burglary.(b)

Of the entering necessary to constitute a burglary.
*795

With respect to the entering necessary to constitute burglary; it is agreed, that any, the least entry either with the whole or any part of the body, hand or foot, or with any instrument or *weapon introduced for the purpose of committing a felony, will be sufficient.(c) Thus, where the prisoner, in the night time, cut a hole in the window shutters of the prosecutor's shop which was part of the dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop, within his reach, it was holden to be burglary.(d) So, if a thief breaks the window of a house in the night time, with an intent to steal, and puts in a hook or other engine to reach out goods; or puts a pistol in at the window with intent to kill; this is burglary, though his hand be not within the window.(e) And, in a case where thieves came in the night to rob A., who, perceiving it, opened his door, issued out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged burglary by great advice.(f)

Discharging a gun, &c., on the outside of the house.

Though it is admitted that a person putting a pistol in at a window with intent to kill, thereby makes a sufficient entry, to constitute a burglary, yet it has been questioned whether if he should shoot *without* the window, and the bullet came in, the entry would be sufficient.(g) It is, however, elsewhere laid down, that to discharge a loaded gun into a house is a sufficient entry.(h) And a learned writer has observed, that it seems difficult to make a distinction between this kind of implied entry, and that which is effected by means of an instrument introduced within the window or threshold, for the purpose of committing a felony; unless it be that the one instrument by which the entry is effected is holden in the hand, and the other discharged from it; but that no such distinction is any where laid down in terms.(i)

Introduction of an instrument, in the act

It appears, however, that the mere introduction of an instrument, in the act of breaking the house, will not make a sufficient entry; but that the instrument by which the entry is effected must be introduced for the

(b) 2 Hale, 354, 355. *Sed quare*, and see Edmond's case, Hutt. 20, Kel. 67, 1 Hale, 554, where a servant who unlatched the stair-foot door, and went with a hatchet to kill his master, was held guilty of burglary. And see *ante*, p. 791. C. S. G.

(c) 3 Inst. 65. 1 Hale, 555. Sum. 80. 1 Hawk. P. C. c. 38, s. 11, 12. 1 And. 115. Lamb. c. 7, p. 263, Fost. 108. 4 Bla. Com. 227. Bacon, Ab. tit. *Burglary* (B).

(d) Gibbons's case, Fost. 107, 108. (e) 3 Inst. 64. 1 Hale, 555. Sum. 80.

(f) 1 Hale, 553. Crompt. 32, (a). 2 East, P. C. c. 15, s. 7, p. 490.

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

(h) 1 Hawk. P. C. c. 38, s. 11; and it appears to have been ruled by Lord Ellenborough, C. J., that a person discharging a gun from the outside of a field into it, so as that the shot must have struck the soil, was guilty of breaking and entering the field. See *Pickering v. Rudd*, 5 Camp. 220. 1 Stark. R. 58.

(i) 1 East, P. C. c. 15, s. 7, p. 480.

purpose of committing a felony. So that where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered, when the owner for fear threw out his money to him, and he went off with it: the better opinion appears to have been, that it was not a burglary. (*j*) In another case, where a prisoner had bored a hole with an instrument called a *centre-bit* through the pannel of a house door, near to one of the bolts by which it was fastened; and that some pieces of the broken pannel were found withinside the threshold of the door; but it did not appear, that any instrument, except the point of the *centre-bit*, or that any part of the bodies of the prisoners had *been withinside the house, or that the aperture was made large enough to admit a man's hand; the court held this not to be a sufficient entry. (*k*)

breaking
the house.

*796

Where a glass window was broken, and the window opened with the hand, but the shutters in the *inside* were not broken, it was ruled to be burglary, but considered as going to the extremity of the law. (*l*) In a more recent case, however, it was decided that introducing the hand between the glass of an outer window, and an inner shutter, is a sufficient entry to constitute burglary, on the ground that as the glass of the window is the outer fence, whatever is within the glass is within the house. A sash window was fastened in the usual way by a latch from the bottom of the upper sash to the top of the lower one, and there were inside shutters fastened within; the prisoner broke a pane in the upper sash, and introduced his hand within the window to undo the latch, but whilst he was cutting a hole in the shutter with a *centre-bit*, and before he had undone the latch of the window, he was seized. The point saved for the consideration of the judges was, whether the introduction of the hand between the window and the shutter to undo the window latch was a sufficient entry, and the judges present held that it was. (*m*) And in a more recent case, where in breaking a window in order to steal something in the house, the prisoner's finger went within the house, the judges held that there was a sufficient entry to constitute burglary. The prisoner was instantly apprehended before he could put his hand to steal any thing. (*n*)

Introduc-
ing the
hand
between
the glass of
a window
and an in-
ner shutter.

But throwing up a sash and introducing an instrument between the sash and an inside shutter to force open the shutter, is not an entry, if the hand or some part of it is not within the sash. A glass sash window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, which were about an inch thick; after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the

Introduc-
ing instru-
ments to
force shut-
ters.

(*j*) 1 Hale, 555, *ante*, p. 793, note (*p*).

(*k*) *Rex v. Hughes* and others, O. B. 1785. 1 Leach, 406. 1 Hawk. P. C. c. 38, s. 12. 2 East, P. C. c. 15, s. 7, p. 491.

(*l*) *Roberts's alias Chambers's case*, O. B. 1702. 1 East, P. C. c. 15, s. 3, p. 487. It was so ruled by Ward, Ch B., Powis and Tracy, Js., and the Recorder; and they thought this the extremity of the law; and, on a subsequent conference with the other judges, Holt, C. J., and Powell, J., doubting and inclining to another opinion, no judgment was given.

(*m*) *Rex v. Bayley*, Hil. T. 1818, MSS. Bayley, J., and Russ. & Ry. 341. Two of the judges, Lord Ellenborough, C. J., and Garrow, B., had some little doubt. The judges absent were Gibbs, C. J., Bayley, J., and Dallas, J. *Rex v. Perkes*, 1 C. & P. 300, S. P.

(*n*) *Rex v. John Davis*, Hil. T. 1823, Russ. & Ry. 499.

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

*797 The prisoners were convicted before Best, J., on an indictment, charging them with burglariously breaking and entering the dwelling-house of the prosecutor, with intent to steal, and stealing a fitch of bacon. The prisoner Loosely lodged in the prosecutor's house: the window-shutter was in the night time opened from the *inside of the house, the casement of the window was taken out, and the bacon was most probably put through the window to Burr, by whom it was carried away from the prosecutor's premises to Burr's house. It did not appear that Loosely went out of the house, or that Burr ever entered the house. His lordship inclined, at the trial to think that the charge of burglary in the indictment was not supported by the evidence; but told the jury that if they believed the facts, he advised them to convict, and that he would save the point for the twelve judges; afterwards, on conferring with the judges of the court of King's Bench, he thought that there was no evidence of entering the house, and he therefore did not present the case to the twelve judges, but recommended a pardon, on condition of transportation for seven years, as the prisoners were properly convicted of larceny. (p)

Entry need not be made the same night as the breaking. The entry need not be made on the same night as the breaking, though both must be done in the night time: (q) but this point will be more properly mentioned in the treating of the time at which the offence may be committed.

A breaking and entering by one, will be the act of the whole party engaged in the transaction. The doctrine which has been laid down, respecting principals in the second degree, and aiders and abettors, in a former part of this work, will apply to the case of burglary; and make the breaking and entering by one the act of all the party engaged in the transaction, and legally present while the fact is committed. (r) So that if A., B., and C., go upon a common purpose and design to commit a burglary in the house of D., and A. only actually break and enter the house, B. stand near the door, but do not enter, and C. stands on the lane's end, and orchard gate, &c., to watch, this will be burglary in them all; and they are all in law principals. (s)

Entry and stealing effected by means of an infant. Neither will the offence be the less the act of the party, from his having effected the entry and the stealing by means of an infant under the age of discretion. Thus, if A., a man of full age, take a child of seven or eight years old, well instructed by him in the villainous art, as some such there are; and the child goes in at the window, takes goods out, and delivers them to A., who carries them away, this is burglary in A., though the child who made the entry be not guilty, by reason of his infancy. (t)

Of the mansion-house. II. The breaking and entering which have been thus described, must take place in a *mansion* or *dwelling-house*; which latter term is now generally adopted in indictments for burglary. And in treating of such mansion, or dwelling-house, it will be proper to inquire, first, as to what shall be so considered; secondly, how far it must be inhabited; and, thirdly, as to the person to be deemed the owner of it; for the ownership must be correctly stated in the indictment.

Every house for the dwelling and habitation of man, is taken to be a

(o) *Rex v. Rust*, R. & M. C. C. R. 183. East, T. 1828.

(p) *Rex v. Burr*, O. B. 1821, MSS. 3 Burn, J., D. & W. 93.

(q) 1 Hale, 551. 4 Bla. Com. 226.

(s) 1 Hale, 555.

(r) *Ante*, p. 26, *et seq.*

(t) 1 Hale, 555, 556.

mansion house in which burglary may be committed. (u) And a portion only of a building may come under this description. Thus where upon an indictment for burglary, it appeared that the prosecutor rented only certain rooms of a house, namely, a shop and parlour, in which the burglary was committed, but that the owner *did not inhabit any part of the house, and only occupied the cellar, it was holden that the shop and parlour were to be considered as the mansion-house of the prosecutor. (v) And sets of chambers in a college, or an inn of court, are to all purposes considered as distinct dwelling-houses; being often held under distinct titles, and, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. (w) A loft, situated over a coach-house and stables, in a public mews, and converted into lodging rooms, has also been holden to be a dwelling-house. The prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but he had never paid any rent; and the rooms were not rated in the parish books as dwelling-houses, but as appurtenances to the coach-house and stables, the way to the coach-house and stables was down a passage out of the public mews, to a stair case which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night, and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions or dwelling houses, as to become the subject of burglary; but the objection was overruled by the court, who thought that the circumstance of these rooms being situated over the coach-house and stables would not alter the nature of the case; and that they were, to all intents and purposes, the habitation and domicile of the prosecutor and his family. (x) Burglary, however, cannot be committed by breaking into any inclosed ground, or any booth, or tent, erected in a market, or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances. (y)

What shall be considered a mansion-house.

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Booths, tents, &c.

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

The mansion or dwelling-house, in which burglary might be com-

(u) 3 Inst. 64.

(v) Rogers's case, 1 Leach, 89, 428. 2 East, P. C. c. 15, s. 19, p. 506. The points respecting different mansions in the same house, will be considered presently, in treating of the *ownership* of the mansion-house.

(w) 1 Hale, 522, 506. 1 Hawk. P. C. c. 38, s. 18. Evans and Fynche (case of). Cro. Car. 473. 4 Bla. Com. 225. 2 East, P. C. c. 15, s. 17, p. 505.

(x) Turner's case, O. B. 1784, *cor.* Gould and Buller, Js.; and Perrin, B. 1 Leach, 305. 2 East, P. C. c. 15, s. 9, p. 492. Mr. J. Buller did not give any opinion; but said he would save the case for the opinion of the judges, who afterwards considered the case, and were of opinion that this was a dwelling-house; and the prisoner, who had been acquitted of breaking and entering in the night time, had judgment for stealing to the value of forty shillings out of the dwelling-house.

(y) 1 Hale, 557. 1 Hawk. P. C. c. 18, s. 35. 4 Bla. Com. 226.

(z) Rex v. Smith, 1 M. & Rob. 256, Park, J. A. J., and Littledale, J.

Not buildings within the curtilage, unless there be a communication.

*799

7 & 8 Geo. 4, c. 29. s. 13.

mitted, was held formerly to include the out-houses, such as ware-houses, barns, stables, cow-houses, or dairy-houses, thought not *under the same roof, or joining contiguous to the dwelling-house, provided they were parcel thereof. (zz) [1] And any out-house within the curtilage, or same common fence, as the mansion-house itself, was considered to be parcel of the mansion, upon the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or homestall. (a) But the 7 & 8 Geo. 4, c. 29, s. 13, has made an important alteration in this respect. It enacts, "that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate, or, by means of a covered and enclosed passage leading from the one to the other." But the breaking and entering any building within the curtilage of a dwelling house, and stealing therein, is subjected to a higher punishment than simple felony by another section of the same statute, which will be more particularly mentioned in a subsequent chapter. (b)

A part of a house may be so severed from the rest as no longer to be a place in which burglary can be committed.

In some cases, a part of a mansion-house may be so severed from the rest, by being let to a tenant, as to be no longer a place in which burglary can be committed. Thus though a shop may be, and usually is, a parcel of the dwelling-house to which it is attached; yet if the owner of the dwelling-house let the shop to a tenant who occupies it by means of a different entrance from that belonging to a dwelling-house, and carries on his business in it but never sleeps there, it is not a place in which burglary can be committed, if there be no internal communication with the other part of the house; for it is not parcel of the dwelling-house of the owner, who occupies the other part, being so severed by lease; nor is it the dwelling house of the lessee, when neither he nor any of his family ever sleep there. (c) But if there be an internal communication, burglary, it seems, may be committed. Thus, where a man let part of his house, including a shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, it was held, upon a case reserved, after conviction for burglary in the shop, laid to

(zz) 3 Inst. 64. 1 Hale, 558. Sum. 82. 1 Hawk. P. C. c. 38, s. 21. 4 Bla. Com. 225.

(a) 1 Hale, 558, 9. 1 Hawk. P. C. c. 38, s. 25. 4 Bla. Com. 225. 2 East, P. C. c. 15, s. 10, p. 493. {See also 1 Hayw. (N. C.) Rep. 102, State v. Twitty; 1b. 242, State v. Wilson.}

(b) Post, chap. 5.

(c) 1 Hale, 557, 558. Kel. 83, 84. 4 Bla. Com. 225, 226. 2 East, P. C. c. 15, s. 20, p. 507.

[1] {To break and enter by night into a store-house in which no one sleeps, and which has no internal communication with the dwelling-house, and is unconnected with it, except by a fence, is not burglary. Nott & M'Cord, 583, State v. Ginns.}

[Every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed. So all out-houses, such as barns, stables, dairy-houses, and offices attached to the mansion-house proper, and intended for the comfort and convenience of the owner, to be used in housekeeping and occupied with the dwelling-house, are in legal signification part and parcel thereof, and included therein. An out-house, however, though within the curtilage, is not a part or parcel of the mansion-house, unless it be used by the family, or some part of it, and for purposes designed to promote the comfort, enjoyment and ease of those engaged in housekeeping. A house in which no member of the family slept, used for the sale of goods, is not part and parcel of the mansion-house, though within thirty feet of it and within a common enclosure. Armour v. The State, 3 Humphreys, 379.]

be the dwelling-house of the father, that the conviction was right, upon the ground that the part of the house let to the son continued to be part of the dwelling-house of the father, by reason of the internal communication. (d) Where a pauper hired a house and garden for a year, and held the same from 1812 to 1821, but during the last four years let to a lodger one of the rooms on the ground floor, which communicated with the yard appurtenant to the house by an outer door, and with the adjoining rooms of the house by an inner door, of which doors the lodger kept the keys, and he occupied nothing but the room; Lord Tenterden, C. J., said, "It is said that the lodger held a part distinct from the rest, so that a *burglary committed in that part might, in an indictment, be laid to have been in the dwelling-house of the lodger; I think, however, that that proposition is not established by the facts stated. It is said, that putting the key of the inner door into the hands of the lodger was the same thing as if there was a brick wall between his and the adjoining room. If, indeed, it had been stated that the key was delivered to the lodger for the express purpose of preventing the communication between the different apartments, there would be more weight in the argument. But the key may have been delivered to him for the purpose of enabling him to enter either way; and if that was the object, then he had not any distinct dwelling-house. I rather infer from the facts stated, that that was the object for which the key was delivered: and if so, then the pauper held the whole house, and it is to be considered as one entire tenement: and in that case a burglary committed in the part occupied by the lodger must have been laid to have been in the dwelling-house of the pauper." (e)

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If the lessee, or his servant, should usually or often lodge at night in a shop or other premises severed from the house, it would then be the mansion or dwelling-house of such lessee, in which burglary might be committed. (ee)

A case was put upon the old law of burglary, whether, if the owner and occupier of a dwelling-house should let a part of it, namely, a chamber and a cellar, to a tenant, the only passage to the cellar being out of the street, and the cellar should be broken open in the night, it would be burglary: and it was supposed that it would not, on the ground that the cellar must be considered as severed by the lease, and had no communication with the rest of the house. (f) Upon this, however, it was observed, that the cellar would be no more severed from the house by the lease than the chamber, in which a burglary might be committed, and laid to be in the mansion of owner and occupier of the dwelling-house, there being but one common entrance to him and the lodger. But it was admitted, that if the cellar alone were let, clearly no burglary could be committed in it. (g) And this distinction seems fully to have been adopted in a case where the prisoners were convicted of a burglary in the house of T. Smith. Smith was the owner of a house, in which

Chambers, cellars, &c., let to a tenant with no internal communication with the rest of the house.

(d) *Rex v. Sefton*, Mich. T. 1811. MSS. Bayley, J., and Russ. & Ry. 202, where it is said that the judges thought this a case of much nicety.

(e) *Rex v. North Collingham*,^a 1 B. & C. 578, and see *Rex v. Great Bolton*,^b 8 B. & C. 71, *Rex v. Ditchat*,^c 9 B. & C. 176. *Rex v. Macclesfield*,^d 2 B. & Ad. 870.

(ee) 1 Hale, 558.

(f) Kel. 83, 84.

(g) 2 East, P. C. c. 15, s. 20, p. 507. And see *Rex v. Gibson, Mutton, and Wiggs*, 1 Leach, 357. 2 East, 58.

^a Eng. Com. Law Reps. viii. 153.

^b *Ib.* xv. 154.

^c *Ib.* xvii. 355.

^d *Ib.* xxii. 203.

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he resided, and to which house there was a shop adjoining, built close to the house; but there was no internal communication between the house and the shop, and no person slept in the shop, and the only door to the shop was in the court-yard, before the house and the shop, which yard was inclosed by a brick wall, three feet high, including both the house and shop. Smith let the shop, together with some apartments in the house to Hill, from year to year, at a rent. There was only one common door to the house, which communicated as well to Smith's as to Hill's apartment. A gate, or wicket, fastened by a latch in the wall of the court-yard, next the road, served as a communication both to the house and shop. The burglary was committed in the shop. And *upon objection that that could not be said to be the dwelling-house of Smith, the point was referred to the judges, who were all of opinion that the indictment was well laid, in describing it to be the dwelling-house of Smith, who inhabited in one part, it being within the same building, and under the same roof; and there being but one outer door, especially as it was within one curtilage or fence; and that the shop being let with a part of the house inhabited by Hill, still continued to be part of the dwelling-house of Smith, although there was no internal communication between them. But it was admitted that if the shop had been let by itself, Hill not dwelling therein, burglary could not have been committed in it; for then it would have been severed from the house. (*h*)

A room in a house, and occupied therewith, is part of the house, though there be no internal communication.

It was observed in the last edition, that it should seem that no burglary could now be committed in such cellar as that above mentioned, (*i*) whether it were let alone or together with the chamber, as the late act requires that there should be a *communication* between any building broken into and the dwelling-house, in order to constitute burglary; but this position seems to be at variance with the following case in which it was held that a room in a dwelling-house, occupied therewith, and under the same roof, is to be deemed part of the dwelling-house, though it has a separate outer door, and there is no internal communication with the rest of the house. The prisoner was indicted for a burglary in the house of Swinton: Swinton's house consisted of two long rooms, another room used as a cellar and wash-house, on the ground floor, and of three bed-rooms up stairs, one of them over the wash-house; the bed-room over the house place, communicated with the bed-room over the wash-house, but there was no internal communication between the wash-house and any of the other rooms in the house; the whole building was under the same roof; the door of the wash-house opened into a back yard. The prisoner broke into this wash-house, and was breaking through the wall between the wash-house and the house place, when he was detected. The provision in 7 & 8 Geo. 4, c. 29, s. 13, appearing to apply to buildings within the curtilage, other than the dwelling-house, the question whether the wash-house was, for the purpose of burglary, part of the dwelling-house, was submitted to the judges, who differed in opinion upon it, and seven of them thought that it was part of the dwelling-

(*h*) *Rex v. Gibson*, 2 East, P. C. c. 15, s. 20, p. 508. 1 Leach, 357. Where the prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not communicate with the loft in any manner whatever; and on the side of the dwelling-house was a shop, which was not used as a dwelling, and which did not communicate with the four chambers; between this shop and the loft there was a communication by a ladder; the dwelling and shop both opened into the same fold; Holroyd, J., on the authority of *Rex v. Gibson*, held the loft to be a dwelling-house. Thompson's case, 1 Lew. 32.

(*i*) *Ante*, p. 800.

house, but the other five that it was not, and the conviction was affirmed. (j)

Upon an indictment for burglary, it was proved that behind the dwelling-house there was a pantry; to get into the pantry from the dwelling-house it was necessary to pass through the kitchen, into a passage; at the end of the passage there was a door, and outside the door, on the left hand, was the door of the pantry; when the passage door was shut, the pantry door was excluded and open to *the yard. But the roof, or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was "tea-fall," and leant against the wall of an inner pantry, in which there was a latchet window, common to both, and which opened betwixt them, but there was no door of communication between them. The inside pantry was under the same roof as the dwelling-house. The prisoners entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth which was nailed to the window frame. For the prisoners it was submitted, that this was not a burglary; the pantry not being a part of the dwelling-house within a description contained in the 7 & 8 Geo. 4, c. 29, s. 13. For the prosecution it was contended, that inasmuch as there was a direct communication between the outer pantry and the inner, by means of the latchet window, and the inner pantry was under the same roof as the dwelling-house, the outer pantry must be considered a part of the dwelling-house as much as the inner; and further, that inasmuch as the roof, or covering of the passage extended beyond the door of the passage, and actually formed a continuous covered way, from the dwelling-house to the outer pantry, the outer pantry must be considered as communicating with the dwelling-house, by means of a covered and inclosed passage, within the meaning of those words as used in the act of parliament. Taunton, J., after looking carefully into the act of parliament, was of opinion, that the pantry was not a part of the dwelling-house, it not being under the same roof, nor included within the passage by which it was approached; and, consequently, that no burglary was committed by the breaking and entering therein. (i)

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

A building separated from the dwelling-house by a public road, was holden not to be parcel of the dwelling-house, though the road was very narrow, and the dwelling-house and building were held by the same tenure, and some of the offices necessary to the dwelling-house adjoined to such building, and though there was an awning which extended to it from the dwelling-house; but they were not connected by any com-

Part of premises considered as a distinct dwelling-house.

(j) *Rex v. Burrowes*, R. & M. C. C. R. 274, East. T. 1830. See *Reg. v. Mayor of Eye*,^a 9 A. & E. 670.

(i) *Somerville's case*, 2 Lew. 113, York Spr. Ass. 1834.

(k) *Rex v. Turner*,^b 6 C. & P. 407, Vaughan, B.

^a Eng. Com. Law Repts. xxxvi. 239.

^b *Ib.* xxv. 460.

mon fence or roof. But it was holden, that if such building were made a sleeping-place for any of the servants of the dwelling-house, it might be deemed a distinct dwelling-house. J. B. lived in Epsom, and his kitchen, larder, brew-house, and wash-house, were across a public passage nine feet wide; he had an awning over his passage to protect what was brought across; one of his servants, a boy, slept over *the brew-house, and that was the sleeping place allotted him by J. B. The boy's room was broken into, and Park, J. A. J., doubting whether that could be deemed parcel of J. B.'s dwelling-house, saved the point. Upon consultation, the great majority of the judges thought that it was not parcel of the dwelling-house in which J. B. dwelt, because it did not adjoin to it, was not under the same common roof, and had no common fence. Graham B., thought it was parcel of that house; but all the judges, except Park, J. A. J., (Richardson, J., being absent) thought that it was a distinct dwelling-house of J. B.'s, and that as the indictment described it as his dwelling-house, the conviction was right. (l) †

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It seems that an outhouse will not be prevented from being parcel of the dwelling-house by being holden under a distinct title.

It should seem that if an out-house have a communication with a dwelling-house such as is described by the 7 & 8 Geo. 4, c. 29, s. 13, it will not be prevented from being parcel of the dwelling-house by being holden under a distinct title. It was said, indeed, that if a man should take a lease of a dwelling-house from A., and of a barn from B., such barn would be no parcel of the dwelling-house, and not, therefore, a place in which burglary could be committed; (j) a position which would seem to lead to the inference, that no outhouse, holden under a distinct title from the dwelling-house, could be the subject of burglary. But upon this, it was observed, that the circumstance of an out-building being enjoyed by the occupier under a different title from his dwelling-house, seemed a very unsatisfactory reason of itself for excluding it from the same protection, if it were within curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law. (k)

Of the inhabitancy.

The next question relating to the mansion-house is, how far it must be *inhabited*?

Cases where the owner has not begun to inhabit.

It appears to be well settled, that unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house in the proper meaning of the word, as applied to the offence of burglary. There are several cases to this effect, which sufficiently overrule any different opinions which may have been formerly entertained. (l) †

(l) *Rex v. Westwood*, Mich. T. 1822. Russ. & Ry. 495.

(j) 1 Hale, 559.

(k) 2 East, P. C. c. 15. s. 10, p. 494, and see 2 Stark. Ev. 279, note (z), where the doctrine in 1 Hale 559, is also questioned.

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

† [A dairy adjoining a kiln, which adjoins a dwelling by having party walls, but roofs of different heights, and no internal communication, is not the subject of burglary. *Reg. v. Higgins*, 2 C. & K. 322. Eng. C. L. lxi. 321.]

‡ [Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town; though neither the prosecutor nor his family had ever lodged in the house in which the crime is charged to have been committed. *Commonwealth v. Brown*, 3 Rawle, 207.]

A Mr. Smith having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects, to the value of about ten pounds; the house was put under the care of a carpenter for the purpose of being repaired; but Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever, sleep therein. While the house was in this situation, it was broken open in the night-time; and upon a case reserved for the consideration of the judges, they were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary. (*m*)

Cases of Lyons and Miller.

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

*804 Hallard's case.

And though persons sleep in a house thus situated, yet, if they are not of the family of the owner, it will still not be a dwelling-house in which burglary can be committed.

Thus, where the prisoner was indicted for a burglary in the dwelling-house of a Mr. Holland, and it appeared that the house was newly built and finished in every respect, except the painting, glazing, and the flooring of one garret; that a workman who was constantly employed by Mr. Holland, slept in it for the purpose of protecting it, but that no part of Mr. Holland's domestic family had taken possession of it; the court held, that it was not the dwelling-house of Mr. Holland. (*o*)

Fuller's case.

So in a case where it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there, nor any of his family; but that on the night in which it was so broken, and for six nights before, he had procured two hair-dressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods and merchandise, which were deposited therein; the court was of opinion, that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (*p*)

Harris's case.

Where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule is established; and the house, under such circumstances, cannot be considered as the dwelling-house of the owner.

A person put to sleep in house at nights until tenant got.

This point arose upon an indictment for stealing goods to the value of forty shillings in the dwelling-house. (*q*) Mr. Pearce was a brewer, living in Milbank street, the owner of a public-house in Palace-yard,

Davies's case.

(*m*) *Rex v. Lyons and Miller*, 1 Leach, 185. The case is rather differently reported in 2 East, P. C. c. 15, s. 12, p. 497, where it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged an intent to steal, it must mean to steal the goods then and there being, and that nothing being in the house, nothing could be stolen; but it is also further stated, that it seemed to be the sense of the judges, and Eyre, B., declared it to be his opinion, that although some goods might have been put into the house, yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

(*n*) Hallard's case, *cor. Buller, J., Exeter Spr. Assiz. 1796.* 2 East, P. C. c. 15, s. 12, p. 498. 2 Leach, 701, note (*a*), and S. P. Thompson's case, *cor. Grose, J., Kingston Spr. Ass. 1796*, 2 East, *ibid.*, 2 Leach, 771.

(*o*) Fuller's case, O. B. 1782, *cor. the Recorder*, 2 East, P. C. c. 15, s. 12, p. 498. 1 Leach, 186, note (*b*).

(*p*) Harris's case, O. B. 1795, *cor. the Recorder*, 2 Leach, 701. 2 East, P. C. c. 15, s. 12, p. 498.

(*q*) Under the provisions of the 12 Anne, c. 7, now repealed.

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in which the offence was committed. The house was, at the time of the offence, shut up, and in the day time entirely uninhabited; but a servant of Mr. Pearce's was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of beds, chairs, and other articles of furniture, which Mr. Pearce had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his *servants. Upon a case reserved, the judges were of opinion, that as Mr. Pearce never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken in the night.(r)

Using the house for business, &c., but not sleeping there.

Where the owner of the house has never, by himself or by any of his family slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking thereof burglary. One Clayson took a house in a street, and in it carried on his business of a shopkeeper, and dined, entertained his friends, and passed his days there, and had bedding up stairs; but he always slept at his mother's, two doors off, and he had no servant sleeping in the house. An indictment for burglary described this as his dwelling-house, and the prisoner was convicted; but the judges held, that it could not be deemed his dwelling-house, and that the conviction was wrong.(s)

A house will not cease to be the dwelling-house of its owner, on account of his occasional or temporary absence.

When the owner of the house has once entered upon the possession and occupation of it, by himself or by some of his family, it will not cease to be his dwelling house on account of any occasional or temporary absence, even though no person be left in it.(t) Thus if A. have a dwelling-house, and upon occasion he and his family be absent for a night or more, burglary may be committed in their absence; and, so if A. have two mansion-houses, and be sometimes with his family at one, and sometimes at the other, the breach of one of them at the night-time, in the absence of his family, will be burglary.(u) Also, if A. have a chamber in a college, or inn of court, where he usually lodges in term-time; and, in his absence in the vacation, the chamber be broken open, the same rule will apply.(v)

Case of Murray and Harris.

The following case was decided in conformity with these principles. The owner of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return; and sent his wife and family out of town, and left the key with a friend to look after the house; and, after he had been gone a month, no person being in the house, it was broken open in the night, and robbed. A month afterwards, the owner returned with his family, and again inhabited there. This breaking was holden to be burglary.(w)

But in cases of this kind there must be an intention on the part of the

(r) Davies's *alias* Silk's case, 2 Leach, 876. 2 East, P. C. c. 15, s. 12, p. 499.

(s) *Rex v. Martin*, East. T. 1806, MSS. Bayley, J., and Russ. & Ry. 108.

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

(u) 1 Hale, 566. Sum. 82.

(v) *Id. ibid.*

(w) *Rex v. Murray and Harris*, O. B. 10 W. 3. 2 East, P. C. c. 15, s. 11, p. 496, cited also in *Fost. 77*, from MSS. Denton and Chapple, as a case upon a burglary in a house of Mr. Nicholls. In *Rex v. Kirkham*, Lanc. 1817, 2 Stark. Ev. 279, Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture, and intending to return.

owner to return to his house, *animus revertendi*; for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary. (x) But there must be an *animus revertendi*.

The prisoners were indicted for a burglary in the dwelling-house of a Mr. Fakney, and stealing divers goods. Mr. Fakney stated that he made use of the house in question, which was situated in Hackney, as a country house, in the summer time, his chief residence being in London; about the end of the summer before the offence was committed, he removed with his whole family to London, and *brought away a considerable part of his goods: and in the November following his house was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, nor any thing else for the accommodation of a family. Being asked whether at the time he so disfurnished his house, he had any intention of returning to reside there, he declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The facts charged were sufficiently proved against the prisoners; but the court were of opinion that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, the house could not under these circumstances, be deemed his dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary; which they did, but found them guilty of felony, in stealing the clock, &c. (y)

Nut-brown's case.

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So, if a man leaves his house without any intent of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. One Cox lived in St. Martin's lane, but removed to the Haymarket, and kept the house in St. Martin's lane as a warehouse only; none of his family or servants remained there, but two women who worked for him in his business slept there to guard the property; the prisoner stole to the amount of above forty shillings in the house, and was convicted upon an indictment against him describing the house as the dwelling-house of Cox; but upon a case reserved, the judges held that the conviction was wrong. (z) House used as a warehouse.

But though a man leave his house, and never mean to live in it again, yet if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house. The indictment was for burglary in the dwelling-house of Bendall, the place broken into was a shop, parcel of a dwelling-house, which he had inhabited. He had left the dwelling-house, and never meant to live in it again, but retained the shop, and let the other rooms to lodgers; after some time he had put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought putting in a servant and family to live, very different from putting them in merely to sleep, and that this House inhabited by a servant and his family.

(x) Fost. 77. 4 Bla. Com. 225.

(y) Nutbrowns' (John and Miles) case. Fost. 76, 77.

(z) Rex v. Flannagan, Mich. T. 1810. Russ. & Ry. 187.

was still to be deemed Bendall's house, and that the conviction was right.(a)

Inhabitan-
cy, merely
casual, or
for some
particular
purpose,
will not be
sufficient.

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It seems that the mere casual use of a tenement as a lodging, or using it only upon some particular occasions, will not be such an inhabitan-
cy as will constitute it a dwelling-house in which burglary can be committed.(b) Thus, it was agreed by all the judges, *that the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, made no sort of difference in the question, whether the offence was burglary or not.(c) And the circumstance of a porter lying in a warehouse, *to watch goods*, which is only for a particular purpose, does not make it a dwelling-house.(d) The question, therefore, respecting burglary in such barn or warehouse will remain just as if no person had slept in them, to be disposed of by the principles which have been before discussed, as to their being or not being *parcel* of the mansion or dwelling-house.(e)

Qu. as to
the case of
an execu-
tor putting
servants
into the
house of
his testa-
tor, but not
going to
live there
himself.

A point of some nicety arises in the case of an executor putting servants into the house of his testator, but not going to live there himself. A case of this kind occurred, which is thus stated. A. died in his house, and B., his executor, put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself: and upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court *inclined* to think it might, *because the servant lived there.*(f) It was not necessary to decide the point in that case, as it turned out on the evidence that there was not a sufficient breaking of the house; and perhaps it would be difficult to reconcile the opinion, to which the court is said to have inclined, with some of the decided cases and principles upon this subject, if the facts were that the executor did not contemplate any occupation of the house by himself, and that he merely put the servants there for the purpose of taking care of the house and furniture, till they should be properly disposed of according to his trust.(g)

Of the
ownership
of the man-
sion house.

It remains further, in treating of the mansion or dwelling-house, to inquire as to the person who is to be deemed the *owner* of it, in order to be able to state correctly in the indictment the name of the party, in whose dwelling-house the burglary is alleged to have been committed.

The subject is rather of a complicated nature, but from the cases which have been hitherto decided, it seems that the material point to be ascertained will be, whether the ownership remains with the proper owner of the dwelling-house, and is exercised by him, either by his own occupation, or by that of other persons on his account, or whether the proper owner has given such an interest to other persons, in the whole or in parts of the dwelling-house, as to constitute an ownership in such other persons.†

(a) *Rex v. Gibbons*, East. T. 1821, MSS. Bayley, J.

(b) 2 East, P. C. c. 15, s. 11, p. 497

(c) *Brown's case*, 2 East. P. C. c. 15, s. 11, p. 497, and s. 14, p. 501.

(d) *Smith's case*, M. 3, G. 1, by ten of the judges, cited from Lord King's MSS. 96, and Serjeant Forster's MSS., in 2 East, P. C. c. 15, s. 11, p. 497.

(e) *Ante*, p. 798, *et seq.*

(f) *Jones v. Longman* (case of), O. B. 1689, from Chapple's MSS. 2 MSS. Sum. 305, cited in 2 East, P. C. c. 15, s. 12, p. 499.

(g) See *Davies's case*, *ante*, p. 805.

† [In an indictment for burglary, it is sufficient to lay the ownership of the house in a

The owner of a dwelling-house may exercise his ownership by his own personal occupation, or by the occupation of any persons who by law are deemed to be part of his family. This doctrine has been carried to a great extent in the case of a wife. For where it appeared that a lady, whose house was robbed, had for many years lived separate from her husband; and that, when she was about to take the house, the lease of it was prepared in her husband's name, but *that he refused to execute, and said he would have nothing to do with it, in consequence of which she agreed with the landlord herself, and had constantly paid the rent; it was holden upon an indictment for breaking open the house that it was well laid as the dwelling-house of the husband. (h) So where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, it was held that a house which she had hired to live in might be described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. The indictment described the dwelling-house first as the house of J. S., and secondly, as the house of his wife. It appeared that they lived apart, and that the wife subsisted upon property which had been hers before marriage, and which was vested in trustees for her separate use; that the house was no part of the settled property, but was hired by the wife who paid the rent for it, and the husband had never been in it. Upon a case reserved, the judges were clear that this was to be deemed in law the dwelling-house of the husband; it was the dwelling-house of some one; it was not that of the trustees, for they had nothing to do with it; it was not the wife's, because, at law, she could have no property; it could then only be the husband's. (i) In a later case it was held that the house of a husband in which he allowed his wife to live separate from him, might be described as the house of the husband, though the wife lived there in adultery with another man who paid the house-keeping expenses, and though the husband suspected a criminal intercourse between his wife and the other man, when he allowed her to live separate. The indictment was for burglary in the dwelling-house of Gillings, who did not live there, but the house was his for a long term, and he suffered his wife to live there separate from him. He had agreed to the separation, and had given her up the house, because he suspected a criminal intercourse between her and one Websdale, and had allowed her to take a bed and what furniture she chose. She lived there with Websdale, who paid the housekeeping expenses, but neither rent nor taxes. Upon a case reserved, the judges thought that this was properly described as the house of Gillings, and that the conviction was right. (j) Where a prisoner was indicted for breaking into the dwelling-house of Elizabeth A., and it appeared that her husband had been convicted of felony, and was in prison under his sentence when his house was broken into, it was held on a case reserved, that the house was improperly described, although the wife con-

Ownership, where the occupation is by part of the owner's family. Wife living apart from her husband.

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(h) Farro's case, Kel. 43, 44, 45. See *Rex v. Smith*,^a 5 C. & P. 201, per Lord Tenterden, C. J.

(i) *Rex v. French*, Mich. T. 1822, Russ. & Ry. 491.

(j) *Rex v. Wilford and Nibbs*, Trin. T. 1823. Russ. & Ry. 517.

married woman, who lives apart from her husband, and has the occupancy and control of the dwelling. *Drecker v. The State*, 18 Ohio, 308.]

^a Eng. Com. Law Reps. xxiv. 279.

tinued in the possession of it.^(k) But if a case should arise in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband.^(l)

Ownership, where the occupation is by means of the servants of the owner.

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

The house of partners may be laid as their house, though only one of them dwell in it.

A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. Upon an indictment for stealing in the dwelling-house of Halling and others, it appeared that Halling, Pearce and Stone, carried on an extensive wholesale and retail business on the premises, in which the offence was committed. Pearce, with his family, lived in the house, which was the joint property of the firm, built at their joint expense, and the ground rent and expenses were paid by them jointly. The young men employed in the shop and business, ninety-one in number, slept in the house. Halling and the other partner resided elsewhere, and were allowed in the accounts of the firm a certain sum for rent, 225*l.* The warehouse and shop were on the basement story. Upon a case reserved, on the question whether the dwelling-house was properly laid as that of all the partners, or should have been laid as that of the resident partner only, the judges were unanimously of opinion that the dwelling-house was properly described as that of all the partners.⁽ⁿ⁾

Case of Stockport and Edwards. Where the servant of three partners in trade had weekly wages, and some rooms assigned to him for a lodging over the bank and brewery office of the partners, with which his lodging communi-

A modern case appears to have proceeded upon the same principle. The prisoners were indicted for a burglary in the dwelling-house of Messrs. Moore, Harrison, and Hamilton, who were partners in their business of bankers, and also in a brewery concern; and were the owners of the house in question. The lower rooms of the house were three in number, having only one entrance from without, by a door opening to the street, which was the door broken open to commit the felony. It opened in one of the three rooms in which the clerk's business relating to the brewery was transacted: that room communicated by a door-way with an inner room, where the banking business was done, and where the cash, notes, &c., were deposited; and the inner room communicated in the same manner with a further room, which was the private room of the partners. And the business of Messrs. Moore and Co. was transacted only in these lower rooms of the house, in which no person slept. When the entrance door which opened to the street was locked up at night, upon leaving the offices, the clerk,

(k) Reg. v. Whitehead,^a 9 C. & P. 429, C. R.

(l) 2 East, P. C. c. 15, s. 16, p. 504.

(m) Brown's case, Newcastle Sum. Ass. 1787, *cor.* Wilson, J., 2 East, P. C. c. 15, s. 14, p. 501, 502. And see Bertie v. Beaumont, 16 East, 33. See Rex v. James, *post*, 815.

(n) Rex v. Athea, R. & M. C. C. R. 329, East. T. 1832.

^a Eng. Com. Law Repts. xxxviii. 175.

who had the custody of the key, left it in the care of one John Stevenson, who inhabited the upper rooms of the house, from whom it was received again, when the offices were to be opened in the morning. This John Stevenson was a servant to Messrs. Moore and Co. in their brewery, as their cooper, at weekly wages, with firing and lodging for himself and his family: but the contract as to the *lodging was not, in general terms, that he should be provided with lodging, but that he should have the particular rooms which he inhabited for the lodging of himself and his family. There was a separate entrance to these rooms from without; they were not in any way used for the business which was carried on in the lower rooms, some papers only of no consequence being kept in them by Messrs. Moore and Co.; and the only communication between the upper rooms and the lower ones was by a trap-door in the floor of one of the upper rooms and a ladder. Since the robbery, this trap-door and ladder had been constantly used, in order to go down to the lower rooms, and bolt the street door of the offices in the inside, for better security; but none of the witnesses knew of their having ever been used for any purpose previous to the robbery, although they might have been so used at any time, as the trap-door was never kept locked or fastened, and the key of it was left in Stevenson's custody. There were six windows in the upper rooms, which were assessed in the name of Stevenson; but the duty was paid by Messrs. Moore and Co. The lower rooms had nine windows, but were not charged with any window tax, the assessors not considering them as inhabited. Upon these facts two questions were submitted; first, whether this inhabitancy could be considered as the inhabitancy of Messrs. Moore and Co. by their servant Stevenson, or whether Stevenson, by the contract, became tenant, and the upper part of the house was his dwelling-house, and not that of Messrs. Moore and Co.; and secondly, if these premises were the dwelling-house of Messrs. Moore and Co., the further question arose, whether there was such a severance of the lower part as to prevent its being included as part of their dwelling-house. After hearing the argument on behalf of the prisoners, Lord Ellenborough, C. J., said, "Could Stevenson have maintained trespass against his employers for entering these rooms? or, if a man assigns to his coachman the rooms over his stable, does he hereby make him a tenant? Whether the assessors formed a right or a wrong judgment can make no difference; nor is it material to which trade Stevenson was a servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened; and it can make no difference whether the communication between the rooms was through a trap-door or by a common staircase." And Mansfield, C. J., also said, "Many persons have houses given them to live in, as porters at park-gates; if a master turns away his servant, does it follow that he cannot evict him till the end of the year? Could not the prosecutors have turned out this man when they would?" (c)

The same rule, of the occupation of the servant being that of the master, will hold with respect to all persons standing in the relation of

Ownership
of apart-
ments in

(c) *Rex v. Stockton and Edwards*, 2 Taunt. 339. 2 Leach, 1015. The case was reserved by Chambre, J., at Carlisle, and was considered in Mich. T. 1810. Eight of the judges thought that Stevenson was not tenant, but inhabited only in the course of his service. Thompson, B., Graham, B., Lawrence, J., and Chambre, J., *contra*, S. C., under the name of *Rex v. John Stock* and another, in Russ & Ry. 185. The judges did not afterwards pronounce any further opinion; but the prisoners were executed according to their sentence.

palaces,
noblemen's
houses, or
in the
houses of a
public com-
pany.

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servants, and not having the exclusive possession nor paying rent. *Therefore, apartments in the king's palaces, or in the houses of noblemen for their stewards and chief servants, must be laid as the mansion-house of the king or nobleman. (p) Accordingly where three persons were charged with having broken into the lodgings of Sir H. Hungate, at Whitehall, it was agreed that the indictment should be for breaking the king's mansion, called Whitehall. (q) So where a man was indicted for breaking into a chamber in Somerset House, and the indictment charged it to be the mansion-house of the person who lodged in it, it was agreed that the whole house belonged to the queen-mother, and therefore that the indictment was bad. (r) And where a house in Chelsea was broken into, which was used for an office under government, called the Invalid Office, and the rent and taxes of which were paid by government; it was holden that the indictment was defective in laying it to be the house of a person who occupied the whole of the upper part of it. (s) An indictment for a burglary in the custom-house, rightly describes it as the dwelling-house of the king, as he occupies it by his servants. (t) An indictment, also for a burglary in the dwelling-house of the East India Company was holden to be good, the house being inhabited by the servants of that company. (u) And where an indictment charged a burglary in break into the mansion-house of the master, fellows, and scholars of Bennet College, in Cambridge; the fact being that the prisoner broke into the buttry of the college, all the judges, upon reference to them, held that it was burglary. (v)

Ann Hawkins's case.

The following case also appears to have proceeded upon the same principle, that burglary in the apartments of officers of a public company must be laid as committed in the mansion-house of the company. The prisoner was indicted for breaking the mansion-house of Samuel Story, in the night-time. It appeared on the evidence that the house belonged to the African Company; that Story was an officer of the company; that he and many other persons, as officers of the company, had separate apartments in the house, in which they inhabited and lodged; and that the apartment of Story was that which was broken open. It was holden that the apartment of Story could not be called his mansion-house, because he and the others inhabited the house merely as officers and servants of the company. (w)

Ownership
in servants.

But the rule does not apply where a servant lives in a house of his master's at a yearly rent: and such house cannot be described as the master's house, though it be upon the premises where the master's

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*business is carried on, and though the servant have it because of his

(p) 1 Hale, 556, 557. 2 East, P. C. c. 15, s. 14, p. 500.

(q) Rex v. Williams and others, 1 Hale, 522.

(r) Burgess's case, Kel. 27.

(s) Peyton's case, O. B. 1784, 1 Leach, 324. In Bac. Abr. tit. *Burglary*, (E), in the notes, there is a *qu.* in whose house stealing in the Invalid Office, at Chelsea, should be laid to be.

(t) Rex v. Jordan, 7 C. & P. 432, Gaselee, J., and Gurney, B.

(u) Picket's case, O. B. 1765, 2 East, P. C. c. 15, s. 14, p. 501.

(v) Maynard's case, Cambridge Spr. Ass. 1774. 2 East, P. C. c. 15, s. 14, p. 501.

(w) Rex v. Hawkins, cor. Holt, C. J., Tracy, J., and Bury, B., O. B., 1704, Fost. 38, 39.

The case is cited from Mr. J. Tracey's MSS., from which it appears that the jury was discharged of the indictment laying the breaking to be in the mansion-house of Samuel Story; and that it was amended by laying the breaking in the mansion-house of the company. Mr. J. Foster says, that this report is warranted in the substantial parts of it by the record Fost. 39.

services. Greaves and Co. had a house and buildings where they carried on their trade; Mettran, one of their servants, lived with his family in the house, and paid 11*l.* per annum for rent and coals, such rent being much below the value; and Mettran was allowed to live there because he was servant; Greaves and Co. paying the rates and taxes. One of the buildings having been broken into, the indictment charged a burglary to have been committed in the dwelling-house of Greaves and Co., and it was urged that Mettran's occupation was their occupation; that the house he occupied might be deemed their dwelling-house; and that all their buildings might be deemed part of their dwelling-house. But upon a case reserved, the judges thought that as Mettran stood in the character of tenant, and Greaves and Co. might have distrained upon him for rent, and could not arbitrarily have removed him, Mettran's occupation could not be deemed their occupation, and that the conviction as to the burglary was wrong.^(x) And though a servant live rent free for the purpose of his services, in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises occupied by his master, the house may be described as the house of the servant; especially if it does not belong to his master, but to some person paramount to his master; as in the case of a house of a toll-collector. The tolls at a gate between Leeds and Wakefield were let to Ward, who employed Ellis to collect them, and Ellis lived for that purpose in a house belonging to the trustees, and built for them for that purpose; he had a weekly sum from Ward, and the family of Ellis lived with him in the house. A burglary having been committed in the house, it was described in the indictment as the house of Ellis: and upon a case reserved, all the judges were unanimous that it was rightly described; for Ellis had exclusive possession, it was unconnected with any premises of Ward's, and Ward did not appear to have any interest in it.^(y)

And the rule has been holden not to extend to the case of a house occupied by the *agent of a trading company*; though he resided in it with his family, only for the purpose of conducting their trade, and the lease of the house was held and the rent and taxes for it paid by the company; and an indictment was holden to be good, which stated the burglary as being committed in the dwelling-house of such agent.

In this case the agent, a Mr. Sylvester, kept a blanket warehouse in Goswell-street, and resided, together with his wife and children, in the house over the warehouse. The warehouse was on the ground floor, and consisted of four rooms, the second of which was the room that was broken into; and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of Mr. Wm. Sellman and others, a company of blanket manufacturers, consisting of sixty or more, at Whitney, in Oxfordshire, none of whom ever slept in the house. The lease of the premises was in the company, and the whole rent of both dwelling-house and warehouse was paid by them. Sylvester acted as their servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. The commission of the offence being clearly proved, it was contended, by the counsel for the prisoners, on the authority of *Hawkins's case*, that this must be con-

Ownership
in the
agent of a
trading
company.

Case of
Margetts
and others.

*813

(x) *Rex v. Jarvis*, East. T. 1824, MSS. Bayley, J., and Ry. & Mood. C. C. 7.

(y) *Rex v. Canfield and another*, Mich. T. 1824, MSS. Bayley, J., and Ry. & Mood, C. C.

sidered as the dwelling-house of the company, and ought to have been so charged in the indictment, and not as the house of Sylvester, who inhabited it merely for them as their servant. But the court is said to have been clearly of opinion, that it was rightly charged to be the dwelling-house of Sylvester; and that although the lease of the house was held, and the whole rent paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense, to consider it as their dwelling-house, especially as it was evident, that their only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. That the dwelling so furnished was a mean by which they in part remunerated Sylvester for his agency, and precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent: but that the company in this case preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein, towards the salary which he was to receive from them. And that the house was, therefore, essentially and truly the dwelling-house of the person by whom it was occupied.(z)

If a servant live rent free in a house where the master's business is carried on, and the part where the business is carried on is at all times open to the parts where the servant lives, the house may be laid to be the servant's house, though the part enter-

Though a servant live rent free in a house belonging to his master, and his master pay the taxes, and the master's business be carried on in the house, yet if the servant and his family be the only persons who sleep in the house, and the part in which the master's business is carried on be at all times open to those parts in which the servant lives, it may be stated as the servant's house, though the only part entered by the thief were that in which the master's business was carried on. The prisoner was indicted for stealing the property of Bontillior, in the dwelling-house of Bunyon; it appeared that Bunyon was secretary of the Norwich Union and Life Office, at the *time the felony was committed; no one of the company ever dwelt in the house; Bunyon, his family, and servants were the only persons occupying the house, and he lived there as secretary to the company; the rent and taxes were paid by the company. The property stolen was deposited in a safe, in the lower part of the house, which was used as the office of business of the company, for safety till the next morning, when it would have been carried away by Bontillior. The business of the office closed at five o'clock, and the rooms of business were not locked, but left equally accessible to Bunyon, or any part of his family or servants, with any other part of the

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(z) *Rex v. Margetts and others*, O. B. 1801, *cor. Graham, B., and Grose, J.*, 2 Leach, 930. It is also stated in the report of this case, that the court further gave as a reason for their judgment, that "the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that the terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney, in Oxfordshire." But the accuracy of this reasoning may perhaps be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror to the East India Company, or the African Company, in the cases of burglaries in their houses, which have been before mentioned, *ante*, p. 811, but see the next case. There is a note to this case of Margett's and others, which states that Grose, J., asked whether there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and that Mr. Knapp informed the court that his father was clerk to the Haberdasher's Company, and resided in the hall which was broken open; and in that case the court held it to be his father's house.

house. It was objected that the house ought to have been laid as the house of the company : but the recorder, on the authority of the preceding case, overruled the objection, and upon a case reserved, the judges were of opinion that the house was properly described as Bunyon's house, as he and his family and servants were the only persons who dwelt there ; they and they only were liable to be disturbed by a burglary ; and though the judges would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as Bunyon's, and that the conviction was right. (a)

Where a servant lived in a cottage, quite distinct from his master's house, and has the entire control over the cottage, it may be described as his dwelling-house, although he pay no rent for it, and may be liable to give it up whenever his service is terminated. Upon an indictment for a burglary in the dwelling-house of J. Lewis, it appeared that Lewis was a gardener to the Baron de Rutzen, and that he occupied, as gardener, a cottage in his master's garden, that he slept in the cottage, and kept the key, but took his meals with the other servants in the house ; he paid no rent, and considered himself liable to give up the cottage whenever he ceased to be gardener. It was objected that Lewis took no interest in the cottage, but merely occupied it in right of his master, and that it should therefore have been described as the dwelling-house of the master. Lord Denman, C. J., "As the building in which the servant slept is quite distinct and apart from the master's place of residence, and he had a perfect control over it, and kept the key, I think that it is well described as the dwelling-house of the servant ; but I do not think that the indictment would have been bad, had it laid the house as that of the master." (b)

Upon an indictment for burglary, in one count alleged to have been committed in the dwelling-house of Bromage, and in another in the dwelling-house of the Earl of Coventry ; it appeared that Bromage had the house and firing for the services he had performed for the Earl during fifty years, but he did no work, and was allowed so much a week as an old servant ; Littledale, J., held that this was sufficient to support the indictment, as the house of Bromage, or at all events, as the house of the Earl of Coventry. (c)

*Where a policeman was allowed to live in a house, in order to take care of it, and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman, on the ground that he must live somewhere ; and he was not otherwise the servant of the owner than in the particular manner. (d) But where upon an indictment for burglary in the dwelling-house of Bird, it appeared that Bird worked for one Woodcock, who did business as a carpenter for the New River Company, and put him in to take care of the house and flock mills

(a) *Rex v. Witt*, R. & M. C. C. R. 248, H. T. 1830. The Recorder observed, "If the principle stated in *Margett's* be correct, namely, that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, how could that possibly operate upon this company had the house been broken and entered in the night with intent to commit murder upon the person of Bunyon, or any of his family or servants?"

(b) *Rex v. Rees*,^a 7 C. & P. 568.

(c) *Rex v. Ballard and Everall*, Worcester Lent Ass. 1830, MSS. C. S. G. See *Rex v. Jobbing*, *post*, p. 817.

(d) *Rex v. Smith*, cited in *Rex v. Rawlins*,^b 7 C. & P. 150.

^a Eng. Com. Law Reps. xxxii. 633.

^b *Ib.* xxxii. 473.

adjoining, which belonged to the company, and he received no more wages than he did before he lived there, nor had any agreement for any; it was doubted whether the house was properly laid, and it was thought that there might be some difference between this and the preceding case, as here the man was put in by a person who did the work for the company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling-house of Bird.(e)

Where a person is put in a house to take care of it till it is let.

Upon an indictment for house-breaking, describing the house in one count as the dwelling-house of Mary Moulder, and in another count as the dwelling-house of G. B. P. Primm, no proof of the Christian names of Primm was given; but it appeared that Moulder had been put into the house by Primm to take care of it, till it could be let, and she was to have coals for firing found by Primm; she paid no rent for the house; she had been occasionally a servant of Primm for thirty or forty years, and done work for him, for which she had always been paid; and it was objected that the house was not the dwelling-house of Moulder but of Primm. Littledale, J., "I think the evidence is sufficient to support the first count. The prosecutrix has had the exclusive occupation of the house, and although there are very nice distinctions between the cases, I think this was her dwelling-house. She was not put in as a servant, to take care of the furniture or goods, which has generally been the case where such questions have arisen."(f)

Ownership where a servant has part of a house, and the rest is reserved.

But where a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house; and it is the same if any other person has part of the house, and the rest is reserved. The governor of the Birmingham workhouse was appointed under contract for seven years, and was to have the chief part of a house for his own and his family's occupation, but the guardians and overseers who had appointed him, reserved to themselves the use of one room for an office, and three others for store-rooms. The governor was assessed for the house, excepting these rooms. The office was broken open, and the indictment stated it to be the governor's dwelling-house; but after conviction, and a case reserved, the judges held the description wrong.(g)

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Ownership of apartments occupied by guests, &c., in a house or inn.

Where persons are abiding in a house as guests, or by sufferance, *or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as in the mansion of the proprietor of the house.(h) So that if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper.(i) It is indeed said, that if A., a lodger in an inn, goes to his chamber to bed, and his door is latched or locked, and afterwards in the night he rises, opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be a burglary; and it is also said, that it seems it would not, because A. had a kind of special interest and property in his chamber, and therefore that the opening of his own door was no breaking of the innkeeper's house.(j) But though his is the inclination of the opinion of a very great lawyer, the foundation on which it

(e) *Rex v. Rawlins*, 7 C. & P. 150, Vaughan and Gaselee, Js.

(f) *Rex v. George James*, Gloucester Lent Ass. 1830, MSS. C S. G. Brown's case, ante, p. 809, note (m), was strongly relied upon in support of the objection.

(g) *Rex v. Wilson*, E. T. 1806, MSS. Bayley, J., and Russ. & Ry. 115.

(h) 1 Hawk. P. C. c. 38, s. 26.

(i) 1 Hale, 557.

(j) *Ibid.* 554.

proceeds cannot easily be reconciled with the doctrine which he admits in the same page, and also in a subsequent part of his work, namely, that if A. had opened the chamber of B., another lodger in the inn, to steal his goods, it would have been burglary; and that though a lodger has a special interest in his chamber, yet a burglary committed in it must be laid as in the mansion-house of the innkeeper. (k) And it has been remarked that this doctrine is also at variance with the reasoning, in a case subsequently decided, which supposes that a guest has not even the possession of a room in an inn for himself, but that it remains still in possession of the host. (l)

In this last-mentioned case, the prosecutor, who was a Jew pedlar came to a public house, to stay all night, and fastened the door of his bed-chamber; when the prisoner, pretending to the landlord that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams who tried the prisoner, doubting whether the bed-chamber could properly be called the dwelling-house of the prosecutor, as stated in the indictment, the case was submitted to the consideration of the judges. They all thought, that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger: that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civilliter* for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be, unless the room were deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest; and that upon the whole the indictment was insufficient. (m)

*The landlord in this case does not appear to have been privy to the felonious intent of the prisoner; but, on the contrary, was imposed upon by him, and induced to assist in breaking open the chamber, upon the supposition that the guest within it had been guilty of felony: but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary, (n) that doctrine is questioned; and it was well observed, that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which would not be burglary. (o)

If the owner of a house suffer a person to live in it rent free, it may be stated to be that person's house: he is tenant at will. The lessee of a house suffered his son-in-law to live in it, who failed and left it; but one of the son-in-law servants continued in it. The lessee died, and the house was given up to the landlord, whose steward suffered the

Prosser's case. Where the prisoner under pretence of being robbed, had forced open in the night the chamber-door of a guest in an inn, and stolen his goods; held, that the burglary should have been laid in the dwelling-house of the innkeeper, and not of the guest.

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(k) 1 Hale, 554, 557.

(l) 2 East, P. C. c. 15, s. 15, p. 503, where the learned writer says, that this deserves to be well weighed before any final resolution upon the point.

(m) Prosser's case, *cor.* Adams, B., Monmouth Sum. Ass. 1768. 2 East, P. C. c. 15, s. 15, p. 502, 503.

(n) Dalt. c. 151, s. 4.

(o) 2 East, P. C. c. 15, s. 15, p. 502. Kel. 94.

servant to continue in the house, and the only goods in it belonged to the servant. Upon an indictment for breaking the house in the daytime, the house was laid to be the servant's, and upon the point being saved, the judges thought that it was rightly laid, as the servant was there not as servant, but as tenant at will.^(p) And it has been decided, that if the owner of a cottage lets one of his workmen, with his family, live in the cottage, free of rent and taxes, and he lives there principally, if not wholly for his own benefit, it may be described as the workman's cottage. One Gent, a workman in a colliery, had fifteen shillings a-week and a cottage for himself and family, free of rent and taxes: he occupied chiefly for his own benefit, and not for his master's. An indictment for burglary described this as the dwelling house of Gent, and Holroyd, J., thought that it might be considered, as to third persons, either as the master's house or the workman's: and the point being saved, the judges held that it might be described as the workman's, and that the conviction was right.^(q)

The ownership of apartments let out to inmates depends upon whether the owner sleeps under the same roof, and whether there is but one outer door.

*818
Carrell's case.

Though different opinions appear to have been formerly entertained upon the point, whether in the case of burglary in the hired apartment of an inmate it should be laid to be committed in the mansion-house of the inmate or of the owner; ^(r) it is now settled, that if the owner who lets out apartments in his house to other persons sleep under the same roof, and has but one outer door at which he and his lodgers enter, ^(s) all the apartments of such lodgers are parcel of the one dwelling-house of the owner; but, that if the owner does not himself dwell in the same house, or if he and his lodgers enter by different outer doors, the apartments so *let out are the mansion, for the time being, of each lodger respectively.^(t)

The following cases were decided in conformity to this rule. A burglary was committed in a house which belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week; and an inmate named Jordan had two apartments in the house; namely, a sleeping-room up one pair of stairs and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case referred to the judges for their consideration, whether the indictment had properly charged the burglary in the dwell-

(p) *Rex v. Collett*, H. T. 1823, MSS. Bayley, J., and Russ. & Ry. 498.

(q) *Rex v. Jobling*, M. T. 1823, MSS. Bayley, J., and Russ. & Ry. 525. See *ante*, p. 814, and the cases, *post*, tit. *Arson*.

(r) 1 Hale, 556. Kel. 83, 84. 1 Hawk. P. C. c. 38, s. 27. Bac. Ab. tit. *Burglary*, (E), notes.

(s) Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as his dwelling-house. *Monks v. Dykes*, 4 M. & W. 567, but it would be otherwise if a house were divided into several chambers with separate outer doors. *Ibid.* *Fenn v. Grafton*,* 2 B. N. C. 617. 2 Scott, 56.

(t) 4 Bla. Com. 225. *Lee v. Gansel*, Cowp. 1. 2 East, P. C. c. 15, s. 18, p. 503, adopting the doctrine in Kel. 83, 84. And in *Roger's case*, 1 Leach, 90, is the following note by the editor: "I have been favoured with the following opinion of Lord C. J. Holt, upon this subject, from the manuscript notes of the late Lord C. B. Parker.—If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally with their families, yet, if they enter the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. Mr. Tanner, an ancient clerk of the court, said, that the constant opinion and practice had been according to the opinion of Lord C. J. Kelynge, which opinion was cited by Lord C. J. Holt upon this occasion at the Old Bailey October Sessions, 1701."

* Eng. Com. Law Repts. xxix. 433.

ing-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (u) So upon an indictment on the 3 & 4 W. & M. c. 9, (now repealed), for robbery in a dwelling-house, where it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates; one of whom rented the parlour on the ground-floor, and a single room up one pair of stairs; and that the parlour on the ground-floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (v) And in a recent case it was held, that if two or more rent of the owner different parts of the same house, so as to have amongst them the whole house, and the owner does not reserve or occupy any part, the separate parts of each may be described as the dwelling-house of each. Choice rented of the landlord a shop and other rooms in a house, and Ryan rented in the same house another shop and all the other rooms; and he rented them of the landlord also; the staircase and the passage were in common, and the shops opened into the passage, which was inclosed, and was part of the house; all the taxes were paid by Choice. The prisoner broke open the passage door of Ryan's shop, and was indicted for burglary in the dwelling-house of Ryan: and upon the point being saved, the judges had no doubt but that this was rightly described as the house of Ryan, and held that the conviction was right. (w)

*Consistently also with this rule, an occupation of some part of the house by the owner, which does not amount to an inhabiting, will not make the house such as may be stated to be his dwelling-house in an indictment for burglary. The owner of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour and a cellar, (which ran underneath the shop and parlour,) at a yearly rent; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and made an allowance to the inmate of ten shillings a-year, which was deducted from the rent. The entrance to the house was by a common outer door from the street. The shop and parlour were broken open. And upon an indictment for burglary, laying the offence to have been committed in the dwelling-house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar; but that it would have been otherwise if the owner had occupied any part of the house. (x)

Where there is an actual severance of the house in fact, by a partition

(u) Carrell's case, O. B. 1782, considered of by the judges, E. T. 1782. 1 Hawk. P. C. c. 38, s. 32. 1 Leach, 237. 2 East, P. C. c. 15, s. 18, p. 506. The judges relied on Rogers's case, 1 Leach, 90, *ante*, note (t), and *post*, p. 619. The two other judges (Eyre, B. and Buller, J.) who thought that it was not the mansion-house of Jordan, were of opinion that it might have been laid to have been the mansion-house of Nash; to which some of the other judges inclined, if it were not the mansion of Jordan.

(v) Trapshaw's case, O. B. 1786, and Hil. Term, 1787. 1 Hawk. P. C. c. 38, s. 30. 1 Leach, 427. 2 East, P. C. c. 15, s. 18, p. 506.

(w) Rex v. Bailey, E. T. 1824, MS. Bayley, J., and Ry. & Moo. C. C. 23. See Reg. v. Mayor of Eye,* 9 Ad. & E. 670.

(x) Roger's case, O. B. 1772, and M. T. 1772. 1 Hawk. P. C. c. 38, s. 29. 1 Leach, 89. 2 East, P. C. c. 15, s. 19, p. 506, 507.

* Eng. Com. Law Repts. xxxvi. 239.

Ownership, or the like, all internal communication being cut off, and each part being where there is no inhabited by several occupants, separate and distinct mansions in law internal will be constituted.^(y) And this may be, though the rent and taxes of the whole premises be paid jointly out of the partnership fund of the communication. the several occupants.

Jones's case. Several occupancies of distinct parts of the same house by two partners may constitute distinct mansions for each partner, though the rent and taxes be paid from the joint fund. The prisoner was indicted for burglary and larceny in the dwelling-house of Thomas Smith and John Knowles. It appeared that these persons were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from the one to the other without going into the street. The house-keeping servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The prisoner was servant to Smith, and it was in his house that the burglary was committed. It was objected upon these facts, that although the two houses were the joint property of both the partners, yet they were the separate and respective mansions of each, and, therefore, that the burglary ought to have been laid as committed in the house of Smith only. And the court conceived the objection to be well founded, and directed the jury to acquit the prisoner of the capital part of the charge.^(z)

*820
Parminster's case.

*In a more recent case also, it appears to have been ruled that a contribution by one of two partners of a proportion of the rent and taxes, for certain premises used in the partnership concern, did not give him such a joint possession of those premises as to make it necessary to state them in the indictment of the dwelling-house of both the partners. The indictment was for stealing in the dwelling-house of J. Moreland; and the evidence was, that Moreland and one Gutteridge were co-partners; that Moreland was the lessee of the whole premises, and paid all the rent and taxes for them, and that Gutteridge had an apartment in the house, and allowed Moreland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended that Gutteridge, under these circumstances, had a joint possession of the shop and warehouses, and that the indictment should have been framed accordingly; but the point being saved upon this objection for the consideration of the judges, they were of the opinion that the indictment was right.^(a)

If a house be let to A. and a warehouse under the same roof, and with an inner communication, to A. and B., the warehouse cannot be described as the dwelling-house of A. The indictment was for a burglary in the dwelling-house of J. Richards; and the breaking was into the warehouses under the same roof with J. Richards's dwelling-house, and communicating with it internally; but the dwelling-house was let to J. Richards

^(y) 2 East, P. C. c. 15, s. 17, p. 504.

^(z) Rex v. Jones, 1 Hawk. P. C. c. 38, s. 34. 1 Leach, 537. 2 East, P. C. c. 15, s. 17, p. 504. Tracy v. Talbot, 2 Salk. 532, (a case upon a distress for poor's rate,) it was ruled by Holt, C. J., that if two several houses are inhabited by several families who make and have but one common avenue or entrance for both; yet, in respect of their original, both houses continue ratable severally, for they were at first several houses; and if one family goes, one house is vacant. But if one tenement be divided by a petition, and inhabited by different families, namely, the owner in one and a stranger in another, these are several tenements, severally ratable while they are thus severally inhabited; but if the stranger and his family go away, it becomes one tenement.

^(a) Parminster's case, 1 Leach, 537, note (a).

alone, and the warehouses were let to him and his brother, who lived elsewhere. Upon a case reserved, the judges held that the warehouses could not be deemed part of J. Richard's dwelling-house, as they were let to him and his brother, though by the same landlord, that the conviction was therefore wrong. (b)

As, according to the rule which has been stated as now established upon this subject, where the owner of a house lets out apartments in it to lodgers, but continues to inhabit some part of the house himself, and has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling-house; (c) it will be a necessary consequence that if he should break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary, on the ground that a man cannot commit a burglary by breaking open his own house. (d)

III. The definition of burglary now leads us to the *time* at which the offence must be committed. The time must be the *night*, for in the day time there can be no burglary. (e) † It appears that anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but it was afterwards settled as the better opinion that if there were daylight or twilight enough begun or left whereby the countenance of a person might be reasonably discerned, it was no burglary. (f) But this did not *extend to moonlight, for then midnight house-breaking might be no burglary. (g) Besides, the malignity of the offence does not so properly arise from its being done in the dark, as *at the dead of night*, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless. (h)

But the 1 Vict. c. 86, s. 4, provides, "that, so far as the same is essential to the offence of burglary, the night shall be considered and is hereby declared to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

The breaking and entering need not be both done in the same night, for if thieves break a hole in a house one night, with intent to enter another night and commit felony, and come accordingly another night and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night, (i) And this doctrine was recognised in a late case. The prisoner broke the glass of the prosecutor's side-door on the Friday night, with intent to enter at a future time, and actually entered on the Sunday night; and, upon a case reserved, the judges held this to be a burglary, the breaking and entering being both by night, and the breaking being with intent afterwards to enter. (j) It

(b) *Rex v. Jenkins*, East. T. 1813, MS. Bayley, J., and Russ. & R. 244. See *Rex v. Hancock*, Russ. & Ry. 171, *post*.

(c) *Ante*, p. 817.

(d) 4 Bla. Com. 224.

(e) 2 East, P. C. c. 15, s. 18, p. 506. *Ante*, p. 817.

(f) 3 Inst. 63. 1 Hale, 550, 551. Sum. 79. 1 Hawk. P. C. c. 38, s. 2. Bac. Ab. tit. "Burglary," (D). 4 Bla. Com. 224. 2 East, P. C. c. 15, s. 21, p. 509.

(g) 1 Hale, 551.

(h) 4 Bla. Com. 224.

(i) 1 Hale, 551. 4 Bla. Com. 226. *Ante*, p. 797.

(j) *Rex v. Smith*, East. T. 1820, MSS. Bayley, J., and Russ. & Ry. 417.

† [An indictment for burglary may be supported by circumstantial evidence, and it is not necessary to show that the entry could not have been made in the day-time.

The night time consists of the period from the termination of day light in the evening, to the earliest dawn of the next morning. *The State v. Bancroft*, 10 New Hamps. 105.]

is said, however, that if the breaking be in the day time and the entering in the night, or the breaking in the night, and entering in the day, it will not be burglary. (*k*) But upon this position it has been remarked, that the authority upon which it appears to have proceeded (*l*) does not fully prove the point for which it is cited, but only furnishes a resolution to the effect, that if thieves enter in by night at a hole in the wall, which was there before, it is not burglary, without stating who made the hole, and of course not coming up to the case of a hole made by the thieves themselves in the day time, with intent to enter more securely at night. (*m*) And it is observable that it is elsewhere given as a reason why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves brake and entered in the night when they entered, for that the breaking makes not the burglary till the entry; (*n*) which reasoning, if applied to a breaking in the day time, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry also a burglary.

Where the breaking is one night, and the entry another, a party present at the breaking but absent at the entry is a principal. *822

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

Of intent to commit a felony.

IV.—The last part of the definition of burglary relates to the *intent*. The act of breaking and entering the mansion-house in the night must be done "with intent to commit some felony within the same, whether such felonious intent be executed or not." (*p*) And where the breaking is a breaking out of the dwelling-house at night, there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house. (*q*)

(*k*) 1 Hale, 551.

(*l*) Crompt. 33, *a*, ex 8 Ed. 4, cited by Lord Hale, 551.

(*m*) Note (*k*) to 1 Hale, 551, (ed. 1800). 2 East, P. C. c. 15, s. 21, p. 509.

(*n*) 1 Hale, 551.

(*o*) *Rex v. Jordan*, 7 C. & P. 432, *cor. Gaselee, J., and Gurney, B.*

(*p*) *Ante*, p. 785.

(*q*) *Ante*, p. 792.

If the intention of the entry be either laid in the indictment, or appear upon the evidence to have been only for the purpose of committing a trespass, the offence will not be burglary. Therefore an intention to beat a person in the house will not be sufficient to sustain the indictment, for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary.^(r) The entry must be for a felonious purpose.^(s) It should, however, be observed, that if a felony be actually committed, the act will be *primâ facie* pregnant evidence of an intent to commit it; and it is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence.^(t) But it seems that this must be confined to cases where the offence intended is in itself a felony.^(u)

An intent to commit a trespass will not be sufficient.

The prisoner was indicted for burglary, in breaking and entering the stable of one J. Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B., there being. The facts were, that the gelding was to have run for forty guineas, and that the prisoner cut the sinews of his fore leg to prevent his running, in consequence of which he died. Parker, C. B., before whom the prisoner was tried, ordered him to be acquitted, on the ground that his intention was not to commit the felony by killing and destroying the horse, but a trespass only to prevent his running, and that, therefore, it was no burglary.^(v)

Dobb's case.

*The prisoner, being a servant or journeyman to one John Fuller, was employed to sell goods, and receive the money for his master's use. In the course of the trade he sold a large parcel of goods, for which he received a hundred and sixty guineas, none of which he put into the till, nor in any way gave into his master's possession, but deposited ten guineas of the sum in a private place in the chamber where he slept, and carried off the remaining hundred and fifty on leaving his service from which he decamped before the embezzlement was discovered. He left a trunk containing some of his clothes, as well as the ten guineas, behind him, but afterwards, in the night time, broke open his master's house, and took away with him the ten guineas which he had so deposited in the private place in his bed-chamber. This was held to be no burglary, because the taking of the money was no felony; for although it was the master's money in *right*, it was the servant's money in *possession*, and the original act was no felony.^(w)

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Dingley's case.

(r) 1 Hale, 561.

(s) 3 Inst. 65. 1 Hale, 559, 561. Sum. 83. Kel. 47. 1 Hawk. P. C. c. 38, s. 36. Bac. Ab. tit. *Burglary*, (F). 4 Bla. Com. 227.

(t) 1 Hale, 560. 2 East, P. C. c. 15, s. 22, p. 509, s. 25, p. 514, 515. Kel. 47.

(u) 2 East, P. C. c. 15, s. 24, p. 515.

(v) Dobb's case, *cor.* Parker, C. B., Buckingham Sum. Ass. 1770, 2 East, P. C. c. 15, s. 25, p. 513. But it appears that the prisoner was again indicted for killing the horse, and capitally convicted. *Id.* *Ibid.*

(w) Dingley's case, cited by Const, *arguendo* in Bazeley's case, 2 Leach, 840, 841, where he mentions it as cited by Sir B. Shower, in his argument in the case of *Rex v. Meers*, 1 Show. 53, and there said to be reported by Gouldsbrough, 186. Mr. Const further said, that he had been favoured with a manuscript report of it, extracted from a collection in possession of the late Mr. Reynolds, clerk of the arraigns at the Old Bailey, under the title of *Rex v. Dingley*, by which it appears that the special verdict was found at the Easter Sessions, 1678, and argued in the King's Bench in Hil. T. 3 Jac. 2, and in which it was said to have been determined that this offence was not burglary, but trespass only. See the case cited also as *Rex v. Bingley*, 1 Hawk. P. C. c. 38, s. 37, and as a case, Anon. in 2 East, P. C. c. 15, s. 22, p. 510.

Case of
Knight
and Roffey.

In another case also, the decision proceeded upon the same ground, namely, that the intention was not to commit a felony. The prisoners were indicted for a burglary in the dwelling house of M. Snelling, the intent being laid to steal the goods of one L. Hawkins. It appeared that Hawkins, who was an excise officer, had seized some bags of tea in a shop entered in the name of Smith, as being there without a legal permit, and had removed them to Snelling's, where he lodged. The prisoners and many other persons broke open Snelling's house in the night, with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses said, that they supposed the tea to belong to Smith; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on the behalf of Smith; and, upon the point being reserved, all the judges were of opinion that the indictment was not supported: as, however outrageous the conduct of the prisoners was, in so endeavouring to get back Smith's goods, still there was no intention to steal.(x)

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Where two poachers went to the house of a gamekeeper who had *taken a dog from them, and believing him to be out of the way broke the door and entered, on an indictment for burglary it appeared that their intention was to rescue the dog, and not to commit a felony. Vaughan, B., directed an acquittal.(y) On an indictment for burglary with intent to commit a larceny, the evidence was, that three persons attacked the house; they broke a window both in front and at the back; the occupier of the house got up and contended with them with a spade for some time, when they went away; there was no evidence of an actual entry, but there was evidence that the prisoners had ample opportunity to enter and plunder, if they were disposed; it was submitted for the prisoners, that there was no evidence to go to the jury; Parke, J., "There is evidence; it is for the jury to say, whether they went there with that intent or not. Persons do not in general go to houses to commit trespasses in the middle of the night; it is matter of observation that they had the opportunity, and did not commit the larceny, but it is for the jury to say, whether from all the circumstances, they can infer that or any other intent."(z)

The felony
intended
may be
either
felony at
common
law or by
statute.

It is quite clear, therefore, that the entry must be with a *felonious intent*. And it seems also to be now well established, contrary to some opinions which have been formerly entertained upon the point,(a) that it makes no difference whether the offence intended were felony at common law, or only created so by statute; and the reason given for the better opinion is this, that whenever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.(b)

(x) *Rex v. Knight and Roffey*, East. T. 1782. 2 East, P. C. c. 15, s. 22, p. 510. Some of the judges held that if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., which was made felony by 19 Geo. 2, c. 34, (which is now repealed, see *ante*, p. 111.) it would have been burglary. But they agreed that even in that case some evidence would have been necessary on the part of the prosecutor as to the goods being uncustomed, in order to throw the proof that the duty was paid on the prisoners: but the goods being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose.

(y) Anonymous, Math. Dig. C. L., *Burglary*, 48. See *Rex v. Holloway*, 5 C. & P. 524.

(z) Anonymous, 1 Lew. 37.

(a) 1 Hale, 562. *Crompt*. 32. 2 East, P. C. c. 15, s. 22, p. 511.

(b) 1 Hawk. P. C. c. 38, s. 38. 4 Bla. Com. 228. *Bac. Abr. tit. Burglary*, (F). 2 East,

It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment, and proved, agreeably to the fact. And a felony intended to be committed will not support an indictment charging a felony actually committed. Thus, where upon an indictment for burglary and stealing goods, it has appeared that there were no goods stolen, but that the burglary was with intent to steal, it has been holden that the indictment was not supported by the evidence.^(c) So if it be alleged, that the entry was with intent to commit one sort of felony, and it appears upon the facts that it was with intent to commit another: it will not be sufficient.^(d) And where the charge is of a felony intended to be committed by stealing goods, the property in the goods must be correctly stated. Thus, where an indictment charged a burglary in the house of one Joseph Davis, with intent to steal the goods of the said Joseph Wakelin; and it appeared that no such person as Joseph Wakelin had any property in the house, but that in fact the name Wakelin had been inserted by mistake in the indictment instead of Davis, though Lawrence, J., before whom the prisoner was tried, inclined to think that the mistake was not material as to the burglary, a majority of the judges were afterwards of opinion (the point being *saved for their consideration,) that in an indictment of this description it was necessary to show to whom the property belonged, in order to render the charge complete; and the words, "of the said Joseph Wakelin," being material, could not be rejected as surplusage.^(e)

The felony really intended must be stated correctly and proved according to the fact.

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But if the indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed.^(f) And it seems sufficient in all cases where a felony has actually been committed, to allege the commission of it; as that is sufficient evidence of the intention.^(g) But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement.^(h)

It should be observed, also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of a person; and the second count laid it with intent to murder him; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but

But different intents may be laid in the indictment.

P. C. c. 15, s. 22, p. 511. *Rex v. Locost and Villars*, Kel. 30. *Rex v. Gray*, 1 Str. 481. *Rex v. Knight and Roffey*, ante, note (x), p. 823.

(c) 2 East, P. C. c. 16, s. 25, p. 514. *Rex v. Vandercomb and Abbott*, 2 Leach, 708.

(d) 2 East, P. C. c. 15, s. 25, p. 514.

(e) *Jenk's case*, O. B. 1796, cor. *Macdonald*, C. B., Buller, J., and Lawrence, J., and considered of by the judges, Mich. T. 1796, 2 Leach. 774. 2 East, P. C. c. 15, s. 25, p. 514, where it is said that this it seems is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally. See *Rex v. Exminster*, 6 A. & E. 598, where a similar mistake in a surname was held not to vitiate an assignment of an apprentice. In *Reg. v. Rudge*, Gloucester Spr. Ass. 1841, Coleridge, J., seemed clearly of opinion that an indictment for murder, which alleged an assault on *Martha Sheddou*, and that the prisoner "the said *Margaret Sheddou*, did strike, &c.," was not, therefore, bad. C. S. G.

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

(g) 1 Hale, 560. 2 East, P. C. c. 15, s. 25, p. 514. *Rex v. Furnival*, East. T. 1821, Russ. & Ry. 445.

(h) 1 Hale, 549. *Rex v. Furnival*, Russ. & Ry. 445.

the indictment was holden good on the ground that it was the same fact and evidence, only laid in different ways. (i) †

Of the proceedings.

Having thus treated of the offence of burglary, according to its definition, we may inquire shortly concerning the proceedings against offenders by indictment.

Indictment. Allegation that the fact was done in the night.

It is essential that the indictment should state the fact to have been done in the night, *noctanter*, or *nocte ejusdem diei*. (j) And it must also express at about what hour of the night it happened; as where an indictment only alleged the fact to have been committed in the night, but did not express about what hour it was done, Gould, J., held it insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. And he gave as a reason, that as the rule then established was, that a burglary could not be committed during the *crepusculum*, it was therefore necessary to specify the hour, in order that the fact might appear, upon the face of the indictment, to have been done between the twilight of the evening and that of the morning. (k) It is not necessary, however, *that the evidence should correspond with the allegation as to the hour, so that it shows the fact to have been committed in the night. (l)

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Allegation as to the mansion or dwelling-house.

The offence must be laid, as we have seen, to have been committed in a mansion-house, or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. (m) It would not be sufficient to lay it generally as having been committed in a house. (n) Where a burglary had been committed in such an outhouse as by law was considered part of the dwelling-house, it must have been laid as having been done in the dwelling-house, or in a stable, barn, &c., part of the dwelling-house; either of which statements might be adopted. (o)

The allegation of the offence having been committed in a mansion-house, must be understood, however, as confined to burglaries in private houses; for though it has been quaintly observed, that a church is *domus mansionalis Die*, (p) it is the better opinion that the indictment, in the case of a burglary committed in a church, need not proceed upon such a supposition, but will be more properly framed according to the truth of the fact, by stating the offence to have been committed in the parish church of the parish to which it belongs. (q)

Statement of the name of the owner of the

It is necessary to state the name of the owner of the dwelling-house, in the indictment, with accuracy, and such certainty to a common intent, as is, in general, necessary in the description of a party who has sus-

(i) Thompson's case, Norfolk Sum. Ass. 1781, and Mich. T. 1781, when the case was considered of by seven judges only, who were unanimous that the indictment was good. 2 East, P. C. c. 15, s. 26, p. 515.

(j) 1 Hale, 549. *Ante*, p. 820.

(k) Washington's case, Lancaster Lent Ass. 1771. Burn's Just. tit. *Burglary*, s. 1. 2 East, P. C. c. 15, s. 24, p. 513. In 2 Hale, 170, it is said, that the indictment ought to be *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*; but that according to some opinions *burglariter* carries a sufficient expression that it was done in the night.

(l) 2 East, P. C. c. 15, s. 24, p. 513.

(m) *Ante*, p. 797, *et seq.*

(n) 1 Hale, 550.

(o) Garland's case, 1 Leach, 144, where an out-house having been broken open, the indictment was for breaking and entering the dwelling-house; and Dobb's case, 2 East, P. C. c. 15, s. 24, p. 512, and s. 25, p. 513, where the indictment was for breaking and entering the stable of J. B., part of his dwelling-house.

(p) 3 Inst. 64.

(q) 1 Hale, 556. 1 Hawk. P. C. c. 38, s. 17. 2 East, P. C. c. 15, s. 24, p. 512.

† [Breaking into house with intent to steal generally, sustains charge of breaking into house with intent to steal the goods of some particular persons. *Reg. v. Clarke*, 1 C. & R. 421; Eng. C. L. xlviij. 421.]

tained an injury. (r) In a case where the indictment stated the burglary dwelling-house to have been committed in the shop *exjusedem Ricardi*, without mentioning the surname of the owner, it was doubted whether it was good. (s) And where the name of the owner of the dwelling-house was altogether mistaken, as where the indictment laid the burglary to have been committed in the dwelling-house of John Snoxall, and it appeared that it was not the dwelling-house of John Snoxall, it was holden that the prisoner could not be found guilty either of the burglary, or of stealing to the amount of forty shillings in the dwelling-house, it being essential, in both cases, to state in the indictment the name of the person in whose house the offences are committed. (t) And where the prisoner was indicted for stealing in the dwelling-house of Sarah Lunn, and it appeared in evidence that her name was Sarah London, the variance was holden to be fatal to the capital part of the indictment. (u)

The parish in which the dwelling-house is laid to be situated must be correctly stated, as a variance in this respect will be fatal. (v) *Upon an indictment for stealing in a dwelling-house, it has been held, that if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situate at the place named in the indictment by way of venue. The indictment stated that the prisoner, on, &c., at Liverpool, one coat of J. S., of the value of 40s., in the dwelling-house of W. T., then and there being, then and there feloniously did steal; and, a case being reserved upon the question, whether the indictment showed sufficiently that the dwelling-house was situate at Liverpool; the judges held that it did. (w)

In an indictment alleging a dwelling-house to be situated "at the parish aforesaid," the parish last mentioned must be intended. An indictment charged that the prisoners, "of the parish of Walcot," riotously assembled at the parish of St. Peter and St. Paul, and began to demolish a house "situate at the parish aforesaid." The house in question was situate in the parish of St. Peter and St. Paul, it was objected, that as two parishes had been named, the indictment ought to have alleged that the house was in the parish last aforesaid, but it was held that the indictment was sufficient, as the parish aforesaid must relate to the last mentioned parish. (x) Where an indictment alleged that a "burglary was committed at the parish of Woolwich," and the prosecutor proved that the correct name of the parish was "St. Mary, Woolwich," but the parish is called the parish of Woolwich in the Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 2; it was held, that as that act showed that the parish was known by the name of the parish of Woolwich, the indictment was sufficient. (y)

(r) 2 East, P. C. c. 15, s. 24, p. 513. 1 Chit. Crim. Law, 215, *et seq.* 3 Chit. Crim. Law, 1096. *Ante*, p. 807, *et seq.*

(s) Cole's case, Moor. 466. 1 Hale, 558. 2 East, P. C. c. 15, s. 24, p. 513. In Moor it is said to have been holden good; but this is not mentioned by Lord Hale. In 3 Chit. Crim. L. 1098, it is said that there can be little doubt that at the present day such an omission would be considered as material.

(t) White's case, O. B. 1783. 1 Leach, 252. 2 East, P. C. c. 15, s. 24, p. 513.

(u) Woodward's case, O. B. 1785, *cor.* Adair, Serjeant, Recorder. 1 Leach, 253, note (a).

(v) 2 Stark. Crim. Plead. 437, note (z).

(w) Rex v. Napper, Mich. T. 1824, MSS. Bayley, J., and Ry. & Mood. C. C. 44.

(x) Rex v. Richards, 1 M. & Rob. 177, Park, J. A. J., and Gaselee, J. Rex v. St. Mary. Leicester, 1 B. & A. 227. Rex v. Countesthorpe, 2 B. & Ad. 478. Walford v. Anthony, 8 Bing. 75. Rex v. Wright, 1 A. & E. 434.

(y) Reg. v. St. John, 4 9 C. & P. 40, Parke, B., and Bosanquet, J.

* Eng. Com. Law Rep. xxiii. 124. ^b Ib. xxi. 227. ^c Ib. xxviii. 117. ^d Ib. xxxviii. 28.

Where an indictment for burglary charged that the prisoner, "late of Norton juxta Kempsey, in the county of Worcester," "at Norton juxta Kempsey aforesaid, the dwelling-house of T. Hooke, there situate," feloniously did break and enter, &c., and it appeared that Norton juxta Kempsey was a chapelry and perpetual curacy; it was objected that the indictment ought to have stated Norton juxta Kempsey to be a chapelry, or described it in some other manner. But Patteson, J., held that *Reed v. Napper*, R. & M. C. C. R. 44, was a sufficient authority to show that this indictment was good; there it was held that an indictment alleging that the prisoner "at Liverpool" did break and enter a dwelling-house "there situate" was good; and there was no reason why an indictment alleging a burglary "at Norton juxta Kempsey," was not also good, it being proved that there was such a district. (*yy*)

Where the trial is in an adjoining county under the 7 Geo. 4, c. 64, s. 12.

Since the 7 Geo. 4, c. 64, s. 12, (*z*) if a burglary be committed within five hundred yards of the boundary of a county, the offenders may be tried in the adjoining county. An indictment for burglary, which had been found by the grand jury for the county of Hereford, alleging the burglary to have been committed "at the parish of English Bickner, in the county of Gloucester, within five hundred yards of the boundary of the county of Hereford." Upon the arraignment of the prisoners at Hereford, it was objected that the indictment was bad, on the ground that the 7 Geo. 4, c. 64, s. 12, only applied to larceny and other transitory felonies, and not to felonies which were local in their nature; but it was held that the indictment was good; the effect of the 7 Geo. 4, c. 64, s. 12, was to give adjoining counties concurrent jurisdiction over one thousand yards; that the words "dealt with" applied to justices of the peace, who had consequently jurisdiction over five hundred yards in the adjoining county to that in which they were qualified to act; that the words "inquired of" applied to the grand jury; "tried" to the petit jury; and "determined and punished" to the courts of sessions and assizes. (*zz*)

Terms of art—burglariously, —and broke and entered. *828

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

An indictment upon the 7 & 8 Geo. 4, c. 29, s. 11, for "breaking out" of a dwelling-house after committing a felony therein, must expressly aver that the prisoner broke out of the house, and a statement that the prisoner did "break to get out," or "did break and get out," is insufficient. (*b*)

Of laying the intent; and of joining burglary and

With respect to the intent, it is clear that it must be expressly alleged in the indictment, and proved agreeably to the fact, either that the party committed a felony in the dwelling-house, or that he broke and entered the house with intent to commit a felony therein. (*c*) And it seems to

(*yy*) *Reg. v. Brookes and others*,^a Worcester Spr. Ass. 1842, MSS. C. S. G. S. C. 1 C. & Mars. 544.

(*z*) See the section, *ante*, p. 549.

(*zz*) *Rex v. Ruck, Morgan and another*, Hereford Spr. Ass. 1829, Park, J., MSS. C. S. G.

(*a*) 1 Hale, 550. 2 East, P. C. c. 15, s. 24, p. 512. *Ante*, p. 786.

(*b*) *Rex v. Compton*, 7 C. & P. 139. *Vaughan and Patteson, Js.* See the section, *ante*, p. 792.

(*c*) 1 Hale, 550. *Ante*, p. 822, *et seq.*

^a Eng. Com. Law Repts. xli. 296.

be the better course, first to lay the intent, and then state the particular felony, if a felony has actually been committed. For though where an indictment charges that the prisoner "the dwelling-house of A. B. feloniously and burglariously did break and enter and the goods of A. B. then and there feloniously and burglariously did steal, take," &c., it comprises two offences, namely, burglary and larceny, and the prisoner may therefore be acquitted of the burglary, and found guilty only of the larceny; yet it seems he cannot be found guilty of the burglary if he be acquitted of the larceny, on the ground, that when the offence is so charged the larceny constitutes part of the burglary.^(d) It has, therefore, been recommended, by high authority, as the better way, to charge the prisoner with breaking, &c., with intent feloniously and burglariously to steal, &c., and to add also the particular felony, as upon such an indictment he may be convicted of a simple burglary, though acquitted of the felony.^(e)

Where an indictment stated that the prisoner burglariously did break and enter a dwelling-house "with intent one A. Davies in the said dwelling-house then being violently and against her will *then and there* feloniously to ravish and carnally know," and it was objected that the indictment ought to have stated the intent to ravish the said A. Davies in the said dwelling-house; Coltman, J., refused to stop the case, but would have reserved the point if the jury had convicted the prisoner.^(ee)

It was also said by the same high authority, that three offences might have been joint in the same indictment, namely, burglary, larceny, and felony, and upon the statute of 5 & 6 Edw. 6, c. 9,^(f) for robbing a person in a dwelling-house, the owner, his wife, &c., then being within, whether waking or sleeping. And that upon such indictment, which need not have concluded against the form of the statute, the prisoner might have been convicted of the burglary, and found not guilty of felony, or convicted of the felony upon the statute 5 & 6 Edw. 6, c. 9, and found not guilty of the burglary; in either of which cases he would have been ousted of his clergy or he might have been convicted of the larceny only, and found not guilty of the burglary and the felony upon the statute, in which case he would have been entitled to his clergy.^(g)

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

Where a burglary is committed in the house of a convicted felon, the goods may properly be described as the goods of the queen, *although no office has been found, but they cannot properly be described as the goods of the wife of the convicted felon, although she were in the actual possession of the house and goods at the time the burglary was committed. Upon an indictment for breaking and entering the house of E. Andrews, and stealing certain goods, laid in the first count to be the property of E. Andrews, and in the second of the queen, it appeared that the husband of E. Andrews was a convicted felon, and in gaol under his sentence at the time the felony was committed, but the wife continued in possession of the house and goods till they were stolen; it was

(d) 1 Hale, 559, 560.

(e) 1 Hale, 560.

(ee) Reg. v. Watkins,* 1 C. & Mars. 264.

(f) Now repealed by the 7 & 8 Geo. 4, c. 27.

(g) 1 Hale, 561. 2 East, P. C. c. 15, s. 27, p. 516.

(h) *Ante*, p. 825.

* Eng. Com. Law Reps. xli. 148.

submitted that the goods were neither the property of E. Andrews nor of the queen, until office found; but upon a case reserved, the judges held that the prisoner was rightly convicted of larceny only in the second count, which laid the property of the goods in the queen.⁽ⁱ⁾ It is sufficient to lay the property in the name of a person who is bailee of it. On an indictment for breaking and entering the house of Kyezor, and stealing a watch, the property of Miers, Miers proved that the house was taken by Kyezor, and that the witness carried on the business of a silversmith for the benefit of Kyezor and his family, but had himself no share in the profits, and no salary, but he had power to dispose of any part of the stock, which was worth near 3000*l.*, and that he might, if he pleased, take money from the till as he wanted it, but he should inform Kyezor that he had so done; he sometimes bought goods for the shop, and sometimes Kyezor did so. Upon this evidence it was held, that Miers was a bailee of the stock, and therefore in a case of this kind the property might properly be laid in him.^(j)

Of the plea of *autrefois acquit*.
Rex v. Vandercomb and Abbott.
A prisoner indicted for burglary, entering a dwelling-house with intent to steal, cannot plead in bar an acquittal upon an indictment for the same burglary which charged a breaking and entering the same dwelling-house and stealing there.

*830

It was decided in an important case, in which the point was fully considered that an acquittal upon an indictment for burglary, in breaking and entering a dwelling-house *and stealing* goods, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night *with intent* to steal, on the ground that the several offences described in the two indictments could not be said to be the same. The indictment charged the prisoners with burglariously breaking and entering the dwelling house of M. Nevill and A. Nevill, *with intent to steal* their goods, and they pleaded a plea of *autrefois acquit* upon a former indictment, which charged them with burglariously breaking and entering the dwelling-house of M. Nevill and A. Nevill, *and stealing* goods of M. Nevill, goods of A. Nevill, and goods of one S. Gibbs. The plea concluded with averring the identity of the persons of the prisoners, and that the burglary was the same identical and individual burglary. To this plea there was a demurrer, which was argued before all the judges of England; and their opinion was afterwards delivered by Mr. Justice Buller at the old Bailey June Session, 1796. The learned judge said, that it had been contended on behalf of the prisoners, that as the dwelling-house in which, at the time when the burglary was charged to have been committed were precisely the same both in the indictment for the burglary *and stealing* the goods on which they were acquitted, and in the indictment for the burglary *with intent to steal* the goods, which was then depending, the offence *charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceedings on the latter. He then proceeded, "It is quite clear, that at the time the felony was committed' there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case, for burglary is of two sorts: first, breaking and entering a dwelling-house in the night-time, *and stealing goods therein*; secondly, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offence; but it

(i) Reg. v. Whitehead, 9 C. & P. 429.

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

* Eng. Com. Law Reps. xxxviii. 175.

† Ib. xxxviii. 29.

does not of itself constitute the crime in either of them ; for it is necessary to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed, or intended to be committed ; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other.(k) In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broken and entered the house, and stolen the goods stated in the first indictment ; and if crimes are so distinct, that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution for the other."

The learned judge then observed upon the cases which had been cited on behalf of the prisoners, in support of the proposition contended for by their counsel ; namely, *Turner's case*,(l) and the case of *Jones and Bever*.(m) In *Turner's case* it was agreed that the prisoner, having been formerly indicted for burglary, in breaking the house of a Mr. Tryon, and stealing his goods, and acquitted, could not be indicted again for the same burglary, in breaking his house, and stealing therein the money of one Hill, (a servant of Mr. Tryon,) but that he might be indicted for felony in stealing the money of Hill. Upon this case, Mr. J. Buller observed ; "The decision was not a solemn judgment, for the prisoner was not indicted a second time for the burglary ; it was merely a direction from the judges to the officers of the court how to draw the second *indictment for the larceny ; and it proceeded upon a mistake, as I shall presently show. If the judges in that case exercised a little lenity before the indictment, which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that *Turner* having been indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, could not be indicted again for the same burglary for breaking the house, though he might be indicted for stealing the money of Hill, for which he had not been indicted before : and he was indicted accordingly. The judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences ; and that the breaking the house only constituted the crime of burglary ; which is a manifest mistake, for the burglary consisted in breaking the house and stealing the goods ; and if stealing the goods of Hill was a distinct felony from that of stealing the goods of Tryon, which it was admitted to be, the burglaries could not be the same."

*831

(k) It is well established that an indictment for breaking and entering, &c., and stealing goods, will not be supported by evidence of a breaking and entering, &c., with intent to steal them. But it has been supposed that an indictment for breaking and entering, &c., with intent to steal, will be supported by evidence of breaking and entering, &c., and an actual stealing, *ante*, p. 825, 828. If this be so, the report of the judgment delivered by Mr. J. Buller, as here given, states the point too largely ; as it seems to go to the extent of saying that evidence of a breaking and entering, and a felony actually committed, will not support an indictment for a breaking and entering, &c., and a felony intended to be committed. In 2 East, P. C. c. 15, s. 20, p. 520, the learned author observes upon this case, and says, "*Quære*, whether the definition of the crime be not solely resolvable into the breaking, &c., with an intent to commit felony ; of which the actual commission is such a strong evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c., to be with intent to steal, is said to be supported by proof of actual stealing ; though certainly not *vice versa*."

(l) Kel. 30.

(m) Kel. 52.

With respect to the case of Jones and Bever, the learned judge said, that it proceeded entirely upon the decision in Turner's case; and that the foundation failing the superstructure could not stand. *(n)*

Autrefois acquit will not be an effective plea unless the facts contained in the second indictment would, if true, have sustained the first indictment.

The learned judge then referred to several authorities, *(o)* and continued, "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply the principle to the present case: the first indictment was for burglariously breaking and entering the house of Miss Nevills, and *stealing the goods* mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for, in fact, no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of the Miss Nevills *with intent to steal*, which is the charge of the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment." And the prisoners were accordingly tried and convicted. *(p)*

*832

A party indicted for burglary, and stealing, and acquitted, may be again indicted for the same burglary, and stealing the goods of a different person.

In the preceding case the property in the goods was laid differently in the two indictments. The first, upon which the prisoners had been acquitted, stated some of the goods stolen to belong to M. Nevill, others to A. Nevill, and others to S. Gibbs; and the second indictment stated the goods intended to be stolen *to belong to M. and A. Nevill only. And it is said that Buller, J., in delivering the opinion of the judges on the case, observed, that the property in the goods was differently described in the two indictments, and said that this might afford another objection to the plea; but that he had not entered into the consideration of the circumstance, as the case did not require it. *(q)* And the ancient doctrine, that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person, appears to have been overruled in this case, when the authorities by which it was supposed to have been established were denied to be law. *(r)* It may be mentioned, also, that the 7 & 8 Geo. 4, c. 28, s. 4, enacts that "no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

7 & 8 Geo. 4, c. 28, s. 4.

An acquittal of an offence in one king's reign cannot be

Though it is not professed in this treatise to enter minutely into the points decided upon the pleadings in criminal cases, it may be here mentioned, with reference to the important plea of *autrefois acquit*, that, in a late case, the doctrine was recognised that such plea is no bar, unless

(n) *Rex v. Jones and Bever*, Kel. 52. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord Cornbury, and stealing his goods therein; and being acquitted, were afterwards indicted for the same burglary, in breaking and entering Lord Cornbury's house, and stealing the goods of a Mr. Nunnesy; and it was agreed that, as they had been before acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony in stealing the goods of Mr. Nunnesy, precisely as had before been done in Turner's case.

(o) 2 Hawk. P. C. c. 35, s. 3. Fost. 361, 362. *Rex v. Pedley*, 1 Leach, 242.

(p) *Rex v. Vandercomb and Abbott*, 1796, 2 Leach, 708. 2 East, P. C. c. 15, s. 19, p. 519.

(q) 2 East, P. C. c. 15, s. 29, p. 519, note *(b)*.

(r) *Viz. Turner's case*, and the case of Jones and Bever, *ante*, p. 831.

the facts charged in the second indictment would have warranted a conviction upon the first. So that if the offence charged in the second indictment is in one king's reign, and the first indictment was confined by the *contra pacem*, to the preceding reign, an acquittal upon the first could not be pleaded in bar to the second. To an indictment for keeping a gaming-house in the time of Geo. 4, the defendant pleaded that at a sessions, in 4 Geo. 4, he was indicted, for that he, on the 18th of January, 57 Geo. 3, and on divers other days between that day and the taking of that inquisition, kept a gaming-house, against the peace of our said lord the king; that he was tried and acquitted, and that the offence in both the indictments was the same. To this there was a demurrer, and it was urged that the *contra pacem* in the first indictment tied up the prosecutor to the proof of an offence in the time of George 3, for George 3, being the only king named in that indictment, "our said lord the king," in that indictment, must have referred to him, and then the defendant could not have been punished on that indictment for keeping the house in the time of King George the 4th. And the demurrer was held good.^(s)

If a prisoner could have been legally convicted upon an indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence was adduced at the first trial or not. A plea of *autrefois acquit* must only set forth the record of one acquittal; if it were to set forth two, it would be bad, for duplicity, but it seems that the court would take care that the prisoner should not be prejudiced by pleading one acquittal instead of the other. To an indictment for the murder of a child, described in different counts as Charles William, *William, &c., the prisoner pleaded that at a former delivery of the gaol of Newgate he had been indicted, tried, and acquitted of the murder of Charles William Beadle, and the plea averred that the child was as well known by the name of Charles William Beadle as by any of the several names and descriptions of Charles William, &c., as he is in and by the present indictment described: and this averment was traversed by the replication. The prisoner's counsel asked if they might add to this plea, that the prisoner was acquitted on the coroner's inquisition, in which the deceased was described as Charles William Sheen. Burrough, J., "If the prisoner, by his plea, insists on two records, his plea would be double,^(t) but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced." For the prisoner a register was put in, in which the baptism of the deceased, who was about four months old, was entered "Charles William the son of Lydia Beadle;" a witness proved the identity of the child, and that his mother was an unmarried woman, named Lydia Beadle, whom the prisoner had married after the birth of the deceased, and stated that the deceased was always called William or Billy, but that she should have known him by the name of

^(s) *Rex v. Taylor*, 3 B. & C. 502.

^(t) But see *Ashford v. Thornton*, 1 B. & Ald. 423, where plea by the defendant contained an averment of an acquittal both on an indictment for murder and on an indictment for rape, as well as an allegation of an alibi, and divers other facts tending to prove the defendant's innocence. See also 2 Hawk. P. C. c. 23, s. 128, where it is said that there seems to be no doubt that a prisoner may plead as many pleas as he like, unless they be repugnant to each other; and see *ibid.* s. 137, and c. 34. C. S. G.

Charles William Beadle; and if any one had inquired for him by that name she would have known who was meant. The prisoner's father stated that the child's name was Charles William Sheen, but he had never heard him called so. Burrough, J., (in summing up) "The question on this issue is, whether the deceased was as well known by the name of Charles William Beadle as by any of the names and descriptions in the present indictment; and I ought to say that if the prisoner could have been convicted on the former indictment, he must be acquitted now. And whether at the former trial the proper evidence was adduced before the jury or not, is immaterial; for if by any possible evidence that could have been produced, he could have been convicted on that indictment, he is now entitled to be acquitted. The first evidence we have is the register; and, looking at that, would not every one have called the child Charles William Beadle? And it is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know the child by that name, because children of so tender an age are hardly known at all, and are generally called by a Christian name only. If, however, you should think that the name of the deceased was Charles William Sheen, I wish you would inform me of it by your verdict, because it is agreed, that as that is the name in the coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal on that inquisition. My brother Littledale suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it upon this evidence, and if this evidence of the child's name had been given *at the former trial, I think the prisoner should have been convicted. The case of *Rex v. Clark(u)* has been cited, but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle, or Charles William Sheen, or you think that he was known at all by these names, you ought to find a verdict for the prisoner." (v)

*834

Where the means of death are proved by the same evidence.

If the means of death charged in two indictments be such as would be supported by the same evidence, a plea to the one that the prisoner was acquitted on the other is good. Therefore, to an indictment for murder, by giving the deceased oil of vitriol, and forcing him to take it into his mouth and throat, it is a good plea that the prisoner had been acquitted on an indictment for giving the deceased poison, that is oil of vitriol, and forcing him to take, drink, and swallow it down. (w)

An acquittal on an indictment against the prisoner and others, a bar to an indictment

To an indictment against one prisoner only for receiving stolen goods a plea of *autrefois acquit*, upon an indictment against him and four others, on which one was convicted and the three others and himself acquitted, is good upon demurrer. To an indictment against the prisoner for receiving stolen goods, he pleaded that at a previous assizes, an indictment was found against two persons for stealing the said goods, and

(u) R. & R. C. C. R. 358, ante, p. 556.

(v) *Rex v. Sheen*,^a 2 C. & P. 684, cor. Burrough and Littledale, Js. In this case the counsel for the crown replied *ore tenus*, replication from the back of his brief, and the prisoner's counsel joined issue *ore tenus*; the court awarded a *venire* returnable *instantly*, and the sheriff having made his return forthwith, and the jury having been sworn, the counsel for the prisoner opened his case in support of the plea, and called his witnesses; the counsel for the crown afterwards addressed the jury and called witnesses, and the counsel for the prisoner replied.

(w) *Rex v. Clarke*,^b 1 Brod. & B. 473, ante, p. 567.

^a Eng. Com. Law Repts. xii. 295.

^b *Ib.* v. 151.

against Whitehead, the prisoner, and two others, for receiving the said goods, and that the two principals and Whitehead were found guilty, but the prisoner and the other receivers acquitted; to this plea there was a demurrer, and after consideration the following judgment, which had been prepared by Mr. J. Gaselee, was delivered at the next assizes. (x) against the prisoner, alone.

“The plea of *autrefois acquit* is grounded upon an ancient maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence. A great deal of learning is to be found on the subject in 2 *Hawk. P. C.* c. 85, and *Starkie on Criminal Pleading*, p. 316, and many other books. Upon the result of all the authorities the question is, whether the prisoner could have been convicted on the former indictment, for, if he could, he must be acquitted on the second; and the law is very correctly stated to the jury by Mr. Justice Burrough, in the case of the *King v. Sheen*, 2 *C. & P.* 634. It is argued for the prosecution, that an acquittal of a joint felony is not a bar to an indictment for a several felony. However that might be, if it clearly appeared upon the record that several felonies had been committed, in some of which the prisoner Dann had been jointly, and in another separately concerned, it does not appear that the present indictment is confined to any offence committed by the prisoner separately, nor is it so. Upon it he is liable to be convicted of an offence committed separately or jointly with any other person, and consequently with Whitehead. The *plea alleges that the charge in the former indictment against Whitehead and the prisoner and the other three, is the same offence as that charged in the former indictment, and this is admitted by the demurrer. The argument that the prisoner could not be convicted upon the former indictment is not true. The result of that indictment shows that it was not necessary to convict all the parties charged by that indictment. The prisoner might have been convicted either with Whitehead, or without him; nay, if the judge had called upon the prosecutor to elect against whom he would proceed, (whether he did so or not the learned judge was not at liberty to consider, as nothing respecting it appears upon record,) and he had elected to proceed against the prisoner, he might have been convicted alone, which shows he had been in jeopardy; and if the plea of *autrefois acquit* is not a bar, he may now be convicted of the very offence committed jointly with Whitehead, and of which Whitehead has been convicted. A replication that the charges were not the same might possibly, upon evidence, have placed the case in a very different point of view. As the record now stands, the learned judge is bound to adjudge the plea to be good, and that the prisoner be discharged.” (y)

#835

Where a defendant had been acquitted upon an indictment for perjury, alleged to have been committed in an affidavit, the jurat of which was not set out, and he was again indicted for perjury committed in the same affidavit, and the jurat set out, it was held that a plea of the former acquittal was good; for in the first indictment the offence was sufficiently charged without setting out the jurat. (z) In perjury.

Where an insolvent debtor had been acquitted upon an indictment for omitting certain goods out of his schedule, and was again indicted for omitting those goods and some others out of his schedule; it was An insolvent debtor omitting goods from

(x) The case was postponed in order to consult the other judges, but they declined giving any opinion on it, as no judgment had been given, and the case might come before some of them upon error.

(y) *Rex v. Dann*, R. & M. C. C. R. 424.

(z) *Rex v. Emden*, 9 East, 437. See this case, *post*, Vol. 2, tit. *Perjury*.

his sched- held that a plea of *autrefois acquit* was not, in strictness, a good de-
ule. fence to the whole of the second indictment; the prisoners might have
fraudulently omitted out of his schedule the goods mentioned in the last
indictment, which were not mentioned in the first, and in point of law
a prosecutor might prefer separate indictments for each such omission;
but excepting under very particular circumstances such a course ought
not to be pursued.(a)

In bur- Where a prisoner was indicted for a simple burglary in the house of a
glary. person, for whose murder he had been acquitted, Parke, B., said, "The
charge in the indictment did not affect the life of the prisoner, as there
was not an allegation that the burglary was accompanied by violence,
and that if he had been indicted for burglary with violence, as he might
have been convicted of manslaughter, or even assault on the indictment
for murder, on which he had been acquitted altogether, in his opinion
that acquittal would have been an answer to the allegation of violence,
if it had been inserted in the present indictment."

*836 The acquittal on one indictment, in order to be a good defence to *a
subsequent indictment, must be an acquittal of the same identical
The acquit- offence charged in the first indictment. An acquittal, therefore, upon an
tal must offence charging the prisoner as a principal, is no defence to an
have been indictment charging him as accessory before the fact. Plant was indicted
of the same and tried for the murder of her child, and Birchenough for having been
identical present, aiding and abetting her in the said murder. She was found
offence. guilty, he was acquitted. They were arraigned on a second indictment,
in which she was charged with the murder, he as an accessory before
the fact; he pleaded *autrefois acquit*, referring to his acquittal on the
former indictment. The prosecutor demurred, and, upon argument,
Lord Denman, C. J., thought the plea bad, and directed the prisoner to
plead to the indictment, which he did, and was found guilty; and upon
a case reserved, the judges were unanimously of opinion that the plea
of *autrefois acquit* was properly overruled, and that the subsequent
conviction was good.(c)†

The indict- Wherever the indictment whereon a man is acquitted is so far erro-
ment must neous, (either for want of substance in setting out the crime, or the
be good on authority in the court before which it was taken, as where a sessions
the face of were held on a day to which they had not been adjourned,(d) that no
it, and good judgment could have been given upon it against the prisoner, the
before a acquittal is no bar to a subsequent indictment, because in judgment of
competent law the prisoner was never in danger of his life upon it: for the law
tribunal. will presume *primâ facie*, that the judge would not have given a judg-
ment, which would have been liable to be reversed.(e) But if there be
no error in the indictment, but only in the process, it seems agreed that
the acquittal will be a good bar to a subsequent prosecution, the best
reason whereof seems to be, that such error is salved by appearance.(f)

(a) *Rex v. Champneys*, 2 M. & Rob. 26. 2 Lew. 52. Patteson, J., added, "If the case goes on I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were omitted out of the schedule under circumstances essentially different from the others."

(b) *Reg. v. Gould*,^a 9 C. & P. 364, *cor.* Tindal, C. J., and Parke, B.

(c) *Rex v. Birchenough*,^b R. & M. C. C. R. 477. 7 C. & P. 575. This case overruled 1 Hale, 626; 2 Hale, 224; Foster, 361; 2 Hawk. P. C. c. 35, s. 11; Kely, 25.

(d) *Rex v. Bowman*,^c 6 C. & P. 337.

(e) 2 Hawk. P. C. c. 35, s. 8. *Rex v. Turner*, R. & M. C. C. 239. *Vaux's case*, 4 Rep. 44.

(f) 2 Hawk. P. C. *ibid.*

† [An acquittal on an indictment for seduction is a bar to a subsequent indictment for

^a Eng. Com. Law Reps. xxxviii. 156.

^b *Ib.* xxxii. 637.

^c *Ib.* xxv. 428.

Where two indictments for rape were precisely in the same words, and there had been an acquittal upon one, and that acquittal was pleaded to the second; the first indictment was put in, and it was contended, on behalf of the prisoners, that it was evidence that the offence charged in the second was the same as that charged in the first; but it was answered, on the part of the crown, that it was no evidence at all, for if the same prisoners had committed several rapes on the same woman on the same day (which was the fact here) each indictment would be in the same terms. So if a man stole twenty sheep from the same person at different times on the same day, or wounded the same person several times on the same day, each indictment would be in the same words; and of this opinion was the learned judge,^(g) and this opinion has been since confirmed by very high authority.^(h) In the same case the commitment of the prisoners for a rape upon the prosecutrix was tendered in evidence on the part of the prisoners, and objected to on the ground that it had no bearing on the issue, as a commitment might be for *one crime, and any number of indictments might afterwards be preferred for different crimes, and the learned judge was strongly of opinion that it was not admissible.⁽ⁱ⁾

*837

^(g) *Rex v. Parry*,^a 7 C. & P. 836, 2 Moo. C. C. R. 9, S. C. Bolland, B., but he left the case to the jury, reserving the point, which, however, was not decided by the judges; see *Reg. v. Martin*,^b 8 Ad. & Ell. 483.

^(h) *Per* Lord Denman, C. J., *Reg. v. Martin*, 8 Ad. & Ell. 482.

⁽ⁱ⁾ *Rex v. Parry*, *supra*, note ^(g). The commitment was, however, received subject to the opinion of the judges. The jury found that the offences were the same, notwithstanding the learned judge told them that he thought there was no evidence to show that they were so; and upon a case reserved, the judges held that they could not direct the verdict to be set aside, but they did not decide any other point. A plea of *autrefois acquit* may be pleaded *ore tenus*. *Rex v. Bowman*,^c 6 C. & P. 337; *Rex v. Champneys*, *ante*, p. 835; *Rex v. Coogan*, 1 Leach, 448, which means that the prisoner may state the plea, but he must do so in the proper form, the difference being that it may either be put upon parchment by the prisoner, or he may dictate it *ore tenus*, and it may be taken down by the clerk of arraigns, and put upon parchment by him. *Per* Patteson, J., *Rex v. Bowman*, *supra*. The court will not reject an informal plea of *autrefois acquit*, pleaded by the prisoner, but will assign counsel to put it into a formal shape, 2 Hale, 241, and postpone the trial to give time for its preparation, *Rex v. Chamberlain*,^d 6 C. & P. 93, and if the record of the previous acquittal is not made up, the court will postpone the trial to enable the prisoner to apply for a mandamus to make up the record, *Rex v. Bowman*,^e 6 C. & P. 101, which mandamus the Queen's Bench will grant, although it be the record of a sessions improperly held, for the prisoner has a right to have the record of the proceedings correctly made up to make what use of it he can, *Rex v. Justices of Middlesex*,^f 5 B. & Ad. 1113. The prisoner is not entitled as of right to a copy of the indictment, in order to draw up his plea, but the court will order the indictment to be read over slowly in order that it may be taken down, *Rex v. Parry*, *supra*, but the counsel for the crown may give a copy of the indictment to save time, *ibid*. If a prisoner has pleaded "not guilty" to two indictments, and is tried and acquitted on one, the court may grant the prisoner leave to withdraw his plea of "not guilty" on the other, and plead *autrefois acquit*, *ibid*. But perhaps such leave might not be necessary, as it is conceived that a plea would be good, alleging that after the pleading "not guilty" the defendant had been acquitted. See *Rex v. Taylor*,^g 3 B. & C. 612, and the precedent of the plea in that case, 4 Ch. Cr. L. 567. It was once held that the prisoner must plead "not guilty" to the felony at the same time as he pleaded *autrefois acquit*, *Rex v. Vandercomb*, 1 Leach, 712, note ^(a), and see *Rex v. Welsh*, R. & M. C. C. R. 175, but in subsequent cases the plea of *autrefois acquit* has been pleaded alone. *Rex v. Sheen*, *ante*, p. 834; *Rex v. Parry*, *supra*; *Rex v. Birchenough*, *ante*, p. 836; *Rex v. Welch*, Carr. Supp. 56, and see 2 Hawk. P. C. c. 23, s. 128, and the prisoner may afterwards plead "not guilty" to the felony if the jury find the plea against him, or it be held bad upon demurrer. *Rex v. Birchenough*, *supra*, 2 Hawk. P. C. c. 23, s. 128. In misdemeanors *autrefois acquit* alone can be pleaded, and if the judgment be against the defendant it is final. *Rex v. Taylor*,^h 3 B. & C. 502. The plea must set out the former indictment in order that

fornication and bastardy, founded on the same act. *Dinkev v. The Commonwealth*, 17 Penna. State Rep. 126.]

^a Eng. Com. Law Reps. xxxii. 761. ^b *Ib.* xxv. 443. ^c *Ib.* xxv. 428. ^d *Ib.* xxv. 299.

^e *Ib.* 300.

^f *Ib.* xxvii. 281.

^g *Ib.* x. 199.

^h *Ib.* x. 166.

*838 *Where, upon an indictment for a burglary and stealing the goods, A prisoner the prosecutor failed to prove any nocturnal breaking, or any larceny, charged with bur- subsequent to the time when the prisoners entered the house, which must

it may appear to the court that it was valid on the face of it, and if it does not set it out it is bad on error. *Rex v. Wildey*, 1 M. & S. 182. It should also aver that the prisoner was acquitted by verdict, and that he had judgment *quod eat inde sine die*, *ibid.*, and it should conclude with a voucher of the record, *ibid.*; it should also aver the identity of the offences charged in the indictments, and if the name of a person be different in the two indictments, it should aver that the person was as well known by the one name as the other. *Rex v. Sheen*, *supra*, 2 Hawk. P. C. c. 35, s. 3. In *Rex v. Hedgcock*, 4 Ch. Cr. Law, 530, Kingston Ass. 1825, it was objected to a plea, formed according to the precedent in 4 Ch. Cr. L. 530, that it was not averred directly that the prisoner pleaded "not guilty" to the former indictment, and put himself upon the country; secondly, that the record of acquittal was not referred to or vouched, but the reference was only to the former indictment; thirdly, that the prisoner had not pleaded over to the felony. Hullock, B., and Littledale, J., decided that the second objection was clearly tenable, and that there was much weight in the first, but that as to the third, they would even then allow the defendant to plead over to the felony. For precedents of such pleas, see 4 Ch. Cr. L. 528, *et seq.*; *Rex v. Sheen*, *supra*; *Rex v. Dann*, *supra*; *Rex v. Clarke*, *supra*. The crown may either traverse or demur to the plea, and this may be done *ore tenus*. *Rex v. Sheen*, *supra*; *Rex v. Parry*, *supra*. See 4 Ch. Cr. L. 529, 530, 532, precedents of demurrers and joinders in demurrers to such pleas. See a plea of *autrefois acquit*, pleaded *puis darrien continuance*, 4 Ch. Cr. L. 567. The jury to try an issue raised on a plea of *autrefois acquit*, may be either the jury already in the box, *Rex v. Parry*, *supra*, or a venire, returnable *instantler*, may be awarded to the sheriff. *Rex v. Sheen*, *supra*; *Rex v. Scott*, 1 Leach, 401. Where the prisoner pleads *autrefois acquit* and "not guilty" at the same time, the jury cannot be charged to try both the issues at the same time; but must first be charged with the issue on *autrefois acquit*, and if that be found against the prisoner, then with the issue on "not guilty." *Rex v. Roche*, 1 Leach, 134. Where any allegation in the plea is traversed on the part of the crown, the prisoner begins, as the affirmative lies upon him. *Rex v. Sheen*, *supra*; *Rex v. Parry*, 7 C. & P. 836. In order to prove the former acquittal, if it took place at a previous assizes, or in a different court, the prisoner must produce the record regularly drawn up, *Rex v. Bowman*, 6 C. & P. 101, 337; but if it took place at the same assizes, the original indictment, with the notes of the clerk of assize upon it, are sufficient evidence. *Rex v. Horne Tooke*, 25 St. Tr. 545; *Rex v. Parry*, *supra*. In felony, if the plea be decided in favour of the prisoner, the judgment is *quod eat inde sine die*, 2 Hale, 391. *Rex v. Dann*, *supra*. If the plea be decided against the prisoner, and he has pleaded "not guilty" at the same time with it, the trial on the merits immediately proceeds. *Rex v. Vandercomb*, *supra*. If *autrefois acquit* has been pleaded without "not guilty," and the plea is determined against the prisoner, the prisoner then pleads to the felony, and the trial proceeds in the ordinary course. *Rex v. Birchenough*, *ante*, p. 836; *Rex v. Coogan*, 1 Leach, 448. The general rule, as we have seen, is that the acquittal pleaded must have been for the same felony, and it is clear that an acquittal of one felony is no bar to an indictment for another in substance different, whether committed at the same time or not as that of which the prisoner was acquitted; and therefore if a man commit a burglary, and steal the goods of A. and B., and be indicted for the burglary and stealing the goods of A., and be acquitted, he cannot plead such an acquittal to an indictment for stealing the goods of B., 2 Hawk. P. C. c. 35, s. 5, or to an indictment for burglary with intent to steal the goods of A., *Rex v. Vandercomb*, *supra*; or it should seem to be an indictment for burglary and stealing the goods of B., *ibid.* An acquittal of a man as accessory before or after is no bar to an indictment against him as a principal, 2 Hawk. P. C. c. 35, s. 12; nor is an acquittal as principal any bar to an indictment as accessory before, *Rex v. Birchenough*, *supra*, or as accessory after, 2 Hawk. P. C. c. 35, s. 11, 2 Hale, 244; and it is said to have been held that an acquittal of a man as accessory to one principal will not save him from being arraigned as accessory to another in the same fact. 2 Hawk. P. C. c. 35, s. 13. But it is presumed this would only apply where the acquittal of the principal necessarily caused the acquittal of the accessory, see *Rex v. Woolford*, 1 M. & Rob. 384, *post*, 2 vol., and not where the accessory might be convicted on a count for a substantive felony, although the principal were acquitted. See *Reg. v. Pulham*, 9 C. & P. 280. We have seen that an acquittal upon a charge of jointly receiving with others is a good bar to an indictment against one of the prisoners alone. *Rex v. Dann*, *supra*. It is said to be a general rule that a bar in action of an inferior nature will not bar another of a superior nature. 2 Hawk. P. C. c. 35, s. 5. Therefore an acquittal of a misdemeanor would not be a bar to an indictment for a felony, or *vice versa*, an acquittal of a felony be a bar to an indictment for a misdemeanor. Yet it seems that an acquittal on an indictment for murder was a bar to an indictment for petit treason, because both offences were in substance the same. 2 Hawk. P. C. c. 35, s. 5. 2 Hale, 246. So an acquittal of murder is a good bar to an indictment for manslaughter, 2 Hale, 246; and so an acquittal of manslaughter is a good bar to an indictment for murder, for the offences only

have been after three o'clock in the afternoon of the day on *which the *839 offence was charged to have been committed; it was proposed to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the court refused to receive the evidence. They said that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might unquestionably be modified, by showing that the prisoner stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an

glary and stealing, &c., prosecutor failing to prove these facts committed on the day laid, cannot be permitted to prove the

differ in degree, and the fact is the same. 2 Hale, 246, Holcroft's case, 4 Rep. 46, b. Where a prisoner is indicted for a compound offence, as burglary, robbery, murder, &c., and altogether acquitted, it should seem that such acquittal is a good bar to every felony included in such compound offence, of which he might have been convicted on the trial of such compound offence; thus an acquittal on a burglary charging a stealing of goods would be a good bar to an indictment for stealing the same goods, for on the indictment for burglary he might have been acquitted of the burglary and convicted of the larceny only; and although it is said, 2 Hale, 246, that if a man be "indicted for burglary and acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time;" yet this must be intended of an indictment for burglary, *with intent* to steal the goods, as is evident from the words which follow, "and burglary may be where there is no larceny, and larceny may be where there is no burglary." And it should seem that as a party indicted for a felony, including an assault, may now be convicted on such an indictment of an assault, *ante*, p. 778, an acquittal on such an indictment would be a good bar to an indictment for the same assault. Reg. v. Gould, *ante*, p. 835. Generally speaking, an acquittal in one county can only be pleaded in the same county, because all indictments are local, and if the first were laid in an improper county, the defendant could not be found guilty upon it, 2 Hawk. P. C. c. 35, s. 3; 2 Hale, 245; and if the first indictment were laid in the proper county, the second must be in an improper one, and therefore the defendant not being liable to be found guilty upon it, is not put to plead *autrefois acquit*. 2 Hawk. P. C. c. 35, s. 3. But there seems to be many exceptions to this rule. Thus, where a man steals goods in one county and carries them into another, as he may be indicted in either, it seems but reasonable that he should plead the acquittal in one county in bar to a subsequent indictment in the other county, 2 Hawk. P. C. c. 35, s. 4; but this point does not seem settled, and Lord Hale, 2 P. C. 245, says, it seems that an acquittal in the county into which the goods are carried is no bar, because it may be the goods were never brought into that county, and so the felony may not have been in question; but this reason rather tends to show that an acquittal in the county where the goods were stolen would be a bar to an indictment in the county into which they were carried, for in such case the felony must have been in question. If A. rob B. in the county of C., and carry the goods into D., though he cannot be indicted of robbery in D., yet he may of larceny, and if acquitted, that acquittal of larceny is no bar to an indictment for robbery in C., because it is another offence. 2 Hale, 245. So if A. commit a burglary in the county of B., and carry the goods into C., if he be acquitted of larceny in C. he may be indicted for the burglary in B., *ibid*. Where an acquittal pleaded in a foreign county has been allowed, as in 41 Ass. 9, it must be intended of an indictment removed out of that county where the prisoner was first indicted. 2 Hale, 245. The correct rule appears to be that an acquittal in any court whatsoever, which has jurisdiction over the case, is a good bar of any subsequent prosecution for the same crime. 2 Hawk. P. C. c. 35, s. 10. And therefore an acquittal for murder at a grand session in Wales may be pleaded to an indictment for the same murder in England, *ibid*. So an acquittal of murder before a court of competent jurisdiction in a foreign country is a good bar to an indictment for the same murder in this country. Rex v. Roche, 1 Leach, 134. Rex v. Hutchinson, 3 Keb. 785, cited in Beak v. Thyrrwhit, 3 Mod. 194, 1 Show. 6. And it should seem that in all those cases where offences are made triable in two or more counties, as each county has jurisdiction, an acquittal in one would be a good bar to an indictment in the other county. See the 7 Geo. 4, c. 64, s. 13, as to offences committed during journeys or voyages; sec. 12 as to offences committed on the boundaries of counties; the 9 Geo. 4, c. 31, s. 7, 8, as to murder and manslaughter; sec. 22, as to bigamy; 1 Wm. 4, c. 66, s. 44, as to forgery, &c. The acquittal, in order to be a bar, must be by verdict on a trial. 2 Hale, 246. 2 Hawk. P. C. c. 35, s. 6. A discharge, therefore, by the jury on a coroner's inquest, is no bar. 2 Hale, 246. But an acquittal through the misdirection of a judge is a good bar, *ibid*. So if a court upon a special verdict erroneously adjudge it to be no felony, as long as this judgment is unreversed, the prisoner may plead it in bar to another indictment, *ibid*.; but if the judgment be reversed the party may be indicted *de novo*, *ibid*. Note by C. S. G.

larceny done on the former day. antecedent felony committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct; and that it might as well be proposed to prove any felony, which those prisoners might have committed in that house seven years before. (*k*)

Verdict.

Where a larceny, whether within or ousted of clergy, was charged in the same indictment with a burglary, it was holden that the prisoner might be found not guilty of the burglary, and convicted of the larceny. (*l*) Thus, where the prisoners were acquitted of the burglary upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the statute 12 Anne, c. 7, (*m*) and the judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. (*n*)

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Not guilty of the burglary, but guilty of stealing above the value of forty shillings in a dwelling-house.

*In this case the finding of the jury was, "not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing the box and money in the dwelling-house;" (*o*) upon which part of the objection, on behalf of the prisoner, was, that they were not excluded from clergy, because the jury had acquitted them of the burglary. (*p*) And formerly it appears to have been doubted whether, where the words "not guilty of the burglary" were a part of the finding of the jury, the prisoner was not by necessary consequence acquitted of the felony also. (*q*) But in a more recent case, where the indictment was for a burglary and larceny, and the verdict was, "not guilty of the burglary, but guilty of stealing above the value of forty shillings in the dwelling-house;" and the entry by the officer was in the same words; the judges, after some debate, and after adjourning the case to a subsequent term, held the finding sufficient to warrant a capital judgment. They agreed that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury; and that the minute was only for his future direction. (*r*)

Where several persons are indicted together for burglary and larceny, the offence of some may be burglary, of the others, only larceny.

It has been supposed, that upon an indictment against several persons for a burglary and larceny, the jury could not find one guilty of the burglary and another guilty of the larceny only upon the same indictment, and the same evidence, as such a finding would show that the offences of the several prisoners were of a distinct nature, and therefore ought to have been included in the same indictment. (*s*) But by the opinion of a majority of the judges in a late case, it appears that upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only. Upon an indictment against Moss and two others for burglary

(*k*) *Rex v. Vandercomb and Abbott*, 2 Leach, 708.

(*l*) *Ante*, 828.

(*m*) Now repealed by the 7 & 8 Geo. 4, c. 27.

(*n*) *Rex v. Withal and Overend*, Guildford Ass. 1772, Hill. T. 1774. 1 Leach, 88.

(*o*) In the indictment the box was described as containing sixty pounds of money.

(*p*) *Rex v. Withal and Overend*, 1 Leach, 88. 2 East, P. C. c. 15, s. 28, p. 517.

(*q*) *Comer's case*, 1744, 1 Leach, 36. 2 East, P. C. c. 15, s. 28, p. 516.

(*r*) *Hungerford's case*, Bristol, 1790, East. and Trin. T. 1790, 2 East, P. C. c. 15, s. 28, p. 518. Many of the judges thought that an entry "not guilty of the breaking and entering in the night, but guilty of the stealing, &c.," would be more correct. But it appeared upon inquiry to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict "not guilty of murder, but guilty of manslaughter," or, "not guilty of murder, but guilty of feloniously killing and slaying;" and yet murder includes the killing.

(*s*) *Rex v. Turner and others*, 1 Sid. 171. 2 East, P. C. c. 15, s. 28, p. 519.

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

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

Burglary was at common law a felony within the benefit of clergy;(v) but a higher punishment was imposed by the provisions of several statutes now repealed. And the 7 & 8 Geo. 4, c. 29, made it a capital offence in England, and the 9 Geo. 4, c. 55, in Ireland, but the 1 Vict. c. 86, repeals so much of the 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, "as relates to the punishment of any person convicted of burglary," (after the 30th Sept. 1831). And by sect. 2, enacts, that "Whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof, shall suffer death." Punishment of principal offenders.

By sect. 3, "Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years." Burglars using violence to suffer death.

By sec. 6, "In the case of every felony punishable under this act every principal in the second degree, and every accessory before the Punishment of accessories.

(t) *Rex v. Butterworth and others*, Mich. T. 1823, MSS. Bayley, J., and Russ. & Ry. 520. An analogous case is the conviction of one for murder and another for manslaughter, on an indictment for murder. See *ante*, p. 510. C. S. G.

(u) Anonymous, 1 Lew. 36.

(v) 3 Inst. 63, 65. 4 Bla. Com. 228.

fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this act punishable, and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property)(*w*) shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

Offences punishable by imprisonment.

By sect. 7, "Where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

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Offences within the jurisdiction of the Admiralty.

*By sect. 10, "Where any felony punishable under this act shall be committed within the jurisdiction of the Admiralty of England or of Ireland, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction."(*ww*)

An indictment on s. 2 must name the person struck, and the statement must be proved.

In an indictment on sec. 2, it is necessary to allege the person who was struck, and if the proof do not support the allegation, the prisoner must be acquitted of the offence in sec. 2, but may be convicted of a simple burglary. An indictment charged a burglary, and striking D. James, but it appeared that the person struck was Jones and not James, and it was held that the indictment must allege both the burglary and the striking, and the proof must correspond with the indictment, and therefore the prisoner could not be convicted of an offence within sec. 2; but he was convicted of a simple burglary.(*x*)

Upon an indictment on sec. 2, if the jury were to acquit of the burglary, they might convict the prisoner of an assault, under the 1 Vict. c. 85, s. 11.(*y*)

Trial of accessories.

The trial of accessories is now regulated by the 7 Geo. 4, c. 64, ss. 9, 10, 11; by which an accessory before the fact may be tried as such for a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. It provides, also, that such accessories, and also accessories after the fact, may be tried by any court which has jurisdiction to try the principal felon, although the offence be committed on the seas, or abroad; and that if the offence be committed in different counties, the accessory may be tried in either. And it also enacts that the accessory may be prosecuted after a conviction of the principal, although the principal be not attainted.(*z*)

(*w*) See the Chapter on *Receivers*, *post*, 2 Vol.

(*ww*) The act does not extend to Scotland, sec. 11.

(*x*) *Reg. v. Parfitt*,^a 8 C. & P. 288, *Alderson and Gurney*, Bs.

(*y*) See the section and the cases upon it, *ante*, p. 778. *Qu.* however, if a wounding, which amounted to a felony, were proved, whether a conviction for an assault could take place on such an indictment, the rule being that a misdemeanor merges in a felony. See *Rex v. Harmwood*, *ante*, 692. C. S. G.

(*z*) See this statute, ss. 9, 10 and 11, *ante*, p. 39, *et seq.*

^a Eng. Com. Law Reps, xxxiv. 393.

*CHAPTER THE SECOND.

*843

OF SACRILEGE, OR OF BREAKING ANY CHURCH OR CHAPEL, AND
STEALING THEREIN.

THE 23 Hen. 8, c. 1, and 1 Edw. 6, c. 12, which related to this offence, were repealed by the 7 and 8 Geo. 4, c. 27.

But the 7 & 8 Geo. 4, c. 29, s. 10, enacted, "That if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel shall break out of the same, every such offender being convicted thereof, shall suffer death as a felon."

The 5 & 6 Wm. 4, c. 81, reciting the 36 Geo. 3, (I.) and the 52 Geo. 5 & 6 Wm. 3, c. 143, relating to letter stealing, and that by the 7 & 8 Geo. 4, c. 29,⁴ c. 81. and the 9 Geo. 4, c. 55, "it is amongst other things enacted, that if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon,"^(a) repealed "so much of each of the said acts as inflicts the punishment of death upon persons convicted of any of the offences therein and *hereinbefore* specified," and enacted, that "from and after the passing of this act (10th September, 1835,) every person convicted of any of the offences *in the said act so specified*, or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

The 6 & 7 Wm. 4, c. 4, reciting the 5 & 6 Wm. 4, c. 81, and that "by^{6 & 7 Wm. 4, c. 4.} reason of a clerical error in copying the same, a doubt may be entertained, whether persons guilty of such offences are now by law liable to any punishment," enacts, that "the same act shall be read as if, instead of the words, 'in the said *act so specified*,' the words, 'in the said *acts so specified*,' had been inserted in the said act of the last session; and that all persons who may hereafter be duly convicted of any of the *offences mentioned in the said act of the last session shall and may be sentenced by the court or judge by or before whom such offenders may be tried, to transportation for life, or for any term of years not less than seven, or to be imprisoned for any term not exceeding three years, with or without hard labour, and for any period of solitary confinement during such imprisonment, at the discretion of such court or judge." But by the 1 Vict. c. 90, s. 5, after the 1st of October, 1837, "it shall not be lawful for any court to direct, that any offender shall be kept in soli-

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(a) The 9 Geo. 4, c. 55, s. 10, enacted, that "if any person shall break and enter any church, *meeting-house*, chapel, or *other place* of divine worship, and shall steal therein, or therefrom, any chattel, or having stolen any chattel in or from any church, *meeting-house*, chapel, or other place of divine worship, shall break out of the same, every such offender being convicted thereof shall suffer death as a felon." The recital in the 5 & 6 Wm. 4, is so much narrower than the clause in the 9 Geo. 4, c. 55, that a question might be raised whether that act repeals the punishment of death in all the cases included in sec. 10 of the 9 Geo. 4, c. 55, and the more so as the act recites four statutes, two relating to Ireland and two to England, and only declares the expediency of providing for a lesser punishment for the offences contained in the two acts relating to England, *viz.*, the 52 Geo. 3, and 7 & 8 Geo. 4, c. 29. C. S. G.

tary confinement for any longer periods than one month at a time, or than three months in the space of one year."

A larceny, therefore, committed in a church or chapel, accompanied with a breaking of such church or chapel, is no longer a capital offence, and the provisions of the 1 Ed. 6, c. 12, which made the felonious taking of any goods out of a church or chapel a capital offence, though there was no breaking, are not re-enacted.

A tower is parcel of the church.

The tower of a parish church, having an internal communication with, and not being separated from the body of the church, is a part of the church within the meaning of the 7 & 8 Geo. 4, c. 29. Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in a church tower; this tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind; it was objected that the stealing of these articles deposited in the tower was not sacrilege; but it was held that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church within the meaning of the 7 & 8 Geo. 4, c. 29, s. 10. (b)

Where, upon an indictment for sacrilege upon the church of Chard, it appeared that the offence had been committed by breaking into the vestry and stealing the sacramental plate out of a chest in the vestry; and the vestry had in old times been the porch of the church, and when the church was altered the porch was turned into the vestry room, and it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; and the vestry had a door opening into the body of the church, and another into the churchyard, which was always kept locked inside. Coleridge, J., held that this vestry was as much a part of the church for the purpose of this indictment as the altar or the nave. (bb)

Meaning of the word "chapel."

The word "chapel," in the 7 & 8 Geo. 4, c. 29, s. 10, means a chapel where the rites and ceremonies of the Church of England are performed, and does not include the chapels of dissenters. Upon an indictment for breaking and entering a chapel, which upon the evidence, turned out to be a dissenting chapel; Gaselee, J., and Vaughan, B., were of opinion, that as dissenting chapels were mentioned expressly in the 7 & 8 Geo. 4, c. 30, which makes the burning of churches, &c., a capital offence, and were not mentioned at all in the 7 & 8 Geo. 4, c. 29, s. 10, which stands in the statute-book, as the chapter next preceding it, the omission must have been intentional, and consequently that a dissenting chapel was not within the 7 & 8 Geo. 4, c. 29, s. 10. (c)

Of the words "any chattel."

The words "any chattel," would probably be deemed to extend to articles in a church or chapel, though not used for divine service. The words "any goods," in the repealed statute 1 Ed. 6 c. 12, were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in proper order; and it was con-

(b) *Rex v. Wheeler*,^a 3 C. & P. 585, Parke, J. J.

(bb) *Reg. v. Evans*,^b 1 C. & Mars. 288.

(c) *Rex v. Warren*, 6 C. & P. 335, note (a); *S. P. Rex v. Richardson*,^c 6 C. & P. 335; *Rex v. Nixon*,^d 7 C. & P. 442, Patteson, J., and Gurney, B. It should seem that these cases are not applicable to the Irish act; see the section, *ante*, note (a). C. S. G.

^a Eng. Com. Law Repts. xiv. 465. ^b *Ib.* xli. 166. ^c *Ib.* xxv. 427. ^d *Ib.* xxxii. 578.

sidered that such articles were under the protection *of the statute, whilst the church was in a course of being repaired, if they had not been brought in merely for the purpose of such repairs. Whilst a church was being repaired, the prisoner stole from it a pot used to hold charcoal for airing the vaults, and a snatch-block, used to raise weights, if the bells wanted repair. These articles had been kept in the church for years, and were not brought in for the repairs which were then in progress. Upon a case reserved, the judges were unanimous that such goods were under the protection of the statute, and that a capital sentence ought to be passed upon the prisoner, as they thought that the violation of the sanctity of the place was what the statute was intended to prevent.(d) *845

The word "chattel" does not include any thing affixed to the freehold. Upon an indictment for breaking into a chapel, and stealing a bell and divers other articles, it appeared that the bell was the only thing not fixed in the chapel, and it was held that the case must be confined to the stealing of the bell; for although the same statute, sec. 44, said that stealing fixtures might be the subject of larceny, yet it did not say that fixtures should be considered as chattels, which they must be to bring them within the section, upon which that indictment was founded.(e) Fixtures are not within the act.

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

It has been holden that where the bells, books or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners.(h) And it is said that he who takes away the goods of a chapel or abbey, in the time of vacation, may be indicted, in the first case, for stealing *bona capellæ*, being in the custody of such and such; and, in the second, for stealing *bona domus et ecclesia*, &c.(i) By the 7 & 8 Geo. 4, c. 29, s. 61,(j) "in the case of every felony

(d) *Rex v. Raurke*, East, T. 1819, MSS. Bayley, J., Russ. & Ry. 386.

(e) *Rex v. Nixon*,^a 7 C. & P. 442, Patteson, J.

(f) *Rex v. Hutchinson*, Russ. & Ry. 412, *post*, tit. *Larceny*.

(g) *Rex v. Boulton*,^b 5 C. & P. 537, Parke, J. J.

(h) 1 Hale, 512. 2 Hale, 81. 1 Hawk. P. C. c. 33, s. 45. 2 East, P. C. c. 16, s. 69, p. 651.

(i) 1 Hale, 512. 2 Hale, 81. 1 Hawk. P. C. c. 33, s. 45. 2 East, P. C. c. 16, s. 69, p. 651.

(j) Mr. Lonsdale, Cr. L. 130, treats this section as repealed as far as relates to principals in the second degree and accessories before the fact, but subsisting as to accessories after the fact; but as the words are, "any felony punishable under this act," and as sacrilege is not now punishable under the 7 & 8 Geo. 4, c. 29, it may be doubted whether accessories after the fact are punishable under this section. If they are not, it should seem that they are

^a Eng. Com. Law Reps. xxxii. 578.

^b Ib. xxiv. 435.

Principals
in the second
degree and
accessories.
*846

punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with *death, or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact, to any felony *punishable under this act*, shall, on conviction, be liable to be imprisoned for any term not exceeding two years." And by sec. 4, "where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offenders to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offenders shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet. (k) The proceedings for the trial of accessories are regulated by 7 Geo. 4, c. 64, ss. 9, 10, 11. (l)

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*CHAPTER THE THIRD.

OF HOUSE-BREAKING.

BESIDES the nocturnal house-breaking, or burglary, which has been treated of in the first chapter of this book, the law of England, in its especial regard for the safety and security of the habitation of man, provided by several statutes (a) that the forcible invasion of the dwelling-house of another, or house-breaking, when accompanied with felony, should be liable to capital punishment, though committed in the day-time.

7 & 8 Geo.
4, c. 29, s.
12. Break-
ing, enter-
ing, steal-
ing, &c.

The ancient statutes upon this subject have been repealed by the 7 & 8 Geo. 4, c. 27. But the 7 & 8 Geo. 4, c. 29, s. 12, enacts, that "if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever," (b) every such offender, being convicted thereof, shall suffer death as a felon.

4 Wm.
4, c. 44.

The 4 Wm. 4, c. 44, repealed this provision so far as related to the punishment of death, and sec. 61 of the same act, as to the punishment of principals in the second degree, and accessories before the fact, and enacted, that every person convicted of house-breaking as principals, or accessories before the fact, should be liable to be transported for life, or for not less than seven years, and previously to transportation imprisoned for not exceeding four years, nor less than one year, &c.

1 Vic. c. 90.

The 1 Vict. c. 90, s. 1, recites the 4 Wm. 4, c. 44, and repeals so much of that act "as relates to the punishment of any person convicted of the offence of breaking and entering any dwelling-house and stealing, as in that act mentioned," and enacts, that after the 30th of September, every person convicted of such offence, "shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years." And by sec. 3, "it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol

punishable under the 7 & 8 Geo. 4, c. 9, ss. 8 and 29, and 1 Vict. c. 90, s. 5, as for a felony, for which no punishment is specially provided. See note, *ante*, p. 116. C. S. G.

(k) But see 1 Vict. c. 90, s. 5, (*ante*, p. 844,) as to the limitation of solitary confinement.

(l) *Ante*, p. 29, *et seq.*

(a) 1 Edw. 6, c. 12, s. 10. 5 & 6 Edw. 6, c. 9. 39 Eliz. c. 15. 3 W. & M. c. 9.

(b) The 9 Geo. 4, c. 55, (Irish Act,) s. 12, is verbatim the same as this section.

or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

*The 7 & 8 Geo. 4, c. 29, s. 13, provides and enacts, that no building, ^{*818} although within the same curtilage with the dwelling-house, shall be deemed to be part of such dwelling-house, for the purpose of burglary, or for any of the purposes aforesaid, ^{Does not extend to buildings within the curtilage.} unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other.

Principals in the second degree, and accessories before the fact, are punishable as the principals in the first degree; ^{Principals in the second degree and accessories.} and accessories after the fact (except receivers of stolen property,) are liable to imprisonment for two years. ^(d) The proceedings for the trial, &c., of accessories, are regulated by 7 Geo. 4, c. 64, ss. 9, 10, 11. ^(e)

By analogy to the cases decided upon the repealed statutes, ^(f) it is conceived that such a breaking and entering as would, if committed in the night, constitute a burglary, will be necessary, in order to bring a case within the 7 & 8 Geo. 4, c. 29, s. 12. And by the express words of the statute, the breaking and entering must be attended with some larceny, so that although a house be broken and entered in the day-time with a felonious intent, it will not be an offence within the statute if nothing be taken. ^{Breaking and entering.}

But it is not necessary that the chattel should be taken out of the house. Before the 7 & 8 Geo. 4, c. 29, the last removal of the goods from the place where the thief found them, though they were not carried out of the house was sufficient, as in other larcenies, ^(g) and the same has been held since that statute. Upon an indictment for house-breaking, it appeared that the prisoner, after having broken into the house, took two half sovereigns out of a bureau, in one of the rooms, but, being detected, he threw them under the grate in that room; it was held, that if they were taken with a felonious intent, this was a sufficient removal of them to constitute the offence. ^(h) ^{The chattel need not be taken out of the house.}

A person present at the breaking and entering, but not at the stealing, is guilty of the whole offence. Upon an indictment against Jordan, Sullivan, and May, for house-breaking, it appeared that Jordan and Sullivan accompanied May, who was to secrete himself in the house, so that during the night he might commit the robbery; and that the door being latched, they assisted him in gaining admission, by opening an umbrella to screen him from observation while he entered; but they went away soon after he got in, and were not seen near the place again until after the robbery had been committed. It was held, that as Jordan and Sullivan were present at the commencement of the transaction, ^{A person present at the breaking and entering, but not at the stealing, is a principal.}

(b) *i. e.* House-breaking and stealing in a dwelling-house.

(c) 1 Vict. c. 90, s. 1.

(d) By the 7 & 8 Geo. 4, c. 29, s. 61, *ante*, p. 845. See note (j), *ibid*.

(e) *Ante*, p. 39, *et seq.*

(f) 1 Hale, 522, 523, 526, 548. 2 Hale, 352, 353. 1 Hawk. P. C. c. 34, ss. 2, 3. 2 Hawk. P. C. c. 33, s. 88, 92. Fost. 108. 2 East, P. C. c. 16, s. 68, p. 631, s. 72, p. 636, s. 75, p. 638.

(g) 2 East, P. C. c. 16, s. 75, p. 639.

(h) *Rex v. Amier*, 6 C. & P. 344, Park, J. A. J.

* Eng. Com. Law Repts. xxv. 431.

they must be considered as guilty of the whole. There had been a case of burglary, where the breaking was one night and the entry the next, and the judges had decided that a party who was present at the *breaking, and not present at the entering, was guilty of the whole, and that this was a much stronger case than that.”(i)

*849

Dwelling-house.

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

It seems, also, that questions which may arise upon this statute, as to what shall be deemed a *dwelling-house*, must be governed by the same rules as apply to similar questions in cases of burglary, keeping in mind the enactment before mentioned as to buildings within the curtilage. A chamber in one of the inns of court was held to be a dwelling-house within the repealed statute, 39 Eliz., c. 15.(k)

Upon an indictment for burglary and stealing, if it be proved that the prisoner broke and entered, but not in the night time, he may be convicted of house-breaking if any goods are stolen.(l) So on an indictment for house-breaking if it be not proved that the prisoner broke into the house, he may be convicted of stealing therein to the amount of 5*l.*, if in fact he stole goods in the dwelling-house to that amount; and if the value of the things stolen were under 5*l.*, he may be convicted of simple larceny.

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*CHAPTER THE FOURTH.

OF STEALING IN A DWELLING-HOUSE, ANY PERSON THERIN BEING PUT IN FEAR.

1 Vict. c. 86, s. 1.

Stealing in a dwelling-house with menace or threat.

THIS was a capital offence by the 3 Wm. & Mary, c. 9, s. 1,(a) and the 7 & 8 Geo. 4, c. 29, s. 12, but the 1 Vict. c. 86, s. 1, repeals so much of the 7 & 8 Geo. 4, c. 29, and the 9 Geo. 4, c. 55, (relating to Ireland), “as relates to any person who shall steal any chattel, money, or valuable security to any value whatever in any dwelling-house, any person therein being put in fear,” and by sec. 5, enacts, that whosoever shall steal any property in any dwelling-house, and shall by any menace or threat(b) put any one therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.”(c)

Meaning of the word “property.”

Sec. 9 enacts, “that the word ‘property’ shall throughout this act be deemed to denote every thing included under the words chattel, money,

(i) *Rex v. Jordan*,^a 7 C. & P. 432, Gaselee, J., and Gurney, B. See this case, *ante*, p. 822.(j) *Reg. v. Andrews*,^b 1 C. & Mars. 121, S. C. Worcester Sum. Ass. 1841, MSS. C. S. G. Coleridge, J., overruling *Reg. v. Smith*, 2 M. & Rob. 115, which Coleridge, J., said Paterson, J., was himself since satisfied had been wrongly decided.(k) *Rex v. Evans and Fynche*, Cro. Car. 473.(l) *Rex v. Compton*,^c 3 C. & P. 418, Gaselee, J.

(a) Repealed by the 7 & 8 Geo. 4, c. 27.

(b) The words in the 7 & 8 Geo. 4, c. 29, s. 12, were, “any person therein being put in fear,” which might be without any menace or threat. C. S. G.

(c) See ss. 6 & 7, *ante*, p. 841, as to principals in the second degree, hard labour and solitary confinement.^a Eng. Com. Law Reps. xxxii. 572.^b *Ib.* xli. 72.^c *Ib.* xiv. 375.

or valuable security," used in the 7 & 8 Geo. 4, c. 29, (d) and 9 Geo. 4, c. 55. (Irish act.)

The 7 & 8 Geo. 4, c. 29, s. 13, prevents any building, although within the same curtilage, from being deemed part of the dwelling-house, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other. And the observation in the preceding chapter, upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence now under consideration. It is clear that no breaking of the house is necessary to constitute this offence; and it should seem that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some *person therein should be put in fear. (e) But questions of difficulty may perhaps arise to the degree of fear which must be excited by the thief.

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The repealed statute 3 Wm. & Mary, c. 9, enacted, that every person who should feloniously take away any goods or chattels being in any dwelling-house, the owner or any other person being therein and put in fear, should not have the benefit of clergy. It does not appear to have been expressly decided upon that statute whether or not it was necessary to prove the actual sensation of fear felt by some persons in the house, or whether fear was to be implied, if some person in the house were conscious of the fact at the time of the robbery. But it was suggested as the better opinion, and was said to have been the practice, that proof should be given of an actual fear excited by the fact when committed out of the presence of the party, so as not to amount to a robbery at common law. (f) And it was observed that where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied; but that clearly if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case was not within that statute. (g) The time, place, and circumstances ought to be considered by the jury in order to determine whether they were such as would put a person of reasonably sound mind in fear. Upon an indictment upon the 7 & 8 Geo. 4, c. 29, for stealing in a dwelling-house, a person therein being put in fear, it appeared that the prosecutor's wife, about eleven at night, was going to bed, when she saw the prisoner under the bed, in which her husband was asleep, and she immediately screamed out in alarm, on which the prisoner, without offering her any sort of violence or saying any thing passed out of the room; Tindal, C. J., told the jury that it was not necessary there should be any violence used; but if, from the circumstances, taking into consideration the time of night, and the place where the prisoner was found, a person in a dwelling-house was put in fear

The putting in fear.

Time, place, and circumstances to be considered.

(d) By sec. 5 of which any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate, to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or any warrant or order for the delivery or transfer of any goods or valuable thing, are respectively included in the words "valuable security."

(e) See *Burglary*, ante, p. 792, and 2 East, P. C. c. 16, s. 55, p. 623.

(f) 2 East, P. C. c. 16, s. 71, p. 635. *Rex v. Etherington and Brook*, id. *ibid*.

(g) *Id. ibid*.

(those circumstances operating on a reasonably sound mind) it was a putting in fear within the statute. *(h)*

Indictment must allege that the party was put in fear by the prisoner. It was decided upon the 3 Wm. & Mary, c. 9, (now repealed,) that the indictment must expressly allege that some person in the house was put in fear by the prisoner. The form was (after stating a stealing of goods in the dwelling-house of one J. G.,) "he the said J. G., and one M. E., and one M. G., the wife of the said J. G., then being in the said dwelling-house, and being put in fear therein;" and, on the first consideration of the case, most of the judges, to whom it was referred, inclined to think that the indictment was good, in pursuing the words of the statute; but they ultimately agreed that the prisoners were entitled to their clergy for the defect in the indictment, in not stating that the persons in the house were put in fear *by the prisoners.* *(i)*

*852 *But in this case the judges held, that the prisoners were properly convicted of the larceny, and they accordingly received sentence of transportation *(j)*

So where a prisoner was indicted for house-breaking and stealing in the house goods of more than five shillings value, and the indictment did not state whether any person was in the house, the judges were unanimously of opinion that although clergy was taken away equally, whether any person was in the dwelling-house or not, the property stolen being above five shillings in value, (either under the 39 Eliz. c. 15, or the 3 Wm. & Mary, c. 9, s. 1,) yet the indictment ought to show upon which charge the case was founded, otherwise the prisoner could not have the means of knowing as he ought, which charge he was to meet, and that the prisoner was therefore entitled to his clergy. *(k)*

Principals in the second degree and accessories. The enactments respecting principals in the second degree and accessories mentioned in the chapter on burglary, *(l)* apply also to the present degree and offence.

By sec. 10 of the 1 Vict., c. 86, offences committed within the jurisdiction of the Admiralty may be dealt with in the same manner as any other felony committed within that jurisdiction. *(m)*

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*CHAPTER THE FIFTH.

OF STEALING IN A DWELLING-HOUSE TO THE VALUE OF 5*l.* OR MORE.

7 & 8 Geo. 4, c. 29, s. 12.

THE 7 & 8 Geo. 4, c. 29, s. 12; enacts, "that if any person shall steal in any dwelling-house any chattel, money, or valuable security to the value in the whole of five pounds or more, every such offender being convicted thereof shall suffer death as a felon."

The 2 & 3 Wm. 4, c. 62, recited the preceding provision, and the 9 Geo. 4, c. 55, s. 12 (relating to Ireland,) *(a)* and repealed "so much

(h) Little's case, 1 Lewin, 201. It should seem that this case would not come within the new act, no menace or threat having been used. See note *(b)*, ante, p. 850. C. S. G.

(i) Rex v. Etherington and Brook, 2 Leach, 671. 2 East, P. C. c. 16, s. 71, p. 635, in which last authority it is said, that the judges came to their conclusion, upon being referred to some precedents of indictments for burglary, in which to oust the offenders of their clergy in case of their standing mute or challenging more than twenty, they were charged with putting persons in fear who were in the houses, (within 1 Edw. 6, c. 12,) and also to some other books and precedents.

(j) 2 Leach, 673.

(k) Rex v. Marshall, East, Term, 1827. R. & M. C. C. R. 158.

(l) Ante, p. 841.

(m) The act does not extend to Scotland, s. 11.

(a) The provision in this act is verbatim the same as in 7 & 8 Geo. 4, c. 29, s. 12.

of the said acts as inflicts the punishment of death upon persons convicted of any of the felonies hereinbefore specified," and enacted, that after the 11th July, 1832, "every person convicted of any of the felonies hereinbefore specified, or of counseling, aiding or abetting the commission thereof, shall be transported beyond the seas for life." And the 4 Wm. 4, c. 44, s. 3, enacted that all persons punishable by transportation for life under the 2 & 3 Wm. 4, c. 62, should be liable previously to their being transported to be imprisoned, with or without hard labour, in the common gaol or house of correction; or to be confined in the penitentiary for any term not exceeding four years nor less than one year.

The 1 Vict. c. 90, s. 1, recites these provisions of the 2 & 3 Wm. 4, ^{1 Vict. c.} c. 62, and 4 Wm. 4, c. 44, and repeals "so much of the said recited ^{90.}

acts as relates to the punishment of persons convicted of offences for which they are liable under the 2 & 3 Wm. 4, c. 62, to be transported for life," and enacts, that "from and after the commencement of this act, (Oct. 1, 1837,) every person convicted of any such offences, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years." And by s. 3, "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

According to the construction put upon the repealed statute 12 Anne, c. 7, (which related to a stealing of this kind to the value of *forty ^{Dwelling-house.} shillings,) the dwelling house must be one in which burglary might be committed. ^{*854} (b) But with respect to buildings within the curtilage, the 7 & 8 Geo. 4, c. 19, s. 13, enacts, that no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house, for the purposes of burglary, or for any of the purposes aforesaid, (bb) unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered or inclosed passage leading from the one to the other. (c)

The repealed statute of 12 Anne, ousted of clergy every person who should feloniously steal any money, goods, &c., of the value of forty shillings or more, *being in any dwelling-house*; the recent statute enacts, that if any person shall *steal in any dwelling-house* any chattel, &c.; but has been construed upon the same principle, and considered as intended to give greater security only to property deposited in a house, so as to be under the protection of the house, and not to property about the person of the party from whom it is stolen. It may be useful, however, to notice some of the cases decided upon the repealed statute. It was decided upon that statute that its provisions did not extend to a ^{Construction of the} stealing in a man's own house: on the ground that the statute was not ^{repealed} intended to protect property, which might happen to be in a house, from ^{statute 12} ^{Anne, c. 7.}

(b) 2 East, P. C. c. 16, s. 81, p. 644. Davies's *alias* Silk's case, *ante*, p. 805; and other cases cited in the Chapter on *Burglary*, *ante*, p. 797, *et seq.*

(bb) *i. e.* House-breaking and stealing in a dwelling-house.

(c) See *ante*, p. 799, *et seq.*

Property under the protection of the house.

the owner of the house, but from the depredations of others. *(d)* And upon the same principle, where it appeared that the prisoner was a married woman, and had stolen the property in the dwelling-house of her husband, it was holden that she could not be convicted in the capital part of the charge, as the house of the husband must be construed to be her house also: and she was therefore found guilty only of the simple larceny. *(e)* But a lodger who invited a man to his room, and there stole his goods to the value of forty shillings when not about his person, was holden liable to be found guilty of stealing in the dwelling-house under that statute; the goods of a lodger's guest being under the protection of the dwelling-house. The prisoner lodged at Wakefield's, and having invited the prosecutor to sleep in his room, stole the prosecutor's watch while it was hanging at the bed's head; and he was convicted of stealing to the value of forty shillings in the dwelling-house of Wakefield, [neither Wakefield nor any of his family knew of the prosecutor's being there; so that he was the guest of the prisoner, and it was doubted whether the prisoner was not to be considered as the owner of the house with respect to the prosecutor; but] upon a case reserved, seven judges against three held the conviction right. *(f)* If a person go to bed leaving a watch on the table in the room, and it is stolen while he is asleep, this is a stealing in the dwelling-house. Upon an indictment for stealing *in the dwelling-house under the 7 & 8 Geo. 4, it appeared that the prosecutor had gone with the prisoner, who was a prostitute, to a house where they were shown into a room, for which he paid; he fastened the door and put his watch in his hat, which he placed upon a table, and then went to bed with the prisoner, and went to sleep, and she, while he was asleep, stole the watch; it was suggested that this was not a case within the statute, as the property was not under the protection of the house, which was essential to support the indictment, but under the protection of the person of the prosecutor. Parke, B., and Patteson, J., having considered the point and looked into the cases, said, that the preceding case was an authority in support of the indictment; they therefore were of opinion that under the circumstances, and the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the statute. *(g)* So if one, on going to bed, put his clothes and money by the bed-side, these are under the protection of the dwelling-house, and not of the person; therefore a party stealing them was held rightly convicted on an indictment for stealing in a dwelling-house; and the question whether goods are under the protection of the dwelling-house, or in the personal care of the owner, is a question for the court and not for the jury. *(h)* But if a person put

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(d) Rex v. Thompson and Maedaniel, O. B. 1784. 1 Leach, 338. 2 East, P. C. c. 16, s. 18, p. 644.

(e) Gould's case, O. B. 1780. 1 Leach, 217. 2 East, P. C. c. 16, s. 81, p. 644, in which last book it is said, that the prisoner was the mistress of a brothel, and stole the money from a sailor who lodged in her husband's house.

(f) Rex v. Taylor, East, T. 1820, MSS. Bayley, J., and Russ. & Ry. 418. I have inserted the statement between the brackets from Russ. & Ry. C. S. G.

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

(h) Rex v. Thomas, Carr. Supp. 295, 3rd edit. C. R.

* Eng. Com. Law Reps. xxxiv. 288.

money under his pillow, and it is stolen while he is asleep, this is not a stealing of money in the dwelling-house within the meaning of the act. Thus, where money was stolen from under the pillow of a person sleeping in a dwelling-house, it was held that the case was not within the repealed statute.⁽ⁱ⁾ So where a guest in the bed at an inn, placed his small-clothes containing his money under his head, and they were stolen, and the indictment was on the repealed statute of the 12 Anne, c. 9, for stealing to the amount of forty shillings in the dwelling-house, it was held that the property having been thus taken under the party's personal protection, it was no longer under the protection of the house.^(k) And property left at the house and delivered to the occupier under the supposition that it was for one of the persons in the house, was considered to be entitled to the protection of the house, and the stealing of it to the value of forty shillings to be within that statute. Two boxes belonging to a Mrs. Douglas, who lodged at 38, in Rupert street, were delivered at No. 33, in the same street, where the prisoner lodged, by a porter from the Green Man and Still, (but whether by accident or collusion with the prisoner was not proved, as the porter, though called upon his recognizance, did not appear) and the occupier of the house, No. 33, took them in and paid the portage, supposing them to be for the prisoner, whose name *she did not know, as he had recently taken his lodging with her. Shortly afterwards, when the prisoner came she told him of the arrival of the boxes, and of the portage she had paid, when he said, it was all right, and he would pay her again. The boxes were put into his room, and he went out two or three times in the course of the evening, carrying bundles each time, and when he went out the last time he did not return again. The boxes were found entirely ransacked. The jury found the prisoner guilty, but upon a doubt whether these goods were sufficiently *under the protection of the house* to bring the case within the statute, the point was submitted to the consideration of the judges, who held that the goods were under the protection of the dwelling house, and that the capital conviction was therefore proper.^(l)

Property delivered to the occupier of a house by mistake.

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In a case upon the same statute where the indictment was for stealing a bank-note of the value of 25*l.*, in the dwelling-house of one C. M. Adams, it appeared the prisoner was a lodger in Mrs. Adams' house, and that, on the day on which the offence was committed she, wanting to get the note changed, sent the servant with it to his apartments, to request him to give her change for it; when the prisoner, after examining his purse, and saying that he had not gold enough about him for the purpose, but that he would go to his banker's and get it changed, left the house with the note in his hand, and never returned. Upon these facts a question arose, whether the case was within the statute, which was considered as having been made to protect such property as might be *deposited in the house*, and not property which was on the person of the party; and the point having been saved for the opinion of the judges, they were of opinion that the case was not within that sta-

(i) Anonymous, 2 Stark. P. C. 467, note (a), *cor.* Chambre, J., Lancaster Sum. Ass. 1812. Mr. Starkie adds, "but Ward was convicted and received sentence of death in a similar case," *cor.* Bayley, J., Lancaster Sum. Ass. 1814. Note, Ward was a guest at an inn. See the next note. C. S. G.

(k) Rex v. Challenor, Dick. Q. S. 245. 5th edit., Park, J. A. J., who said that Ward's case (see the last note,) held to the contrary, might have turned on some peculiar circumstances.

(l) Rex v. Carrol, East, T. 1825, R. & M. C. C. 89. See Rex v. Mucklow, R. & M. C. C. R. 160, *post*, tit. *Larceny*.

tute.(m) And, upon the same principle, where a person in possession of a large sum of money, was deluded by a ring-dropper, who pretended to have found a purse, to go into a public house and share its contents, and there induced to lay his money on the table, when the ring-dropper immediately took up the money and carried it off, it was decided, upon reference to the judges, that the case was not within that statute. A majority of them were of opinion that, in order to bring a case within that statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, or money kept in the house, and not things immediately under the eye, or personal care of some one who happened to be in the house.(n)

Stealing to the amount mentioned in the statute at one time.

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Another point was decided upon the statute of Anne, namely, that it was necessary the stealing should be to the amount of forty shillings at one time; it being a rule that a number of distinct grand larcenies cannot be added together, so as to *constitute a capital offence. Thus, where the evidence was that the prisoner was the servant of the prosecutor, and had, at different times, purloined his master's property to a very considerable amount, but it did not appear that he had ever taken to the amount of forty shillings at any one particular time; the court held that the case was not within the statute. They said that the property must be stolen to the amount of forty shillings at one and the same time: and that the several values of different portions of property, stolen at different times, could not be added together for the purpose of making the offence capital, they being in fact different and independent acts of stealing.(o) But where the property was stolen at one time to the amount of forty shillings, and a part of it only, not amounting to forty shillings was found upon the prisoner, and produced at the trial, the court left it to the jury to say whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced.(p)

If a prisoner steal a number of different articles, amounting together to the value of five pounds, and take them all out of the house at one and the same time, this is an offence within the 7 & 8 Geo. 4, c. 29, s. 12, although they were stolen in the dwelling-house at different times. Upon an indictment for stealing lace in the dwelling-house to more than the value of 5*l.*, it appeared that the prisoner sent the lace, which was in several distinct pieces in a parcel from his master's shop, and no one piece of the lace was worth 5*l.*; it was suggested that *in favorem vite* the judge would take it that the pieces of lace might have been stolen at different times. Bolland, B., "I cannot assume that to have been so, we find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once: and unless you give some evidence to show that it was stolen at different times, you do not raise your point; but even if you did, I should think it would be of no avail, for on the last Winter Circuit, it appeared that a person at Brighton stole goods in the same

(m) Campbell's case, O. B. Jan. 1792. 2 Leach. 564. 2 East, P. C. c. 16, s. 82, p. 644, 645.

(n) Owen's case, O. B. 1792. 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-house*, s. 6. 2 Leach, 572. 2 East, P. C. c. 16, s. 82, p. 645. And the same point was again decided in Castledine's case, O. B. Oct. 1792, which was also referred to the judges; and again in Watson's case, O. B. 1794. See 2 Leach, 574, note (a). 2 Leach, 640. 2 East, P. C. c. 16, s. 82, p. 645, 646, and s. 107, p. 680, 681.

(o) Petrie's case, 1 Leach, 294.

(p) Hamilton's case, 1 Leach, 348. The jury found the prisoner guilty of stealing goods in the dwelling-house to the value of forty shillings.

way that you wish me to suppose that this person did, for it was shown that he stole the articles, one or two at a time, and under the value of 5*l.*, but that he carried them out of his master's house all together, the articles amounting in all to more than 5*l.* value, and Mr. B. Garrow, after much consideration, held that as the articles were all brought out of the house together, it was a capital offence."(*q*)

As in cases of burglary, so in indictments for this offence, the name of the owner of the house should be correctly stated in the indictment; as a material variance in this respect will be fatal to the capital part of the charge. Thus, where an indictment upon the statute of Anne stated the dwelling-house to belong to one J. Snoxall, and upon the evidence it appeared that it was not his house, it was holden that the prisoner could not be convicted upon that statute;(*r*) and it was holden to be a variance fatal to the capital *part of an indictment upon the same statute where the house was stated to belong to S. Lunn, and it appeared on the evidence that the proper name was S. London.(*s*)

The indictment must state the name of the owner of the house correctly.

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Where the place is material the place stated as venue is to be taken to be the true place; therefore, in an indictment for stealing in a dwelling-house, if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named by way of venue. The prisoner was convicted upon an indictment, which stated that the prisoner at Liverpool, in the county aforesaid, one coat of the value, &c., in the dwelling-house of W. T., then and there being, then and there feloniously did steal, &c., but a doubt having occurred whether the situation of the house was sufficiently described, and whether the indictment ought not to have stated "in the dwelling-house of W. T. *there situate*," the point was submitted to the judges, who held that the indictment showed sufficiently that the house was situate at Liverpool, and that the conviction was therefore proper.(*t*)

Parish.

The offence of stealing in a dwelling-house is local, and consequently the situation of the house must be correctly described; and if the house be stated to be situated in a parish and county named, it must be proved that all such parish is in such county; and if it be not so proved the prisoner cannot be convicted of the offence of stealing in the dwelling-house, but he may be convicted of larceny. The indictment stated that the prisoner, "late of the parish of St. Catherine, in the county of Gloucester," "at the parish aforesaid, in the county aforesaid," feloniously stole sundry articles mentioned in the indictment in the dwelling-house of M. D. G. Muirhead "there situate;" it was proved that the house was situate in the parish of St. Catherine, and that that parish was partly in the county and partly in the city of Gloucester, and the house was in the part of the parish in the county; it was objected that this was a fatal variance, and *Reg. v. Brooks, infra*, was relied upon; and Cresswell, J., held that the objection was good as the offence was local, and the meaning of the statement in the indictment was not merely that the dwelling-

(*q*) *Rex v. Jones*,^a 4 C. & P. 217, Bolland, B. The decision seems clearly correct; for as long as the goods were in the owner's house they were in his possession, and the removal from the house was a new larceny of all. See *Rex v. Dyer*, 2 East, P. C. c. 16, s. 154, p. 767, 768, and *Rex v. Atwell*, *ibid.* C. S. G.

(*r*) White's case, 1 Leach, 252, *ante*, p. 827.

(*s*) Woodward's case, 1 Leach, 253, note (*a*), and see other cases, *ante*, p. 827.

(*t*) *Rex v. Napper*, M. T. 1834, R. & M. C. C. R. 44. See *Rex v. Richards*, 1 M. & Rob. 177, *ante*, p. 827.

house was in the county of Gloucester, but that the parish of St. Catherine was in that county. The prisoner was, however, convicted of the simple larceny. (tt)

Value. In ascertaining the value of the articles stolen, the jury may use that general knowledge which any man can bring to the subject, but if it depends on any particular knowledge of the trade, the juryman must be sworn. On an indictment for stealing a watch and seals of the value of 7*l.*, a witness having sworn that the property, in his opinion, was worth that sum, the jury inquired if they were at liberty, to put a value on the property themselves; Parke, B., "If a gentleman is in the trade he must be sworn as a witness; that general knowledge which any man can bring to the subject may be used without; but if it depends upon any knowledge of the trade, the gentleman must be sworn." (u)

Verdict. In this, as in most other offences, any one of several persons may be found guilty upon an indictment charging them with a joint offence. But they cannot be found guilty separately of separate parts of the charge, and if they be so found guilty separately, a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus, where two persons, Hempstead and Hudson, were indicted upon the statute of Anne for stealing in the dwelling-house to the value of 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles of the value of 6*l.*, and Hudson guilty as to the residue; the judges, upon a case reserved, held that judgment could not be given against both, but that upon a pardon or *nolle prosequi*, as to Hudson, it might be given against Hempstead. (v)

A prisoner indicted for burglary, &c., found guilty upon the 12 Anne. Where a prisoner was indicted for robbery in a house, or burglary and stealing of goods, and the evidence proved a larceny committed in the dwelling-house to the amount of forty shillings, it was held that he might be acquitted of robbery and burglary, and found guilty upon the statute of Anne, although there was no special count upon the statute in the indictment. (w)

*859 *So, upon an indictment for burglary and stealing to more than the amount of 5*l.*, the prisoner may be acquitted of the burglary, and found guilty of stealing in the dwelling-house to the amount of 5*l.* (x)

Principals in the second degree, and accessories. Principals in the second degree, and accessories before the fact, are punishable with death, as principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years. (y) The proceedings for the trial of accessories are regulated by the 7 Geo. 4, c. 64, ss. 9, 10, 11. (z)

(tt) Reg. v. Walter Jackson, MSS. C. S. G. Gloucester Spr. Ass. 1842.

(u) Rex v. Rosser,^a 7 C. & P. 648, Parke, B., and Vaughan, J.

(v) Rex v. Hempstead, M. T. 1817, MSS. Bayley, J., and Russ. & Ry. 344.

(w) 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-house*, s. 3.

(x) Rex v. Compton,^b 3 C. & P. 418, Gaselee, J.

(y) 7 & 8 Geo. 4, c. 29, s. 61. See the section, *ante*, p. 485, which, if not expressly, seems to be impliedly repealed by the 2 & 3 Wm. 4, c. 62, as to principals in the second degree and accessories before the fact, who are now punishable in the same way as principals in the first degree, see *ante*, p. 853. A doubt may be entertained whether accessories after the fact are punishable under sec. 61 of the 7 & 8 Geo. 4, c. 29, as that only applies to offences punishable under that act, which stealing in a dwelling-house to the amount of 5*l.* no longer is. See my note, *ante*, p. 845.

(z) *Ante*, p. 39, *et seq.*

^a Eng. Com. Law Reps. xxxii. 670.

^b *Ib.* xix. 376.

*CHAPTER THE SIXTH.

*860

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

THE 7 & 8 Geo. 4, c. 29, after providing (by s. 13,) that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes before mentioned in the act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other; by sec. 14 enacts, "that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security,^{7 & 8 Geo. 4, c. 29, s. 14.}(a) such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, house-breaking, or stealing to the value of five pounds in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment."

The 1 Vict. c. 90, s. 2, recites the preceding section, and repeals so much of it as relates to the punishment of persons convicted of any of the offences therein specified, and enacts, that "every person convicted after the commencement of this act (1 October, 1837,) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years;" and by sec. 3, "it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

By sec. 61, of the 7 & 8 Geo. 4, c. 29,^(b) principals in the second degree, and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are liable to imprisonment for any term not exceeding two years.^(c)

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This enactment, specifying as it does in express terms a building

(a) See *ante*, p. 850, note (d).

(b) This section does not appear to be repealed by the 1 Vict. c. 90; but as it only applies to felonies punishable under the 7 & 8 Geo. 4, c. 29, it seems doubtful whether principals in the second degree and accessories are punishable under it. If not, they would seem to be punishable as for a felony, for which no express provision is made. See my note, *ante*, p. 116. C. S. G.

(c) See this section, *ante*, p. 845. The proceedings for the trial of accessories are regulated by the 7 Geo. 4, c. 64, ss. 9, 10, 11, *ante*, p. 39, *et seq.*

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

Cases in which particular buildings were held to be *parcel* of a dwelling-house.

In a case where the prisoner had broken into a goose-house which opened into the prosecutor's yard, into which yard the prosecutor's house also opened and the yard was surrounded partly by other buildings of the homestead, and partly by a wall, some of which buildings had doors opening backwards, as well as doors opening into the yard, and there was a gate in one part of the wall opening upon a road, the judges held that the goose-house was *parcel* of the dwelling-house. (*d*)

Where, upon an indictment for breaking and entering a building within the curtilage, it appeared that there was a large square inclosure at the back of a dwelling-house, surrounded on all sides by a barn, cow-sheds, a granary, pig-styes, and walls, and that within such larger inclosure there was a lesser inclosure, abutting on one side on the back of the dwelling house, and on another on the pig-styes, and the third and fourth sides of which were formed by a wall about four feet high, which separated it from the other part of the large inclosure, and the back-door of the house entered into such lesser inclosure, and out of it there was a gate into the larger inclosure, into which there was no door immediately leading from the house; and some corn was stolen out of the granary, which was on the opposite side of the large inclosure from the house. Wightman, J., after consulting Erskine, J., held that the whole of the larger inclosure was within the curtilage, and not merely the lesser inclosure immediately at the back of the house, and consequently that the granary was a building within the curtilage. (*dd*)

In another case, the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., so as to be altogether an enclosed yard; the workshop had no internal communication with the house, and it had a door opening into the street, and its roof was higher than that of the dwelling-house; the street-door of the workshop was broke open in the night; and upon an indictment for burglary, the question arose, whether the workshop was *parcel* of the dwelling-house; and, upon a case reserved, the judges were unanimous that it was. (*e*) And it was holden that an out-house in the yard of a dwelling-house was *parcel* of the dwelling-house, the yard being inclosed, although the occupier had another dwelling-house opening into

(*d*) *Rex v. Clayburn and another*, East. T. 1818. Russ. & Ry. 360.

(*dd*) *Reg. v. Wood and others*, Stafford Spr. Ass. 1843, MSS. C. S. G.

(*e*) *Rex v. Chalking and another*, East. T. 1817, MSS. Bayley, J., and Russ. & Ry. 334; and see *Rex v. Lithgo*, Russ. & Ry. 357.

the yard, and had let such other dwelling-house with certain easements in the yard, the two houses having been originally in one. The prosecutor had in one range of buildings a house which he occupied, a house which he let, and a warehouse, all of which opened into a yard which was surrounded by a wall, gates, and buildings; the tenant of the second house had certain easements in *the yard, and his house was between the prosecutor's house, and the warehouse, and the two houses had formerly been in one. The prisoner was convicted of burglary in breaking into the warehouse, and a case was reserved upon the question, whether such warehouse could be deemed part of the prosecutor's house; and the judges (nine of them being present) were of opinion that the warehouse was part of the prosecutor's house; it was so before the house was divided, and it remained so notwithstanding the division; and they held the conviction right. (f)

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

It was holden that burglary could not be committed by breaking into a centre building used for the purpose of trade, but having no internal communication with the dwelling-houses which formed the wings. The building was stated, in the first count of the indictment, as the dwelling-house of M. R. Boulton; in the second, as the dwelling-house of J. Bush; and in the third, as the dwelling-house of W. Nelson. The place broken into was a centre building, having two wings; in such centre building an extensive business was carried on, relating to different manufactories in which one Matthew Boulton was concerned with M. R. Boulton, W. Nelson, and several other persons; and also relating to two other manufactories in which Matthew Boulton was concerned on his own account: in part of one of the wings was the dwelling-house of M. R. Boulton, and in the other part of the same wing, the dwelling-house of J. Bush, mentioned in the second count of the indictment, who was a workman of Matthew Boulton's; but neither of such dwelling-houses had any internal communication with the centre building, except only in the one occupied by J. Bush, a window, which looked into a passage that ran the whole length of the centre building; and in the other wing was the dwelling-house of W. Nelson, which also had no internal communication with the centre building. In the front of this building there was a terrace or front yard, fenced round, in different ways, and at the end of the pile of building, by a wall, with gates for horses and carriages, and a door for foot passengers: the prisoners entered by a door in the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; from thence, through a door which had been left open, up a staircase in the centre building, where they broke open some of the rooms; having so entered the premises by the assistance of a servant of Matthew Boulton's who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon a case reserved, the judges

Centre building used for purposes of trade, but having no communication with the dwelling-houses which formed the wings.

(f) *Rex v. Walters and others*, East. T. 1824, MSS. Bayley, J., and R. & M. C. C. R. 13.
 (g) *Ante*, p. 860.

*863 agreed that the prisoners were not guilty of burglary; and the grounds upon which they so decided are *stated to have been, that the centre building, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house; and that it was not to be considered as under the same roof as the houses adjoining, though the roof of it had a connexion with the roofs of the houses.(h)

Factory and dwelling-house with an internal communication, the factory being used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he had a partner.

But where there was an internal communication between a factory and the dwelling-house, by means of an open passage only, the factory, being within the same fence as the dwelling-house, and used with it, was held to be parcel of the dwelling-house; although it was used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he had a partner. The premises were surrounded by a garden wall, the front wall of the factory, and the wall and gate of the stable yard; they were of the extent of rather more than an acre, and the house was in the centre; there was no other communication between the house and the factory than by one open passage inside the walls. In the factory the prosecutor, the occupier of the dwelling-house, carried on one business of his own, and another jointly with a partner, who lived elsewhere: and the rooms over the factory were used for the joint as well as the separate business. These rooms were broken into, and a part of the separate property of the prosecutor, and also part of the joint property was stolen; and upon an indictment for burglary in the dwelling-house of the prosecutor, and after conviction, a case being reserved, the judges held that these rooms were part of the prosecutor's dwelling-house, and that the conviction was right.(i)

Out-house holden under a distinct title from the dwelling-house.

It was said upon the old law of burglary, that if a man took a lease of a dwelling-house from A., and of a barn from B., such a barn would be no parcel of the dwelling-house, and not therefore a place in which burglary could be committed;(j) a position leading to the inference, that no out-house, holden under a distinct title from the dwelling-house, could be the subject of burglary. But upon this it was observed, that the circumstance of an out building being enjoyed by the occupier under a different title from his dwelling-house, seemed a very unsatisfactory reason of itself for excluding it from the same protection, if it were within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law.(k)

Outward fence of curtilage not opening into a building.

A door, wall, or other fence forming part of the outward fence of the curtilage, and opening in no building, but into the yard only, was held not to be such a part of the dwelling-house as that the breaking thereof would constitute burglary; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house, and within the curtilage, were over the gateway, and that there was a hole in the ceiling of the gateway, for taking *up goods into the building above. The prosecutor had a dwelling-house, warehouses, and other buildings, and a

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(h) *Rex v. Egginton and others*, 2 Leach, 913. 2 East, P. C. c. 15, s. 10, p. 494. 2 Bos. & Pul. 508.

(i) *Rex v. Hancock*, East. T. 1810, MSS. Bayley, J., and Russ. & Ry. 170.

(j) 1 Hale, 559.

(k) 2 East, P. C. c. 15, s. 10, p. 494. And see *ante*, p. 803.

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

*CHAPTER THE SEVENTH.

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OF BREAKING, ETC., AND STEALING IN ANY SHOP, WAREHOUSE, OR COUNTING-HOUSE.

THE 7 & 8 Geo. 4, c. 29, s. 15, enacts, "that if any person shall break and enter any shop, warehouse or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned." By the clause here referred to (s. 14), the offender is liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.^(a)

The 1 Vict. c. 90, s. 2, recites sec. 15 of the 7 & 8 Geo. 4, c. 29, and 1 Vict. c. repeals so much of it as relates to the punishment of persons convicted^{90, s. 2.} of any of the offences therein specified, and enacts that "every person convicted after the commencement of this act (1 October, 1837) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years;" and by sec. 3, "it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction; and also to direct, that the offender shall be kept in soli-

(l) *Rex v. Bennett and another*, Hil. T. 1815, MSS. Bayley, J., and Russ. & Ry. 289.

(m) *Rex v. Davis and another*, Hil. T. 1817, MSS. Bayley, S., and Russ. & Ry. 322.

(a) The 9 Geo. 4, c. 55, s. 15, relating to Ireland, contains similar provisions to those in the 7 & 8 Geo. 4, c. 29, s. 14 & 15, and is not altered by the 1 Vict. c. 90, s. 2.

tary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

The shop must be a shop for the sale of goods, and a mere workshop will not be sufficient. Upon an indictment on the 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. c. 90, for breaking into a shop and stealing coals, it appeared that the prosecutor sold coal, and was also a blacksmith: the place from which the coal was stolen was a shop, to which persons went who bought it, it being a room beyond the blacksmith's shop. Mr. B. Alderson said, "to come within the provisions of these acts the place must be more than a mere workshop, it must be a shop for the sale of articles. A workshop, such as a carpenter's shop or a blacksmith's shop, would not be within the acts."(b)

*866 *It has been held that an indictment upon sec. 15 of the 7 & 8 Geo. 4, c. 29, must expressly aver that the prisoner stole the goods in the shop, and that it is not sufficient to aver that the prisoner broke and entered the shop, and the goods "in the shop then and there being found feloniously did steal."(c)

The offence of breaking and entering a shop is local, and, therefore, the situation of the shop must be correctly described in the indictment. Where an indictment charged that J. Brookes, "late of the parish of St. Peter the Great, in the county of Worcester," "the warehouse of W. Webb there situate," feloniously did break and enter, &c., and it appeared that the parish of St. Peter the Great is partly situate in the county of Worcester, and partly situate in the county of the city of Worcester, and that the warehouse was in that part of the parish which is in the county of Worcester; Patteson, J., after referring to *Rex v. Perkins*, 4 C. & P. 363, held that the indictment was not supported, as this is a local description, but in *Rex v. Perkins* the parish was only laid by way of venue to a simple larceny. The prisoners were, however, convicted of a simple larceny.(cc)

The proper mode would have been to state that the offence was committed "in that part of the parish of St. Peter the Great, which is situate in the county of Worcester."

Principals in the second degree, and accessories before the fact, are punishable in the same manner as the principals in the first degree: and accessories after the fact (except receivers) are liable to be imprisoned for any time not exceeding two years.(d)

(b) *Reg. v. Sanders*,^a 9 C. & P. 79.

(c) *Reg. v. Smith*, 2 M. & Rob. 115, Patteson, J. But upon this case being cited in *Reg. v. Andrews*, Worcester Sum. Ass. 1841, Coleridge, J., said he had spoken to Patteson, J., about it, and that that learned judge now thought the decision in *Reg. v. Smith*, was not correct. See *ante*, p. 849. C. S. G.

(cc) *Reg. v. Brookes and others*,^b Wor. Spr. Ass. 1842, MSS. C. S. G., S. C., 1 C. & Mars. 543.

(d) Sec. 61, *ante*, p. 845. This section does not appear to be repealed by the 1 Vict. c. 90, but as it only applies to felonies punishable under the 7 & 8 Geo. 4, c. 29, it seems doubtful whether the principals in the second degree and accessories are punishable under it; if not, they should seem to be punishable as for a felony, for which no express provision is made. See my note, *ante*, p. 116. As to the proceedings for the trial, &c., of accessories, see the 7 Geo. 4, c. 64, ss. 9, 10, 11, *ante*, p. 29, *et seq.*

^a Eng. Com. Law Reps. xxxviii. 42.

^b *Ib.* xli. 296.

*CHAPTER THE EIGHTH.

OF ROBBERY FROM THE PERSON.(A)

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ROBBERY from the person appears to be well defined as "a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear."^(a) Definition
of the
offence.

(a) 2 East, P. C. c. 16, s. 124, p. 707. Hichman's case, 1 Leach, 280. 4 Bla. Com. 243. 1 Hawk. P. C. c. 34. 1 Hale, 532. 3 Inst. 68. The force necessary to constitute robbery, must be employed before (or at the time) the property is stolen. If the stealing be first, and the force afterwards, the offence is not robbery, but stealing from the person. *Per* Park, J., Smith's case, 1 Lewin, 301. See *post*, p. 874.

(A) MASSACHUSETTS.—Robbery was always punished as a capital offence in this State, until the passing of the statute of 1804, c. 143, by which the punishment was reduced to hard labour for life. This statute remained in force until the passing of st. 1818, c. 124, when robbery, if committed under certain circumstances of aggravation, was again punished with death. The last mentioned statute is in these words:

Sect. 1. "That if any person shall commit an assault upon another, and shall rob, steal, and take from his person, any money, goods, or chattels, or any property which may be the subject of larceny, such robber being, at the time of committing such assault, armed with a dangerous weapon, with intent to kill or maim the person so assaulted and robbed; or if any such robber, being armed as aforesaid, shall actually strike or wound the person so assaulted and robbed, every person so offending, and every person present, aiding and abetting in the commission of such felony, or who shall be accessory thereto before the fact, by counseling, hiring, or procuring the same to be done and committed, and who shall be duly convicted thereof, shall suffer the punishment of death." The third section of this statute enacts, "that if any person being armed with a dangerous weapon, and with intent to commit murder or robbery, shall assault another," shall be punished by solitary imprisonment not exceeding one year, and by confinement afterwards to hard labour not exceeding twenty years. And the same punishment is extended to persons present aiding and abetting, &c., and to accessories before the fact.

A larceny committed either with actual force and violence, or with a constructive force, by an assault and putting in fear, is a robbery; and in an indictment for such offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *Commonwealth v. Humphries*, 7 Mass. Rep. 242. In this case, the allegation of putting in fear was omitted: this omission occasioned some doubt in the minds of the court, and the justices present thought the prisoner entitled to have the question, as to the validity of the indictment, examined. The court advised upon the question. The prisoner was convicted, and when he was brought up for sentence, Sewall, J., delivered the opinion of the court. The statute thus describes the offence: "any person who shall by force and violence, or other assault and putting in fear, feloniously rob, steal, &c." This clause of the statute admits perhaps of some uncertainty in the construction. "Putting in fear, may be so connected with the preceding words, as to become an essential circumstance in describing the offence of robbery, as well when the assault is accompanied with actual force and violence, as when it is by a constructive force, as by menaces; and if putting in fear was essential to an indictment at common law, the words of the statute are not sufficiently explicit to establish a construction, changing the definition of the crime, or the form of the indictment, in this respect." The learned judge then referred to 1 Hawk. P. C. c. 34. 3 Inst. 67. 1 H. H. P. C. 531. Dyer's Reports, 224, and 4 Bla. Com. 243, where, after giving the definition of robbery, Blackstone says, "that previous violence, or putting in fear, is the criterion that distinguishes robbery from other larceny; and that it is not necessary, though usual, to lay in the indictment, that the robbery was committed by putting in fear; it is sufficient if it be laid to be done with violence." "This was the opinion of Mr. Justice Foster, in delivering the opinion of the judges of the cases of *M'Donalds and al.*" Foster's Rep. 128. The same was the opinion of the twelve judges in *Donally's case*, Leach's C. L. 299, and Lord Ch. J. Eyre, in his argument of the same case, as reported in East's Crown Law, c. 18, s. 127, 130, 167, says, that in the old precedents of indictments for robbery, the putting in fear is not alleged. The result of this inquiry is, that we are not restrained by the common law definition of robbery, or by any precise form of the indictment, as to the circumstances in question. And without departing from any established principle, the construction may be, what the words cited (from the statute) certainly admit, that a larceny committed with actual force and violence, or by a constructive force by an assault and putting in fear, is to be adjudged a robbery; and that in this respect, the statute has preserved the definition of the crime, as it was described and punished by the common law.

The first case that occurred after the passing of the statute of 1818, c. 124, was *The Com*

Punishment of robbery attended with cutting or wounding. Punishment for robbery attended with violence.

The 1 Vict. c. 87, s. 2, repeals part(b) of the 7 & 8 Geo. 4, c. 29, and the 9 Geo. 4, c. 55, [relating to Ireland,] and enacts, that "whosoever shall rob any person, and at the time of or immediately before or immediately after such robbery, shall stab, cut, or wound any person, shall be guilty of felony, and being convicted thereof, shall suffer death."

By sec. 3, "whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall, together with one or more person or persons, rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

(b) The act repeals so much of those statutes as relates to any person who shall rob any person, steal from the person, assault with intent to rob, with menaces or by force, demand any property with intent to steal, accuse, or threaten to accuse, of any infamous crime, plunder any wreck, and so much of the acts as relates to principals in the second degree, and accessories before and after the fact.

monwealth v. Michael Martin, 17 Mass. Rep. 539; in which it was decided by the unanimous opinion of the whole court, that to make robbery a capital offence within the first section of the statute, it is sufficient if the party be armed with a dangerous weapon, with intent to kill or maim the person assaulted, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent. The prisoner was indicted upon the first clause of the first section of the statute, for the robbery of John Bray, "being then and there at the time of committing the assault aforesaid, in manner and form aforesaid armed with a certain dangerous weapon called a pistol, with intent him the said John Bray, then and there to kill and maim." The defence set up was, that to constitute the crime of robbery a capital offence within the statute, it must be proved that there was an absolute intent to kill or maim the party robbed, at all events, whether the robbing could be accomplished without killing or maiming, or not; and that in the present case, the fact of the prisoner's having left the party robbed, without killing or maiming him, or making an actual attempt to do it, proved that there was no such intent, as was by the statute constituted an essential ingredient in the capital offence. This construction of the statute was not adopted by the court, but they instructed the jury, that if they were satisfied from the evidence, that the prisoner armed himself with a loaded pistol with intent to kill or maim the party whom he should rob, if such killing or maiming were necessary for his purpose of robbing; and that, when he assaulted and robbed Major Bray, he had the power of executing such intent, and meant to do it, if he could not otherwise rob him, the offence was capital according to the statute; and they accordingly found the prisoner guilty. See the opinion of the court at large, delivered by Parker, C. J., in which the above construction of the statute is unanswerably maintained.

PENNSYLVANIA.—To constitute robbery, there must be a felonious taking of property from the person of another, by force, either actual or constructive; but if force be used, it is not essential, that the prosecutor should be either aware, or afraid of the taking. Hence, when the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's, and held him against a wall, during which time he took the prosecutor's watch from his fob, without his knowledge, and without his suspecting any intention of felony, this was held to be robbery. So decided upon special verdict, in the case of *Commonwealth v. Sneling*, 4 Binn. 379, in which case it was observed among other things by Tilghman, C. J., "if a man is knocked down and rendered senseless, and in that situation his money is taken without his knowledge, it shall not avail the thief to say, that it was not taken against the consent of the man, whom he had rendered incapable of exercising the faculty of volition." "Fear is not an essential ingredient of robbery; force is sufficient. See *ante*, *Commonwealth v. Humphries*, 7 Mass. Rep. 242.

To constitute the crime of robbery, it is not necessary that the taking should be from the person of the owner; it is sufficient if it be done in the presence of the owner; as if by intimidation he is compelled to open his desk, or throw down his purse, and then the money is taken in his presence. Wharton's Digest, 151, *United States v. Jones*, C. C. April, 1813, cited by Wharton, from MSS. Reports. {3 Wash. C. C. Rep. 209, S. C.}

UNITED STATES.—For the statute of the United States against robbery of the carrier of the mail of the United States, see Ing. Dig. 687, 688.

{See Revised Statutes of New York, Vol. ii. 677, 678.}

By sec. 4, "whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery, committed either with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt to endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person, whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid to extort or gain from such person, and shall, by intimidating such person by such accusation or threat, extort or gain from such person any property, shall *be guilty of felony,(c) and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Punishment for obtaining property by threat of accusing of unnatural crimes.

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By sec. 5, "whosoever shall rob any person, or shall steal any property from the person of another,(d) shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years."

Punishment of stealing from the person.

By sec. 6, "whosoever shall assault any person with intent to rob, shall be guilty of felony, and being convicted thereof, shall (save and except in the cases where a greater punishment is provided by this act) be liable to be imprisoned for any term not exceeding three years."

Punishment for assault with intent to rob.

By sec. 7, "whosoever shall with menaces or by force demand any property of any person, with intent to steal the same, shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years."(e)

Demanding money with menaces.

By sec. 9, "in the case of every felony punishable under this act, every principal in the second degree and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property,) shall on conviction, be liable to be imprisoned for any term not exceeding two years."

Punishment of accessories.

By sec. 10, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

Offences punishable by imprisonment.

By sec. 12, "the word 'property' shall throughout this act be deemed to denote every thing included under the words 'chattel, money, or valuable security,' used in the said acts of the seventh and eighth years and ninth years respectively of King George the Fourth."(f)

Construction of the word "property."

Recurring to the foregoing definition of this offence, and keeping in mind that robbery is an aggravated species of larceny,(g) we may inquire

(c) Of "Robbery," in the 7 & 8 Geo. 4, c. 29.

(d) *Post*, Chapter, *Of Stealing from the Person*.

(e) As to the cases upon this section, and assaults with intent to rob, see *ante*, p. 674, *et seq.*

(f) See the 7 & 8 Geo. 4, c. 29, s. 5, *ante*, p. 850, note (d).

(g) *Peat's case*, 1 Leach, 228. *Lapier's case*, 1 Leach, 320. It was formerly excluded

first, as to the felonious taking; secondly, as to the taking against the will of the party; and, thirdly, as to the violence or putting in fear.

*869 *1. As to the felonious taking.

Of the felonious taking. Amount of the value of the property immaterial.

The taking may be of money or goods "of any value." The value, therefore, of the property taken is quite immaterial; a penny as well as a pound, forcibly extorted, makes a robbery; the gist of the offence being the force and terror.^(h) Thus the taking of a slip of paper, which contained a memorandum of a sum of money due to the prosecutor, has been held sufficient.⁽ⁱ⁾ But something must be taken, and it must be of some value;^(j) otherwise the offence will be only that of an assault with intent to rob;^(k) but it need not be of the value of any known coin, even of a farthing.^{(l)†}

But it must be of some value, and taken from the possession of the owner.

The property taken must not only be of some value, but it must be taken from the peaceable possession of the owner. In a case where the prisoner had obtained a note of hand from a gentleman by threatening with a knife held to his throat to take away his life; and it appeared that the prisoner had furnished the paper and ink with which it was written, and that the paper was never out of her possession; it was holden not to be robbery. The judges were of opinion that the note was of no value; that as the legislature at the time of passing the 2 Geo. 2, c. 5, s. 3, whereby the stealing a chose in action was made felony, could not possibly have a case like this in contemplation, it was not within that act of parliament; that the note did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written, as it appeared that both the paper and ink were the property of the prisoner, and that the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him; but that if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery.^(m)

A robbery cannot be committed unless the party has the property in his peaceable possession to do with it what he likes.

A robbery cannot be committed unless the party has the property in his peaceable possession to do with it what he chooses. The prisoners were indicted under the 7 & 8 Geo. 4, c. 29, s. 6, (now repealed) for feloniously demanding of Mr. Gee, with menaces, a deed, and a valuable security, and it appeared that they had decoyed the prosecutor into a house, and then forced him into a retired place, so constructed that no cries could be heard, where they pushed him down on a bench, and a chain was passed across his breast and a rope around his neck, and his legs were fastened with a cord to some staples in the ground; whilst

from clergy by the enactments of several statutes, viz. 23 Hen. 8, c. 1, s. 3. 1 Edw. 6, c. 12, s. 10. 3 W. & M. c. 9, s. 1, and as to the accessories before the fact, 4 & 5 Ph. and M. c. 4, s. 1.

(h) 3 Inst. 69. 1 Hale, 532. 1 Hawk. P. C. c. 34, s. 16. 4 Bla. Com. 243. 2 East, P. C. c. 16, s. 125, p. 707.

(i) *Rex v. Bingley*,^a 5 C. & P. 702, Gurney, B.

(j) *Philpoe's case*, 2 Leach, 672, 680.

(k) *Ante*, p. 867.

(l) *Reg. v. Morris*,^b 9 C. & P. 349, Parke, B., *infra*, tit. *Larceny*. See also *Rex v. Clark, Russ. & Ry.* 181, *infra*, 2d Vol. tit. *Larceny*.

(m) *Philpoe's case*, 2 Leach, 273. The form of the note was—"two months after date I promise to pay to Miss Maria Theresa Philpoe, or order, the sum of two thousand pounds sterling, for value received.—John Courtoy, Oxenden-street." See *Rex v. Hart*,^c 6 C. & P. 106, *post*, tit. *Larceny*.

† [It is essential to constitute robbery that the money or other valuable was taken from the person and against his will. *Kit v. The State*, 11 Humphreys, 167.]

^a Eng. Com. Law Reps. xxiv. 474.

^b Ib. xxxviii. 148.

^c Ib. xxv. 303.

he was so fastened, two sheets of papers, pens, and ink were brought to him, and he was compelled to write on the paper so brought to him a check for a sum of money, and a letter requesting certain deeds to be delivered to the bearer; these documents remained with him *for half an hour while he wrote some letters, and it was contended that as they were in his possession during that time, the case was distinguishable from the preceding one. Patteson, J., "Mr. Gee was chained and padlocked, a rope was put around his neck, and he could not move hand or foot except just to write; they bring him pens, ink and paper, and he writes the orders; he had the papers it was true in his hands; but chained as he was is it possible to conceive that he had such a peaceable possession at them as to be at liberty to do what he pleased with them? For that is the meaning of peaceable possession. I cannot perceive the difference between the case of Courtoy and the present, except that the latter is the stronger of the two. The ground of the decision in that case must govern the decision of the court in this case, a robbery cannot be committed unless the person has the property in his peaceable possession to do with it as he chooses. If Mr. Gee had brought the documents ready written the case would have been different, but he does not write them until he is chained."(n) *870

By the "taking" necessary in this offence, is implied that the robber must be in *possession* of the thing taken. So that if a man, having a purse fastened to his girdle, be assaulted by a thief, and the thief, in order the more easily to take the purse, cut the girdle, and the purse thereby fall to the ground, this is no taking; for the thief never had the purse in his possession.(o) And, upon the same principle, in a case where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay; the judges were of opinion that the offence of robbery was not completed.(p) But if in the former case the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again; for the purse would have been once in his possession.(q) And it is not necessary that the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying, "If you value your purse, you will please to take it back, and give me the contents of it;" but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that there was *sufficient taking* to complete the offence, although the prisoner's possession committed only for an instant.(r) And in a case where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing her ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the judges, upon a case being submitted for their consideration, were all of opinion, that there was a *sufficient taking* from the *person to constitute robbery. They thought that it *871

(n) *Rex v. Edwards*, 6 C. & P. 521, Patteson, J., and Bosanquet, J.

(o) 3 Inst. 69. 1 Hale, 533.

(p) *Farrell's case*, O. B. 1787, 1 Leach, 322, note (b).

(q) 3 Inst. 69. 1 Hale, 533.

(r) *Peat's case*, 1 Leach, 228.

* Eng. Com. Law Reps. xxv. 522.

was sufficient, as the ear-ring was in the possession of the prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant.(s) It should, however, be observed, with respect to cases of this description, that though it may have been formerly holden that a sudden taking or snatching of any property from a person unawares was sufficient, the contrary doctrine appears to be now established: and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person, as in the case last cited, or unless there be some previous struggle for the possession of the property, or some force used to obtain it.(t)

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

There may be a taking in law.

Not only a taking in fact, but a taking in law, is sufficient to constitute a robbery.(w) It has, therefore, been holden, that if thieves attack a man to rob him, and finding little or nothing about him, force him by menace of death to swear to fetch them money, which he does accordingly and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law.(x) And if upon A. assaulting B., and bidding him to deliver his purse, B. refuse to do so, and then A. pray B. to give or lend him money, and B. does so accordingly, under the influence of fear, the taking will be complete.(y) For where the thief receives money, &c., by the delivery of the party, either while the party is under the terror of an actual assault; or afterwards while the fear of menaces made use of by the thief continues upon him, such thief may in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket.(z)

But there must be the *animus furandi*, or felonious intent.

The taking must in all cases be accompanied with a felonious intent, or *animus furandi*; but if a man *animo furandi* say—"Give me your money,"—"Lend me your money,"—"Make me a present of your money," or words of like import, they are equivalent to the most positive order or demand; and, if any thing be obtained in consequence, such a taking will be within the definition of robbery.(a) There is, however, a case of considerable nicety, which should be here noticed, where though the original assault was clearly with a felonious intent, *872 the taking of the goods was holden to be no more than a trespass. A assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money, but finding none, he pulled off the bridle of B.'s horse, and threw that and some bread which B. had in pannels

(s) *Lapier's case*, 1 Leach, 320.

(t) *Macaulay's case*, O. B. 1783, 1 Leach, 287. *Baker's case*, O. B. 1783, id. 290. *Horner's case*, O. B. 1790. 2 East, P. C. c. 16, s. 121, p. 703, *post*, p. 875. *Rex v. Mason*, Mich. T. 1820, *post*, p. 876.

(u) 1 Hawk. P. C. c. 34, s. 2.

(v) 1 Hale, 533.

(w) 6 Inst. 68. 1 Hale, 532.

(x) *Id. ibid.* 2 East, P. C. c. 16, s. 129, p. 714.

(y) 1 Hale, 533.

(z) 2 East, P. C. c. 16, s. 128, p. 711, s. 129, p. 714. And see further as to cases of this kind, *post*, p. 879, *et seq.*, where "the putting in fear" is spoken of.

(a) By Willes, J., delivering the opinion of the judges in *Donnally's case*, 1 Leach, 196. And see further upon the subject of the felonious intent, *post*, p. 874, *et seq.*, in the cases relating to "violence or fear;" and *post*, vol. 2, in the Chapter on *Larceny*.

about the highway, but did not take any thing from B. ; and it was resolved, upon a conference with all the judges, that this was not robbery, because nothing was taken from B. (aa) But it is remarked upon this case, that the better reason for the decision seems to be, that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation of the goods from the person. (b)

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

If a party take property from another under a *bonâ fide* belief that it is his own, it is not robbery.

Some questions as to the felonious intent having arisen where the property has been taken under colour of a purchase. Thus, though it is clear that if a person by force, or threats, compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value, it is robbery; (d) yet it has been doubted, whether the forcing a higler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (e) So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. (f) It is suggested, *however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them to show that the intention of

Where the property has been taken under colour of a purchase.

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(aa) Anon. O B. 1689, 2 East, P. C., c. 16, s. 98, p. 662.

(b) 2 East, P. C. c. 16, s. 98, p. 662.

(c) Rex v. Hall, Gloucester Lent Ass. 1828, MSS., C. S. G., S. C. 3 C. & P. 400. See similar cases, 2d Vol. tit. *Larceny*

(d) Rex v. Simons, Cornwall Lent Ass. 1773. 2 East, P. C. c. 16, s. 128, p. 712.

(e) 1 Hawk. P. C. c. 34, s. 14. 4 Bla. Com. 244.

(f) The Fisherman's case, York, 26 Eliz., 2 East, P. C. c. 16, s. 98, p. 661, 662.

the party was not fraudulent, and so not felonious.(g) For though it does not necessarily follow, as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is, therefore not felonious; yet it is submitted, that such a circumstance would be pregnant evidence in the negative.(h) But cases where the owner is induced to part with his property at less than its value, by fear of the violence of any individual, or of the outrages of a mob, come under a different consideration, and constitute a sufficient taking with a felonious intent.(i)

The taking sufficient, if it be in the presence of the owner.

The taking need not be immediately from the person of the owner; it will be sufficient if it be in his presence.(j) Therefore, if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A. will be sufficient.(k) So it has been said, that if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbery of the master.(l) So, if the thief, having first assaulted A., takes away his horse standing by him; or, having put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A., for he takes it openly and before his face while under his immediate and personal care and protection.(n) But it is clear, that the property must be taken in the presence of the owner. And where it appeared upon a special verdict that some thieves gently struck the prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves "then and there *immediately*" took it up; a great majority of the judges held, that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding.(o) In a case where robbers, by putting in fear, made a wagoner drive his wagon from the highway in the day-time, but did not rob the goods till night, much doubt appears to have been entertained; some having holden it to be a robbery from the first force, but others having considered that the wagoner's possession continued till the goods were actually taken, unless the wagon were driven away by the thieves themselves.(p)

*874 *Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road, and ran to his assistance,

(g) 2 East, P. C. c. 16, s. 98, p. 662.

(h) Id. *ibid.*

(i) *Post*, p. 881, *et seq.*

(j) 1 Hale, 553. 1 Hawk. P. C. c. 34, s. 6. *Rex v. Francis*, 2 Str. 1015.

(k) 3 Inst. 68. 1 Hale, 533.

(l) *Per* Roll, C. J. *Rex v. Wright*, Style, 156.

(n) 1 Hale, 533, and 1 Hawk. P. C. c. 34, s. 6. 4 Bla. Com. 243.

(o) *Rex v. Francis*, 2 Str. 1015. *Rex v. Grey and others*, 2 East, P. C. c. 16, s. 126, p. 708, S. P. In *Rex v. Francis*, the judges clearly thought it a case of grand larceny, and therefore would not discharge the prisoners, but directed a new indictment to be preferred, considering themselves confined to the doubt of the jury, whether there was a sufficient taking, and that they could not give judgment for a larceny.

(p) 2 East, P. C. c. 16, s. 126, p. 707, 708.

and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence; the bundle in this case was not in the prosecutor's possession. If these persons intended to take the bundle why did they assault the prosecutor, and not the person who had it? (q)

It may be observed, with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or, rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery. Thus where a thief clandestinely stole a purse, and, on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away, it was holden to be simple larceny only, and not robbery, as the words of menacc were used after the taking of the purse. (r) But, if the purse had been obtained by means of the menace, the offence would have amounted to robbery. (s)

II.—The second subject of consideration in following the definition of this offence, is as to the taking “against the will” of the party.

In a case where the party upon whom the robbery was alleged to have been committed, consented to the fact for a base purpose, it was holden to be no robbery. One Salmon, and several others, in order to obtain for themselves the rewards given by act of parliament for apprehending robbers on the highway, concerted a plan by which a robbery might be effected upon Salmon by a person named Blee, who was one of the confederates, and two strangers procured by Blee. It was expressly found that Salmon was a party to the agreement; that he consented to part with his money and goods under colour and pretence of a robbery; and that for such purpose and in pursuance of this consent and agreement, he went to a highway at Deptford, and waited there till the colourable robbery was effected. The judges were of opinion that, in consideration of law, no robbery was committed upon Salmon; and the reason given was, that his property was not taken against his will. (t)

III.—We may now proceed to inquire, as to “the violence of putting in fear.”

The words of the definition, as given at the beginning of the *chapter, are in the alternative, “violence or putting in fear;” and it appears that if the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery. (u) The principle, indeed, of robbery is violence; but it has been often holden,

(q) *Rex v. Fallows*, 5 C. & P. 508, Vaughan, B. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as it was the violence of the prisoners that made him put it down, and it was taken in his presence. See *Rex v. Wright*, *supra*, note (l). C. S. G.

(r) Harman's case, 1 Hale, 434. 1 Hawk. P. C. c. 34, s. 7. See *ante*, p. 767, note (a).

(s) By Lord Mansfield, in Donnally's case, 2 East, P. C. c. 16, s. 130, p. 726.

(t) *Rex v. M'Daniel* and others, Post. 121, 128. The case of Norden, *post*, p. 880, was cited on the part of the crown; but Mr. Justice Foster remarks upon it as distinguishable on many grounds. Post. 129.

(u) 2 East, P. C. c. 16, s. 127, p. 708, and the authorities there cited. Post. 128.

that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence.(v)

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

Of the degree of violence.

With respect to the degree of actual "violence," where the taking is effected by that means, it appears to be well settled that a sudden taking, or snatching from a person unawares, is not sufficient. Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, when the prisoner ran past him, and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery.(y) And the same was holden in a case where it appeared that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it.(z) The same doctrine has been held in three other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street;(a) in another an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street;(b) and in a third, a watch was jerked, with considerable force out of a watch-pocket.(c) But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual "violence." Thus in the case which has been already *mentioned, where an ear-ring was snatched from a lady's ear, and the ear torn through, and blood drawn by the force used, it was holden to be robbery.(d) So, where a heavy diamond pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed and strongly craped, was snatched out, and part of the hair torn away at the same time, it was holden that this was a sufficient degree of violence

If there be any injury to the person, or a struggle, that is sufficient.

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(v) Donnally's case, 1 Leach, 196, 197. 2 East, P. C. c. 16, s. 130, p. 727. Reane's case. 2 Leach, 619. 2 East, P. C. c. 16, s. 132, p. 735.

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

(x) Fost. 128. 4 Bla. Com. 244. 2 East, P. C. c. 16, s. 128, p. 711.

(y) Macauley's case, O. B. 1783, 1 Leach, 287. Baker's case, id. 290. S. P. {State v. Trexler, 2 Caroline Law Repository, 90.}

(z) Robins's case, Bridgewater Sum. Ass. 1787, cor. Buller, J., 1 Leach, 290, note (a).

(a) Steward's case, O. B. 1690, 2 East, P. C. c. 16, s. 121, p. 702.

(b) Horner's case, O. B. 1790, 2 East, P. C. c. 16, s. 121, p. 703.

(c) Rex v. Gnosil,* 1 C. & P. 304. Garrow, B., saying, "The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property."

(d) Lapiere's case, O. B. 1784, 1 Leach, 300, ante, p. 871.

* Eng. Com. Law Repts. xi. 400.

to constitute a robbery. (e) And in a case where it appeared that the prisoner snatched at a sword while it was hanging at a gentleman's side, and that the gentleman perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword, and took it away; the court held that it was a robbery. (f) In a case where the prosecutor's watch was fastened to a steel chain, which went round his neck, the seal and chain hanging from his fob, and the prisoner laid hold of the seal and chain, and pulled the watch from the fob; but the steel chain still secured it; upon which the prisoner, by two jerks, broke the steel chain, and made off with the watch; upon a case reserved, the judges were unanimous that this was a robbery, as the prisoner did not get the watch at once, but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (g) So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. (h) Where a prisoner ran up against a person, for the purpose of diverting his attention while he picked his pocket, the judges held that the force was sufficient to make it a robbery, it having been used with that intent. (i)

Where violence is made use of, to obtain the property with a felonious intent, as stated in the definition of this offence, it seems that it will not the less amount to robbery, on account of the thief having recourse to some colourable or specious pretence, in order the better to effect his purpose.

Violence accompanied with some colourable and specious pretence.

One Merriman, who was taking cheeses along the highway in a cart, was stopped by a person named Hall, who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Merriman and Hall agreed to go before a magistrate to determine the matter; and, during Merriman's absence, other persons riotously assembled on account of the dearness of provisions, and in confederacy with Hall, for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the statutes of hue and cry), that this was no robbery, because there was no force; but Hewitt, J., overruled the objection, and left the case to the jury, who were of opinion that Hall's conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence, for the purpose of defrauding *Merriman, and found that the offence was robbery; which was afterwards confirmed by the Court of King's Bench, on a motion for a new trial. (j) It is well observed upon this case, (k) that the opinion that it amounted to a robbery must have been grounded upon the consideration that the first seizure of the cart and goods by Hall, being by violence, and while the owner was present, constituted the offence of robbery.

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(e) Moore's case, O. B. 1784, 1 Leach, 335.

(f) Davies's cases, C. B. 11 Ann. 2 East, P. C. c. 16, s. 127, p. 709. 1 Leach, 290, note (a).

(g) Rex v. Mason, Mich. T. 1820, MSS. Bayley, J., and Russ. & Ry. 419.

(h) Ante, p. 871.

(i) Anonymous, mentioned by Holroyd, J. 1 Lewin, 300.

(j) Merriman v. The Hundred of Chippenham, cor. Hewitt, J., and afterwards cor. B. R., on a motion for a new trial, Mich. 8 Geo. 3. 2 East, P. C. c. 16, s. 127, p. 709.

(k) 2 East, P. C. c. 16, s. 127, p. 709, note (a).

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In another case, also, the offence was holden to be robbery, though the violence made use of was under the colour and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of having committed an assault upon a woman who lodged in her house. The magistrate at the office having examined the complaint, ordered her to find bail; but at the same time advised the parties to make the matter up, and become good friends. The magistrate then left the office, *(l)* and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, *(m)* took her to an adjacent public house, where her husband was waiting in expectation that she would be discharged. When her husband found that the matter was not settled, he requested that the prisoner would wait a short time, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up for some time in a stinking place, and then brought her out and threatened to carry her immediately to prison. She was terrified, and implored him to wait till her husband returned; and producing a shilling from her pocket, offered to give it to him, or even to give him half-a-crown, if he would comply with her request; but he refused, and immediately handcuffed her to a man whom he had in custody on a charge of assault, and who, as the prisoner alleged, had before rescued himself. The prisoner then kicked her, thus handcuffed before him; and shoved her and her companion into a coach, which he ordered to drive to the New Prison. He then came into the coach; and, almost immediately upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her the shilling, which she continued to hold in her hand, saying at the same time, "This will buy us a glass a-piece." He then asked her if she had any more money in her pocket, said that he was sorry for her children, and that if she had as much money as would pay for the coach, she should not go to prison. She exclaimed that she had no more money; but the man who was handcuffed to her rattled the handcuff against the side of her pocket, and the prisoner put his hand into her pocket, and took out three shillings. He then continued to *promise to carry her back, but did not give any directions to the coachman to change his course. In about ten minutes after he had so taken the three shillings, he stopped the coach at a public house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank, upon his insisting she should do so; *(n)* he gave the shilling which he first took from her to pay for the gin, and took sixpence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison

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(l) In the report of this case in East, it is said that the prisoner alleged that the magistrate made out a warrant of commitment for the prosecutrix, but that it was not produced.

(m) See note *(l)*

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

He paid a shilling, or one shilling and sixpence for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said, that in order to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colourable mean of putting his felonious intention into execution. And upon the case being referred to the twelve judges, they were unanimously of opinion, that as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly a robbery. (o)

Though the violence he used for a different purpose than that of obtaining the property of the person assaulted; yet if property be obtained by it, the offence will, under some circumstances at least, amount to robbery; as where money was offered to a party endeavoring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted; and this was holden to be a robbery by a considerable majority of the judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself *from his felonious conduct, though his original intent were to commit a rape. (p)

Though the violence be not used for the purpose of obtaining the property of the party assaulted; yet if property be obtained by it, the offence may be robbery.

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With respect to "the putting in fear," or constructive violence, when that is the means by which the taking is effected, it may be considered, with reference, first, to those cases in which the fear excited has been of injury to the *person*; secondly, to those in which the fear excited has been of injury to the *property*; and, thirdly, to those in which the fear excited has been of injury to the *character*. It should, however, be remembered, as generally applicable to cases of this description, that where property is extorted by fear, it will constitute a robbery by putting in fear, though it may be taken in the shape of a colourable gift. (q) So that if a man, whether with or without a drawn sword, or other offensive weapon, but with such circumstances of terror as indicate a felonious intention, ask alms from a person who gives to them through mis-

Of the putting in fear.

(o) Gascoigne's case, O. B. 1783, *cor.* Nares, J. 1 Leach, 280, considered of by the judges in Mich. T. 1793. 2 East, P. C. c. 16, s. 127, p. 809. And see the Sess. Pap. 295.

(p) Blackham's case, 1787. 2 East, P. C. c. 16, s. 128, p. 711.

(q) *Ante*, p. 871, *et seq.*

trust and apprehension of violence, it will be robbery; and so it will be if the thief, after having first made an assault, cease to use force, and ask money for alms, which is given him by the party attacked, while there remained a reasonable ground for the continuance of the fear excited by the assault.^(r) And if thieves come to rob A., and, finding little about him, enforce him, by menace of death, to swear to bring them a great sum, which he does accordingly, this is robbery, if the fear of that menace continued upon him at the time he delivered the money.^(s)

Of the fear of injury to the person.

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

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Such fear may be presumed, though the party go to meet the robber, and for the purpose of apprehending him.

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

And this fear may exist though the property be taken under colour and on pretence of a purchase.

The fear necessary to constitute the crime of robbery may exist, though the property be taken under colour, and on the pretence of a purchase. For if a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer less than the value, it is robbery; as where the prisoner took a quantity of wheat worth eight shillings, and forced the owner to take thirteen pence half-penny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the judges upon a conference.^(x)

^(r) 2 East, P. C. c. 16, s. 128, p. 711. 4 Bla. Com. 244. *Ante*, p. 871, *et seq.*

^(s) *Ante*, p. 871, Fitzh. Coron. pl. 464. 3 Inst. 68. 1 Hale, 532. 2 East, P. C. c. 16, s. 129, p. 714, in which last book the reason given by Hawkins (1 Hawk. P. C. c. 34, s. 1) for this doctrine, and which would seem to lead to the conclusion that it would be robbery in such case, though the party delivered the money solely under the mistaken conscientious compulsion of his oath, is denied. And from note ^(a) in East, P. C. *ibid.*, it seems that the delivery of the money was an act more immediately consequent upon the menace and oath than would appear from the statement of the case as given in the text from 3 Inst., and 1 Hale.

^(t) Fost. 128. 4 Bla. Com. 243, 244. Donnally's case, 1 Leach, 197.

^(u) Hughes's case, 1 Lew. 301, Bayley, J.

^(v) Fost. 128. 2 East, P. C. c. 16, s. 128, p. 711.

^(w) Fost. 129.

^(x) Simon's case, Cornwall Lent Ass. 1773. 2 East, P. C. c. 16, s. 128, p. 712.

But whether the forcing a chapman to sell his wares, and giving him the full value for them, will amount to robbery, has been considered as doubtful.^(y)

It seems that the fear of violence to the person of a child of the party from whom property is demanded, will fall within the same consideration as if the fear were of violence to the person of the party himself. Thus where a case was put in argument of a man walking with his child, and delivering his money to another person, upon a threat that, unless he did so, the other would destroy his child, Hotham, B., said, that he had no doubt that it would be a robbery.^(z) And in a subsequent case, Eyre, C. J., said, that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.^(a)

But obtaining money from a wife, under a threat of accusing her husband of an unnatural crime, is not robbery. Upon an indictment for robbing the wife of P. Abraham, it appeared that the money was obtained from the wife by a threat to accuse her husband of an unnatural offence, and the money so obtained was the property of her husband. Littledale, J., said "the case was new and perplexing; he thought it was rather a misdemeanor. To make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused, and the apprehension of the wife was of a different character. The 7 & 8 Geo. 4, c. 7, is in terms confined to threats made to the party himself. The principle is, that the person threatened is thrown off his guard and has not firmness to resist the extortion; but he could not apply that *principle to the wife of the party threatened. Even as a misdemeanor, the case was new, though he thought that the only way to treat the offence. He therefore directed an acquittal."^(b)

The cases in which the offence of robbery has been committed by means of a fear of injury to the *property* of the party are principally

(y) 1 Hawk. P. C. c. 34, s. 14. 4 Bla. Com. 244, *ante*, p. 872.

(z) Donnally's case, 1779. 2 East, P. C. c. 16, s. 130, p. 718.

(a) Reane's case, 1794. 2 East, P. C. c. 16, s. 132, p. 735, *post*, p. 890.

(b) *Rex v. Edward*, 1 M. & Rob. 257. S. C. 5 C. & P. 518.* The prisoner was afterwards tried for the misdemeanor, but acquitted, the prosecutor not appearing. See *Rex v. Knewland*, 2 Leach, 721, *post*, p. 884, which seems to support the view of the learned judge that if this was not robbery, it was only a misdemeanor. But it seems to deserve consideration whether as "the law considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury;" [*per Ashhurst, J.*, delivering the judgment in *Rex v. Knewland*,] it might not well be contended that the fear of such a charge being made against a husband would operate as strongly on the mind of the wife as any threat of personal violence, or even of death to him could possibly do; and especially as "the bare idea of being *thought* addicted to so odious and detestable a crime is of itself sufficient to deprive the injured person of all the comforts and advantages of society; a punishment more terrible, both in apprehension and reality, than even death itself," [*per Ashhurst, J.*, *ibid.*,] and therefore, the threat of making such a charge must operate in the strongest possible manner on the mind of the wife, indeed much more forcibly than any threat of injury to any property could possibly do. It should be observed, that in *Rex v. Knewland* it was contended on the trial that if the fear was not sufficient to constitute the crime of robbery, the prisoners might be convicted of larceny, if they obtained the money fraudulently, with a felonious design to convert it to their own use; but this point was neither noticed by the court on the trial, nor by the twelve judges upon the case reserved; indeed the only question submitted to them seems to have been whether the circumstances were sufficient to constitute the crime of robbery. C. S. G.

* Eng. Com. Law Reps. xxiv. 435.

those in which the terror excited was of the probable outrages of a mob.

Simon's case. Threat to tear the mow of corn, and level the house of the prosecutor.

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

Taplin's case. Money extorted by the prisoner at the head of a mob without any particular threat being expressed.

During the riots in London, in the year 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, "God bless your honour, remember the poor mob." The prosecutor told him to go along; on which he said, "Then I will go and fetch my captain," and went away; but soon afterwards the mob, to the number of a hundred, armed with sticks, and such other things as they had been able to procure, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the by-standers said, "You must give them money," and the boy said, "Now, I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The *prosecutor then said to the prisoner, "How much?" to which the prisoner answered, "Half a crown, sir;" upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half a crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery.(d)

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Evidence of other demands of money made by the same mob at other places on the same day is admissible.

If a mob go to a person's house, and civilly ask and advise him to give them something, if this be not done *bonâ fide*, but as a mere mode of robbing him, the offence is robbery; and evidence of demands of money, made by the same mob on the same day, at other houses, is admissible, to show that this was not done *bonâ fide*. On an indictment for robbery, it appeared that the prisoners went with a mob to the prosecutor's house, and that one of the mob very civilly, and, as the prosecutor then thought, with a good intention, advised him to give them something to get rid of them, and to prevent mischief, and that in consequence of this, he gave them the money stated in the indictment. To show that this was not *bonâ fide* advice, but in reality a mere mode of robbing the prosecutor, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different times of the same day, when some of the prisoners were present; it was objected that the fact, that money had been demanded at other places would be no proof of any demand made on the prosecutor; and that this was, in effect, trying the prisoners upon other charges which they could not be prepared to meet. But it was held, that what was done before and after the particular

(c) Simon's case, 1773. 2 East, P. C. c. 16, s. 131, p. 731. See another case against the same prisoner, where the threat was of injury to the person, *ante*, p. 880.

(d) Taplin's case, O. B. 1780. 2 East, P. C. c. 16, s. 128, p. 712.

transaction at the prosecutor's house, but in the course of the same day, and when the prisoners were present, might be given in evidence. (e)

In another case, which occurred also upon the trial of some of the rioters in the year 1780, the prosecutor swore that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently;" upon which he gave him a shilling. It was also sworn by another witness, that the prisoner also said, that if the prosecutor "would keep the blood within his mouth, he must give the shilling." This offence was also holden to be robbery. (f)

In a subsequent case, corn was taken from the prosecutor by the prisoner, and a mob who accompanied him, compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered, it should be taken away. The prosecutor had corn belonging to other persons in his possession when the prisoner came to him, together with a great mob marching in military order. One of the mob, said, that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings which was worth thirty-eight shillings. This was ruled to be robbery. (g)

*Some years subsequent to the cases which have been mentioned, and during the riots at Birmingham, a case occurred where money was obtained from the owner by a threat that if he did not give it, his house should be destroyed by a mob. The two prisoners were indicted for robbing one Grundy. The prisoners, together with a man who was unknown, went to the house of Mr. Grundy, near Birmingham; when, upon Mr. Grundy coming out, they pulled off their hats, and shouted, "Church and King;" upon which Mr. Grundy did the same, and advanced towards the prisoner in much alarm, when the stranger accosted him, and said, "I am come out of friendship to you, Mr. Grundy, to let you know your house is marked to come down to-morrow morning at two o'clock. I am the head of the mob; they are two thousand strong in Birmingham; I must have something to make my men drink; I can bring two or three hundred in an hour's time, or keep them back." Mr. Grundy said, "As to something to drink, you shall have any thing you have a mind for." The stranger then said, "I must have money." Mr. Grundy offered him half-a-crown, which he rejected with contempt; upon which Mr. Grundy asked what he wanted? and he replied that he must have twenty guineas; and, upon Mr. Grundy telling him that he had not so much in the house, said, that if Mr. Grundy did not give him something handsome for his men to drink, his house should come down. Mr. Grundy said, that he might have nine or ten guineas; which he asked to see. While Mr. Grundy was taking his purse out of his pocket, one of the prisoners told him he might depend upon it that the stranger was the head of the mob, with other discourse of a similar kind as to his

(e) *Rex v. Winkworth*, 4 C. & P. 444, Parke and Alderson, Js., and Vaughan, B. Lord Tenterden, upon having this ruling communicated to him, concurred in it.

(f) *Brown's case*, O. B. 1780. 2 East, P. C. c. 16, s. 131, p. 731.

(g) *Spencer's case*, *cor. Buller, J.*, York Sum. Ass. 1783. 2 East, P. C. c. 16, s. 128, p. 712, 713. The prisoner was executed. As to cases where the owner has been compelled to part with his property under colour of a purchase, see *ante*, p. 872 and 880.

power; and particularly that he was the first man who had entered every house that had been destroyed. This expression so struck Mr. Grundy that he immediately took the money, which amounted to nine guineas and a half, out of his purse, and gave it to the stranger; who counted it, and demanded something to drink; when they all went into Mr. Grundy's house and had some liquor; after which, in going away, they assured Mr. Grundy that he should be protected. There was no evidence that the prisoners had any of the money at the time; but it appeared that a small share of it was given to them afterwards. Mr. Grundy, in giving his evidence, said, that he was greatly alarmed, but not for his person; that no injury was threatened to his person; but that, when he delivered his money, his apprehension was, that if he had refused to do so, the men would have gone to Birmingham, and have returned with other persons, and pulled down his house and plundered it, (before he could have removed his wife, who was in the house in great agitation,) as they had threatened, and as different houses in Birmingham had been before pulled down. Upon these facts it was objected, on behalf of the prisoners, that there was no evidence of robbery, as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house, by pulling it down. *884 The truth of the evidence was, *however, left to the jury; who found the prisoners guilty, saying, that they were satisfied that Mr. Grundy did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that, if he refused, his house would at some future time be pulled down, as the prisoners and strangers threatened, in the same manner as other houses in Birmingham had been before, and the facts of the case being afterwards submitted to the judges, for their opinion, whether the evidence amounted to robbery, a majority of them held that it did. (h)

Of the fear of injury to the character.

The cases of robbery in which the property has been obtained by means of a fear being excited of injury to *the character* of the party robbed appear to be all of one description. Indeed it has been said, that the terror which leads a party to apprehend an injury to his character has never been deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. † In the case in which this doctrine is laid down it appeared that the prisoners, assisted by other persons, got the prosecutrix into a house, under pretext of an auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow-street, and from thence to Newgate, and be imprisoned till she could raise the money; that, after these threats had been used, a pretended constable was introduced, who said to the prosecutrix, "Unless you give me a shilling you must go with me," upon which she was induced to give the pretended constable a shilling; and that the prosecutrix parted with the shilling, being in bodily fear of going to prison, as a means of

The fear of being sent to prison is not alone a sufficient ground of terror to constitute robbery.

(h) Astley's case (James and Ezekiel,) 2 East, P. C. c. 16, s. 131, p. 729.

† [Threats of a prosecution do not amount to that constructive violence which will change an offence from larceny to robbery, except in one instance, namely, a threat to prosecute for an unnatural crime. *Long v. The State*, 12 Georgia, 293.]

obtaining her liberty, and to avoid being carried to Bow-street and to Newgate, and not out of fear or apprehension of any other personal force or violence. The judges, after argument, and a minute discussion of the circumstances of the case, were of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow street, and from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an individual to part with property, so as to amount to robbery. And they said, it was a case of simple duress for which the party injured might have a civil remedy by action, which could not be, if the fact amounted to felony.(i)

But the fear of injury to character, which may be excited by accusing a person of sodomitical practices, had been holden to *come under a different consideration, long before the 7 & 8 Geo. 4, c. 29. As the imputation of being addicted to so odious and detestable a crime would be sufficient to deprive the injured person of all the comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality, the law considered the fear of losing character by such an imputation, as equal to the fear of sustaining personal injury, or even of losing life itself.(ii)

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By the 1 Vict. c. 87, s. 4, "Whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery committed either with mankind or with beast, or of any assault with intent to commit said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise or threat to any person whereby to move or induce such person to commit or permit the same abominable crime, with a view or intent in any of the cases aforesaid to extort or gain from such person, and shall by intimidating such person by such accusation or threat extort or gain from such person any property, shall be guilty of felony,(j) and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or be imprisoned for any term not exceeding three years." It is clear upon this enactment, that the offender must extort or gain the property from the party robbed by *intimidating* such party, and that the intimidation must be by an accusation or threat to accuse of an infamous crime. With respect to the nature and degree of the *intimidation* it should seem that if the accusation or threat produces a reasonable fear of loss of character, the *intimidation* will be sufficient, though the accusation or threat be not accompanied with any actual violence, and though it do not produce any fear of being taken into custody, or exposed to any punishment.

Punishment for obtaining property by threat of accusing of unnatural crimes.

The prisoner was indicted for a highway robbery, in the year 1776,

(i) *Rex v. Knewland and Wood*, O. B., 1796, 2 Leach, 721. 2 East, P. C. c. 16, s. 181, p. 732. It appears from the latter book that the case was considered by the judges in Hil. T. 1796, Ashhurst, J., Hotham, B., Perryn, B., Buller, J., being absent. But the opinion of the judges was afterwards delivered by Ashhurst, J., who did not state that he in any way dissented.

(ii) By Ashhurst, J., in the case of *Knewland and Wood*, 2 Leach, 731.

(j) Of "*Robbery*," in the 7 & 8 Geo. 4, c. 29.

Jones's case. Case of robbery where the prosecutor stated that at the time he parted with his money he understood the threatened charge to be an imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which he had been detained in the street by the prisoner, put him in fear for the safety of his person,

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and the following facts appeared upon the evidence. The prosecutor and the prisoner, not being at the time at all acquainted, pressed together with a great crowd, into the upper gallery of the play-house at Covent-garden, after which the prisoner took his seat by the side of the prosecutor. During the play the prisoner asked the prosecutor whether a journeyman who had spoken to him was of his company; to which the prosecutor replied in the negative; and no other conversation passed between them during the play. When the play was over the prisoner followed the prosecutor out of the house, and as they were crossing Bow street proposed to him to have something to drink, to which the prosecutor assented, and they went together to an adjoining public house. In a few minutes, and after they had drunk some porter, the prisoner turned towards the prosecutor, and asked him what he meant by the liberty he had taken with his person in the play-house. The prosecutor said he knew of no liberties being taken; when the prisoner replied, "Damn you, Sir, but you did; and there were several reputable merchants in the house who will take their oaths of it." The prosecutor much alarmed, *immediately rose from his seat, paid for the porter, and went out of the house, saying to the prisoner, that he did not know what he meant. The prisoner followed him into the street, where there was a considerable crowd, and halloed out; "Damn you, Sir, stop! for if you offer to run, I will raise a mob about you;" and then seizing him violently by the arm, exclaimed, "Damn you, Sir! this is not to be borne! you have offered an indignity to me, and nothing can satisfy it!" The prosecutor, terrified by these expressions, and the manner in which they were uttered, replied, "For God's sake, what do you want, what would you have me do?" to which the prisoner said, in a lower tone of voice, "A present—a present—you must make me a present." The prosecutor asked him, "A present of what?" upon which the prisoner said, "Come, come, what money have you? How much can you give me now?" The prosecutor said, he had but little money, but that the prisoner should have what he had about him: and accordingly gave him three guineas, and some silver. The prisoner said it was not enough, and demanded more. During the whole of this conversation the prisoner held the prosecutor fast by the arm, and thereby defeated several efforts which he made to get away; and at length, when he suffered the prosecutor to walk on, still accompanied him, keeping tight hold of his arm, down another street. At length the prisoner loosed his arm, but did not leave him; and as he refused to tell his name, or where he lived, followed him to the door of his lodgings. Early the next morning the prisoner called at his lodgings, and frightened the prosecutor out of a further sum of forty pounds. The prosecutor soon afterwards communicated what had happened to a friend, and by his advice determined to apprehend the prisoner when he could meet with him; but he was not apprehended till some months after, when he again called upon the prosecutor, and again threatened to impeach his character, unless he would give him more money.

In this case the prosecutor swore, that at the time he parted with his money he understood the threatened charge to be the imputation of sodomy: that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner had detained him in the street had put him in fear for the safety of his person. The case was left to the jury, with a direction to con-

sider whether the prosecutor parted with his money under the impression of fear; and the jury found the prisoner guilty, declaring that they thought that such an accusation would strike a man with as much or more terror than if he had a pistol at his head. Judgment being respited in order that the opinion of the judges might be taken, the point was afterwards considered by them; and they were of opinion that the conviction for a highway robbery was proper; that, in order to constitute a robbery, there was no occasion to use weapons, or real violence; and that taking money from a man in such a situation as rendered him not a free man (as if a person so robbed were in fear of a conspiracy against his life or character) was such a putting in fear as would make the taking of his money under that terror a robbery. (k) And a case which had been *previously decided upon the same point, was mentioned with approbation. (l)

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In the latter case, which was so mentioned with approbation by the judges, it appears that there was some actual violence used in the assault, and a laying of hands on the party; and in the former case, there was, as has been seen, a continual force and violence, and a threat to deliver the party up to the mob as a sodomite, besides the fact of laying hold of the arm; circumstances which were afterwards urged as giving a peculiar character to those cases, and as making them distinguishable from one in which no such circumstances should exist. (m) But the circumstances of actual violence appear to have been considered as not material in a case in which the judges, after great discussion, held the offence to amount to robbery.

On the 18th of January, 1779, the prosecutor, a young gentleman, was passing through Soho Square, between the hours of six and seven o'clock in the evening, when he met the prisoner, whom he had never seen before. The prisoner accosted him, and desired that he would give him a present. The prosecutor said, "For what?" The prisoner answered, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him a half a guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the 20th of January, about four o'clock in the evening, the prosecutor met the prisoner again in Oxford street, who made use of the same threats as before; telling the prosecutor that he knew what had passed in Soho Square, and that unless he would give him more money, he would take him before a magistrate and accuse him of the same attempt; adding, that it would go hard against him unless he could prove an *alibi*. The prosecutor then went to the shop of a grocer in Old Bond street, the prisoner following him, and staying on the outside of the door; and the prosecutor, being in the shop, took a guinea out of his pocket, gave it to the grocer, and desired he would give it to the man at the door, which the grocer did, and the prisoner then went away. The prosecutor stated that he was exceedingly alarmed at both the

Donnally's case. Obtaining money by saying, "You had better comply, or I will take you before a magistrate and accuse you of an attempt to commit an unnatural crime," holden to be robbery,

(k) Jones's *alias* Evans' case, 1776, 1 Leach, 139. 2 East, P. C. c. 16, s. 130, p. 714. Nine of the judges only were present at the consideration of the case, De Grey, C. J., and Ashurst, J., being absent, and there being one vacancy.

(l) Brown's case, O. B. 1763, *cor.* Eyre, B., when Recorder. 2 East, P. C. c. 16, s. 130, p. 715, where Harold's case *alias* Hutton's, O. B. 1778, is mentioned as one in which the prisoner was convicted for a similar robbery.

(m) See the judgments of Peryn, B., and Blackstone, J., in Donnally's case, 2 East, P. C. c. 16, s. 130, p. 717, 718, 721, and the judgment of the court, as delivered by Willes, J., in Donnally's case, 1 Leach, 193.

times, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life.

*888 The case was left to the jury, with directions to consider, first whether they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger; and secondly, if they should not think that the prosecutor apprehended that his life was in danger, then whether the money was not obtained by means of the prisoner's threats, and *against the will of the prosecutor; for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty, and said that they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. But, doubts being entertained respecting the conviction, the judgment was respited, and the question submitted to the opinion of the judges. Some difference of opinion prevailing amongst them, they directed the case to be argued; and after judgment, and very full consideration, they at length all agreed that it amounted to robbery.

The opinions of the judges were delivered *seriatim*, and contain some learned and interesting discussions relating to the nature of the fear by which a party may be induced to part with his property, in cases where no actual violence is employed to obtain it; ⁽ⁿ⁾ and Willes, J., afterwards delivered the result of their deliberations. He said, that the facts of the case showed that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt, that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, he stated, that it is not necessary to lay a putting in fear in the indictment; and that the circumstance of actual fear need not be proved upon the trial; for if the fact be laid to be done violently and against the will, the law *in odium spoliatoris* will presume fear. That there need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute a robbery. That no actual danger is necessary, as a man may commit a robbery without using any offensive weapon, as by using a tinder-box or candlestick instead of a pistol. And that when a villain comes and demands money, no one knows how far he will proceed. The learned judge then referred to the facts and circumstances of the case, as sufficient to bring it within these rules of law. He stated that the situation of the prosecutor was that of a young gentleman accosted at night, in the streets of London, by a person he never saw before, and whom he must have suspected to be a villain; and that this person *demanded* a present. Even that seemed sufficient to satisfy the legal idea of robbery. But the prisoner went further, and used the words, "You had better comply, or I will take you before a magistrate." This, then, was a threat of violence; for the prosecutor had every thing to fear in being dragged through the streets as a culprit charged with an unnatural crime. It was a threat which must necessarily and unavoidably produce intimidation, and occasion a rea-

(n) These opinions are given at length in the report of the case in 2 East, P. C. c. 16, s. 130, p. 716, to p. 726.

sonable fear, which might operate *in constantem virum*, as well as *in meticulousum virum*. He then observed, upon the argument urged by the counsel for the prisoner, that this was a fraudulent taking, and not a taking by violence; and said, that in many cases fraud would supply the place *of violence, as in burglary, where, though it was necessary to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodgings, or of having business.(o) But he said, that the judges did not determine the case entirely on this ground, but were of opinion that there was proof of a constructive violence, which they thought was sufficient; and that they were all of opinion that enough was proved in this case for the jury to find the prisoner guilty of robbery.(p)

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This doctrine appears to have been acted upon in subsequent cases,(q) in one of which the party delivered his money solely from fear of losing his character.

Daniel Hickman was indicted in 1783, for robbing one John Miller of two guineas. It appeared upon the evidence that the prosecutor had some employment in the palace of St. James's, and an apartment in which he was accustomed to sleep, and that the prisoner was occasionally a sentinel on guard at the palace. One night the prosecutor treated the prisoner with some bread and cheese and ale, in his room. About a fortnight afterwards, very late in the evening, the prosecutor was going up stairs to his apartment, when he heard somebody close behind him, and on turning round, saw that it was the prisoner, who said, "It is me." The prosecutor asked him, what brought him there at that time of night? upon which the prisoner answered "I am come for satisfaction; you know what passed the other night; you are a sodomite; and if you do not give me satisfaction, I will go and fetch a sergeant and a file of men, and take you before a justice; for I have been in the black hole ever since I was here last, and I do not value my life." The prosecutor then asked him, what money he must have, when the prisoner said, "I must have three or four guineas." The prosecutor gave him two guineas, which was all he had, and promised to give him another guinea the next morning: and the prisoner took the two guineas, saying, "Mind, I don't demand any thing of you." The next morning he came and received the other guinea; and, in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore, that he was very much alarmed when he gave the prisoner the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preserving his character from reproach, and not from the fear of personal violence.

The learned judge who tried the prisoner, in leaving the case to the jury, remarked, upon the point in which it might be supposed to differ from that of Donnally,(r) that in Donnally's case the prosecutor had sworn that he delivered his money under an apprehension of personal

(o) *Ante*, p. 792, *et seq.*

(p) Donnally's case, 1779, 1 Leach, 193. 2 East, P. C. c. 16, s. 130, p. 715 to 728.

(q) Staples's case, O. B. 1779. Hickman's case, O. B. 1783, considered of by the judges in 1783, 2 East, P. C. c. 16, s. 130, p. 728. Staples was executed, but Hickman was relieved on condition of transportation. It appears from Hickman's case, (1 Leach, 278,) that Donnally was not executed, and that some doubts had been entertained as to the opinion of the twelve judges in that case.

(r) *Ante*, p. 887.

*890 danger, as well as from the fear of losing his character; but that in the present case the prosecutor had sworn that he parted with his money for the sake of his character only, and not from any *apprehension of danger to his person. The jury found the prisoner guilty; and that the prosecutor parted with his money against his will, through a fear that his character might receive an injury from the prisoner's accusation; but as some doubt was entertained whether the case was within the principle upon which Donnally's proceeded, it was submitted to the consideration of the judges; and their opinion was afterwards delivered by Ashhurst, J., to the following effect: "Some doubts having been entertained as to the opinion of the twelve judges, in the case of Patrick Donnally, the learned judge, who tried the prisoner, thought it proper that the present case should, likewise, be referred to their consideration. They have accordingly conferred upon it; and they are of opinion that it does not *materially* differ from the case of Donnally; for that the true definition of robbery is the stealing, or taking from the person, or in the presence of another, property to any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference: for to most men the idea of losing their fame and reputation is equally, if not more, terrific, than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges were unanimously of opinion that upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest or all crimes is, as in the present case, a *sufficient force* to constitute the crime of robbery, by putting in fear."^(s)

This case seems to have gone to the full extent of the doctrine upon which it proceeded, and must be considered as in some measure qualified and restrained by subsequent decisions; in one of which it was holden that as the prosecutor had parted with his property for the purpose of convicting the prisoners, and after the apprehension of injury to his character, from the foul charge, had ceased, it was not robbery;^(t) and in the other it was holden, by a majority of the judges, that in order to constitute robbery, in a case of this kind, the property must be taken upon an immediate apprehension of present danger, upon the charge being made, and not after the parties have separated, and there has been time to deliberate and procure assistance, and after a friend has actually been consulted respecting the transaction.^(u)

Reane's case. The prosecutor having parted with his property for the purpose of convicting the prisoners, and after the apprehen-

The prisoner, James Reane, was indicted for a highway robbery, and taking nineteen guineas and a shilling; and David Watkins was charged, in the same indictment, as an accessory before the fact. The evidence of the prosecutor disclosed the following circumstances: on the 12th of May, 1794, the prosecutor met the prisoner, Reane, in the street. He was an entire stranger to the prosecutor; but he asked for money, saying that he was in great distress; and, upon the prosecutor's refusing to give him any, went away muttering expressions of anger and discontent. On the next day he again met the prosecutor in the street, and repeated

(s) Hickman's case, 1 Leach, 278. 2 East, P. C. c. 16, s. 130, p. 728. The prisoner was not executed; see *ante*, note (g).

(t) Reane's case, 1794. 2 Leach, 616. 2 East, P. C. c. 16, s. 132, p. 734.

(u) Rex v. Jackson and Shipley, 1 East, P. C. c. *Addenda*, xxi.

his request for money; *and, on being refused, said, "You shall be the worse for it." On Friday, the 23d of May, he again accosted the prosecutor in the street, and told him that he had taken indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day the prosecutor received a letter from him containing similar charges, and mentioning his place of residence; in consequence of which the prosecutor, having consulted with a friend, was induced to write to him, and appoint to meet him in the street to hear what he had to say. He accordingly met him there, when Reane said, that if the prosecutor did not give him money he could prove his having committed indecencies with him in the park, as a third person had seen it; upon which the other prisoner, Watkins, joined them, saying, "Yes, I saw you." The prosecutor exclaimed, that it was a horrid abominable falsity; upon which Watkins said, "You have great interest with the government; I shall be glad of a place as a clerk, either in the customs or excise." The prosecutor said, that he would apply for one, upon which Watkins went away. Reane then said, "You have given that man a certainty; I will have a certainty also;" upon which the prosecutor told them that he should. On the following morning Reane met the prosecutor by appointment, and told him that he had considered the matter, that he must have twenty pounds in cash, and a bond for fifty pounds a-year; upon which the prosecutor, in pursuance of a plan which he had previously concerted with his friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and the bond. The prosecutor, on his next interview with Reane, offered him the twenty pounds; but he refused to take the money without the bond, upon which the prosecutor fetched the bond, and gave it, together with nineteen guineas and a shilling, to Reane, who carried both the bond and the money away with him, saying that he would not give the prosecutor any further trouble. It was objected on behalf of the prisoners that this proof was defective; as in order to constitute robbery there must be a violence, or fear of danger, as to the person or character; and that such violence, or fear, must exist at the time when the property is parted with; but the case was left to the jury, who found the prisoners guilty; upon which judgment was respited, in order that the opinion of the twelve judges might be taken. At the first conference the judges (Buller, J., being absent) were inclined to think that this was not robbery, as there was neither violence nor fear at the time the prosecutor parted with his property. Eyre, C. J., observed, "That it would be going a step further than any of the cases to hold this to be robbery. That the principle of robbery was violence; and where the money was delivered through fear, that was constructive violence. That the principle he had acted upon, in such cases, was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. That this was different from Norden's case,^(v) where there was actual violence; *for here there was neither actual nor constructive violence. A man might

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sion of injury to character had ceased, it was holden not to be robbery.

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he said to take by violence who deprived the other of the power of resistance, by whatever means he did it. And he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges of a man holding another's child over a river, and threatening to throw it in unless he gave him money." The judges thought the matter deserving of further consideration; but they ultimately adhered to the opinion to which they had at first inclined; and held (Buller, J., being absent) that the conviction was wrong; as there was no violence, either actual or constructive. (*w*)

Jackson's Shipley, and Morris's case. Taking money from the prosecutor, upon a threat to accuse him of an unnatural offence, held not to be robbery, unless the money were taken immediately upon the threat made and not after the parties had separated, and there had been time for the prosecutor to deliberate and procure assistance; and more especially not, where the prosecutor consulted a friend, and such friend was present when the money was paid.

The prisoners, John Jackson, William Shipley, and John Morris were indicted in 1802, for robbing one W. S. in the dwelling-house of one S. Rowe. The evidence of the prosecutor was, that while he was threshing in his father's barn, at a place called Gidling, the prisoners Shipley and Morris came to him, and asked if W. S. lived there, to which he answered that he was the man. They then asked him if he remembered lying with two soldiers some time before; and upon his saying that he did, they said that one of the soldiers named Jackson, had said that he had *abused* him; and that Jackson had then come over to Carlton, (an adjoining place,) and would certainly follow the law, unless he would come and make it up with him; but, that if he went there, and made it up with Jackson, there would be no more of it. The prosecutor answered, that he knew nothing of the sort, but that he would go and hear what Jackson had to say. Shipley and Morris then went away; and the prosecutor followed them to a public house, kept by S. Rowe, at Carlton, where he also found the prisoner Jackson and another soldier. Some conversation took place in a private room, when Jackson preferred the same charge against the prosecutor of his having unnaturally abused him; which was positively denied by the prosecutor. At last Jackson told the prosecutor, that if he would pay him the expenses, there would be nothing more of it: and upon the prosecutor saying that he was willing to pay any thing in reason, Morris and Shipley made out a sort of account, by setting down in writing the following articles as mentioned by Jackson:—"Doctor, 1*l.* 11*s.* 6*d.*; for abusing me, 1*l.* 8*s.*; Morris, 10*s.*; Shipley, 5*s.*; the other soldier, 2*s.* 6*d.*; the total was 3*l.* 17*s.*; but they asked to have four guineas. The prosecutor said he had no such money; but upon their insisting upon having it, he said he would try to get it from his parents; and asked one of them to accompany him, which Shipley accordingly did. The prosecutor swore that he was much frightened and hurried, and did not know what best to do. He went, however, accompanied by Shipley, to his mother's; and, under the pretence of a soldier having been hurt, obtained from her four guineas. On their return to the public house, the prosecutor stopped at the house of one Shelton, and prevailed upon Shelton to go along with him. Shelton inquired what was the matter; and, upon being informed by Shipley, declared his disbelief of the charge, and said that if it were his own case he would not pay the money; upon which Shipley said, that if the prosecutor did not pay the money, it would cost him *50*l.* or 100*l.*, or perhaps his neck; that he was himself a constable, and would go for a warrant the next morning. This language frightened the prosecutor very much. When the prosecutor, Shipley, and Shelton got to the public house, Jackson, Morris, and the other soldier were left in the same room in which the prosecutor had left them. The pro-

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(*w*) Reane's case, 2 East, P. C. c. 16, s. 132, p. 734. 2 Leach, 616.

secutor sat down, and after a few minutes, laid the four guineas upon the table, and asked who would take it; upon which they all said "Jackson;" but Shipley took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expenses (meaning Shelton). The prosecutor asked for a receipt; but Morris said his friend would do as well: and Shelton made some inquiries as to the doctor to whom Jackson had applied, but received only evasive answers. The prosecutor swore to the falsehood of the charge, but said he was scared at it, and that was the reason why he parted with his money. On his cross-examination, it appeared that Jackson had first made the charge on the morning after the night they had lain together, but did not repeat it then; and that they continued eating and drinking for several hours after; that afterwards he had heard of Jackson's having repeated the charge in several companies, which had caused him much agitation. Shelton's evidence went to confirm the prosecutor in his account as to the part of the transaction which happened in his presence, and he also swore, that as they were going to the public house, he called the prosecutor back, and advised him not to pay the money. And he added, that the prosecutor was quite scared out of his wits.

These facts being left to the jury, they found the prisoners guilty, and sentence was passed upon them; but execution was respited, on a doubt conceived by Graham, B., by whom they were tried, whether the case did not go somewhat beyond those which had been previously decided; and principally, because the prosecutor had a friend present during the transaction. The case being submitted to the consideration of the judges, a majority of them were of opinion that it did not amount to robbery, though the money were taken in the presence of the prosecutor, and the fear of losing his character were upon him. Most of such majority thought that, in order to constitute robbery, the money must be parted with *from an immediate apprehension of present danger, upon the charge being made*, and not, as in this case, where the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance; and had applied to a friend, by whom he was advised not to pay it, and who was actually present at the very time when it was paid; which circumstance, they thought, had the appearance rather of a composition of a prosecution than of a robbery and seemed like a calculation whether it were better to lose his money than risk his character. And one of the judges, who agreed that it was not robbery, thought that there was not such a *continuing fear* as could operate *in constantem virum*, from the time when the money was demanded until it was paid; as, in the interval, the prosecutor had taken advice, and might have procured assistance. Those judges, who thought the case did amount to robbery, considered the question as concluded by the finding of the jury, that the prosecutor had parted with his money through *fear continuing at the time, which fell within the definition of robbery, which had been long adopted and acted upon: and they said that it would be difficult to draw any other line. They thought, also, that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance; the money being given to prevent the public disclosure of the charge.(x)

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(x) *Rex v Jackson, Shipley, and Morris, cor. Graham, B., Nottingham Spr. Ass. 1802, and E. T. 1802. 1 East, P. C. Addenda, xxi.*

Mr. East, who cites this case, from MSS. Jud.(y) suggested a question, whether the decision did not, in a great measure, overrule the case of Hickman, which is mentioned in the preceding pages.(z) But it should be observed, that the circumstances of these cases materially differ; and, particularly, that in Hickman's case, the two guineas were given *immediately* upon the charge being made, and that there was no previous application to any friend, or other person, from whom advice or assistance might have been procured.

Elmstead's case. Money was obtained by calling a man a sodomite and threatening him, but the money was parted with by the prosecutor, not so much from fear of losing his character as from fear of losing his place.

Hickman's case was again observed upon, in a case which occurred shortly afterwards. The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite and b——r. The prosecutor took him each time before a magistrate, who discharged the prisoner. On leaving the magistrate, the prisoner followed the prosecutor, again called him a sodomite and b——r, and asked him to make him a present, said he would never leave him till he had pulled the house down, but if he did make him a handsome present, he would trouble him no more. He asked four guineas, and the prosecutor being frightened for his reputation, and for fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted before Hotham, B., (Le Blanc, J., and Chambre, J., being present,) but upon a doubt in the privy council, the opinion of the judges was taken. Most of the judges thought that this was within Hickman's case, and nine of them(a) seemed to think Hickman's case binding, but the three others(b) thought it not law.(c) It seems that the prisoner was pardoned.(d)

Cannon's case. Money held to have been obtained by robbery, there having been some constraint upon the person of the prosecutor.

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But in a case where that which took place was considered as amounting to a constraint upon the person of the prosecutor, it was held that the money was obtained by robbery, though the prosecutor, not having the money about him, went to a friend to procure it, and though the prisoners had seen the prosecutor several hours before, had then made the charge, and had fixed a future time for receiving the money. And it was held that calling a coach for the purpose of carrying the prosecutor before a magistrate, and the prosecutor being induced to get into it, amounted to constraint upon *his* person, though he had no apprehension of further violence to his person, than that of being carried before a magistrate. The prisoners had been with the prosecutor at ten o'clock in the morning, and had threatened to prefer the charge of an attempt to commit an unnatural crime, if he did not give them 10*l.*; one of them pretended to be an assistant police officer, and to him the prosecutor had given 10*l.* the night before. The prosecutor fixed to meet them the next morning at nine o'clock, but they came again that night at nine, and said they could not wait, and that, as the prosecutor had not 10*l.* about him, they must take him to Bow-street. He then agreed to go, and they called a coach, and he got in. They then said if he would procure the money, they would not prefer the charge. He went

(y) Id. xxiv., in the margin.

(z) *Ante*, p. 889, *et seq.*

(a) Chambre, Le Blanc, Rooke, Thomson, Grose, Heath, Hotham, M'Donald, and Lord Alvanley.

(b) Graham, Lawrence, and Lord Ellenborough.

(c) Lord Ellenborough thought that the prosecutor's principal inducement in the present case to part with his money was the fear of the loss of his place, and his lordship said that he should feel no difficulty in recommending a pardon.

(d) *Rex v. Elmstead*, Mich. T. 1802, MSS. Bayley, J.

to a friend's, and got 10*l.* and gave it to them. He was there about five minutes. The prisoners went to the house with him, and waited for him in the street. Upon the trial, the prosecutor said he was under the apprehension of being carried by force into custody, but that he did not give the money under the impression of danger to his person. The prisoners were convicted, and, upon a case reserved, ten of the judges held that the calling the coach, and getting in with the prosecutor, was a forcible constraint upon him, and sufficient to constitute a robbery, though he had no apprehension of further injury to his person; but five(*e*) of the judges thought that some degree of force or violence was essential, and that the mere apprehension of danger to the character would not be sufficient to constitute the offence. Five(*f*) others of the judges seemed to think it would.*(g)*

In a later case the point came again under the consideration of the judges, and it appears now to be settled that fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment. The prisoner saw the prosecutor, a servant, whom he knew, at his master's door, and applied to him for 5*l.* saying money he would have, and that of the prosecutor. He then demanded 1*l.*, and said, that if he did not instantly get it he would go into the prosecutor's master and swear that the prosecutor wanted to take diabolical liberties with him. Then hearing some money jingle in the prosecutor's pocket he demanded it, and the prosecutor gave it him, being one shilling and some halfpence. He then inquired about the prosecutor's clothes, and swore that money he would have, or the value, before he left the house, upon which the prosecutor fetched him up a coat, and he then went away. The prosecutor stated in his evidence, that he gave the property for fear of his character and place, that his fear was, that the prisoner would go into his master, but that he had no fear of being taken into custody, or of punishment. The prisoner was convicted, and, upon a case reserved, all the judges, except Graham, B., thought that this was within Hickman's case, and that they were bound by that case, and could not properly depart from it. And Richards, C. B., Bayley, J., and Holroyd, J., expressed their opinions that Hickman's case was *right, because the charge conveyed such a degree of terror as might be expected to overpower a firm and constant mind. None of the other judges, except Graham, B., intimated a contrary opinion. And the conviction was affirmed.*(h)*

Egerton's case proceeds upon the principle of Hickman's case, and decides that fear of loss of character and service upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment.

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It is equally a robbery to extort money by threatening to accuse of an unnatural crime, whether the party so threatened has been guilty of such crime or not. Upon an indictment for robbery it appeared that the prisoner had obtained the money by threatening to accuse the prosecutor of an unnatural crime; the prisoner's defence was, that the prosecutor had made an attempt to commit such crime, and had voluntarily given him the money not to prosecute him for it. Littledale, J., ruled that it was equally a robbery to obtain a man's money by intimidating him with a threat of an accusation of an infamous crime, whether the prosecutor were really guilty of the crime or not; as if he was guilty,

It is immaterial whether the party be guilty of the crime or not.

(*e*) Lord Ellenborough, the Chief Baron, Lawrence, Chambre, and Graham.
 (*f*) Heath, Grose, Thomson, Le Blanc, and Wood.
 (*g*) Rex v. Cannon, Hil. T. 1809, MSS. Bayley, J., and Russ. & Ry. 146.
 (*h*) Rex v. Egerton, Hil. T. 1819, MSS. Bayley, J., and Russ. & Ry. 375.

the prisoner ought to have prosecuted him, and not have extorted money from him. (i)

Fuller's case. Parting with the money for the purpose of afterwards prosecuting the offender, does not amount to robbery.

But parting with property upon the charge of an unnatural crime, will not make the taking a robbery, if it is parted with, not from fear of loss of character, but for the purpose of prosecuting the offender. The prisoner applied to Fry to lend him 10s., and upon his refusal threatened to charge him with an unnatural crime, and got from him 17. 10s. Fry parted with it from an anxiety that his master's family might not be disturbed, and in expectation that he might secure the prisoner: and he immediately stated the circumstances to his master, and to a friend, and planned with them what he should do in case of the prisoner applying again. The prisoner did apply again; and Fry fixed to meet him; marked some money, engaged a constable, and having met the prisoner, gave him the money, and had him apprehended; he parted with his money in order that he might prosecute, because he knew himself innocent, and not from the threats. Upon a case reserved, the judges held that this taking did not constitute a robbery, and the prisoner was recommended to a limited pardon. (j)

Threatening to procure witnesses to support a charge already made.

Threatening to procure witnesses to support a charge already made is not a threatening to accuse. The prisoner was indicted for having feloniously charged and accused A. B. with having committed an infamous offence; the evidence was, that he had threatened to procure witnesses to support a charge already made; it was objected, that the statute applied only to the threatening to accuse *prospectively*, and that this was at most a threat to support such a charge by evidence. Bayley, J., "Threatening to procure witnesses to support a charge already made is not within the act of parliament which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, it is another to procure witnesses to support an accusation already made." (k)

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Meaning of the terms "accuse" and "threaten to accuse."

The word "accuse," in the 7 & 8 Geo. 4, c. 29, s. 7, has been held not to mean the preferring a charge before a tribunal competent *to entertain it, but means to charge the prosecutor before any third person, and "threatening to accuse," means threatening to accuse before any third person. Upon an indictment on the 7 & 8 Geo. 4, c. 29, s. 8, (now repealed) for accusing the prosecutor of an attempt to commit an infamous crime, the words proved to have been used did not amount to a threat to accuse before any tribunal, and it was objected that the word "accuse" imported a charge made before a magistrate or some judicial tribunal. Patteson, J., "By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; it was not necessary that the threat should be that of accusing by course of law; and the 7 & 8 Geo. 4, c. 29, s. 7, being declaratory of the former law, could hardly be considered as less extensive in its operation. Neither is it necessary to construe the term "accuse" in two different senses. The term "accuse" throughout the act means to charge the

(i) *Rex v. Gardner*, 1 C. & P. 479, Littledale, J.

(j) *Rex v. Fuller*, Hil. T. 1820, MSS. Bayley, J., and Russ. & Ry. 408.

(k) Gill's case, 1 Lew. 305, York, 1827. The indictment was upon the 54 Geo. 4, c. 4, s. 5, now repealed. Bayley, B., seemed also to think that a threat to prosecute would amount to a threat to accuse.

prosecutor before any third person; and "threatening to accuse" means "threatening to accuse before any third person."^(l)

On the trial of an indictment upon the 1 Vict. c. 87, s. 4, for extorting money by intimidating a person, by threatening to accuse him of an infamous crime, the jury need not confine themselves to expressions used before or at the time the money was given; but if those expressions are equivocal, may connect them with what was afterwards said by the prisoner when taken into custody. Upon an indictment on the 1 Vict. c. 87, s. 4, containing a count for threatening to accuse F. H. of an abominable crime, and another count for threatening to accuse him of an attempt to commit such crime; it appeared that Kain and Nugent came up to the prosecutor: Kain said, "Don't you know me?" H. said, "No." Kain said, "You must recollect me from what took place last night." He said, "No. What is it about?" Kain said, "You must recollect me, you used me indecently. You took hold of my person." H. told him he was mistaken, and to go about his business. Kain said he was not mistaken, and added, "Give me some money or I will expose you." He went on, and Kain and Nugent followed, Kain saying that Nugent was his witness. At the bottom of the lane, Kain said, "Come, come, stop." The prosecutor asked him what he wanted. Kain said, "You have used me in a sodomitical way." The prosecutor walked on and went into his house, and called his wife into the shop, the prisoners came to the shop door: H. asked them to come in, and they came into the outer door; H. then asked them what they wanted, Kain said he wanted money, he said, "Give me some money and we will say nothing about it; if you do not we will expose you, and punish you." The prosecutor's wife asked them what they wanted the money for; the prosecutor told her that they had accused him of an indecent assault, and wanted money for it; H. refused to give them any money; they frequently said they would not go away without they had some money. H.'s wife appeared to be very much flurried, and said, in their hearing, that she wished H. to give them money to get rid of them; H. refused at first to do so, but seeing her state of mind, and being much agitated himself, he desired her to give them some, and she gave them 8s.; H. directed her to do so in consequence of the threat that *had been used: it was from fear on his own mind as well as because his wife was flurried that he gave them the money; H. said he was very much alarmed, and would not have parted with the money but through fear. The officers who took the prisoners into custody stated that he fastened them together, and on his doing so, Kain turned round to the prosecutor, and said, "This is as close as we were when we were under the bridge," &c. Nugent said, he followed them over the fields, and saw them go under the bridge together, and that they had their trowsers down. It was contended for the prisoners that neither count was proved; that the only evidence the jury could consider was, what took place before the money was obtained, as that alone could operate on the mind of the prosecutor to induce him to part with the money; and that the prosecutor did not part with the money from any fear of his own, but in consequence of the agitation of his wife. Park, J. A. J., after conferring with Parke, B., told the jury he thought the second count was not supported. The question, therefore, for them would be, whether the prisoners did not

The jury are not confined to the words used at the time, but if they are equivocal may connect them with what was afterwards said.

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(l) *Rex v. Robinson*, 2 M. & Rob. 14. S. C. 2 Lew. 273. The words were "Give us our allowance money and we will say nothing about it."

threaten to accuse the prosecutor of the whole offence; and in considering this question, he did not think it was necessary to confine themselves to the words used before the money was obtained; but that as some of those words were equivocal in their meaning, they might connect with them what was said afterwards by the prisoners when they were taken into custody. *(m)*

Since the 1 Vict. c. 87, an indictment for robbery is not supported by threats of accusing of an infamous crime within sec. 4.

Since the 1 Vict. c. 87, s. 4, an indictment in the ordinary form for robbery is not supported by proof of extorting money by threats of accusing of an infamous crime within that section. Therefore a person present to aid A. B., to extort money by such a charge, cannot be convicted of a robbery with A. B., effected by him with actual violence, such person being no party to such violence. Upon an indictment in the ordinary form against Taunton and Henry for robbery, it was proved that at about nine o'clock at night Henry induced the prosecutor to walk with him into a house in Westminster, then fitting up as a cook's shop, under the pretence of showing him the fittings; when he had entered, the prisoner locked the door, seized him by the collar, told him he had him in his power, and if he made a noise he would send for the police, and charge him with sodomitical practices; this induced the prosecutor not to give the alarm, and then Henry rifled his pockets of a sovereign and a shilling, and proceeded to take the watch-guard from his neck, and the watch from the fob, and immediately afterwards took some rings from his fingers; some noise was made while this was going on, and Taunton, who was in the house, came to the door of the room, and after trying in vain to gain admittance through it, got in the window; he came into the room after Henry had rifled the prosecutor's pockets, and whilst he was removing the watch-guard; there was a candle burning in the corner of the room; Taunton took no part in the robbery, and it was not quite clear that he saw it. The jury found Henry guilty, and that Taunton was present at the time of the taking of the rings, and was a party with Henry to a design to bring the prosecutor there, and obtain money and property from him on a false charge *of an unnatural crime, but that he was not aiding or assisting in or privy to the robbery committed by Henry, by taking from the person of the prosecutor. It seemed to Parke, B., that since the 1 Vict. c. 87, s. 4, the offence of robbery and of obtaining money or goods on a charge of sodomy, were distinct offences, and that Taunton could not be considered, under these circumstances, as a principal in the second degree to the robbery; and, upon a case reserved, the judges thought that inasmuch as the 1 Vict. c. 87, repeals the 7th section of the 7 & 8 Geo. 4, c. 29, the offence intended by Taunton was that of extorting money by accusation, &c., under the 1 Vict. c. 37, and no longer robbery, under the 7 & 8 Geo. 4, c. 29, and that the conviction was therefore wrong. *(n)*

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Where money is obtained by any of the threats in the 1 Vict. c. 87, s. 4, the indictment

Since the 1 Vict. c. 84, s. 4, where money is obtained by any of the threats to accuse specified in that section, the indictment, it seems, must be on that section and not for robbery; but where the money is obtained by threats to accuse, other than those specified in that section, the indictment may, it seems, be for robbery, if the party was put in fear, and parted with his property in consequence. It seems doubtful whether

(m) Reg. v. Cain, ^a 8 C. & P. 187, *cor.* Park, J. A. J., and Parke, B.

(n) Reg. v. Henry, ^b 2 Moo. C. C. R. 118. S. C. 9 C. & P. 309.

^a Eng. Com. Law Repts. xxxiv. 347.

^b Ib. xxxviii. 128.

a count for demanding money with menaces is supported where it is proved that the money was actually obtained by menaces. The first count framed on the 1 Vict. c. 87, s. 4, charged that the prisoner threatened to accuse the prosecutor of having attempted to commit with him an abominable crime, and thereby extorted a sovereign, &c. The second count charged the prisoner with robbery in the common form. The third count, framed on sec. 7 of the 1 Vict. c. 87, charged the prisoner with demanding money of the prosecutor with menaces. The prosecutor stated that he was induced to meet the prisoner, by his telling him that if he did not he would rue it as long as he lived; when I saw him he said, "walk this way;" I followed him, and after we got into rather a lonely place, he said, "Can you not lend me some money?" I said, "You have no claim on me, I cannot do so, you can have no money from me;" he then said, "I am now going to say something of very great importance to you, and it is no use your calling out for help, or giving me into the hands of the police, for if you do, remember, I am armed, and if you do, by God! I will have my revenge; and if you do not assist me I will say you took indecent liberties with me some time ago." He was exceedingly excited while saying this; he threw his arms about and used violent gesticulation; I thought he was going to attack me, it was a lonely spot; I was so completely paralysed and overcome I scarcely knew what I was about; I was induced in consequence of that threat to give him some money on the spot. The prosecutor added that he gave him the money both from fear of personal violence, and from the attack on his character. For the prisoner it was contended that the evidence did not support the first count, as the words used did not necessarily import an intention to accuse of an attempt to commit the whole capital crime. That with respect to the second count, the charge of robbery was not sustainable, as since the 1 Vict. c. 87, the charge of robbery was only sustainable, by showing that the money was obtained by actual force, or the fear of personal violence. With regard to the third count, it *was not supported, as the proof was of another offence, namely, the actual obtaining of the money with threats. The Recorder in summing up said, "There is this distinction between the present statute and the 7 & 8 Geo. 4, c. 29, that in the latter the words are, 'if any person shall accuse,' &c., 'every such offender shall be deemed guilty of robbery,' whereas in the former the words are 'shall be guilty of felony.' There are also in the present statute separate provisions for the punishment of robbery, and also a provision for demanding property with menaces. The difference is, that in the present statute the offence is not asserted to be robbery but only felony, and it may be that the legislature intended to say, 'We will allow the law to remain as it is on the cases decided, as to the crime of robbery; but we will not allow of a constructive robbery further than that, but will provide for it by the provisions of this act.' The statute is not very clear; I shall therefore take your opinion as to the matters of fact upon each of the separate charges. With respect to the first count, I am of opinion that the threat must be to accuse of an attempt to commit the complete capital offence: and you will say, upon the evidence, whether such a threat has or has not been proved. As to the second count, the question is whether the prosecutor parted with his money under bodily fear, such as would operate upon a man of firm mind, and if you shall be of opinion that the property was parted with from the influence conjointly

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of the violence offered and the vague threat of an undefined charge, the crime of robbery will in my opinion have been made out. In order to constitute robbery in the absence of actual force, it is necessary that the party should be put in actual bodily fear, but I shall not think it the less bodily fear because it was produced by two adequate causes, each of them sufficient in itself to produce the effect. If there was violence enough to produce bodily fear, it will be a robbery; and I do not think it the less a robbery, because in addition to the violence there was a threat to accuse. Then, with respect to the third count, I shall hold that, if menaces were used to obtain money, that count is sustained, although the money was actually obtained.' The jury found the prisoner guilty on the two last counts only, but he was afterwards sentenced on the second count only. (o)

Having thus treated of the facts and circumstances necessary to constitute the crime of robbery, this chapter may be concluded by shortly adverting to some points which have been decided respecting persons aiding and abetting in this offence, and also respecting the indictment.

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Of principals
and
accessories.

The same general rules which prevail in other cases of principals and accessories, apply also in the case of robbery. (p) Thus, if several persons come to rob a man, and they are all present, and one only actually takes the money, it is robbery in all. (q) So if A. B. and C. come to commit a robbery, and A. stand sentinel at a hedge-corner to watch if any person should come, and B. and C. commit the robbery, it will be robbery in A. also, though he was at a distance from them, and not within view. (r) And the principal of several persons engaged in one common design being in the eye of law present when the fact is committed has been carried to a considerable extent in the case of robbery. For where three men went out to rob, and attacked a man who made his escape, and while two of them were engaged with that man, the third robber rode off and robbed another person in the same highway, without the knowledge of the two other robbers, and out of their view, and then returned to them; it appears to have been holden, that all of them were guilty of this robbery, as they came together with intent to rob, and to assist one another in so doing. (s) But where several men by agreement rode out to commit a robbery, and at Hounslow one of them parted from the company, and rode away towards Colenbrook, and the others rode towards Egham, and at the distance of about three miles from Hounslow, committed a robbery; it was holden that the man who

(o) Reg. v. Norton, 8 C. & P. 671. The reporters state in a note that the Recorder mentioned the case to Parke, B., and that they were both of opinion that in those cases where the money was obtained by any of the threats specified in the statute, the indictment must be upon the statute and not for robbery; but where the money was obtained by threats to accuse other than those which are specified in the statute, the indictment might be for robbery, if the party was put in fear, and parted with his property in consequence. The finding on the second count was held good. Indeed it seems sustainable on two grounds: first, that there was violence enough without any threat at all to put the party in fear; and secondly, that the threat to accuse was not one of those mentioned in the act, and therefore it might properly be taken into consideration as co-operating with the violence in producing the bodily fear, which in the absence of force is necessary to constitute robbery.

(p) *Ante*, p. 26, Book I., Chap. ii. The punishment of principals in the second degree and accessories has been mentioned, *ante*, p. 868.

(q) 1 Hale, 534. 1 Hawk. P. C. c. 34, s. 5.

(r) 1 Hale, 534, 537.

(s) 1 Hawk. P. C. c. 34, s. 5. Pudsey's case, 1 Hale, 533, 534.

parted from the company was not guilty of this robbery, though he rode out with the others upon the same design : for he left them at Hounslow, and, as he did not fall in with them afterwards, possibly he repented of the design, but at least he did not pursue it. (t)

The presumption of a party repenting of his evil design appears to have been admitted to a greater extent in a more modern case. It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him in a peremptory manner, what money he had in his pocket. Upon his replying that he had only twopence-halfpenny, one of the prisoners immediately said to the other, "If he really has no more, do not take that," and turned, as if with an intention to go away; but the other prisoner stopped the prosecutor and robbed him of the twopence-halfpenny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them had taken the halfpenny from his pocket. The court said that this evidence went to the acquittal of both the prisoners; for if two men assault another, with intent to rob him, and one of them, before any demand of money, or offer to take it be made, to repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion, who afterwards takes the money; for he changed his evil intention before the act which completes the offence was committed. That the prisoner, therefore, which ever of the two it was who thus desisted, could not be guilty of the offence charged; that one of them was guilty, but which of them personally did not *appear. And, as the prosecutor could not ascertain who it was that took the property, both the prisoners must be acquitted. (u)

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The indictment for robbery must state an assault upon the person; and that such assault was made *feloniously*. And where the indictment charged that the prisoner, "in and upon I. M., &c., *did make an assault*, and him the said I. M., in corporeal fear and danger of his life, then and there *feloniously did put*," it was holden to be defective; and that the omission of the statement of the assault having been feloniously made, was not aided by the statement of the prosecutor having been feloniously put in fear and danger of his life. (v) The taking must be charged to be with violence, and against the will of the party; and the statement in the usual form of an indictment for this offence, is, "certain goods, &c., of the said A. B., from his person and against his will, then and there feloniously and *violently* did steal, take, &c." But the word *violently* is not essentially necessary: as in a case where it was objected that the indictment did not show that the taking was done *violenter*, and that the prisoner was, therefore, entitled to his clergy, and the authority of Lord Hale was cited, (w) all the judges upon the point being

Of the indictment.

(t) *Rex v. Hyde and others*, 1 Hale, 537, 538.

(u) *Rex v. Richardson and Greenow*, O. B. 1785, *cor. Buller, J.*, 1 Leach, 387. The Court also said that it was like the Ipswich case, where five men were indicted for murder, and it appeared, on a special verdict, that it was murder in one, but not in the other four, but it did not appear which of the five had given the blow which caused the death; and it was ruled that as the man could not be clearly and positively ascertained, all of them must be discharged.

(v) *Rex v. Pelfryman and Randal*, 2 Leach, 563.

(w) 1 Hale, 534, where it is said that the indictment must run, *quod vi et armis apud B. in regiâ viâ ibidem, &c.*, 40s. *in pecuniis numeratis felonice et violenter cepit a personâ*; and, therefore, if the word *violenter* be omitted in the indictment, or not proved upon evidence, though it were in *altâ viâ regiâ et felonice cepit a personâ*, it is but larceny, and the offender shall have his clergy: and *Ey. 224 b. H. 17 Jac. in B. R. 2 Rol Rep. 154*, are cited.

reserved, agreed that the word *violenter* was no technical term essentially necessary in the indictment: and that if it appeared upon the whole, that the fact was committed with violence, it was sufficient to constitute a robbery. (x) And with respect to the authority cited, they said that Lord Hale, in the passage referred to, was inaccurate in his expression; that the definition which he gave of robbery was a felonious taking from the person with violence; and that if the fact were so described in the indictment as to answer the definition, it came up to Lord Hale's own doctrine. (y) It is considered as uncertain whether the indictment should charge that the party was put in *fear*; though, as such statement is usual, it will be more safe to insert it. (z) But, in general, no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party. (a) And where the taking has been by a putting in fear by means of threats to charge the party with sodomitical practices, the indictments appear to have been for robberies in the usual form. (b)

*903 An indictment for robbery which merely alleges that the prisoner, *with force and arms, assaulted and robbed the prosecutor, is good after verdict; and an indictment for robbery need not conclude *contra pacem*, as the punishment is only altered by the statute. An indictment alleged that the prisoners, with force and arms, upon one W. M., did make an assault, and him the said W. M., then and there feloniously did rob of, &c., and did not conclude "against the form of the statute;" and it was objected that it ought to have averred either that the fact was committed with *force and violence*, or that the party was put in fear; it was answered that the word *rob* necessarily imported that the act was accompanied with violence, and Trapshaw's case was cited. (c) Lord Lyndhurst, C. B., was inclined to think the indictment insufficient, but upon consideration he stated his determination to reserve the point; however, at the following assizes, Mr. B. Parke said, "Lord Lyndhurst had intended, if on consideration he thought it doubtful, to reserve this question for the decision of the judges; but he has conferred with some of them, including myself, and we are of opinion that it was sufficient to follow the words of the statute 7 & 8 Geo. 4, c. 29, s. 6, and that it is unnecessary to pronounce whether the objection would have been good upon demurrer, since it must be considered in arrest of judgment, though, in point of fact taken before verdict, as is from courtesy and convenience commonly done and allowed, though not strictly regular. And such being the case, the omission of a more particular description of the offence is cured by the 7 Geo. 4, c. 64, s. 21." The learned judge then mentioned the case of

(x) Smith's case, 2 East, P. C. c. 16, s. 166, p. 783, 784.

(y) Id. *ibid.*

(z) 2 East, P. C. c. 16, s. 166, p. 793. It is not necessary that the indictment should charge that the party robbed was put in fear if it is stated that the prisoner acted *violenter*, and that the party was robbed *contra voluntatem*. Per Foster, J., 19 St. Tr. 806.

(a) 2 East, P. C. c. 16, s. 166, p. 783, s. 127, p. 108.

(b) Jones's *alias* Evan's case, 2 East, P. C. c. 16, s. 130, p. 714. 1 Leach, 139, *ante*, p. 885, and the other cases of a similar nature, cited *ante*, p. 889, *et seq.* But now they must be framed upon the statute, see Reg. v. Norton, *ante*, p. 899.

(c) 1 Leach, 427. There Gould, J., in delivering the opinion of the judges upon the question whether under the words "rob any dwelling-house," in the 3 & 4 Wm. & M. c. 9, a breaking and entering the house was necessary, said, "The words rob in legal construction always includes the idea of force and violence, and although this part of the statute does not expressly signify that breaking and entering the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other acts of parliament penned in the same manner, that those ingredients are *ex vi termini* included in, and implied by, the word rob."

Rex v. Chatburn, (d) which was an indictment for murder, and a conviction for manslaughter; there the prisoner was transported for life, though the words *contra formam* were omitted. The reason was, as in this case, that the punishment only is varied. (e)

Where several are jointly indicted under the 1 Vict. c. 87, s. 3, for robbery, it is not necessary to aver that they were together; but where one only of the party is indicted, it ought to be averred that he committed the offence together with others. Upon an indictment for robbery it appeared that the prisoners committed the act together with others, who were not apprehended, but it was not so charged in the indictment; and the question was, whether, in order to bring him within the higher penalty, it ought not to have been specially averred. Patteson, J., "Where several are indicted for committing the offence it is not necessary to aver that they were together; but if one be indicted alone, who committed the act with others, it is proper that it should be so averred. (f)

*It was formerly material to state correctly in the indictment, whether the robbery was committed in or near the *king's highway*; and many points of much nicety arose as to the manner of such statement, and also as to what should be considered as a highway robbery. (g) But the 3 Wm. & M. c. 9, s. 1, (now repealed) relating generally to all robberies, whether in a highway, house, or elsewhere, made these points no longer necessary to be considered: and we have seen the provisions of the 1 Vict. c. 87, are quite general. (h) In a case which occurred soon after the 3 Wm. & M. was passed, where the indictment was for robbery near the highway, and a robbery in a house was the offence proved, it was holden by all the judges, that as that statute took away clergy in all robberies, the prisoners should not have their clergy. (i) And so upon an indictment which charged the prisoner with robbing a person in a field near the highway, where the jury found a verdict "guilty of the robbery, but not near the highway," it was holden by all the judges that the prisoner was ousted of clergy. (j) And a case is mentioned as having been determined upon similar principles, where the robbery was in a house in the street, hired by one of the prisoners for the purpose, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling-house of that prisoner. (k) It followed, therefore, that it was not material, where the robbery was charged to have been committed in a dwelling-house, that the ownership of the house should be correctly stated. Thus, where the prisoner was con-

(d) R. & M. C. C. 403, *ante*, p. 655.

(e) Lennox's case, 2 Lew. 268.

(f) Rafferty's case, 2 Lew. 271. In Doran's case, *ibid.*, note, the same very learned judge ruled the same way. Assuming this ruling to be correct, it may admit of doubt whether it be prudent in an indictment against several, merely to allege that they robbed the prosecutor, because, in case only one were convicted, it may well be doubted whether judgment for the more severe punishment could be given against him. The offence is one consisting of number, and in this respect like a riot; and there it has been held that if all but two be acquitted no judgment can be given against them. *Rex v. Sadbury*, 1 Lord Raym. 484, *ante*, p. 288. Perhaps the safer course would be to allege that A. B. and C., "together with divers other evil disposed persons," committed the robbery (see *Rex v. Sadbury*.) and then if A. alone were convicted, but it was proved that he was in company with another or others, he might, it is conceived, receive judgment for the higher punishment. C. S. G.

(g) 1 Hale, 535, 536. 2 East, P. C. c. 16, s. 168, p. 784, 785.

(h) *Ante*, p. 867.

(i) Summer's case, 1705. 2 East, P. C. c. 16, s. 168, p. 785.

(j) Wardle's case, 1800. 2 East, P. C. c. 16, s. 168, p. 785. Russ. & Ry. 9.

(k) *Rex v. Darnford and Newton*, O. B. 1780. 2 East, *ibid.*

victed upon an indictment which charged him with robbing a person in the dwelling-house of one Aaron Wilday, and it had not appeared who was the owner of the house in which the fact was committed, the judges held the conviction proper.^(l) And again where the prisoner was indicted for robbing a person in the dwelling-house of Joseph Johnstone, and it appeared upon the evidence, that the prisoner, whose name was Susannah Johnstone, had committed the robbery in the house of her husband, but the Christian name of the husband could not be proved; the prisoner being convicted upon this evidence, the judges were of opinion that the conviction was proper.^(m)

Indictment using the maiden name of the prosecutrix, where she had married after the robbery, holden to be proper. *905

In a case of an indictment for a highway robbery upon the person of Elizabeth Hudson, it appeared that such was the name of the prosecutrix at the time the robbery was committed, but that after the robbery and at the time the bill was presented to the grand jury, and found by them she was married to a person by the name of *Heywood; and, upon these facts, it was objected that the indictment was erroneous. But Gould, J., and Eyre, C. B., held that the description of the prosecutrix, in this case, by her maiden name, was sufficient.^(o)

An indictment for robbery alleged that the three prisoners assaulted G. Pritchard, and H. Pritchard, and stole from G. Pritchard two shillings, and from H. Pritchard one shilling and a hat, and it appeared that G. and H. Pritchard were walking together at the time when the prisoners attacked and robbed them both; and Tindal, C. J., held that the prosecutor was not bound to elect, as it was all one act and one entire transaction, and there was no interval of time between the assaulting and robbing of the one, and the assaulting and robbing of the other. But if there had been, the felonies would have been distinct, but that was not so in this case.^(mm)

Ownership of the property must be correctly stated.

An indictment for robbery must state the ownership of the property correctly; and where a servant has received money for his master, and he is robbed of it before it comes into the actual possession of the master, it should be laid as the property of the servant, and not of the master. Upon an indictment for robbing B. of the money of W., it appeared that B., the servant of W., had received the money of some customers of his master, and was on his return to his master's house, when he was robbed of the money; it was objected that the money could not be laid as the property of W., as it had never reached his hands. Alderson, B., "I am inclined to think the objection valid; it is difficult to see how such an offence as embezzlement could have been part of our criminal law if the possession of the servant of property, which had never come to the hands of the master, were construed to be the possession of the master. If it were, every servant who converted to his own use property received by him for his master, would be guilty of larceny."⁽ⁿ⁾

(l) Pye's case, Warwick, 1790, *cor.* Thompson, B., and in East. T. 1790. 2 East, P. C. c. 16, s. 168, p. 785, 786. 1 Leach, 352, note (a).

(m) Johnstone's case, 1793, *cor.* Ashhurst, J., and in East. T. 1793. 2 East, P. C. c. 16, s. 168, p. 786. Russ. & Ry. 10, in the note.

(o) Turner's case, 1 Leach, 536.

(mm) Reg. v. Giddings, 1 C. & Mars. 634.

(n) Reg. v. Rudick, 8 C. & P. 237. The jury were discharged as to this indictment, and a new indictment preferred, laying the property in B. in one count, and in W. in another, and the prisoners were convicted upon it. There seems to be a distinction in such cases where the money is stolen from the servant, and where it is embezzled by him. See vol. 2, p. 93, note (u), and p. 163. C. S. G.

^a Eng. Com. Law Repts. xli. 344.

^b Ib. xxxiv. 368.

In robbery from the person, as in other complicated or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear of violence, and found guilty of the simple larceny. (o)†

It has been held that a prisoner indicted for robbery may be convicted under the 1 Vict. c. 85, s. 11, of an assault, although the jury find that the prisoner had no intention to commit a robbery. (p)

The 1 Vict. c. 87, s. 13, enacts, "That where any felony punishable under this act shall be committed within the jurisdiction of the Admiralty of England or of Ireland, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction."

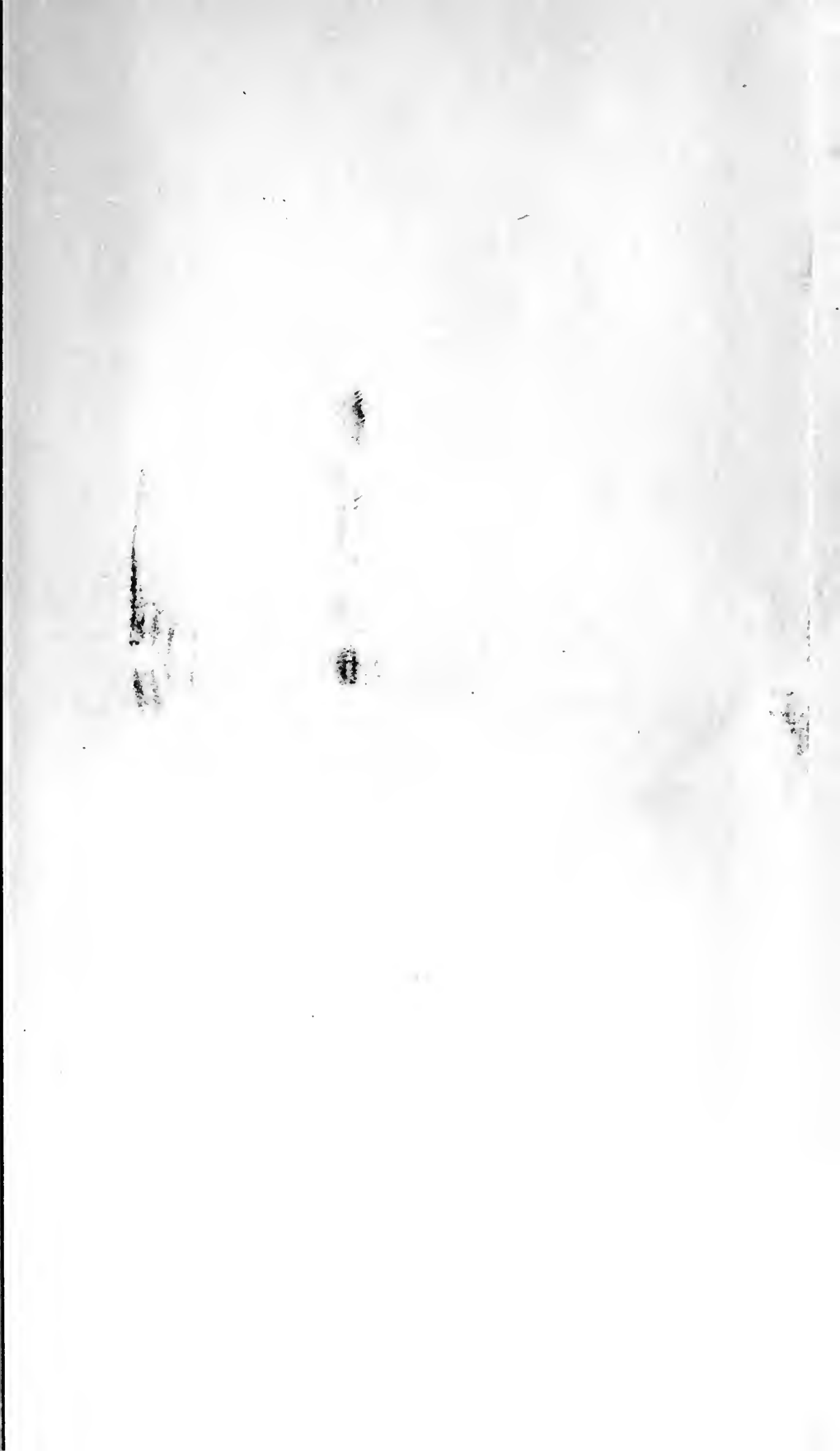
(o) 2 East, P. C. c. 16, s. 167, p. 784. But where a special verdict was found, which stated facts amounting only to a larceny, as the only doubt referred to the court was whether the prisoners were or were not guilty of felony and robbery charged against them in the indictment; the judges thought that judgment of larceny could not be given upon such finding. They, therefore, remanded the prisoners to be tried upon another indictment. *Rex v. Francis*, ante, p. 873.

(p) *Reg. v. Ellis*,^a 8 C. & P. 654. See the section and cases upon it, ante, p. 778, et seq.

† [Under indictment of several for robbery, one cannot be convicted of assault if the others were guilty of robbery, but all may be convicted of assault. *Reg. v. Barnett*, 2 C. & K. 594. Eng. C. L. lxi. 543.]

^a Eng. Com. Law Reps. xxxiv. 570.







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