THE

LAW OF CRIMES.

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PREFACE.

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

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

The alphabetical arrangement has been adopted in the second chapter, as, on the whole, more convenient for the practising lawyer. The student, however, will perhaps find it to his advantage, on first peru-

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

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

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

J. W. M.

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CRIMINAL LAW.

CRIMINAL LAW.

CHAPTER I.

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

CRIME DEFINED.

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

§ 2. **By whom defined.** — Crimes are defined both by the common and by the statute laws, — the common law prevailing, so far as it is applicable and not abrogated by statute, in all the States of the Union. Under the government of the United States there are, strictly speaking, no common-law crimes. That government has never adopted the common law. Its criminal jurisdiction depends entirely upon statutory provision authorized by the Constitution; and where the statute makes punishable a crime known to and defined by the common law, but does not itself define the crime, the common law is resorted to for the definition.[2]

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

[2] United States *v.* Hudson, 7 Cranch (U. S.) 32 · 1 Bishop Cr. Law, § 194.

Crimes committed within its exclusive jurisdiction within the States are by statute to be punished in the same manner as such crimes are punished by the laws of the particular States where they are committed.[1]

If a statute define a new offence or prohibit a particular act, without providing any mode of prosecution or punishment, the common law steps in and supplies the mode, — by indictment; and the punishment, by fine and imprisonment.[2]

§ 3. **Trifling Offences not Indictable.** — Some violations of legal duty are said to be so trifling in their character, or of such exclusive private interest, that the law does not notice them at all, or leaves them to be dealt with by the civil tribunals.[3]

§ 4. **Moral Obliquity not Essential.** — Moral obliquity is not an essential element of crime, except so far as it may be involved in the very fact of the violation of law. What, therefore, is criminal in one jurisdiction may not be criminal in another; and what may be criminal at a particular period is often found not to have been criminal at a different period in the same jurisdiction. The general opinion of society, finding expression through the common law or through special statutes, makes an act to be criminal or not according to the view which it takes of the proper means of pre-

[1] United States *v.* Paul, 6 Pet. (U. S.) 141. In Ohio, there is said to be no criminal common law, and several other States have statutes modifying the common law in some particulars. These particulars are not within the scope of this compendium. They are pretty fully stated by Mr. Bishop, 1 Cr. Law, § 35, and notes.

[2] Com. *v.* Chapman, 13 Met. (Mass.) 68; State *v.* Fletcher, 5 N. H. 257; State *v.* Patten, 4 Ired. (N. C.) 16; Com. *v.* Piper, 7 Leigh (Va.), 657; Keller *v.* State, 11 Md. 525.

[3] See Reg. *v.* Kenrick, per Ld. Denman, 5 Q. B. 62, in commenting upon Rex *v.* Turner, 13 East, 228.

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

§ 5. **Same Subject. Criminal Intent.** — Doubtless, in the earlier history of the common law, only such acts were deemed criminal as had in them the vicious element of an unlawful intent, — acts which were *mala in se*, and indicated some degree of moral obliquity. But this quality has long since ceased to be essential, and at the present day *mala prohibita* — acts made criminal by statute, many of them unobjectionable in a moral aspect, except so far as the doing an act prohibited by law may be deemed immoral — constitute no inconsiderable portion of the category of crimes.

To illustrate: The statute prohibits the sale of adulterated milk. A person who sells adulterated milk without knowing it to be adulterated, or even honestly believing it to be pure, is, nevertheless, guilty of a crime. There are many acts which the law, looking to the protection of the community, seeks to prevent; making it perilous, by making it criminally punishable, to do them. As every one is presumed to know the law, every one knows that the sale of adulterated milk is prohibited. No one is bound to sell milk; but if he do, he is bound to know whether it is adulterated or not; and if he intentionally sells milk

without having correctly determined beforehand, as it is in his power to do, whether it is or is not of the character prohibited, he is so far at fault, and to that extent guilty of a neglect of legal duty.[1] For the same reason, the sale of a single glass of intoxicating liquor, even for a praiseworthy purpose, may or may not be criminal in different jurisdictions, and at different times in the same jurisdiction, according as the legislature, in the interest of the public good, may provide. The hardship of requiring that a person shall know a fact is no greater than to require that he shall know the law. In other words, where the statute clearly so intends, ignorance of a fact is no more an excuse than ignorance of law.[2]

§ 6. **Intent. Motive.**—Intent must not be confounded with motive. The intent applies to and qualifies the act. Motive is that which leads to the act. And while it is essential, except as heretofore stated,[3] that the intent to commit the crime should appear, either

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

[2] *Ex parte* Baronnet, 1 E. & B. 1; Rex *v.* Bailey, R. & R. C. C. 1; Com. *v.* Boynton, 2 Allen (Mass.), 160. Upon the general subject, see, in addition to the cases already cited, Judge Bennett's note to Rex *v.* Wheatly, 1 Lead. Cr. Cas. 1; United States *v.* Anthony, and Mr. Green's note, 2 Cr. L. R. 215; Queen *v.* Mayor, &c., L. R. 3 Q. B. 629; State *v.* Smith, 10 R. I. 258; Barnes *v.* State, 19 Conn. 398; Ulrick *v.* Com., 6 Bush (Ky.), 400; Reg. *v.* Prince, L. R. 2 C. C. R. 151; s. c. 1 Am. Cr. Rep. 1; Steph. Dig. Cr. L. p. 20, art. 34; State *v.* Goodnow, 65 Me. 30; Lawrence *v.* Com. (Va.), 6 Reptr. 285; McCutcheon *v.* People, 69 Ill. 601. There are cases to the contrary (Stern *v.* State, 53 Ga. 229; Binney *v.* State, 8 Ohio, 230; Marshall *v.* State, 49 Ala. 21; Williams *v.* State, 48 Ind. 306), which Mr. Bishop approves. But by the settled law of England, and the great weight of authority in this country, the doctrine of the text is the better law. See 12 Am. Law Rev. 469.

[3] See *ante*, § 5.

expressly or by implication, no such necessity exists as to motive, and it need not be proved.[1]

If, therefore, the intent to violate the law exists, the motive is immaterial. For example, it is an indictable offence at common law to enter, without the consent of the owner, an unconsecrated burial-ground, and dig up and carry away a corpse buried there, though it be done openly, decently, and properly by a relative, and from a sense of filial duty and religious obligation.[2] Nor will it be any justification for a person who intentionally does an act which the law prohibits, — voting, for instance, — that he conscientiously believed he had a right to vote, notwithstanding the statute;[3] nor that the act would be harmless;[4] nor that it would be for the public benefit.[5] Nor is it of avail that the real purpose is other than to violate the law, the natural result of the act being to violate the law, — as where one assaults an officer in the discharge of his duty, the purpose not being to hinder the officer in the discharge of his duty, but to inflict upon him personal chastisement, on account of some private grief. If the act results in the obstruction of the officer in the discharge of his duty, the offender is guilty of the latter offence.[6]

§ 7. **Intent presumed from the Unlawful Act.** — When

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

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

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

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

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

[6] United States *v.* Kerr, 5 Mason C. Ct. 453.

one does an unlawful act, he is by the law presumed to have intended to do it, and to have intended its ordinary and natural consequences, on the ground that these must have been within his contemplation, if he is a sane man, and acts with the deliberation which ought to govern men in the conduct of their affairs.[1] He is none the less responsible for the natural consequences of his criminal act, because from ignorance, or carelessness, or neglect, precautionary measures are not taken to prevent those consequences.[2] In some cases, as we have already seen,[3] this presumption is conclusive as to the intended consequences, and cannot be met by counter proof. As a general rule, however, in those cases where an act in itself not criminal becomes so only if done with a particular intent, there the intent must be proved by the prosecution; while in those cases where the act is in itself criminal, the law implies a criminal intent, and leaves it open to the defendant to excuse or justify.[4] But the unlawfulness of the act is a sufficient ground upon which to raise the presumption of criminal intent.[5] It is, of course, always open to proof that there was no intention to do any act at all, whether lawful or unlawful; as that the person charged was insane, or was compelled to the act against his will, or was too young to

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

[2] State *v.* Bantley, 6 Reptr. (Conn.) 72; Com. *v.* Hackett, 2 Allen (Mass.), 136; Regina *v.* Holland, 2 M. & Rob. 351; Rex *v.* Reading, 1 Keb. 17.

[3] *Ante*, § 5.

[4] Rex *v.* Woodfall, 5 Burr. 2667; State *v.* Goodenow, 65 Me. 30; 3 Greenl. Ev. § 21.

[5] Com. *v.* Randall, 10 Gray (Mass.), 34; United States *v.* Taintor, *ubi supra*.

be capable of entertaining a criminal intent. So, at least when the act is criminal in its nature, and not peremptorily prohibited by the statute, it may be shown that it was done through mistake; as where one drives off the sheep of another, which are in his own flock without his knowledge,[1] or, intending to shoot a burglar, by mistake shoots one of his own family.[2]

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

This rule is based upon the fact that the offences charged and proved are not identical; and on an indictment for one offence no man can be found guilty of another or different offence, unless the latter is part of and embraced in the former.

When, however, the crime charged necessarily embraces a lesser offence as part and parcel of it, and the latter is described in the indictment with such distinctness that it would constitute a good separate indictment for that offence, the accused, under the indictment charging the greater and the lesser, may be found guilty of the latter. Thus, on an indictment for an assault with intent to murder, the assault being well charged, and the intent not being proved, the defendant may be found guilty of an assault. This was the com-

[1] 1 Hale P. C. 507. [2] 1 Hale P. C. 42.

[3] Rex v. Boyer, 1 Moody C. C. 29; Note to United States v. Taintor, 2 Green's Cr. Law Rep. 244.

mon law when both offences were of the same grade, and is now the law by statute in England, and very generally in the United States, when the offences are of different grades.[1]

§ 9. **Malice.** — Although in a popular sense malice means hatred, hostility, or ill-will, yet in a legal sense it has a much broader signification. In the latter sense it is the *conscious violation of the law to the prejudice of another*. It is evil intent or disposition, whether directed against one individual or operating generally against all, from which proceeds any unlawful and injurious act, committed without legal justification. Actions proceeding from a bad heart actuated by an unlawful purpose, or done in a spirit of mischief, regardless of social duty and the rights of others, are deemed by the law to be malicious.[2] The voluntary doing an unlawful act is a sufficient ground upon which to raise the presumption of malice. And so if the act be attended by such circumstances as are the ordinary symptoms of a wicked and depraved spirit, the law will, from these circumstances, imply malice, without reference to what was passing in the mind of the accused at the time when he committed the act.[3]

Envy and hatred both include malice; but the latter may exist without either, and is a more general form of wickedness. As to the proof of malice and the degree thereof necessary to constitute specific crimes, more will be said hereafter, as occasion requires.[4]

[1] Reg. *v.* Bird, 5 Cox C. C. 20; Com. *v.* Roby, 12 Pick. (Mass.), 496; 1 Bishop Cr. Law, § 809.

[2] 2 Fost. Cr. Law, 256; Ferguson *v.* Kinnoul, 9 C. & F. 302, 321; Com. *v.* Webster, 5 Cush. (Mass.) 305; State *v.* Decklotts, 19 Iowa. 447.

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

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

Something will also be said under Homicide of the not now very material distinction between express and implied malice.

§ 10. **Knowledge presumed.** — Knowledge of the criminal law on the part of every person *capax doli* within its jurisdiction is conclusively presumed, upon grounds essential to the maintenance of public order. This fact, therefore, is always taken for granted. Ignorance of the law excuses no one. And this principle is so absolute and universal, that a foreigner recently arrived, and in point of fact not cognizant of the law, is affected by it.[1] It rests upon considerations of public policy, the chief of which is that the efficient administration of justice would become impracticable, were the government obliged to prove in every case that the defendant actually had knowledge of the law.

§ 11. **When the Meaning of the Law is uncertain.** — There are cases, however, when there is doubt as to the interpretation of the law, in which it has been held that acting under a mistaken opinion as to its purport may be an excuse. Thus, it is said that when the act done is *malum in se*, or when the law which has been infringed is settled and plain, the maxim, *Ignorantia legis neminem excusat*, will be applied in its rigor; but when the law is not settled, or is obscure, and when the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, or of its existence, — as where one takes property believed to be his own under a claim of right, in ignorance of the existence of a law which vests the

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

property in another;[1] or takes illegal fees;[2] or illegally votes,[3] under a mistake as to the meaning of the law, — this rule, if enforced, would be misapplied. Whenever, therefore, a special mental condition constitutes a part of the offence charged, and such condition depends on the fact whether the party charged had certain knowledge with respect to matters of law, the fact of the existence of such knowledge is open to inquiry.

But these cases do not militate against the doctrine heretofore stated, where the real question is whether the statute clearly intends to make the act criminal, without reference to the question of knowledge.[4]

CRIMINAL CAPACITY.

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

§ 13. **Infants,** therefore, are not amenable to the criminal law until they have reached that degree of understanding which enables them to appreciate the quality of the act. The law fixes this limit arbitrarily, for the sake of convenience, at the age of seven years, and will not listen to evidence that a person below this age is capable of understanding the quality of his act. Between the ages of seven and fourteen, with

[1] Rex *v.* Hall, 3 C. & P. 409; Reg. *v.* Reed, C. & M. 306.

[2] State *v.* Cutter, 36 N. J. 125; People *v.* Whalley, 6 Cow. (N. Y.) 661; Halstead *v.* State (N. J.), 1 Cr. L. Mag. 300.

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

[4] *Ante*, § 5. See also, as to the application of this maxim, The Queen *v.* Mayor of Tewksbury, L. R. 3 Q. B. 629, and Mr. Green's note to United States *v.* Anthony, 2 Cr. Law Rep. 215.

some exceptions, the presumption is that the infant lacks discretion or criminal capacity, and the burden of proof that he does is upon the prosecutor. If there be no evidence upon this point, the prosecution fails. There are two generally admitted exceptions to this rule, — a female under the age of ten years being conclusively presumed to be incapable of consenting to sexual intercourse, and a male under fourteen being conclusively presumed to be incapable of committing rape.[1] In Ohio, this presumption is held to be disputable.[2] And in Massachusetts, it has been held by a divided court that a boy under the age of fourteen may be guilty of an assault with intent to commit rape, on the theory that penetration only is necessary to the consummation of the crime.[3] In California, by statute, all infants under fourteen are incapable.[4]

After the age of fourteen, the presumption is that the infant has criminal capacity, and the presumption is sufficient, if not met by counter proof, to warrant the jury in finding the fact. But the defendant may prove his incapacity.[5] An exception to this last rule, in the nature of physical incapacity, is where an infant over fourteen fails in some public duty, as to repair a high-

[1] Reg. *v.* Phillips, 8 C. & P. 736; Reg. *v.* Jordan, 9 C. & P. 118.

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

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

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

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

way. In this case he is held incapable, as he has not command of his fortune till he arrives at his majority.[1]

§ 14. Coercion. Fraud. — Married women are presumed to be so far under the control and coercion of their husbands, that in many cases they are not held responsible for crimes committed in their presence.[2] But this presumption is only *prima facie*, and may be rebutted by evidence that the woman was not coerced, but acted voluntarily, according to her own pleasure.[3] There are exceptions to this incapacity of married women, upon which, however, the authorities are not agreed. She seems to be responsible for treason and murder, by the general consent of the authorities, and perhaps for robbery, perjury, and forcible and violent misdemeanors generally.[4] But there are cases of a non-consenting will, as where one is compelled, by fear of being put to death, to join a party of rebels, or is entrapped into becoming the innocent agent of another, whereby a person unwittingly or unwillingly, rather than through incapacity, becomes the instrument of crime wielded by the hand of another. The will is constrained by fear or deceived by fraud into what is only an apparent consent.[5] And it has been said that the pressure of circumstances may be so great as to release one from criminal responsibility for

[1] Hale P. C. 20.

[2] 1 Hale P. C. 14.

[3] Reg. *v.* Pollard, 8 C. & P. 553; State *v.* Cleaves, 59 Me. 295; Com. *v.* Butler, 1 Allen (Mass.), 4; Rex *v.* Stapleton, Jebb C. C. 93; Miller *v.* State, 25 Wis. 384; 2 Green's Cr. Law Rep. 286, note.

[4] See the authorities collected in note to Com. *v.* Neal, 1 Lead. Cr. Cas. 81; 3 Greenl. Ev. § 7, 13th ed.

[5] 1 Foster Cr. Law, 14; 1 Hale P. C. 50; Steph. Dig. Cr. Law, art. 31.

an act which, but for the pressure, would be a crime; as where a council, without authority, depose and imprison a governor, to prevent irreparable mischief to the State;[1] or one of two persons swimming in the sea supported by a plank thrusts the other off, if, by so doing, one would be saved, and by not so doing, both would be lost.[2] But such cannot be said to be the established law.[3]

§ 15. **Corporations** being impersonal, and merely legal entities, without souls, as it has been said, though incapable of committing those crimes which can only proceed from a corrupt mind, may, nevertheless, be guilty of a violation not only of statutory but common-law obligations, both by omission and, by the greater weight of authority, by commission. They cannot commit an assault, though they may be held civilly responsible for a tort committed by their agent.[4] Nor can they commit any crime involving a criminal intent. But they may create a nuisance, through the acts of their agents, and by the very mode of their operations; in which case they are subject to indictment and punishment by fine, or even the abrogation of their charter, — the only punishments applicable to a corporation: the latter a sort of capital punishment, inflicted when the corporation has forfeited the right to live.[5]

A corporation is also indictable for negligence in the non-performance of the duties imposed upon it by

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

[2] Bacon's Maxims, No. 5. See also Com. *v.* Holms, 1 Wall. Jr. (Pa.) 1.

[3] Steph. Dig. Cr. Law, art. 32; Wharton Hom. §§ 560, 561.

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

[5] Reg. *v.* Railway Co., 9 Q. B. 315; Delaware Canal Co. *v.* Com., 60 Pa. St. 367; 1 Bishop Cr. Law, §§ 420, 422.

its charter, or otherwise by law.[1] It has been held in some cases that a corporation is not indictable for a misfeasance,[2] — in opposition, however, to the great weight of authority.[3]

§ 16. **Insane Persons.** — Insanity, under which the law includes all forms of mental disturbance, whether lunacy, idiocy, dementia, monomania, or however otherwise its special phenomena may be denominated, is another ground upon which persons are held incapable of committing a crime. Insanity is mental unsoundness. It exists in different forms and degrees. A higher degree of insanity is requisite to protect a person from the consequences of a criminal violation of law, than to relieve him from the obligation of a contract. In order to protect him in the former case, his mind must be affected by disease to that extent that he cannot understand the nature, character, or consequences of the act. A partial insanity, short of this, will not relieve him from responsibility. If he has sufficient mental capacity to know that the act which he is about to commit is wrong and deserves punishment, and to apply that knowledge at the time when the act is committed, he is not in the eye of the criminal law insane, but is responsible. All persons whose minds are diseased or impaired to the extent named, and all whose minds are so weak — *idiots*, *lunatics*, and the like — that they have not the suffi-

[1] Reg. *v.* Railway Co., 3 Q. B. 223; People *v.* Albany, 11 Wend. (N. Y.) 589.

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

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

ciency of understanding and capacity before stated, come under the protection of irresponsibility.[1]

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

§ 18. **Emotional Insanity,** which is a newly discov ered, or rather invented, phase of irresistible impulse, and is nothing but the fury of sudden passion driving

[1] McNaughten's Case, 10 C. & F. (H. of L.) 200; Com. *v.* Rogers, 7 Met. 500; Freeman *v.* People, 4 Denio (N. Y.), 9; State *v.* Pike, 49 N. H. 398; Blackburn *v.* State, 23 Ohio St. 146; United States *v.* McGlue, 1 Curtis (U. S. C. Ct.), 8; State *v.* Huting, 21 Mo. 464; Spann *v.* State, 47 Ga. 553; Brown *v.* Com., 78 Pa. St. 122; State *v.* Johnson, 40 Conn. 136; Flanagan *v.* People, 52 N. Y. 467; State *v.* Richards, 39 Conn. 501.

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

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

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

[5] Com. *v.* Mosler, 4 Barr (Pa.), 266; United States *v.* Hewson, 7 Boston Law Reptr. 361 (U. S. C. Ct.), Story, J.; Scott *v.* Com., 4 Met. (Ky.) 227; Hopps *v.* People, 31 Ill. 385.

a person, otherwise sane, into the commission of crime, is utterly repudiated by the courts as a ground of irresponsibility.[1]

§ 19. **Moral Insanity,**[2] or that obliquity which leads men to commit crime from distorted notions of what is right and what is wrong, and impels them generally and habitually in a criminal direction, as distinguished from mental insanity, though appearing to have the sanction of the medical faculty as a doctrine founded in reason and the nature of things, is scouted by many of the most respectable courts as unfounded in law;[3] and although accepted to a limited extent by others, is treated even by them as a doctrine dangerous in all its relations, and to be received only in the clearest cases.[4] It may also be observed, that moral insanity is sometimes confounded with, and sometimes distinguished from, irresistible impulse. In Pennsylvania, for instance, very recently, the existence of such a kind of insanity seems to have been recognized; but it was said to bear a striking resemblance to vice, and ought never to be admitted as a defence without proof that the inclination to kill is irresistible, and that it does not proceed from anger or other evil passion.[5] Hence

[1] State *v.* Johnson, 40 Conn. 136; Willis *v.* People, 5 Parker C. C. (N. Y.) 621; People *v.* Bell, 49 Cal. 485. See also a very vigorous article upon the subject, 7 Alb. Law Jour. 233. Upon the general subject of insanity as a defence, see Com. *v.* Rogers, 1 Lead. Cr. Cas. 94, and note.

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

[3] Humphrey *v.* State, 45 Ga. 190; Farrer *v.* State, 2 Ohio St. 54; State *v.* Brandon, 8 Jones (N. C.), 463; Choice *v.* State, 31 Ga. 424; People *v.* McDowell, 47 Cal. 134; United States *v.* Holmes, 1 Clifford (U. S. C. Ct.), 198; State *v.* Lawrence, 57 Me. 574; and cases before cited on the general topic, *ante*, § 16. See also Wharton on Homicide, § 583.

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

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

many cases appear to be in conflict which in fact are not irreconcilable. The absence of clear definitions is a serious embarrassment in the discussion of this subject.

§ 20. **Insanity, Proof of.** — As a question of evidence, the burden of proof of sanity is upon the government in all cases. The act must not only be proved, but it must also be proved that it is the voluntary act of an intelligent person. Where the will does not co-operate, there is no intent. But as sanity is the normal state of the human mind, the law presumes every one sane till the contrary is shown; and this presumption, in the absence of evidence to the contrary, is sufficient to sustain this burden of proof. If, however, the defendant can, by the introduction of evidence, raise a reasonable doubt upon the question of sanity, he is to be acquitted. This is the general rule, supported by the great weight of authority.[1]

In some of the States, however, it is held that if the prisoner sets up insanity in defence, he must prove it by a preponderance of evidence, or it is of no avail. It is not enough for him to raise a reasonable doubt on the point.[2] In New York, the authorities seem to be conflicting.[3]

In New Jersey, it seems to be the law that the pris-

[1] Com. *v.* Pomeroy, 117 Mass. 143; People *v.* Garbutt, 17 Mich. 9; State *v.* Crawford, 11 Kan. 32; s. c. 32 Am. Law Reg. N. S. 21 and note; Polk *v.* State, 19 Ind. 170; State *v.* Marler, 2 Ala. 43; Dow *v.* State, 3 Heisk. (Tenn.) 348; State *v.* Jones, 50 N. H. 369.

[2] Lynch *v.* Com., 77 Pa. St. 205; Kelley *v.* State, 3 S. & M. (Miss.) 518; State *v.* Felter, 32 Iowa, 49; People *v.* Best, 39 Cal. 690; State *v.* Lynch, 4 L. & Eq. Reptr. 653; Biswell *v.* Com., 20 Gratt. (Va.) 866.

[3] Wagner *v.* People. 4 N. Y. 509; People *v.* McCann, 16 N. Y. 58; Flannagan *v.* People, 52 N. Y. 467.

oner must prove the defence of insanity beyond a reasonable doubt.[1]

§ 21. **Voluntary Drunkenness**, as a rule, is not regarded by the law as an excuse for the commission of a crime while under its influence, since one who, under such circumstances, perpetrates a crime is deemed to have procured, or at least consented to, that condition of things by which the commission of the crime became more probable. Although intoxication, according to its degree, may cloud or eventually obscure the reason for the time being, and excite the passions of man, if it be the result of voluntary and temporary indulgence, it cannot be regarded either in excuse, justification, or extenuation of a criminal act. If privately indulged in, it may not be a crime in itself. It is, nevertheless, so far wrongful as to impart its tortious character to the act which grows out of it.[2] It was said by Coke,[3] and has been sometimes repeated by text-writers since, that the fact of intoxication adds aggravation to the crime committed under its influence; but this seems not to have the authority of any well-adjudged case, nor to be well founded in reason. It cannot, for instance, aggravate an offence which in law is only manslaughter if committed by a sober, into murder if done by a drunken, man; nor generally lift a minor offence into the category of a higher grade. If intoxication be a crime, it may be punished distinctively; but the punishment of intoxication should not be added to that of the crime committed under its influence. If

[1] State *v.* Spenser, 1 Zab. 202.

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

[3] Coke Litt. 247.

this were permissible, greater responsibility would attach to the intoxicated than to the sober man, in respect of the particular offence.[1]

§ 22. **Intoxication. Malice. Design.** — When, however, in the course of a trial, a question arises as to the particular state of the mind of the accused at the time when he committed a crime, — as, for instance, whether he entertained a specific intent, or had express malice, or was acting with deliberation, — the fact of intoxication becomes an admissible element to aid in its determination; not as an excuse for the crime, but as a means of determining its degree. If a man be so drunk as not to know what he is doing, he is incapable of forming any specific intent.[2]

But the presumption that a man intends the natural and probable consequences of his act is as applicable to the drunken as to the sober man; and the capacity to form the intent to shoot with a deadly weapon implies the capacity to form the intent to kill.[3]

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

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

[2] Jones *v.* Commonwealth, 75 Pa. St. 403; Roberts *v.* People, 19 Mich. 401; State *v.* Johnson, 40 Conn. 136; Malone *v.* State, 49 Ga. 210; McIntyre *v.* People, 38 Ill. 514; State *v.* Garvey, 11 Minn. 154; People *v.* Robinson, 2 Park. C. C. (N. Y.) 205; Schlencher *v.* State (Neb.), 8 Reptr. 207; State *v.* Bell, 29 Iowa, 316.

[3] Marshall *v.* State (Ga.), 5 Reptr. 647.

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

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

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

[1] Macconnehy *v.* State, 5 Ohio St. N. S. 77; United States *v.* Drew, 5 Mason (U. S. C. Ct.), 28; People *v.* Williams, 47 Cal. 314; State *v.* McGonigle, 5 Harr. (Del.) 510; Cornwell *v.* State, 1 M. & Y. (Tenn.) 147.

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

[3] Humphreys *v.* State, 45 Ga. 109.

CLASSIFICATION OF CRIMES.

§ 25. **Three Classes.** — Crimes are classified as *treasons*, *felonies*, and *misdemeanors*, the former being regarded as the highest of crimes, and punished in the most barbarous manner, as it is a direct attack upon the government, and disturbs the foundations of society itself. It is primarily a breach of the allegiance due from the governed to the government. It is active disloyalty against the State; and because it is against the State, is sometimes called *high* treason, in contradistinction to *petit* treason, which, under the early English law, was the killing of a superior toward whom some duty of allegiance is due from an inferior, — as where a servant killed his master, or an ecclesiastic his lord or ordinary. Now, however, this distinction is done away with both in this country and England, and such offences belong to the category of homicide.[1]

§ 26. **Felonies** at common law were such crimes as upon conviction involved the forfeiture of the convict's estate.[2] They were also generally, but not always, punishable with death. These tests have long since been abolished in England, and what constitutes felony is now to a great extent, both there and in this country, determined by statutory regulation. Whenever this is not the case, the courts look to the history of the particular offence under consideration, and ascertain whether it was or was not regarded by the common law as a felony. The more usual statutory test in this country is that the offence is punishable with death, or imprisonment in the State prison.[3] The term is

[1] 4 Bl. Com. 75, 92. [2] 4 Bl. Com. 94.
[3] 1 Bishop Cr. Law, § 618.

now significant only as indicating the "degree or class" of the crime committed.[1] What was felony at common law, unless the statute has interposed and provided otherwise, is still regarded as felony in all the States of the Union, with the possible exception of Vermont,[2] without regard to the ancient test or to the mode of punishment.

§ 27. **Misdemeanors** include all other crimes, of whatever degree or character, not classed as treasons or felonies, and however otherwise punishable.[3] It is for the most part descriptive of a less criminal class of acts. But there are undoubtedly some misdemeanors which involve more turpitude than some felonies, and may, for this reason, be visited with greater severity of punishment, though not of the same kind. What was not felony by the common law, or is not declared to be by statute, or does not come within the general statutory definitions, is but a misdemeanor, though, in point of criminality, it may be of a more aggravated character than other acts which the law has declared to be felony.[4] When a question arises whether a given crime is a felony or a misdemeanor, and the question is at all doubtful, the doubt ought to be resolved in favor of the lighter offence,[5] in conformity to the rule of interpretation in criminal matters, that the defendant shall have the benefit of a doubt.

§ 28. **Attempt.** — An attempt is an act done in part execution of a design to commit a crime.[6] There must

[1] 1 Russ. on Crimes, 40.
[2] State *v.* Scott, 24 Vt. 127.
[3] 1 Russ. on Crimes, 43.
[4] Com. *v.* Newell, 7 Mass. 245.
[5] Com. *v.* Barlow, 4 Mass. 439.
[6] Smith *v.* Commonwealth, 54 Pa. St. 209.

be an intent that a crime shall be committed, and an act done, not in full execution, but in pursuance, of the intent.[1] An attempt to commit a crime, whether common law or statutory, is in itself a crime, — usually a misdemeanor, unless expressly made a felony by statute.[2] But if the act, when accomplished, would be a violation of neither statute nor common law, — as, for instance, the procuring an abortion with the consent of the mother, she not being then quick with child, — the attempt is no crime.[3]

§ 29. **Attempt. Preparation. Intent.** — An attempt to commit a crime is distinguishable from preparation to commit it, and also from the intent to commit. The purchase of matches, for instance, with the intent to set fire to a house at some convenient opportunity, is not an attempt to set the fire. It is mere preparation, and though the intent exists, there is no step taken in the perpetration of any crime to which the intent can attach. The law does not punish the mere entertainment of a criminal intent. To bring the law into action it is necessary that some act should be done in pursuance of the intent, immediately and directly tending to the commission of the crime; an act which, should the crime be perpetrated, would constitute part and parcel of the transaction, but which does not reach to the accomplishment of the original intent, because it is prevented, or voluntarily abandoned.[4] What

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

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

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

[4] Steph. Dig. Crim. Law, art. 49; Lewis *v.* State, 35 Ala. 380.

does immediately and directly so tend is to be determined by the circumstances of each particular case; and, as might be expected, courts which agree upon the principle are not entirely consistent in its application. The dividing line between acts preparatory to, and in execution of, a crime is very shadowy. If the act preparatory be unequivocal and explicable only upon the theory that it was intended as a step in the commission of a crime, as in the procuring dies for making counterfeit coins, it seems to be held to be an attempt; although, if explicable as a lawful act, it might be otherwise.[1] So taking a false oath in order to procure a marriage license is an attempt to marry without a license.[2] So the taking an impression of a key to a storehouse and preparing a false key with intent to enter and steal has been held to be an attempt to steal.[3] On the other hand, the putting the finger on the trigger of a pistol at half cock, or otherwise not in condition to be discharged, has been held not to constitute an attempt to shoot.[4] And the delivery of poison by A. to B., in order that the latter might deliver it to C., to be taken by the latter, is not an "attempt to poison" by A.[5] Nor is the actual administration of a substance supposed to be poisonous, but not so in fact.[6] But Regina *v.* Williams was a case under a statute; and it seemed to be agreed by all the judges that while they must confine statutory attempts

[1] Rex *v.* Fuller, R. & R. C. C. 308; Reg. *v.* Roberts, 7 Cox C. C. 39.

[2] Reg. *v.* Chapman, 3 Cox C. C. 467.

[3] Griffin *v.* State, 25 Ga. 493.

[4] Rex *v.* Harris, 5 C. & P. 159.

[5] Reg. *v.* Williams, 1 Den. C. C. 39.

[6] State *v.* Clarissa, 11 Ala. 57.

strictly to the terms of the statute, a less intimate connection of the act done with the crime intended is requisite in common-law attempts.[1]

In England, it has been also held that to constitute an attempt, the act committed must be of such a nature and under such circumstances that the actor has the power to carry his intention into execution, and that thrusting the hand into the pocket of another with intent to steal a pocket-book, or some other article of property, is no attempt, if there be at the time nothing in the pocket to steal.[2] But this doctrine is questioned even in England;[3] and the contrary is generally if not universally held in this country.[4] To incite, solicit, advise, or agree with another to commit a crime is in itself a crime in the nature of an attempt, although the contemplated crime be not committed.[5] But it has recently been said that the doctrine of these cases, if sound law, cannot be extended to the solicitation to commit a misdemeanor, a mere solicitation not amounting to an attempt.[6] It would seem, however, that if solicitation is an attempt in the case of felony, it is in that of misdemeanor. It is certainly something more than intent, and the doctrine of the last case can better be supported upon the failure of the indictment

[1] Reg. *v.* Roberts, 7 Cox C. C. 39. See the cases illustrative very fully collected and stated in 1 B. & H. Lead. Cr. Cas., note to Rex *v.* Wheatley, pp. 6–10; Reg. *v.* Cheeseman, 9 Cox C. C. 103; People *v.* Murray, 14 Cal. 159.

[2] Reg. *v.* Collins, 10 Jur. N. S. 686; Reg. *v.* Taylor, *ubi supra.*

[3] See 3 Greenl. Ev. §§ 2, 163, 215, and notes.

[4] See Mr. Greaves's note to 1 Russ. on Crimes, p. 1054, 4th ed.

[5] Reg. *v.* Higgins, 2 East, 5; State *v.* Avery, 7 Conn. 266; 3 Greenl. Ev. (13th ed.) § 2, and note; Steph. Dig. Cr. Law, arts. 47, 48; 1 Bishop, Cr. Law, § 767; State *v.* Sales, 2 Nev. 269.

[6] Swift *v.* Com., 54 Pa. St. 209.

sufficiently to set forth the mode of solicitation than upon the point that mere solicitation is not an act. An offer to give a bribe, and an offer to accept a bribe, have been held to be indictable offences;[1] and so have a challenge to fight a duel;[2] and inviting another to send a challenge.[3] Although suicide is not punishable, yet it is criminal,[4] and an unsuccessful effort at suicide is punishable as an attempt;[5] though in Massachusetts the phraseology of the statute which makes attempts punishable by one-half the penalty provided for the completed crime has practically made the offence of an attempt to commit suicide dispunishable.[6] In some of the States, suicide is not regarded as a crime, but by statute it is made a felony to persuade another to commit suicide.[7]

CLASSIFICATION OF CRIMINALS.

§ 30. **Principals. Accessories.** — Criminals guilty of felony are also classified by the common law, according to the nearness or remoteness of their connection with the crime committed, into *principals* and *accessories*. In high treason all are principals, on account, it is said, of the heinousness of the crime; and in misdemeanors all are principals, because it is beneath the dignity of the law to distinguish the different shades of guilt in petty crimes.[8] And of prin-

[1] United States *v.* Worrall, 2 Dall. 384; Walsh *v.* People, 65 Ill. 58.

[2] State *v.* Farrier, 1 Hawks (N. C.), 487; Com. *v.* Whitehead, 2 Law Reporter, 148.

[3] Rex *v.* Phillips, 6 East, 464.

[4] Com. *v.* Mink, 123 Mass. 422.

[5] Reg. *v.* Doody, 6 Cox C. C. 463.

[6] Com. *v.* Dennis, 105 Mass. 162.

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

[8] 4 Bl. Com. 35.

cipals, in felony, we have those of the *first* and *second degrees*.

A principal in the first degree is the perpetrator of the act which constitutes the crime, whether he does it with his own hand, or by the hand of an innocent third person, — the third person being ignorant of the character of the act perpetrated;[1] where, for instance, a parent puts poison into the hands of his son not yet arrived at the age of discretion, and directs him to administer it; or one person, by fraud, force,[2] threats, or otherwise, induces another to take poison[3] or to steal, the fact that the instigator is not actually present is immaterial, if the connection between him and the act be direct, or the crime be committed under such circumstances that no one else but the instigator can be indicted as principal. Otherwise, a crime might be committed, and no one would be guilty as principal.[4]

When several persons participate in an act, each doing a part and neither the whole, as where several take part in a single burglary, all are principals in the first degree.[5]

Principals in the second degree are those who, without actually participating in the act itself, are present aiding and encouraging the party who commits the act; as where one undertakes to watch to prevent the principal from being surprised, or to aid him to escape, or in some other way to be of immediate and direct assistance to him in the promotion of his enterprise.[6] This

[1] State *v.* Shurtleff, 18 Me. 368; Bishop *v.* State, 30 Ala. 34.
[2] Collom *v.* State, 3 Heisk. (Tenn.) 14; 1 Hale P. C. 514.
[3] Blackburn *v.* State, 23 Ohio St. 146.
[4] 1 Hale P. C. 514; Vaux's Case, 4 Coke, 44.
[5] Rex *v.* Kirkwood, 1 Moody, 304.
[6] 4 Bl. Com. 36; Breese *v.* State, 12 Ohio St. 146.

distinction, however, of the old law is not now regarded with any favor, and, in fact, it has in many, if not most, of the States become practically obsolete.[1] Some statutes, however, recognize it, and in some the punishment is based upon the distinction.

§ 31. Accessories are divided into two classes,—those *before* and those *after* the fact. An accessory *before* the fact is one who, without being present aiding or abetting, procures, advises, or commands another to commit the crime.[2] An accessory after the fact is one who, knowing the fact that a felony has been committed, receives, relieves, comforts, or assists the felon.[3] These distinctions grew out of the rule of the common law, that every offence should be particularly described, so that the party charged might know with reasonable certainty to what he was to answer. The tendency of the modern law is to disregard the distinction, so far as it can be done consistently with the observance of the rules of pleading.[4]

The offences of advising another to commit a felony, the adviser not being present at its commission, and of receiving and concealing stolen goods, are, so far as the circumstantial description is concerned, different from the felonies themselves, and in several of the States the latter has been by statute made a distinct and substantive offence, punishable whether the principal felon has or has not been tried and convicted, though

[1] 1 Bishop Cr. Law, § 648.

[2] 4 Bl. Com. 63.

[3] 4 Bl. Com. 37.

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

under the ancient common law the accessory could be put upon his separate trial only in case the principal had been tried and convicted. This rule was adopted to avoid the absurdity of convicting an accessory and afterwards acquitting the principal. And where now the accessory may be tried before or after the principal is convicted, if afterwards, before sentence, the principal be tried and acquitted, the accessory, already convicted, on proof of the acquittal of the principal, will be entitled to his discharge, the statute modifying the common-law rule only so far as to allow of the trial of an accessory before or after the conviction of the principal, but not after his acquittal.[1]

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

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

It is also a principle of the common law that the offence of the accessory cannot be greater than that of the principal,[4] nor can the person who advises the

[1] McCarty *v.* State, 44 Ind. 214; s. c. 2 Green Cr. Law Rep. 715. A substantially similar statute exists in most of the States as well as in England. See *post*, p. 31, n, 3.

[2] State *v.* Chapin, 17 Ark. 561. See also Adams *v.* People, 1 Comst. (N. Y.) 173; State *v.* Ricker, 29 Me. 84; Com. *v.* Smith, 11 Allen (Mass.), 241; Holmes *v.* Com., 25 Pa. St. 221; 2 Burr's Trial, 440.

[3] 2 Hawk. P. C. c. 29, § 1.

[4] 2 Hawk. P. C. c. 29, § 1.

commission of a particular crime be held as accessory to a principal who commits a substantially different crime, unless the latter is the natural result of the effort to commit the one advised.[1] Thus, if a person advises another to beat a third, he is accessory to the beating and its natural consequences, but he is not accessory to the different and additional crime of rape committed by the principal.[2] It has recently been held in England by Lush, J., at Nisi Prius, that if several persons agree together to commit a criminal act in a particular way, each is responsible for the acts of the others done in the way agreed on, but not for acts done in any other way. If, for instance, A. and B. agree to assault C. with their fists, each is responsible for the consequences of an assault by the other with the fists. But A. is not responsible, if B., without his knowledge, uses a knife, for the consequences of any injury by the knife.[3] But it may be doubted if this is sound law.[4]

§ 32. **No Accessories in Misdemeanors.** — In misdemeanors all are principals, and so the common law seems to have held of treason. To felonies, therefore, the distinction is confined.[5]

§ 33. **Accessories in Manslaughter.** — At common law it was once held that one could not be accessory before the fact to manslaughter, because that offence was in

[1] 2 Hawk. P. C. c. 29, § 18.

[2] 2 Hawk. P. C. c. 29, § 18; Watts *v.* State, 5 W. Va. 572.

[3] Reg. *v.* Caton, 12 Cox C. C. 624.

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

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

its nature sudden and unpremeditated.[1] But it has been said by high authority that Lord Hale in thus stating the law alludes only to cases of killing *per infortunium*, or in self-defence, and that in other cases of manslaughter there seems to be no reason why there may not be accessories.[2] However this may be, the question becomes unimportant in those States which do not favor the distinction between principals in the first and second degree, and principal and accessory before the fact; and there a man indicted as accessory before the fact to murder may be convicted, though his principal may have been convicted of manslaughter only, or even if he have been acquitted.[3]

Where one employs a second to procure a third person to commit a felony, the first two are accessories to the third principal. And this is true, although the first knows not who the third may be.[4] So one may be accessory after the fact by procuring another to assist the principal.[5] And where one would become an accessory if the offence instigated should be committed, yet if, before its commission, he countermands his advice and withdraws from the enterprise, he is not accessory to any act done after notice actually given of the withdrawal.[6] He is only accessory to the act which has been committed when the aid is rendered. Thus, where one renders

[1] 1 Hale P. C. 437.

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

[3] People *v.* Newberry, 20 Cal. 439. See *ante*, p. 29, n. 1.

[4] Rex *v.* Cooper, 5 C. & P. 575.

[5] Rex *v.* Jarvis, 2 M. & R. 40.

[6] 1 Hale P. C. 618.

aid after a mortal stroke, but before the consequent death, he is not accessory to the death.[1]

§ 34. **Husband and Wife.** — By the common law the duty of a wife to succor and harbor her husband prevented her from incurring the guilt of an accessory after the fact thereby. But no other relationship was a protection.[2] By statute, however, in some of the States other relationships have been made a protection. But though the wife cannot be an accessory after the fact to her husband as principal, and it is said that for the same reason — relationship and duty to succor and protect — the husband cannot be accessory after the fact to the wife[3] (against the opinion, however, of the older authorities[4]), yet either may be accessory before the fact to the other as principal.[5]

§ 35. **Assistance must be personal.** — By a very nice distinction it is held that he who buys or receives stolen goods, though he may be guilty of a substantive misdemeanor, is not an accessory, because he does not receive or assist the thief personally, it being necessary to constitute an accessory after the fact that the act should amount to personal assistance to the principal;[6] while he who assists him in further carrying them away after they have been stolen, is an accessory.[7] On the other hand, a person who is in fact absent and away from the place where the crime,

[1] 1 Hale P. C. 602.

[2] 2 Hawk. P. C. c. 29, § 34.

[3] 1 Deac. Cr. Law, 15.

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

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

[6] 4 Bl. Com. 38; Loyd *v.* State, 42 Ga. 221; People *v.* Cook, 5 Park. (N. Y.) C. R. 351; Reg. *v.* Chapple, 9 C. & P. 355.

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

by previous arrangement, is committed, as where he entices and keeps away the owner of a store while his confederate robs it, — this absence being in furtherance and part of the enterprise, — is not an accessory but a principal.[1] So, if he watches for the purpose of giving information, or other aid if necessary.[2] Mere presence, however, without approval known to the principal, or other encouragement, evidenced by some act, does not make one an accessory.[3] Nor is one absent, though in some sense aiding, as the stakeholder to a prize-fight, to be regarded as an accessory.[4]

§ 36. **An Accomplice** is one who shares in the commission of the crime in such manner that he may be indicted with the principal as a participator in the offence. Therefore, under a statute for unlawfully administering a drug to a pregnant woman with intent to procure a miscarriage, the woman is not an accomplice.[5] Nor is a person who enters into a pretended confederacy with another to commit a crime, and aids him therein for the purpose of detecting him, having himself no criminal intent, either an accessory or an accomplice.[6] Nor is one who entraps another into the commission of a crime for a like purpose.[7] So under an indictment for betting at ten-pins, one who

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

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

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

[4] Reg. *v.* Taylor, 13 Cox C. C. 68.

[5] State *v.* Hyer, 39 N. J. 598; Com. *v.* Boynton, 116 Mass. 345.

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

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

merely takes part in the game, but does not bet, is not an accomplice.[1]

The question whether one is an accomplice usually arises in the course of a trial, as a question of evidence, and is to be determined by the jury, under instructions from the court, as to what constitutes an accomplice.[2] Being *particeps criminis*, his evidence may be regarded as that of a criminal. And it is the usual practice of the courts to advise not to convict upon the uncorroborated testimony of an accomplice. This, however, is not a rule of law. It is entirely within the discretion of the court whether it will caution the jury in this way; and a refusal so to do is no matter of exception.[3] The practice in England is more uniform in felonies than in misdemeanors, in which latter case it is sometimes refused.[4] In Georgia the rule is made applicable only in felonies.[5] But a conviction on the uncorroborated evidence of an accomplice is good at common law. The principle which allows the evidence to go to the jury at all necessarily involves the right to believe and act upon it.[6] But by statute in Iowa, and perhaps other States, there must be corroboration.[7]

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

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

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

[4] McClurg *v.* Wright, 10 Ir. Law, N. S. 514; 1 Greenl. Ev. § 382, n.

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

[6] Com. *v.* Bosworth, 22 Pick. (Mass.) 397; People *v.* Costello, 1 Denio (N. Y.), 86; United States *v.* Kepler, 1 Bald. C. Ct. 22; State *v.* Walcott, 21 Conn. 272; Dawley *v.* State, 4 Ind. 128; State *v.* Prudhomme, 25 La. Ann. 522; State *v.* Hyer, *ubi supra;* Lindsay *v.* People, 63 N. Y. 143; Hamilton *v.* People, 29 Mich. 173. *Contra*, People *v.* Ames, 39 Cal. 403; Lopez *v.* State, 34 Tex. 133.

[7] State *v.* Moran, 34 Iowa, 453; Smith *v.* State, 37 Ala. 472.

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

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

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

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

§ 38. **Evidence. Pleading. Trial.** — By the common law there was one state of circumstances under which a person might be found guilty of a misdemeanor without a trial to the jury upon the merits. If a plea of former acquittal or conviction to an indictment for a misdemeanor be found, on replication or demurrer, against the prisoner, he might be sentenced without a trial for the offence itself;[2] but upon the decision against the prisoner in such a case, on an indictment for felony, he might answer over, and have his trial upon the merits. This is not, however, the rule in this country, where the prisoner is usually allowed to have his trial in both cases, as a matter of right, if in his plea he reserves the right to plead over.[3] In Tennessee, it

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

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

[3] Com. *v.* Goddard, 13 Mass. 455; Com. *v.* Barge, 3 Pa. 268; Ross *v.* State, 9 Mo. 696; State *v.* Dresser, 54 Me. 569; United States *v.* Conant, C. Ct. Mass., Sept. 1879.

has been said to be a matter of discretion with the court.[1]

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

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

§ 39 *a*. **Ex post facto Law.** — Laws, in general, can have no retroactive efficacy; and, especially in the United States, all *ex post facto* laws, or laws which make criminally punishable an act which was not so punishable at the time it was committed, or punish an offence by a different kind of punishment, or in a different manner,—not diminishing the punishment,—from that by which it was punishable before the statutes were passed, and prohibited by the Constitution of the United States.[6]

On the other hand, when a statute creating an offence

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

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

[3] O'Neil *v.* State, 48 Ga. 66. [4] Cook *v.* State, 11 Ga. 53.

[5] Com. *v.* Barlow, 4 Mass. 39.

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

is repealed, or expires before judgment in a criminal case, judgment cannot be entered against the prisoner, unless by a saving clause in the statute excepting pending cases; and in such cases, if the statute expires after judgment and before execution, the judgment will be reversed or execution stayed.[1] But laws changing the rules of evidence or of procedure[2] do not come under the category of *ex post facto* laws.

§ 40. **No One Twice to be put in Jeopardy.** — It is another well-settled and most salutary principle of criminal law that no person shall be put upon trial twice for the same offence. This old doctrine of the common law has found its way into the Constitution of the United States, and into that of most or all of the States, in different forms of expression, substantially that no person shall be put twice in jeopardy of life or limb for the same offence. The meaning of this is, that when a person has been in due form of law put upon trial upon a good and sufficient indictment, and convicted or acquitted, that conviction or acquittal may be pleaded in bar to a subsequent prosecution, within the same jurisdiction, for the same offence.[3] And even if the indictment be insufficient and the proceedings be irregular, so that a judgment thereupon might be set aside upon proper process, yet if the sentence thereunder has been acquiesced in by, and executed upon, the convict, such illegal and voidable judgment constitutes a good plea in bar.[4] So if the

[1] Hartung *v.* People, 22 N. Y. 95; United States *v.* Finlay, 1 Abb. 364; State *v.* Daley, 29 Conn. 272; Taylor *v.* State, 7 Blackf. (Ind.) 93; Com. *v.* Pa. Canal Co., 66 Pa. St. 41.

[2] Stokes *v.* People, 53 N. Y. 162; People *v.* Mortimer, 46 Cal. 114.

[3] United States *v.* Gibert, 2 Sumn. (U. S. C. Ct.) 42.

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

prisoner be sentenced to an illegal punishment, — as, for instance, to fine and imprisonment, where the law authorizes only one, after part execution of either, — he cannot afterwards, upon a revision of the sentence, even during the same term of court, be punished by the imposition of the lawful punishment.[1] But the rule does not protect from prosecution by another sovereignty, if the same act is a violation of its law, as the laws, and especially the criminal laws, of a country have no extra-territorial efficacy. If, therefore, one sovereignty has punished an act which was also a violation of the law of another sovereignty, the latter has the right, in its discretion, also to punish the act.[2] Doubtless, however, in such case, the fact of prior punishment would have great weight in determining whether the guilty party should be again punished at all, or if punished, to what degree.[3] It has been said by high authority[4] that a conviction of piracy, which is an offence against all sovereignties, under one sovereignty, would doubtless be recognized in all other civilized countries as a good plea in bar to a second prosecution. When there are two sovereignties having jurisdiction within the same geographical limits, there can be no doubt that one act may constitute a crime against both, and be punishable by both. Thus, an assault upon an officer of the United States, while acting in the discharge of his duty within the limits of a State, may be punished as an assault by the

[1] *Ex parte* Lange, 18 Wall. (U. S.) 183, Clifford and Strong, JJ., dissenting.

[2] State *v.* Brown, 1 Hayw. (N. C.) 116; United States *v.* Amy, 14 Md. 152; Com. *v.* Green, 17 Mass. 514; Phillips *v.* People, 55 Ill. 429; *post*, § 41.

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

[4] United States *v.* Pirates, 5 Wheat. (U. S.) 184.

State, and, by the United States, as an assault upon its officer in the discharge of his duty, — a higher offence.[1] So the same act may be a violation of a city charter and the penal law of the State.[2] Where the same act constitutes two offences, there may be a punishment for each offence.[3] Though from the words "jeopardy of life or limb" it has been contended that the rule is applicable, where such words or their equivalent are used, only to such crimes as are punished by injury to life or limb, yet it is very generally if not universally held by the courts that it is applicable to all grades of offences.[4] It is not only for the interest of society that there should be an end of controversy, but it is a special hardship that an individual should be indefinitely harassed by repeated prosecutions for the same offence. So firmly is this doctrine established, that the government will not be allowed to institute a second prosecution, or put the prisoner to a new trial, even though his acquittal is consequent upon the judge's mistake of law, or the jury's disregard of fact. If, however, he be convicted by a misdirection of the judge in point of law, or misconduct on the part of the jury, he may by proper process have the verdict set aside; in which case, the trial not having been completed, and the verdict having been set aside at his request, the accused may be again set to the bar.

To give, therefore, the accused a good plea that he has once been put in jeopardy, it must appear that he was put upon trial in a court of competent jurisdic-

[1] Moore *v.* Illinois, 14 How. (U. S.) 137; and see *post*, § 41.

[2] Ambrose *v.* State, 6 Ind. 351.

[3] State *v.* Inness, 53 Me. 536; Com. *v.* McShane, 110 Mass. 502. See also *post*, § 41.

[4] 1 Bishop Cr. Law, § 990.

tion, upon an indictment upon which he might have been lawfully convicted of the crime charged, and before a jury duly impanelled, and that, without fault on his part, he was convicted or acquitted, or that, if there was no verdict, the jury were unlawfully discharged. And the jury may be discharged before verdict is rendered, when in the judgment of the court there is a clear necessity therefor, or the ends of justice will otherwise be defeated; as where the term of court expires before a verdict is reached; or the jury, after sufficient deliberation, of which the court is the judge, cannot agree; or the trial is interrupted by the sickness or death of judge or juror; or the jury is discharged by the consent of the prisoner.[1] So much of the learned opinion of Judge Story, in United States *v.* Gibert,[2] as holds that no new trial can be had in cases of felony, is now generally, if not universally, regarded as unsound law.[3] If the accused procure a conviction by fraud, it will not avail him as a plea in bar, this being, within the above rule, by his fault.[4] So if, after a trial, the prisoner fails to appear when the jury return with their verdict, and no verdict is rendered, no trial is completed, and the accused may be put on trial again.

As to the effect of a former acquittal of an offence which includes, or is part of, another offence, there is

[1] See *Ex parte* Lange, 18 Wall. (U. S.) 183; Reg. *v.* Bird, 5 Cox C. C. 20; Com. *v.* Roby, 12 Pick. (Mass.) 496; Guenther *v.* People, 24 N. Y. 100; Hines *v.* State, 24 Ohio, N. S. 134; State *v.* Jefferson, 66 N. C. 309; State *v.* Wilson, 50 Ind. 487; State *v.* Vaughan, 29 Iowa, 286; McNeil *v.* State, 47 Ala. 498.

[2] 2 Sumner C. Ct. 42.

[3] *Ex parte* Lange, *ubi supra.* Dissenting opinion of Clifford, J.

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

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

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

the ground that the proof made the case one of murder.[1] The offence is the same if the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence at the trial of the first, but whether the facts are so combined and charged in the two indictments as to constitute the same offence. It is not sufficient that the facts on which the two indictments are based are the same. They must be so alleged in both as to constitute the same offence in degree and kind.[2]

A conviction or acquittal on a charge of larceny of one of several articles, all stolen at the same time, is a good plea in bar of any subsequent prosecution for the larceny of either or all of the other articles.[3]

The trial and jeopardy begin when the accused has been arraigned and the jury impanelled and sworn.[4]

§ 41. **Jurisdiction.** — As a rule, an offence against the laws of one sovereignty is no offence against the laws of another; and one sovereignty has no

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

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

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

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

jurisdiction over, and will not undertake to punish, crimes committed in another. Where, however, a criminal act perpetrated in one State or foreign sovereignty, by continuity of operation takes effect in another, the courts of the latter have jurisdiction to punish the crime as if all the *res gestæ* had taken place within its territory. If, for instance, a man standing on one side of the boundary between two States intentionally discharges a gun at a person standing on the other side of the boundary, and injures him, the offence may be punished at the domicile of the injured party.[1] So if a man resident in one sovereignty sends an innocent agent into another, who by means of false pretences obtains money from a person resident in the latter, the principal is guilty of an offence in the latter, and may be punished by its tribunals, if the offender be found within the limits of their jurisdiction.[2]

So it has been held that a larceny of goods in one jurisdiction is a larceny in every jurisdiction where the thief may be found with the stolen goods; but upon this point the authorities are not uniform.[3] A robber, however, in one jurisdiction becomes merely a thief in another, by taking his stolen goods into the latter.[4] And in a very recent case,[5] an indictment

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

[2] Adams *v.* People, 1 Comst. (N. Y.) 173; State *v.* Chapin, 17 Ark. 501; Johns *v.* State, 19 Ind. 421.

[3] 3 Greenl. Ev. § 152, note, where the cases *pro* and *con* are collected; Stanley *v.* State, 24 Ohio St. 166; Com. *v.* Uprichard, 3 Gray (Mass.), 434; State *v.* Underwood, 49 Me. 181.

[4] 1 Hale P. C. 507, 508; 2 Hale P. C. 163.

[5] Com. *v.* White, 123 Mass. 450.

against a receiver of stolen goods alleged to have been stolen in Massachusetts was upheld upon proof that the goods were stolen in New York, and taken by a New York receiver into Massachusetts, and there sold to the indicted receiver, — a decision the soundness of which cannot be said to be free from doubt.

The same act — counterfeiting, for instance — may be an offence against two sovereignties, and punishable by both.[1] So a bank officer, under the national bank law of the United States, may be punished by the United States for wilful misappropriation of the funds of the bank, and also, under the common law, for larceny, or for embezzlement, if the statute make it embezzlement, by the State in which the act is done.[2] Doubtless, however, a prosecution in good faith by one government would be taken into consideration by the other.[3]

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

Where lands within the territorial limits of a State are ceded to the United States, exclusive legislative and judicial authority is vested in the United States government, by the Constitution; and they may exercise it, unless the State, by the act of cession, reserves

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

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

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

rights inconsistent with the exercise of such authority.[1] For the purposes of jurisdiction, a private vessel upon the high seas is to be regarded as a part of the sovereignty whose flag she carries, and crimes committed on board of her while at sea are cognizable only by that sovereignty. When, however, such vessel comes within the jurisdiction of another power, crimes committed on board of her are cognizable by the power into whose limits she has come.[2]

It is further to be noted that jurisdiction to try for the commission of a crime is conferred by the law, and not by the consent of parties.[3]

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

§ 42. **Benefit of clergy** was an old common-law right which the clergy had, when they were charged

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

[2] People *v.* Tyler, 7 Mich. 161; s. c. 8 Mich. 320.

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

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

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

with crime, of having their causes transferred to the ecclesiastical tribunals, or, after conviction, of pleading certain statutes in mitigation of sentence. Of its specific character and its limitations it is not proposed to speak, as it is doubtful if it is a right which can now be successfully asserted in any State of the Union.[1]

§ 43. **Christianity a Part of the Common Law.** — The general maxims and precepts of Christianity constitute a part of the common law.[2]

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

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

CHAPTER II.

OF PARTICULAR CRIMES.

ABDUCTION.

§ 44. **Abduction** was made a crime by an old statute,[1] — sufficiently old to have been brought with our ancestors to this country as part of the common law.[2] The specific offence seems to have been limited to the taking away for lucre — no doubt by force, fraud, or fear — of adult females, "maid, widow, or wife," having property, or being heirs apparent, for the purpose of marriage. A taking for lucre and a marriage or defilement are essential to the completion of the offence.[3] And perhaps the distinction between this offence and kidnapping consists in this limitation, — kidnapping relating to the taking away any person, and more especially children, for any unlawful purpose. It may be, also, that abduction might be complete without taking the person abducted out of the realm, but only from home to some other place within the realm; while it was essential to the act of kidnapping that the person seized should be taken out of the country, or, at all events, seized with that intent.[4] It is now an offence for the most part if not entirely regulated by statute.

[1] 3 Hen. VII. c. 6.

[2] Com. *v.* Knowlton, 2 Mass. 534.

[3] Baker *v.* Hall, 12 Coke, 100.

[4] See *post*, KIDNAPPING.

These statutes variously describe and define the offence. While the substance is substantially the same in all, yet there are specific differences which distinguish, and leave it uncertain, till a comparison of the statutes solves the question, whether the decisions in one State are applicable to the statutes in another. Under these several statutes it has been held that abduction "for the purpose of prostitution," means for general and promiscuous illicit intercourse. A mere seduction and illicit intercourse with the seducer does not amount to prostitution.[1] Where a statute provides that the person so abducted must have been of previous chaste character, the abduction of a person who had been previously a prostitute is not within the statute, unless she had reformed.[2] If she had previously had intercourse with the defendant only, it seems that this cannot be held to be conclusive of previous unchaste character. The unchastity must be with other men.[3] In a very recent case,[4] a distinction is made between the phrase "of previous chaste character," as used in the statute against abduction, and the phrase "of good repute for chastity," used in another section of the same statute against seduction. In the former case, a single proven act of illicit intercourse is admissible in defence, as the issue is actual, personal virtue; while in the latter case it might not be, as reputation is the issue. But the distinction is

[1] Com. v. Cook, 12 Met. (Mass.) 93; State v. Stoyell, 54 Me. 24; State v. Ruhl, 8 Iowa, 447; People v. Parshall, 6 Park. (N. Y.) C. R. 129.

[2] Carpenter v. People, 8 Barb. (N. Y.) 603; State v. Carron, 18 Iowa, 72.

[3] State v. Willspaugh, 11 Mich. 278.

[4] Lyons v. State, 52 Ind. 426.

between "character" used in one statute, and "repute" used in the other. And it may be doubted if the distinction is not too fine. Very high authorities treat character and reputation as substantially identical.[1]

It is also held under these statutes that within the meaning of the term "forcible abduction" are included cases where the mind of the person is operated upon by falsely exciting fears, by threats, fraud, or other unlawful or undue influence amounting substantially to a coercion of the will, and an effective substitute for actual force.[2] And a child of four years old is incapable of consenting to be taken away by the father from the mother.[3] Where a statute limits the offence to the abduction of persons within a specified age, it is held that the fact that the abductor did not know, or even the fact that he had reason to believe and did believe, that the person taken away was not within the designated age, is immaterial. The act is at the peril of the perpetrator.[4]

ABORTION.

§ 45. Although there is[5] the precedent of an indictment for an attempt to procure an abortion as a crime at common law, and it has been said by a distinguished text-writer[6] that the procuring an abortion is an in-

[1] See 1 Greenl. Ev. § 461 and notes.

[2] Moody *v.* People, 20 Ill. 315; People *v.* Parshall, 6 Park. (N. Y.) C. R. 129.

[3] State *v.* Farrar, 41 N. H. 53. See also *post*, SEDUCTION.

[4] State *v.* Ruhl, 8 Iowa, 447; *ante*, § 5.

[5] 3 Chitty Cr. Law, 557.

[6] 2 Whart. Cr. Law, § 1220.

dictable offence at common law, it is found upon examination that the precedent referred to is for an assault, and the case[1] relied upon as an authority is also for an assault. The better opinion is that the procuring an abortion is not, as such, an indictable offence at common law, although the acts done in pursuance of such a purpose do undoubtedly amount to other offences which the common law recognizes and punishes. But the procuring of an abortion with the consent of the mother before she is quick with child is not, at common law, even an assault, the consent of the mother effectually doing away with an element necessary to the constitution of an assault.[2] The procuring it after that time is a misdemeanor, and may be a murder.[3]

Under a statute punishing the procurement of an abortion "by means of any instrument, medicine, drug, or other means whatever," the indictment charging that the defendant beat a certain pregnant woman with intent to cause her to miscarry, it was held that the case was not made out by proof that the defendant beat her and caused her thereby to miscarry, unless the beating was with that intent.[4]

This view of the common law doubtless led to such statutes as prevail in Massachusetts, Vermont, and New York, and, probably, most of the other States,

[1] Com. *v.* Demain, 6 Pa. L. J. 29. A later case in Pennsylvania, however, holds that an indictment will lie. Mills *v.* Com., 1 Harris (Pa.), 631.

[2] But see *post*, § 56, as to effect of consent.

[3] Reg. *v.* West, 2 C. & K. 784; Smith *v.* State, 33 Me. 48; State *v.* Cooper, 2 Zab. (N. J.) 52; Com. *v.* Parker, 9 Met. (Mass.) 263; Evans *v.* People, 49 N. Y. 384.

[4] Slattery *v.* People, 76 Ill. 217. See also *ante*, § 8.

punishing the procurement of, and the attempt to procure, a miscarriage, under which it is held that the consent of the woman is no excuse, and that the crime may be committed though the child be not quick.[1] And under the New York statute the woman who takes drugs to effect a miscarriage is equally guilty with the person who administers them to her.[2] Yet she is not strictly an accomplice, the law regarding her rather as a victim than a perpetrator.[3]

Upon general principles, as we have already seen, an attempt to commit a statutory misdemeanor or felony is itself a misdemeanor, indictable and punishable as such at common law.[4]

ADULTERY.

§ 46. **Adultery** is the unlawful and voluntary sexual intercourse between two persons of opposite sexes, one at least of whom is married. It is not an offence at common law,[5] and although in most of the States it is now made criminal, it is in some of them only cognizable in the ecclesiastical tribunals. The foregoing definition is based upon the general terms of the statutes of the several States under which it is not material which of the parties is married, the offence being adultery on the part of the married person, and forni-

[1] Com. *v.* Wood, 11 Gray (Mass.), 85; State *v.* Howard, 32 Vt. 380; People *v.* Davis, 56 N. Y. 95; Mills *v.* Com., 13 Pa. St. 631; Cobel *v.* People, 5 Park. (N. Y.) C. R. 348. See also State *v.* Murphy, 3 Dutch. (N. J.) 112; Willey *v.* State, 46 Ind. 363; State *v.* Van Hooten, 37 Mo. 357.

[2] Frazer *v.* People, 54 Barb. (N. Y.) 306.

[3] Dunn *v.* People, 29 N. Y. 523; *ante*, § 36.

[4] *Ante*, § 28.

[5] 4 Bl. Com. 65.

cation on the part of the unmarried.[1] But it embraces a wider field, no doubt, than comes within the original idea of adultery, which was the introduction of spurious offspring into the family, whereby a man may be charged with the maintenance of children not his own, and the legitimate offspring be robbed of their lawful inheritance, making it necessary that one of the parties should be a married woman. In some of the States, this idea still prevails as to criminal prosecutions for adultery, while in suits for divorce the intercourse of a married man with an unmarried woman is held to be adultery.[2] The statutes of the several States so differ, however, that while in some States intercourse of an unmarried man with a married woman is adultery on the part of the man,[3] in others, intercourse by a married man with an unmarried woman is not adultery on the part of the latter,[4] and in others, an unmarried man cannot commit adultery.[5]

That the parties cohabited in the honest belief that they had a right to, and did not intend to commit the crime, is no defence, as has already been shown.[6]

"Open and notorious adultery" cannot be shown by the mere act of adultery. The fact of openness and notoriety must be proved, and that the party charged publicly and habitually violated the law.[7] So

[1] State *v.* Hutchinson, 36 Me. 261; Miner *v.* People, 58 Ill. 59.

[2] State *v.* Armstrong, 4 Minn. 335.

[3] State *v.* Wallace, 9 N. H. 515; State *v.* Pearce, 2 Blackf. (Ind.) 318; State *v.* Weatherby, 43 Me. 258.

[4] Cook *v.* State, 11 Ga. 53; State *v.* Armstrong, 4 Minn. 335.

[5] Respub. *v.* Roberts, 2 Dall. (U. S.) 124.

[6] *Ante*, § 5; State *v.* Goodenow, 65 Me. 30.

[7] State *v.* Crowner, 56 Mo. 147; People *v.* Gates, 46 Cal. 52;

"living in adultery" means more than a single act of illicit intercourse.[1]

AFFRAY.

§ 47. **An affray** is the fighting, by mutual consent, of two or more persons in some public place, to the terror of the people.[2] The meaning of the word is, that which frightens; and the offence consists in disturbing the public peace by bringing on a state of fear by means of such fighting, or such threats of fighting as are calculated to excite such fear, whether there be actual fear or not being immaterial. Mere wordy dispute, therefore, without actual or threatened violence by one party or the other, does not amount to an affray.[3] But if actual or threatened violence is resorted to by one, who is provoked thereto by the words of the other, this will make the latter guilty.[4] It is sometimes held that consent is not essential.[5] But it is obvious that one who is assaulted, and merely uses such force as is necessary to beat off his assailant, is guilty of no offence. He is not fighting, in the sense of the definition, but is merely exercising his right of self-defence.[6]

The place must be a public one. A field, therefore,

Wright *v.* State, 5 Blackf. (Ind.) 358; State *v.* Marvin, 12 Iowa, 499; Miner *v.* People, 58 Ill. 59; Carrotti *v.* State, 42 Miss. 334.

[1] Smith *v.* State, 39 Ala. 554; Richardson *v.* State, 37 Tex. 346.

[2] Wilson *v.* State, 3 Heisk. 278; Simpson *v.* State, 5 Yerg. (Tenn.) 356; 4 Bl. Com. 146.

[3] State *v.* Sumner, 5 Strobh. (S. C.) 53; Hawkins *v.* State, 13 Ga. 322; State *v.* Downing, 74 N. C. 184.

[4] State *v.* Sumner, 5 Strobh. (S. C.) 53; Hawkins *v.* State, 13 Ga. 322; State *v.* Downing, 74 N. C. 184; State *v.* Perry, 5 Jones (N. C.), 9. But see *contra*, O'Neil *v.* State, 16 Ala. 65.

[5] Cash *v.* State, 2 Overt. (Tenn.) 198.

[6] See also Klum *v.* State, 1 Blackf. (Ind.) 377.

surrounded by a dense wood, a mile away from any highway or other public place, does not lose its private character by the casual presence of three persons, two of whom engage in a fight.[1] An enclosed lot, however, in full view of the public street of a village, thirty yards distant,[2] is a public place, though a highway itself is not necessarily a public place, because by disuse or the undergrowth of trees, or otherwise, it may have become concealed from public view.[3] A fight begun in private, and continued till a public place is reached, becomes an affray.[4]

By the definition, it requires two to make an affray. If, therefore, one of two indicted persons be acquitted, the case fails as to the other.[5]

APOSTASY.

§ 48. **Apostasy** stands at the head of the list of crimes against religion of which the ancient common law took cognizance, and is defined as a total renunciation of Christianity by one who has embraced it.[6] The Church of England was and is a State institution, and it has been deemed to be the duty of the State to protect it, and through it the State religion. Hence the common law punished whatever was calculated to injure or degrade it. Out of this view of State policy grew the common-law crimes of *Apostasy*, *Heresy*,

[1] Taylor *v.* State, 22 Ala. 15. See also State *v.* Heflin, 8 Humph. (Tenn.) 84.

[2] Carwile *v.* State, 35 Ala. 392.

[3] State *v.* Weekly, 29 Ind. 206.

[4] Wilson *v.* State, 3 Heisk. (Tenn.) 278.

[5] Hawkins *v.* State, 13 Ga. 322. See also RIOT.

[6] 4 Bl. Com. 42.

Simony, *Non-Conformity*, *Reviling the Ordinances of the Church*, *Blasphemy*, and *Profane Cursing and Swearing*, — neither of which it is believed, except the last two, which only, therefore, will be specially noticed in their proper places, have ever been, or are likely to be, here recognized as crimes against the State; for though, as has already been seen,[1] Christianity is a part of the common law in this country as well as in England, yet as we have no established church and no established religion to which the State is bound to extend its protection, most of these offences are left to the discipline of the various religious bodies in which they may arise. *Blasphemy* and *profane cursing and swearing*, however, being offences against good morals, as well as hostile to the spirit of Christianity, have, by exception, in this country been held indictable.[2]

ARSON.

§ 49. **Arson** is the malicious burning of another's dwelling-house.

It is an offence against the security afforded by a man's dwelling-house; and the law looks upon it in this light, rather than as an injury to his property. It regards the violation of the sanctity of one's abode as a much graver offence than the mere injury to his property, just as it regards the larceny of a watch from the person or from a building as a graver offence than the simple larceny of the watch without these attendant circumstances.[3]

§ 50. **Dwelling-house. What it embraces.** — At com-

[1] *Ante*, § 43.

[2] See 1 Bl. Com. bk. 4, c. 4. See also BLASPHEMY.

[3] People *v.* Gates, 15 Wend. (N. Y.) 159.

mon law the term "dwelling-house" embraced all outhouses within the same curtilage, and used as part and parcel of the residence, though not under the same roof.[1] Curtilage means an enclosure of a piece of land around a dwelling-house, usually including the buildings occupied in connection with the use of the dwelling-house, whether the enclosure be made by a fence or by the buildings themselves.[2]

§ 51. **Dwelling-house. Ownership.** — Simply burning one's own house is not arson, nor any offence, at common law, unless it be accompanied by a design to injure.[3] But by statute in some of the States the wilful and malicious burning of any building is made punishable; and in such case the owner may be guilty of the offence by burning his own barn.[4] He may be said to own the house who has the right of present possession, as the lessee or mortgagor before foreclosure.[5] A husband is not guilty of the crime who burns the house which he jointly occupies, as tenant by the curtesy, with his wife who owns the fee; nor the wife who sets fire to her husband's house;[6] though a widow whose dower has not been assigned, and who has no present right of possession, the house being occupied by a tenant, may be guilty of it. So of

[1] 4 Bl. Com. 221.

[2] Com. *v.* Barney, 10 Cush. (Mass.) 480; *post*, BURGLARY; Bishop, Stat. Crimes, § 277 *et seq.*; People *v.* Taylor, 2 Mich. 250.

[3] Bloss *v.* Tobey, 2 Pick. (Mass.) 325.

[4] State *v.* Hurd, 51 N. H. 176. See also Shepherd *v.* People, 19 N. Y. 537.

[5] People *v.* Van Blarcom, 2 Johns. (N. Y.) 105; Rex *v.* Pedley, 1 Leach Cr. Law (4th ed.), 242; Spalding's Case, 1 Leach Cr. Law, 218.

[6] Snyder *v.* People, 26 Mich. 106; Rex *v.* March, 1 Moody, 182.

a reversioner who burns the house before the tenant's right of occupation has expired.[1] A servant, though living in the house, yet having no right of possession, may commit the crime;[2] but a tenancy for a year, or any special ownership which carries with it the right of possession at the time of the burning, is sufficient to exempt from guilt.[3]

§ 52. **Dwelling-house. Occupation.** — The building will be considered a dwelling-house within the meaning of the law, if actually occupied as such, though it may not have been erected for that purpose, and may also be occupied for other purposes, as for a jail, or a building occupied in part as a lodging-house.[4] It must be in some substantial sense an occupied house, and that, by the person alleged to be the owner. It is not necessary that he should be actually present in the house at the time of the burning. If the house contain the occupant's effects, and he has the design to return, after a temporary absence, this is a sufficient occupation to constitute it a dwelling-house.[5] Mere ownership, without occupancy by the owner, is not sufficient.[6] Nor is the fact that it is habitable and intended for occupancy, unless it is also in some sense used as a place of residence.[7] It must be a completed

[1] Reg. *v.* Harris, Fost. Cr. Law, 113.

[2] Rex *v.* Gowen, 2 East P. C. 1027.

[3] McNeal *v.* Woods, 3 Blackf. (Ind.) 485; 2 East P. C. 1022; People *v.* Gates, 15 Wend. (N. Y.) 159; State *v.* Lyon, 12 Conn. 487. See also *post*, BURGLARY.

[4] People *v.* Orcutt, 1 Park. C. R. 252; People *v.* Cotteral, 18 Johns. (N. Y.) 115.

[5] State *v.* Johnson, 48 Ga. 116; State *v.* Toole, 29 Conn. 342.

[6] Com. *v.* Barney, 10 Cush. (Mass.) 478.

[7] State *v.* Warren, 33 Me. 30; Hooker *v.* Com., 13 Grat. (Va.) 763.

house, ready for occupancy, and not an abandoned one, unfit for habitation.[1]

§ 53. **Malice.** — The malice requisite to constitute the crime is that general malice which accompanies a criminal purpose. Carelessness or negligence, without a specific intent unlawfully to burn or to do some other wrong, does not constitute the malice which is an essential ingredient in the crime of arson.[2] But when, intending to burn the house of one, the accused burns the house of another, the crime is committed. Arson being intended and committed, it is not permissible that the guilty party should escape the consequences, by alleging his mistake as to one of the varying incidents of the crime. So far as the public offence is concerned, it is immaterial whether the house burned be that of one person or another.[3] And one may be guilty of arson by setting fire to his own house, whereby the house of another is burned, if the proximity was such that the burning of the latter was the natural and probable consequence of burning the former.[4] If the burning accomplished was not with a felonious intent, but for a purpose which, if accomplished, would constitute a crime of a grade below a felony, as where a prisoner sets fire to the jail in which he is confined, with the purpose of thereby effecting his escape, this, it has been held, is not arson, if the attempt to escape is only a misdemeanor.[5] But the

[1] State *v.* McGowen, 20 Conn. 245; Elsmore *v.* St. Briacels, 4 B. & C. 461. See also McGary *v.* People, 45 N. Y. 153.

[2] 4 Bl. Com. 222.

[3] 1 Hale P. C. 569; 1 Hawk. P. C. c. 39, § 19.

[4] 2 East P. C. 1031.

[5] People *v.* Cotteral, 18 Johns. (N. Y.) 115; Delany *v.* State, 41 Tex. 601; State *v.* Mitchell, 5 Ired. (N. C.) 350.

contrary has been held in Alabama;[1] and in England a person who set the fire, for the purpose of getting the reward offered for the earliest information of it, was held guilty of arson.[2]

The cases, however, upon this point seem to be wholly irreconcilable. Where there is the intent to burn, coincident with the act of burning, the crime seems to be complete, upon general and well-settled principles and according to every definition; and the fact that the burning was the secondary rather than the primary purpose — a felonious means to an unlawful but not felonious end — does not seem to relieve it in any respect or degree of its criminality. It sounds strangely, and seems not in accordance with sound reason or public policy, that one who intentionally commits a felony and a misdemeanor, — the former as a step towards the latter, — shall be deemed less guilty than he would have been if the commission of the felony had been his sole purpose, and he had committed no misdemeanor.[3] The failure to observe the distinction between intent and motive — the former of which qualifies the act, while the latter moves to it[4] — has doubtless led to the confusion. The man who deliberately sets fire to and burns a jail intends to burn it, whether his motive be self-sacrifice, revenge, escape, or reward.[5] The case might be different if, while a party is stealing in a building, he accidentally, by dropping a match, sets fire to the building. It has been

[1] Luke *v.* State, 49 Ala. 30.

[2] Reg. *v.* Regan, 4 Cox C. C. 335.

[3] See 1 Bishop, Cr. Law, §§ 323–345; 2 Bishop Cr. Law, §§ 14, 15.

[4] *Ante*, § 6.

[5] Reg. *v.* Regan, 4 Cox C. C. 335.

recently held in Ireland that this would not be arson.[1] But this is doubtful if there is any malice or evil intent in the crime intended, — if it be not a mere *malum prohibitum*.[2]

§ 54. **Burning** means an actual combustion of some portion of the house, so that the wood is actually on fire. It is sufficient if it is charred. It is not necessary that it be consumed or destroyed.[3]

ASSAULT.

§ 55. Strange as it may seem, there is no definition of an assault which meets unanimous acceptance. The more generally received definition is that of Hawkins,[4] to wit: "An attempt or offer with force and violence to do a corporal hurt to another." We have already seen[5] that to constitute an attempt there must be some overt act in part execution of a design to commit a crime; and upon the theory that an assault is but an attempt, it is held that a mere purpose to commit violence, unaccompanied by any effort to carry it into immediate execution, is not an assault. The violence which threatens the "corporal hurt," or, as it is frequently expressed, "personal injury" or "bodily

[1] Reg. *v.* Faulkner, 11 Irish L. T. R. 130.

[2] 2 Russ. on Crimes, 486.

[3] People *v.* Haggerty, 46 Cal. 354; Com. *v.* Tucker, 110 Mass. 403; People *v.* Butler, 16 Johns. (N. Y.) 203; Mary *v.* State, 24 Ark. 44. The statutes of most if not all the States have modified the common law of arson to a greater or less extent; and while decisions will be found apparently inconsistent with the principles stated in the text, it will doubtless be found that such decisions depend upon the peculiarities of the respective statutes.

[4] 1 P. C. c. 62, § 1.

[5] *Ante*, § 29.

harm," must be set in motion.[1] It is the beginning of an act, or of a series of acts, which, if consummated, will amount to a battery, which is the unlawful application of violence to the person of another.[2] One, therefore, who, within such proximity to another that he may inflict violence, lifts his hand, either with or without a weapon, with intent to strike, or lifts a stone with intent to hurl it, or seizes a loaded gun with intent to shoot it, is, upon all the authorities,[3] guilty of an assault.

§ 56. **Unlawfulness. Consent.** — The force to constitute an assault must be unlawful. A parent, or other person standing *in loco parentis*, may use a reasonable amount of force in the correction of his child.[4] So a schoolmaster may correct his pupil; or a master his apprentice;[5] but the master's authority is personal, and cannot be delegated to another, as can that of a parent.[6] An officer may also use such force in making an arrest;[7] and, generally, all persons having the care, custody, and control of public institutions, and charged with the duty of preserving order and preventing their wards from self-injury, such as the superintendents of asylums and almshouses.[8] So the

[1] People *v.* Yslas, 27 Cal. 630; Smith *v.* State, 39 Miss. 521.

[2] See BATTERY.

[3] United States *v.* Hand, 2 Wash. (U. S. C. Ct.) 35; State *v.* Morgan, 3 Ired. 186; Higginbotham *v.* State, 23 Tex. 574. The Penal Code of Texas defines an assault as "Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery." Art. 476.

[4] State *v.* Alford, 68 N. C. 322.

[5] Gardner *v.* State, 4 Ind. 632.

[6] People *v.* Phillips, 1 Wheeler C. C. 155.

[7] Golden *v.* State, 1 Rich. N. S. (S. C.) 292.

[8] State *v.* Hull, 34 Conn. 132.

conductor of a railway train may forcibly put from his train any person guilty of such misconduct as disturbs the peace or safety of the other passengers, or violates the reasonable orders of the company.[1] And so may the sexton of a church[2] in a like way protect a lawful assembly therein. This right, however, must be exercised with discretion, and must not, in degree or in kind of force, surpass the limits of necessity and appropriateness.[3] The modern tendency is to construe strictly against the person using the force. It was formerly held that a husband might correct his wife by corporal chastisement; but this is now denied to be law in some of the States, and it is doubtful if the practice would be upheld by the courts of any State.[4] The mere relationship of master and servant, the former not being charged with any duty of education or restraint, will not now, whatever may have been the law heretofore, authorize the use of force.[5]

In some cases there may be an assault when the injured party apparently consents to the unlawful act, as where a female patient is deceived by a physician into consenting that improper liberties should be taken with her.[6] So, where a female pupil of tender years, by the dominating power of her teacher, is induced,

[1] People *v.* Caryl, 3 Park. C. C. (N. Y.), 326; State *v.* Goold, 53 Me. 279.

[2] Com. *v.* Dougherty, 107 Mass. 243.

[3] Com. *v.* Randall, 4 Gray (Mass.), 36.

[4] Com. *v.* McAfee, 108 Mass. 458; State *v.* Oliver, 70 N. C. 60; Gorman *v.* State, 42 Tex. 221; Fulgham *v.* State, 46 Ala. 108. See also Mr. Green's note to Com. *v.* Barry, 2 Green Cr. Law Rep. 288.

[5] Matthews *v.* Terry, 10 Conn. 455.

[6] Reg. *v.* Case, 1 Den. C. C. 580.

without resistance, to permit the same thing.[1] But when a person *sui juris*, without fraud or coercion, consents to the application of force, certainly, if the force be such as may be lawfully consented to, there can be no assault. It has been accordingly held that if a woman consents to her own dishonor,[2] or to the use of instruments whereby to procure an abortion,[3] or one requests another to lash him with a whip,[4] — these several acts do not constitute assaults, because they are assented to by the parties upon whom the force is inflicted. So prize-fighters, for the same reason, have been held not to be guilty of an assault upon each other.[5] But it has also been held that if two go out to fight in anger, each is guilty of an assault.[6] It is doubtful whether, upon principle, the existence of anger can be of any moment, if there is a mutual agreement to fight. Under certain circumstances, such fighting may amount to a breach of the peace; and if in a public place, and to the terror of other people, it would be an affray.[7] But whatever else they may be guilty of, — consent certainly not authorizing a breach of the peace, or an affray, or the procurement of an abortion, — there seems no warrant in the law for holding that one may be guilty of an assault by the application of force to another, to which the latter deliberately consents. Still, there is high authority for the proposition, that where two parties go out by con-

[1] Reg. *v.* Nichol, R. & R. 130; Reg. *v.* Lock, 12 Cox C. C. 244.
[2] People *v.* Bransby, 32 N. Y. 525.
[3] *Ante*, § 45.
[4] State *v.* Beck, 1 Hill (S. C.), 363.
[5] Champer *v.* State, 14 Ohio St. 437.
[6] Reg. *v.* Lewis, 1 C. & K. 419.
[7] See *ante*, AFFRAY.

sent and fight with their fists, each commits an assault by the other, though there is entire absence of anger or ill-will.[1]

Consent, however, is to be distinguished from submission. An idiot,[2] or a person asleep[3] or otherwise insensible,[4] or demented,[5] or deceived,[6] may submit, but he does not consent. Consent is the affirmative act of an unconstrained will, and is not sufficiently proved by the mere absence of dissent.[7]

§ 57. **Degree of Force. Mode of Application.** — The degree of force used is immaterial, provided it be unlawful. The least intentional touching of the person, or of that which so appertains to the person as to partake of its immunity, if done in anger, is sufficient. Thus, to throw water upon the clothes,[8] to spit upon, push, forcibly detain, falsely imprison, and even to expose to the inclemency of the weather, are all acts which have respectively been held to constitute an assault.[9] So any forcible taking of property from the possession of another, by overcoming the slightest resistance, is an assault.[10] Nor need the application of force be direct. If the force unlawfully set in motion

[1] Com. *v.* Colberg, 119 Mass. 350.

[2] Reg. *v.* Fletcher, 8 Cox C. C. 131.

[3] Reg. *v.* Mayers, 12 Cox C. C. 311.

[4] Com. *v.* Burke, 105 Mass. 376; People *v.* Queen, 50 Barb. (N.Y.) 128.

[5] Reg. *v.* Wardhurst, 12 Cox C. C. 443; Reg. *v.* McGavernan, 6 Cox C. C. 64.

[6] Com. *v.* Stratton, 114 Mass. 303.

[7] Reg. *v.* Lock, 12 Cox C. C. 244.

[8] People *v.* McMurray, 1 Wheeler C. C. (N. Y.) 62.

[9] 1 Russ. on Crimes, 605; State *v.* Baker, 65 N. C. 332; Long *v.* Rogers, 17 Ala. 540.

[10] State *v.* Gorham, 55 N. H. 152.

is communicated to the person, whether directly, by something attached to the person, as a cane or a cord, or indirectly, as where a squib is thrown into a crowd, and is tossed from one to another, it is sufficient. But the mere lifting a pocket-book from the pocket of another, or snatching a bank-bill from his hand, without overcoming any resisting force, is not an assault.[1] So setting a dog or a crowd upon another, or driving against the carriage in which he is seated, or striking the horse he is riding or driving, in either case to his injury, will constitute an assault.[2]

§ 58. **Mode of Application.** — It was formerly held that to put a deleterious drug into the food of another, if it be eaten and take effect, was an assault.[3] But upon subsequent consideration it was held that the direct administration of a deleterious drug, without force, though ignorantly taken, is not an assault,[4] — overruling the previous case. A contrary result, however, has been reached in this country by a court of high authority, and with the reasoning of the two just cited cases before it, — the doctrine of the earlier case being approved; and it is said that it cannot be material whether the force set in motion be mechanical or chemical, or whether it acts internally or externally.[5]

The detention or imprisonment of a person by merely confining him in a place where he happens to

[1] Com. *v.* Ordway, 12 Cush. (Mass.) 270.

[2] Russ. on Crimes, 605; 2 Greenl. Ev. § 84; Kirland *v.* State, 43 Ind. 146; s. c. 2 Green Cr. Law Rep. 706; Johnson *v.* Thompson, 1 Bald. C. Ct. 571.

[3] Reg. *v.* Britton, 8 C. & P. 660.

[4] Reg. *v.* Hanson, 2 C. & K. 912 and notes.

[5] Com. *v.* Stratton, 114 Mass. 303.

oe, as by locking the door of the room where he lies asleep, without the use of any force or fraud to place him there, though illegal, does not come within any definition of assault, although the language of some of the old text-writers is broad enough to cover it. Mr. Justice Buller[1] says: "Every imprisonment includes a battery, and every battery an assault;" citing Coke upon Littleton, 253, where it is merely said that imprisonment is a "corporall dammage, a restraint upon personal liberty, a kind of captivity," — obviously no authority for the proposition that every imprisonment includes an assault, though it is authority for the proposition that an imprisonment may be a cause of action. It is probable that such imprisonment only as follows unlawful arrest was in the mind of that great judge and common lawyer.[2] And in one case at least in this country[3] the court has gone very near to that extent. But it would not be safe to say that such is the law. There may be an imprisonment by words without an assault.[4]

§ 59. **Putting in Fear.** — Many authorities hold that although the threatened force be not within striking distance, yet, if it be part of an act or series of acts which, if consummated, will, in the apprehension of the person threatened, result in the immediate application of force to his person, this will amount to an

[1] N. P. 22.

[2] See note to Bridgeman's edition of Buller, p. 22. In Emmott *v.* Lyne, 1 B. & P. N. R. 255, the proposition is said to be absurd, and the fact that it is unsupported by the authority of Coke or Littleton pointed out.

[3] Smith *v.* State, 7 Humph. (Tenn.) 43.

[4] Bird *v.* Jones, 7 Q. B. 742; Johnson *v.* Tompkins, 1 Bald. C. Ct. 571; Pike *v.* Hanson, 9 N. H. 491; 1 Russ. on Crimes, 607.

assault; as where one armed with a weapon rushes upon another, but before he reaches him is intercepted and prevented from executing his purpose of striking;[1] or rides after him, upon horseback, and compels him to seek shelter to escape a battery;[2] or a man chases a woman through a piece of woods, crying "stop," until she arrives at a house, when he turns back, and gives up the chase.[3] The force of fear, taking effect, supplies the actual violence.[4]

Mere words, however menacing, it seems long to have been universally agreed, do not amount to an assault. Though the speaking of the words is an act, it is not of such importance as to constitute an attempt to commit violence. It is not "violence begun to be executed."[5] But words accompanied by acts which indicate an intent to commit violence, and threaten application of force to the assaulted party, unless the assailant be interrupted, constitute an assault.[6]

§ 60. **Menace, but no Intent to commit a Battery.** — It has been recently held that if there is menace of immediate personal injury such as to excite apprehension in the mind of a reasonable man, although the person threatening intended not to injure, as where one person, within shooting distance, points an unloaded gun at another knowing that it is not loaded, it is an assault,[7] adopting the following definition of

[1] State *v.* Davis, 1 Ired. (N. C.) 125; Stephen *v.* Myers, 4 C. & P. 349.

[2] Morton *v.* Shoppel, 3 C. & P. 373; State *v.* Sims, 3 Strobh. (S. C.) 137.

[3] State *v.* Neely, 74 N. C. 425.

[4] Com. *v.* White, 110 Mass. 407; Balkom *v.* State, 40 Ala. 671.

[5] 1 Hawk. P. C. c. 62, § 1.

[6] People *v.* Yslas, 27 Cal. 630.

[7] Com. *v.* White, 110 Mass. 407.

Mr. Bishop:[1] "An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury." And this seems to be the doctrine of the Scotch law.[2] But no well-considered English case has gone to this extent, though there is a dictum by Mr. Baron Parke[3] which supports the doctrine, while other and later cases are to the contrary.[4] Nor has any other American case been found which goes so far. On the contrary, there are several which seem to imply that if the gun be not loaded, it may be shown by the accused in defence.[5] A man who menaces another with corporal injury, with intent to excite his fears, may no doubt be guilty of an indictable offence;[6] but whether the offence constitutes an assault must be considered an open question. An intent to commit one crime cannot make a party guilty of committing another which he did not intend, unless the unintended one be actually committed. Nor does it follow, because a person may be justified in availing himself of force to avoid or ward off apprehended bodily harm, that bodily harm is intended. Not every supposed assault is an actual one, nor does it seem logical or just that the misapprehension of one can fix criminal respon-

[1] 2 Cr. Law, § 23.

[2] Morrison's Case, 1 Brown, 394.

[3] Reg. *v.* St. George, 9 C. & P. 483.

[4] Blake *v.* Barnard, 9 C. & P. 626; Reg. *v.* James, 1 C. & K. 254.

[5] See, in addition to the cases very fully collected by Mr. Bishop, 2 Cr. Law, § 33, n. 1, p. 20; Burton *v.* State (Tex.), 6 Reptr. 471; Tarver *v.* State, 43 Ala. 353; Richels *v.* State, 1 Sneed (Tenn.), 606. See also Mr. Green's note to Com. *v.* White, 2 Green C. L. R. 269, in which the doctrine of the principal case is denied, and the cases upon which it is supposed to rest carefully examined.

[6] State *v.* Benedict, 11 Vt. 236.

sibility upon another, though the latter cannot be allowed to complain that he has suffered the consequences of a misapprehension to which he has given rise.[1]

§ 61. **Consent** to an assault is not to be presumed. But if there be actual consent to the use of the force which would otherwise constitute an assault, this will deprive it of its criminal character as an assault, even though the act consented to be unlawful; as where a woman consents to have connection with a man,[2] or to an operation for the purpose of procuring an abortion;[3] or two men privately spar with each other;[4] though if they publicly engage in a prize-fight, it is said each may be indicted as for an assault:[5] but there are cases which seem irreconcilable with this view of the law.[6] Consent, however, obtained by fraud or false pretences, or threats of such a character as to overpower the will, is no consent.[7] And the consent must be positive. A mere submission, as of an idiot,[8] or of a child,[9] or of a person asleep[10] or otherwise unconscious,

[1] McKay *v.* State, 44 Tex. 43, a very recent case, in which the point is elaborately considered and the definition of Mr. Bishop disapproved. s. c. 1 Am. Cr. Rep. 46.

[2] People *v.* Bransby, 32 N. Y. 525; Reg. *v.* Meredith, 8 C. & P. 589; Smith *v.* State, 12 Ohio St. 466.

[3] Com. *v.* Parker, 7 Met. (Mass.) 263; State *v.* Cooper, 2 Zab. (N. J.) 52.

[4] Reg. *v.* Young, 10 Cox C. C. 371.

[5] Com. *v.* Colbert, 119 Mass. 350. See also State *v.* Lonon, 19 Ark. 577.

[6] Reg. *v.* Meredith, 8 C. & P. 589; Champer *v.* State, 14 Ohio St. 437; Duncan *v.* Com., 6 Dana (Ky.), 295.

[7] Reg. *v.* Case, 4 Cox C. C. 226; Reg. *v.* Saunders, 8 C. & P. 286; Reg. *v.* Hallett, 9 C. & P. 748; Reg. *v.* Woodhurst, 12 Cox C. C. 443.

[8] Reg. *v.* Fletcher, 8 Cox C. C. 13.

[9] Reg. *v.* Lock, 12 Cox C. C. 244; Hays *v.* People, 1 Hill (N. Y.), 351.

[10] Reg. *v.* Mayers, 12 Cox C. C. 131.

or unable to understand what is going on, is not equivalent to consent.[1]

§ 62. **Self-defence.** — As every person has the right to protect himself from injury, he may, when assaulted, use against his assailant such reasonable force in degree and kind as may be necessary and appropriate for his protection. But if he go beyond that limit, he becomes in his turn guilty of assault.[2]

There seems to be no necessity for retreating or endeavoring to escape from the assailant, before resorting to any means of self-defence short of those which threaten the assailant's life. Nor where one has been repeatedly assaulted, and has reason to believe that he will be again, is he bound to seek the protection of the authorities. He may resist the attack, and if it comes, repel force with force.[3]

But before the assaulted party will have the right to kill his assailant he must endeavor to avoid the necessity, if it can be done with safety. If, however, there be reasonable apprehension of danger so imminent or of such a character that retreat or delay may increase it, then the assaulted party is justified in entering upon his defence at once and anticipating the danger.[4]

Such force may also be used in defence of those whom it is one's right or duty, from relationship or otherwise, to protect, and indeed in defence of any one unlawfully assailed.[5]

[1] *Ante*, § 56.

[2] Reg. *v.* Driscoll, C. & M. 214; Gallagher *v.* State, 3 Minn. 270; State *v.* Gibson, 10 Ired. (N. C.) 214; Com. *v.* Ford, 5 Gray (Mass.), 475.

[3] Evers *v.* People, 6 N. Y. Sup. Ct. N. S. 81; Gallagher *v.* State, 3 Minn. 270.

[4] State *v.* Bohan (Kan.), 6 Reptr. 73. See also, *post*, HOMICIDE.

[5] 1 Bishop Cr. Law, § 877.

§ 63. **Defence of Property.** — So force may be used in defence of one's house or his property. A man's house is his castle, for defence and security of himself and his family. And if it is attacked, even though the object of the attack be to assault the owner, he may, without retreating, meet the assailant at the threshold, and prevent his access to the house, if need be, even by taking his life.[1] But here, as in other cases of self-defence, if the intruder be driven off, following and beating him while on his retreat becomes in its turn an assault.[2] And in defence of property the resistance cannot extend to taking the life of the intruder where there is a mere forcible trespass, but only where it is necessary to prevent the felonious taking or destruction of the property.[3]

But though a man will be justified in such extreme measures in defence of his property, this can only be to prevent it from being taken away from him. He cannot resort to any force which would amount to an assault or breach of the peace to recapture his stolen property,[4] as the preservation of the public peace is of greater importance than the status of any man's private property.

§ 64. **Accidental Injury.** — If a person doing a lawful act in a proper manner, without intent to harm another, sets in motion a force which by accident becomes hurtful, this is no assault. Thus, where one

[1] State *v.* Patterson, 45 Vt. 308; Bohannon *v.* Com., 8 Bush (Ky.), 481; Pond *v.* People, 8 Mich. 150; State *v.* Martin, 30 Wis. 216.

[2] State *v.* Conolly, 3 Oreg. 69.

[3] Carroll *v.* State, 23 Ala. 28; 1 East P. C. 402; 1 Bishop Cr. Law, § 875; State *v.* Patterson, 45 Vt. 308.

[4] Hendrix *v.* State, 50 Ala. 148; 3 Bl. Com. 4; *post*, § 118.

throws an object in a proper direction, and by striking some other object it is made to glance, or is driven by the wind out of its course, so that it strikes another, or if, without being turned from its course, it hits a person not known to be in the vicinity when the object is thrown, the act is in no sense criminal.[1]

BARRATRY.

§ 65. **Barratry** is a maritime offence, and consists in the wilful misconduct of the master or mariners, for some unlawful purpose, in violation of their duty to the owners of the vessel.

Thus, stealing from the cargo,[2] wilful deviation in fraud of the owner,[3] or delay for private gain,[4] or any unlawful purpose,[5] have severally been held to constitute barratry. So has the unlawful resistance to the search of a belligerent.[6] And negligence may be so gross as to amount to fraud, just as at common law it may be so gross as to amount to criminality.[7] It is not necessary that there should be fraud in the sense of an intention on the part of the accused to promote his own benefit, at the expense of the owners, but any wilful act of known illegality, every gross malversation or criminal negligence in the discharge of duty, whereby the owner of the vessel is damnified, comes within the legal definition of barratry.[8]

[1] Rex *v.* Gill, 1 Str. 190; 1 Russ. on Crimes, 607.
[2] Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34.
[3] Vallejo *v.* Wheeler, Cowp. 143.
[4] Ross *v.* Hunter, 4 T. R. 33.
[5] Roscow *v.* Corson, 8 Taunt. 684.
[6] Brown *v.* Union Ins. Co., 3 Day (Conn.), 1.
[7] Patapsco Ins. Co. *v.* Coulten, 3 Pet. (U. S.) 222.
[8] Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.

BARRETRY. CHAMPERTY. MAINTENANCE.

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

Barretry is habitual champerty or maintenance, and is committed where one has become so accustomed to intermeddle in strifes and controversies in and out of court, that he may be said to be a common mover, exciter, or maintainer of suits and quarrels; as one becomes a common scold by the too frequent and habitually abusive use of the tongue, or a common seller of liquor, who habitually sells it in violation of law. A single act is sufficient upon which to maintain an indictment either for champerty or maintenance; but a series of acts, not less than three, are necessary to constitute the habit, which is the gist of the crime of barretry.[1]

The offence of barretry may be committed by a justice of the peace who stirs up prosecutions to be had

[1] 4 Bl. Com. 134, 135; Com. *v.* Davis, 11 Pick. (Mass.) 432; Com. *v.* McCullock, 15 Mass. 227; Com. *v.* Tubbs, 1 Cush. (Mass.) 2; Case of Barretry, 8 Coke, 36, which contains much of the early learning on the subject.

before himself for the sake of fees;[1] and, it seems, by one who unnecessarily, and for the purpose of opposing his adversary, brings numerous ungrounded suits in his own right.[2]

The intervention, in order to constitute the crime of maintenance, must be without interest. If one may be prejudiced by the result of the suit, or has a contingent interest therein, as if a vendee has warranted title to the vendor, he has an interest which justifies the intervention.[3]

The intervention must also be officious and without just cause. If, therefore, the relationship of the parties or their circumstances be such as to warrant the belief that the intervention is of a friendly kind, in the interest of justice, and to prevent oppression, it will not now, whatever may have been the extravagant notions of the old lawyers[4] adopted under the pressure of the opinion that such intervention tended to the formation of combinations calculated to obstruct if not overawe the courts, be held to be criminal.[5] Still, an agreement by an attorney to carry on a lawsuit, making no disbursements, and to look to a share of the proceeds for the compensation of his services, is held to be clearly champertous in those States where the common law of champerty has been adopted.[6] Other States, however, deny that the law

[1] State *v.* Chitty, 1 Bail. (S. C.) 379.

[2] Com. *v.* McCulloch, 15 Mass. 227; 1 Hawk. P. C. c. 81, § 3.

[3] Master *v.* Miller, 4 T. R. 320; Goodspeed *v.* Fuller, 46 Me. 141; Williamson *v.* Sammons, 34 Ala. 691.

[4] 1 Hawk. P. C. c. 83, § 4 *et seq.*

[5] Lathrop *v.* Amherst Bank, 9 Met. (Mass.) 489.

[6] Lathrop *v.* Amherst Bank, 9 Met. (Mass.) 489. See also Elliot *v.* McClelland, 17 Ala. 206; Martin *v.* Clark, 8 R. I. 389.

of maintenance and champerty was at all applicable to this country, and refuse to recognize it as in force.[1]

In point of fact, the tendency is to disregard the common law, except so far as it may have been adopted by statute;[2] and it may be doubted if any indictment would now be maintained for champerty or maintenance, not coming strictly within the limits of some precedent. Indeed, Mr. Green[3] asserts that no such indictment can be found in any of the reports of the present day, and expresses the opinion, which seems to be well founded, that probably nothing would now be held indictable as maintenance unless it amounted to a criminal conspiracy to obstruct or pervert the course of justice.

BATTERY.

See ASSAULT.

BESTIALITY.

See BUGGERY.

BIGAMY.

§ 67. **Bigamy**, otherwise called *polygamy*, or the offence of having a plurality of wives or husbands at the same time, like adultery, was an offence of ecclesiastical cognizance, but ultimately became a statutory offence,[4]

[1] Danforth *v.* Streeter, 28 Vt. 490; Bayard *v.* McLean, 3 Har. (Del.) 139; Wright *v.* Meek, 3 Iowa, 472; Thurley *v.* Riggs, 11 Humph. (Tenn.) 53; Key *v.* Vattier, 1 Ohio, 132; Newkirk *v.* Cone, 18 Ill. 440; Stanton *v.* Sedgwick, 14 N. Y. 289; Bentinck *v.* Franklin, 38 Tex. 458; Schomp *v.* Schenck (N. J.), 7 Reptr. 22; Richardson *v.* Rowland, 40 Conn. 565. See also note to the last-cited case, 2 Green Cr. Law Rep. 495, for some interesting details of the state of society out of which grew the law of maintenance and other analogous crimes.

[2] See note to Richardson *v.* Rowland, 14 Am. L. Reg. N. S. 78.

[3] Note to Richardson *v.* Rowland, *ubi supra*.

[4] 1 James I. c. 11; 4 Bl. Com. 164.

the marrying another by a person already married and having a husband or wife living being made a felony. This statute was adopted by Maryland as one which "by experience had been found applicable to their local and other circumstances," and is there held to this day, except as to the punishment, to be a part of the common law. And by the law of Maryland the crime is a felony, as doubtless it is in other States where punishment in the State's prison is or may be the penalty.[1] It is substantially the law in most if not all the States of the Union. It is only the second marriage which is criminal; and, therefore, if the first marriage be in one jurisdiction and the second in another jurisdiction, the crime is only committed, and of course only cognizable, by the tribunals of the latter.[2] And equally, of course, if the first marriage is invalid, the second is no offence anywhere, — in fact, there is no second marriage.[3] There is but one lawful marriage, and if the first be valid the second is void; nor is it material that the second would be void on other grounds. The offence consists in the entering into a void marriage while a prior valid marriage relation exists.[4]

A divorce may, and unless restricted in its terms usually does, annul the former marriage, so as to make

[1] *Ante*, § 26.

[2] 1 Hawk. P. C. bk. 1, c. 43; Putnam *v.* Putnam, 8 Pick. 433; People *v.* Mosher, 2 Parker (N. Y.) C. R. 195; Com. *v.* Lane, 113 Mass. 458.

[3] State *v.* Barefoot, 2 Rich. (S. C.) 209; Shafher *v.* State, 20 Ohio, 1; People *v.* Slack, 15 Mich. 193; McReynolds *v.* State, 5 Cold. (Tenn.) 18.

[4] People *v.* Brown, 34 Mich. 339; Reg. *v.* Brown, 1 C. & K. 144; Reg. *v.* Allen, L. R. 1 C. C. 367; Hayes *v.* People, 25 N. Y. 390; Robinson *v.* Commonwealth, 6 Bush (Ky.), 309; Carmichael *v.* State, 12 Ohio St. 553.

the second one valid. In some States, however, the guilty party in a divorce for adultery on his part may be guilty of polygamy by marrying without leave of court while his divorced wife is living.[1] But after a divorce in one State, a marriage in another valid by the laws of that State, followed by a return to the State where the divorce was granted, and a cohabitation there with the second wife, will not be held polygamous, unless the second wife be an inhabitant of the State granting the divorce, and the parties went to another State to be married in order to evade the law.[2] So if the party goes to another State merely for the purpose of obtaining a divorce, and obtains it by fraud, it will be of no avail to him on his return to the State he left, and marrying again there.[3] And the crime may be committed although the defendant in good faith believed his former partner was dead or divorced.[4] Whether the formerly unmarried party to a polygamous marriage is also guilty, if he marries with knowledge of the other party's disability, of any offence, and what, is an open question, and may be solved differently in different States, according to the degree of the principal offence, whether felony or misdemeanor, or by special provisions of the statute.[5]

[1] Com. *v.* Putnam, 1 Pick. (Mass.) 136; Baker *v.* People, 2 Hill (N. Y.), 325.

[2] Com. *v.* Lane, 113 Mass. 458.

[3] Thompson *v.* State, 28 Ala. 12.

[4] Com. *v.* Marsh, 7 Met. (Mass.) 472; State *v.* Goodman, 65 Me. 30; *ante*, § 5. But see *contra*, Squire *v.* State, 46 Ind. 459.

[5] See Bishop Cr. Proc. § 594; Boggus *v.* State, 34 Ga. 275.

BLASPHEMY.

§ 68. **Blasphemy** is, literally, evil-speaking. But only that kind of evil-speaking which injuriously affects the public is taken notice of by the common law; and under this particular head only the evil-speaking of sacred things. The definitions of blasphemy differ, according to the different views entertained by different ages and countries, as to what things are so sacred as to require, in the interest of public order, their protection against assault. Thus, in Spain it is held to be blasphemous to speak evil of the saints;[1] and in Woolston's Case it was held blasphemous at common law to write against Christianity in general, while it was intimated that learned men might dispute about particular controverted points. Though the common law is understood to prevail in this country relative to this crime, except so far as it has been abrogated by statute, yet it cannot be doubted that its application would, at the present day, be greatly restricted. No such discussion would now be regarded as blasphemous, unless executed in such a manner as to betray a malicious purpose to calumniate and vilify, and to such an extent as to become an injury to public morals. Good morals being one of the strong foundations of social order, must be encouraged and protected. Whatever, therefore, tends essentially to sap such foundation is punishable, upon the same ground as is the publication of obscene writing or pictures.

No category of the sacred things with reference to which blasphemy may be committed has been given in

[1] Bouv. Dict., Blasphemy.
[2] 2 Stra. 834.

any description or definition of the offence by the courts or text-writers. It has been held to be blasphemous to deny the existence of God, with the intent to calumniate and disparage;[1] so, to speak of the Saviour as a "bastard," with like intent,[2] or as an impostor and murderer;[3] so, with like intent, to speak of the Holy Scriptures as "a fable," and as containing "many lies,"[4] or otherwise maliciously to revile them.[5] Christianity is a part of the common law of this country, and its principles are so interwoven with the structure of modern society, that whatever strikes at its root tends manifestly to the dissolution of civil government. "Blasphemy," says Chancellor Kent,[6] "according to the most precise definitions, consists in maliciously reviling God or religion," — as satisfactory a definition, perhaps, as can be given, taking religion to mean that body of doctrine and belief commonly accepted as Christianity.

Whether the words are spoken or written is immaterial. They must, however, if spoken, be heard by somebody, and if written, published.[7]

Many of the States have enacted statutes prescribing the punishment which shall be imposed in certain cases of blasphemy; but these statutes are not regarded as changing the common law, except so far as their

[1] Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

[2] State *v.* Chandler, 2 Harr. (Del.) 553; People *v.* Ruggles, 8 Johns. (N. Y.) 290.

[3] Rex *v.* Washington, 1 B. & C. 26.

[4] Updegraph *v.* Com., 11 S. & R. (Pa.) 394.

[5] Rex *v.* Hetherington, 5 Jur. Q. B. 529.

[6] People *v.* Ruggles, *ubi supra.*

[7] People *v.* Porter, 2 Parker (N. Y.) C. R. 14; State *v.* Powell, 70 N. C. 67.

special terms provide. What was blasphemy at common law is still blasphemy, subject to the modifications of the statute.[1]

Profanity is an offence analogous to blasphemy, which will be further treated under the head of Nuisance, of which both offences are special forms.[2]

BRIBERY.

§ 69. **Bribery** is a misdemeanor at common law, except the bribing of a judge,[3] and has generally been defined as the offering or receiving any undue reward to or by any person whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and induce him to act contrary to the known rules of honesty and integrity.[4] But in more modern times the word has received a much broader interpretation, and is now held to mean the corruptly offering, soliciting, or receiving of any undue reward as a consideration for the discharge of any public duty. Strictly speaking, an offer to give or receive a bribe is only an attempt,[5] and the receipt of a bribe is the consummated offence. But as long ago as 1678 a standing order of the House of Commons made it bribery as well to offer as to receive, and so at the present day either the offering or receiving is held to constitute the offence.

[1] 1 Bishop Cr. Law, § 80, and cases there cited.

[2] The question of the unconstitutionality of such laws, as restrictive of the liberty of speech and of the press, is elaborately discussed, and decided in the negative, by Shaw, C. J., in Com. *v.* Kneeland, which, with the cases in New York and Pennsylvania before cited, are leading cases upon the subject.

[3] 1 Hawk. P. C. bk. 1, c. 67, § 6.

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

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

By undue reward is meant any pecuniary advantage, direct or indirect, beyond that naturally attached to or growing out of the discharge of the duty. Thus, voting is a public duty, and though no compensation is allowed, yet by the exercise of the right one may promote the public welfare, and thus indirectly his own. But if he sells or promises to sell his vote in consideration of any other private reward, it is an abuse of the trust, and an indictable offence. And the buying or promising to buy the vote is equally an offence, though the person selling refuses to perform the contract,[1] or, if a legislator, has no jurisdiction in the premises,[2] or in point of fact has no right to vote.[3] So where a candidate for public office offered, in case of his election, to serve for less than the salary provided by law for the office, whereby the taxes would be diminished, this was held to be within the spirit of the law against bribery.[4] So conduct inducing or tending to induce corrupt official action, as the offer of money to one having the power of appointment to office, to influence his action thereon;[5] or to a sheriff or his subordinate having the custody of prisoners, to induce him to connive at their escape;[6] or to a customs officer, to induce him to forbear making a seizure of goods forfeited by vio-

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

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

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

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

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

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

lation of the revenue laws.[1] The theory of our government is that all public stations are trusts, and that those clothed with them are to be actuated in the discharge of their duties solely by considerations of right, justice, and the public good; and any departure from the line of rectitude in this behalf, and any conduct tending to induce such departure, is a public wrong.[2] Under the statute[3] which prohibits the payment of money to a voter to induce him to vote, it has been held to be no offence to pay the travelling expenses of the voter to and from the polling places, if paid without any consideration that he should vote in a particular way.[4]

BUGGERY.

§ 70. **Buggery**, otherwise called sodomy, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. This crime was said to have been introduced into England by the Lombards, and hence its name, from the Italian *bugarone*.[5] It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman, — his wife, in which case, if she consent, she is an accomplice.[6] But the act, if between human beings, must be *per anum*, and the penetration of a

[1] Rex *v.* Everett, 3 B. & C. 114. See also Caton *v.* Stewart (N. C.), 5 L. & Eq. Reptr. 108.

[2] Trist *v.* Childs, 21 Wall. (U. S.) 441.

[3] 17 & 18 Vict. c. 102.

[4] Cooper *v.* Slade, 36 Eng. L. & Eq. 152.

[5] Coke, 3d Inst. 58.

[6] Reg. *v.* Jellyman, 8 C. & P. 604.

child's mouth does not constitute the offence.[1] If both parties consent, both are guilty, unless one be under the age of discretion.[2] Under the old common law, both penetration and emission were necessary to constitute the offence;[3] but since the statute of 9 Geo. IV. c. 31, § 18, penetration only is necessary.[4] Before this statute, copulation with a fowl was not an offence, as a fowl is not a "beast;" but this statute covers copulation with any "animal." It was always regarded as a very heinous offence, and was early denounced as "the detestable and abominable crime amongst Christians not to be named," and was punishable with death. But though it is still a felony in most of the States, it is, we believe, nowhere capitally punished. In some of the States, where there is no crime not defined in the code, it seems to have been purposely dropped from the category of crimes.[5] The origin of the term "sodomy" may be found in the nineteenth chapter of Genesis. The practice was first denounced by the Levitical law as a heathen practice, and amongst non-Christian nations, at the present day, it is not generally regarded as criminal.

BURGLARY.

§ 71. **Burglary** is the breaking and entering of another's dwelling-house in the night-time, with intent to commit a felony therein.[6] The breaking may be actual or constructive.

[1] Rex *v.* Jacobs, R. & R. C. C. 331.
[2] Reg. *v.* Allen, 1 Den. C. C. 364; Coke, 3d Inst. 58.
[3] Rex *v.* Duffin, 1 R. & R. C. C. 365.
[4] Rex *v.* Reekspear, 1 Moody C. C. 342.
[5] Farwell *v.* State, 32 Tex. 378. See also Estes *v.* Cartin, 10 Iowa, 400
[6] Hawk. P. C. bk. 1, c. 38, § 1.

§ 72. **Actual breaking** takes place when any apartment of the house is broken into by force; as by lifting a latch, or sliding a bolt, or turning a lock or the fastening of a window, or breaking or removing a pane of glass, or lifting up or pulling down an unfastened window-sash or trap-door, or pulling open a sash which swings on hinges, or the cutting out of a netting of twine which is fastened over an open window, or opening the outside shutters. The offence consists in violating the common security of the dwelling-house. It is immaterial whether the doors and windows are fastened or unfastened, provided the house is secured in the ordinary way, and is not left so carelessly open as to invite an entry;[1] and leaving the door or window ajar, or unclosed even to a slight degree, and not so far as to admit the body, would constitute such an invitation, so that opening them further would not amount to a burglarious breaking.[2] It is also held that entering a house by way of the chimney, or even getting into the chimney, is a breaking, though no actual force is used, since it is not usual to secure such an opening, and the house is as much closed as is reasonable or requisite.[3]

§ 73. **Constructive Breaking.** — A constructive breaking is where fraud or threats are substituted for force, whereby an entry is effected; as where entrance is procured by conspiring with persons within the

[1] Com. *v.* Stephenson, 8 Pick. 354; Rex *v.* Haines, 1 R. & R. C. C. 450; Rex *v.* Russell, 1 Moody C. C. 377; s. c. 2 Lead. Cr. Cas. 48, and note.

[2] Rex *v.* Smith, 1 Moody C. C. 178; Rex *v.* Hyams, 7 C. & P. 441; Com. *v.* Strupney, 105 Mass. 588.

[3] Rex *v.* Brice, R. & R. C. C. 450; State *v.* Willis, 7 Jones (N. C.) Law, 190; Walker *v.* State, 52 Ala. 376.

house;[1] or by pretence of hiring lodgings or obtaining refreshment;[2] or under color of legal process fraudulently obtained;[3] or by enticing the owner out of his house, if the entry be made immediately, and before the owner's family have time to shut the door.[4]

§ 74. **Breaking. Connivance. Consent.** — But if the owner, being apprised by his servant of a plan to rob the house, gives his servant the keys, with instructions to carry out the plan, and the servant and the prisoner go together into the house, the servant unlocking the door, this is said to be no burglary, as the act is by the owner's consent;[5] though if the owner, being so apprised, merely lies in wait for the purpose of detecting the perpetrators, this is no consent, and they will be guilty of the offence.[6]

§ 75. **Breaking. Dwelling-house.** —The breaking must be of some part of that actual enclosure which constitutes the dwelling-house. The mere passage across that imaginary line with which the law surrounds every man's realty, and which constitutes a sufficient breaking upon which to found the action of trespass *quare clausum fregit*, is not sufficient. But the break-

[1] 2 East P. C. 486.

[2] 2 East P. C. 486; State *v.* Mordecai, 68 N. C. 207.

[3] Rex *v.* Farr, J. Kelyng, 43; 2 East P. C. 486; State *v.* Johnson, Ph. (N. C.) 186.

[4] State *v.* Henry, 9 Ired. (N. C.) 403. But see opinion of Ruffin, C. J., who dissented, upon the point as to the necessity of immediate entry. See also Breese *v.* State, 12 Ohio, N. S. 146.

[5] Allen *v.* State, 40 Ala. 334. See also Reg. *v.* Hancock, C. C. R. 6 Reptr. 351.

[6] Thompson *v.* State, 18 Ind. 386; Rex *v.* Bigley, 1 C. & D. (Irish) C. C. 202. Compare also Alexander *v.* State, 12 Tex. 540, with Reg. *v.* Hancock, *ubi supra*.

ing of the outer enclosure is not essential, if, after the entry through this, the house or some parts of it be broken. Thus, the forcing of the fastened outer shutters of a window would be a breaking; if these happened to be open, then the forcing of the window would be a breaking; and if both were open, and an entry be effected through them, then a breaking open of a door, — part of the house, — would constitute the offence;[1] though not the breaking open a chest, cupboard, clothes-press, or other movable, not part of the house.[2] So if one guest at an inn break and enter the room of another guest, it is burglary.[3] It was formerly doubted whether an innkeeper would be guilty of burglary by breaking and entering the room of his guest, the doubt resting upon the question whether the room was the guest's for the time being.[4] Under statutes making a special or constructive ownership sufficient, the doubt can hardly exist.[5]

§ 76. **Breaking Out.** — It was early enacted,[6] to solve the doubts which had theretofore prevailed, that the entry by day or by night into a dwelling-house without breaking, with intent to commit a felony, and the breaking out of the house, should constitute the crime of burglary. And such, we believe, is the law in England to the present day.[7] The indictment should

[1] State *v.* Scripture, 42 N. H. 485; Rolland *v.* Com. (Pa.), 5 Weekly Notes of Cases, 53; State *v.* Wilson, Coxe (N. J.), 439.

[2] State *v.* Scripture, 42 N. H. 485; Rolland *v.* Com. (Pa.), 5 Weekly Notes of Cases, 53; State *v.* Wilson, Coxe (N. J.), 439.

[3] State *v.* Clark, 42 Vt. 629.

[4] 2 Bishop Cr. Law, § 106.

[5] *Post*, § 79.

[6] 12 Anne, c. 1, § 7.

[7] Steph. Dig. Cr. Law, art. 319; Rex *v.* McKearney, 2 Jebb C. C 68; s c. 2 Lead. Cr. Cas. 62 and note.

charge the breaking out; and if so charged, it seems that in this country the prisoner may be convicted, where the statute of Anne has been adopted as part of the common law, or has been substantially followed by the statute of the State;[1] but not otherwise.[2] No case has been found of a conviction under such an indictment; and it is at least doubtful if it would now anywhere be held, unless under the clearest evidence, that the statute of Anne is obligatory, that a breaking out to escape is a sufficient breaking to constitute burglary.[3]

§ 77. **Entry.** — In order to constitute an entry, it is not necessary that the whole person should be within the house. Thrusting in the hand or a stick, for the purpose of getting possession of goods within, through an aperture broken for the purpose, is an entry. But the mere passage of the instrument through in breaking, as an augur, by which the break is effected, has been held not to be an entry;[4] yet the thrusting the hand underneath the window, to lift it, so that the fingers extend to the inside of the window, has recently been held to be a sufficient entry.[5] So the sending in a boy after breaking, the boy being an innocent agent, to bring out the goods, is an entry by the burglar, who all the while remains outside.[6] The cases seem to establish the rather nice distinction, that where the

[1] State *v.* McPherson, 70 N. C. 239.

[2] White *v.* State, 51 Ga. 285.

[3] Rolland *v.* Com. (Pa.), 5 Weekly Notes of Cases, 53.

[4] 4 Bl. Com. 227; Rex *v.* Hughes, 406; Rex *v.* Rust, 1 Moody C. C. 183.

[5] France *v.* State, 42 Tex. 276. See also Rex *v.* Davis, R. & R. C. C. 499.

[6] 1 Hale P. C. 555.

implement held in the hands passes within the enclosure for the purpose of breaking only, there is no entry; but if either the hand or implement passes in for the purpose of committing the intended felony, there is an entry. And, upon principle, there seems to be no doubt that one who shoots a ball or thrusts a sword through a window with intent to kill, though he fail of his purpose to kill, is nevertheless guilty of breaking and entering.[1]

§ 78. **Dwelling house. Occupancy.** — As in arson, the dwelling-house comprehends all the buildings within the same curtilage or common fence, and used by the owner as part and parcel thereof, though not contiguous;[2] as, for instance, a smoke-house, the front part and doors of which were in the yard of the dwelling-house, though the rear, into which the break and entry were made, was not.[3] It must be a place of actual residence or habitation, though it is not essential that any one should be within at the very time of the offence. If the occupants are away temporarily, but with the design of returning, and it is the house where they may be said to live, — their actual residence, — this constitutes it their dwelling-house. But occupation otherwise than as a place of residence, as for storage, or even casually for lodgings, or if persons not of the family nor in the general service of the owner sleep, but do not otherwise live, there, and for the purpose of protection only, it is not a dwelling-house in the sense of the law. Nor is a temporary booth or tent erected at a fair or market such a dwelling-house.[4] If, how-

[1] *Ante*, § 6.

[2] *Ante*, § 50.

[3] Fisher *v.* State, 43 Ala. 17.

[4] Amour *v.* State, 3 Humph. (Tenn.) 379; Com. *v.* Brown, 3 Rawle

ever, the house be habitually occupied in part as a storehouse and in part as the lodging-place of the servants and clerks of the owner, it is his dwelling-house.[1] And if it be habitually slept in by one of the family, or one in the service of the owner, even if slept in for the purpose of protection, it has been held to be a dwelling-house within the sense of the law;[2] and by the same court, that if the person so sleeping in the store for its protection be not a member of the family, or in the service of the same, he is but a watchman, and the store cannot be said to be the dwelling-house of the owner.[3]

§ 79. **Dwelling-house. Ownership.** — There may be many dwelling-houses under the same roof; as, where separate apartments are rented to divers occupants, who have exclusive control of their several apartments.[4] If, however, the general owner also occupies, by himself or his servant, the building in part, exercising a supervision over it, and letting it to lodgers or to guests, the house must be treated as his, unless, as in some States is the case, a special or constructive ownership is made by statute sufficient evidence of ownership.[5] But this is rather a question of procedure not pertaining to the definition of the crime.[6]

A church being, as Coke says, the mansion-house of the Almighty, is by the common law a dwelling-house,

(Pa.), 207; State *v.* Jenkins, 5 Jones (N. C.), 430; 3 Greenl. Ev §§ 79, 80.

[1] *Ex parte* Vincent, 26 Ala. 145.

[2] State *v.* Outlaw, 72 N. C. 598.

[3] State *v.* Potts, 75 N. C. 364.

[4] Mason *v.* People, 26 N. Y. 200.

[5] 3 Greenl. Ev. §§ 57, 81; State *v.* Outlaw, 72 N. C. 598.

[6] See also Arson, *ante*, § 52.

within the meaning of the definition of burglary.[1] So was a walled town.[2]

§ 80. **Time.**—The time of both breaking and entering must be in the night, and this, at common law, was usually held to be the period during which the face of a person cannot be discerned by the light of the sun; though some authorities fixed the limits more accurately as the period between sunset and sunrise.[3] Now, by statute[4] in England, night begins at nine and ends at six. In Massachusetts, the meaning of "night-time," in criminal prosecutions, is defined to be from one hour after sunset to one hour before sunrise;[5] and doubtless other States have fixed the limit by statute. It may happen that the acts culminating in the commission of the intended felony extend through several days and nights, as where one is engaged day and night in working his way through a substantial partition wall. If the actual perforation be made during one night, and the entry on the same or a subsequent night, the offence is complete, both being in pursuance of the same design.[6] In some States, by statute, the question of time becomes immaterial.

§ 81. **Intent.**—As the breaking and entry must be with intent to commit a felony, the intent to commit a misdemeanor only would not be sufficient to constitute the crime. Thus, a break and entry with intent to commit adultery would or would not constitute the offence, according as adultery might be a felony,

[1] 3d Inst. 64; Reg. *v.* Baker, 3 Cox C. C. 581.

[2] 4 Bl. Com. 224.

[3] 1 Hawk. P. C. bk. 1, c. 38, § 2.

[4] 1 Vict. c. 86, § 4.

[5] Com. *v.* Williams, 2 Cush. (Mass.) 582.

[6] Rex *v.* Smith, R. & R. 417; Com. *v.* Glover, 111 Mass. 395.

misdemeanor, or, as in some States it is, no crime at all;[1] and if the intent be to cut off the owner's ears, this is not a burglary, since the cutting off an ear does not amount to felony — mayhem — at common law.[2] So if the person who breaks is so intoxicated as to be incapable of entertaining any intent.[3]

CHAMPERTY.

See BARRETRY.

CHEATING.

§ 82. **Cheating** is the fraudulent pecuniary injury of another by some token, device, or practice of such a character as is calculated to deceive the public.[4] Thus, selling bread for the army, and marking the weight falsely upon the barrels;[5] or selling by false weights[6] or measures;[7] or playing with false dice;[8] or by arranging the contents of a barrel so that the top shall indicate that it contains one thing, while in fact it contains another and worthless thing, coupled with the assertion that the contents are "just as good at the bottom as at the top;"[9] or by selling a picture or cloth falsely marked with the name or trade-mark of a well-known artist[10] or

[1] State *v.* Cooper, 16 Vt. 551.

[2] Com. *v.* Newell, 7 Mass. 245.

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

[4] Hawk. P. C. bk. 1, c. 71, § 1. See also Rex *v.* Wheatly, Burr. 1125; s. c. 1 Benn. & Heard's Lead. Cr. Cas. 1, and notes, as to distinction between mere private cheats and those which affect the public so as to become criminal.

[5] Respublica *v.* Powell, 1 Dall. (Pa.) 47.

[6] Rex *v.* Young, 3 T. R. 104.

[7] Rex *v.* Osborn, 3 Burr. 1697; People *v.* Fish, 4 Parker (N. Y.) C. R. 206.

[8] Leeser's Case, Cro. Jac. 497; Rex *v.* Maddock, 2 Rolle, 107.

[9] State *v.* Jones, 70 N. C. 321.

[10] Reg. *v.* Class, D. & B. 460.

manufacturer ;[1] or by the use of false papers,[2] — have been held to be cheats at common law. So has obtaining release from imprisonment by a debtor by means of a forged order from the creditor upon the sheriff.[3] So it has been held that the obtaining from an illiterate person a signature to a note different in amount from that agreed on, by false reading, is a cheat.[4] So, doubtless, would be obtaining money by begging, under the device of putting the arm in a sling, for the purpose of making it appear that it had been injured, when it had not. It is an indictable offence to maim one's self whereby the more successfully to beg,[5] or to disqualify one's self for service as a soldier.[6]

Mere lying by words, although successful in fraudulently obtaining the goods of another, without the aid of some visible sign, token, device, or practice, has never been held at common law to be a cheating.[7]

§ 83. **Token. Device.** — A token is a thing which denotes the existence of a fact, and if false, and calculated to deceive generally, it will render the person who knowingly uses it for the purpose of inducing the belief that the fact denoted does exist, to the pecuniary injury of another, guilty of the crime of cheating. A

[1] Edward's Case, Trem. P. C. 103.

[2] Serlested's Case, Leitch, 202; Com. *v.* Boynton, 2 Mass. 77; Com. *v.* Speer, Va. Cas. 65; Lewis *v.* Com., 2 S. & R. (Pa.) 551; State *v.* Stroll, 1 Rich. (S. C.) 244.

[3] Rex *v.* Fawcett, 2 East P. C. 862.

[4] Hill *v.* State, 1 Yerg. (Tenn.) 76; 1 Hawk. P. C. bk. 1, c. 71, § 1.

[5] 1 Inst. 127.

[6] 3 Burn's J. 115.

[7] Rex *v.* Grantham, 11 Mod. 222; Rex *v.* Osborn, 3 Burr. 1697; Com. *v.* Warren, 6 Mass. 72; State *v.* Delyon, 1 Bay (S. C.), 353; People *v.* Babcock, 7 Johns. (N. Y.) 201.

business card, in common form, purporting to be the card of an existing firm, which is not genuine, and asserts as fact what is not true, is a false token.[1]

A forged order for the delivery of goods is held to be a token, and obtaining goods in this way a cheat, while the obtaining them by the mere verbal false representation that the person purporting to be the signer of the order had sent for them would not.[2] And so is the forged check of another than the person who presents it;[3] but not, it is said, his own worthless check upon a bank where he has never had a deposit,[4] this being merely a false representation in writing. But it is difficult to see why the writing is a token in one case and not in the other. Such subtle distinctions have now very generally been obviated by statutes making the obtainment of money by false pretences criminal.[5]

False personations were formerly held to be cheats,[6] and even falsehoods as to personal identity, age, or condition; and perhaps would now be,[7] where statutes do not provide for such frauds. There seems to be no reason, upon principle, why one who falsely asserts that he is what he naturally or by device falsely appears to be, should not be held guilty of cheating, as availing himself of a visible sign.[8]

§ 84. **Swindling.** — In South Carolina, the subject of cheating was early made a matter of statutory regula-

[1] Jones *v.* State, 50 Ind. 473.
[2] Rex *v.* Thorn, C. & M. 206; Rex *v.* Grantham, 11 Mod. 222.
[3] Com. *v.* Boynton, 2 Mass. 77.
[4] Rex *v.* Johnson, 3 Camp. 370.
[5] See FALSE PRETENCES.
[6] Rex *v.* Dupee, 2 Sess. Cas. 11.
[7] Rex *v.* Hanson, Say. 229.
[8] 1 Gab. Cr. Law, 204.

tion, providing for the punishment of "any person who shall overreach, cheat, or defraud by any cunning, swindling acts and devices, so that the ignorant or unwary may be deluded thereby out of their money or property," under which obtaining horses from an unsophisticated person by means of threats to prosecute for horse-stealing, and that the pretended owner would have his life if he did not give them up, was held indictable.[1] And in Georgia, obtaining money by false pretences is a form of swindling.[2]

CONSPIRACY.

§ 85. We have already seen that it is a crime for one person to solicit another to commit a crime.[3] It is one step in a series of acts, which, if continued, will result in an overt act; and although it may be ineffectual, it is part and parcel of what, if consummated, becomes a complete and effectual crime. It therefore partakes of its criminality, and belongs strictly, perhaps, to that class of crimes which is included under "attempts." Mutual solicitation by two or more persons is, of course, upon the same grounds, equally criminal; and when this mutual solicitation has proceeded to an agreement, it is regarded by the law as a complete and accomplished crime, which it denominates conspiracy, and defines to be "an agreement to do against the rights of another an unlawful act, or use unlawful means." It is immaterial that the end sought is lawful, provided the means by which it is to be sought are unlawful. Nor is it necessary

[1] State *v.* Vaughan, 1 Bay (S. C.), 282.

[2] Par. Dig. art. 2426.

[3] *Ante*, ATTEMPTS, § 29.

that that which is agreed to be done should be criminal, or in itself indictable. It is sufficient if it be unlawful.[1]

§ 86. **In what Sense unlawful.** — Yet perhaps not every unlawful act will support an indictment for conspiracy. Thus, it has been held in England that an agreement to trespass upon the lands of another, as to poach for game, is no conspiracy.[2] And this case has been followed in New Hampshire.[3] So it has been held that an agreement to sell an unsound horse with a warranty of soundness is not an indictable conspiracy.[4] On the other hand it has been held in New Jersey that to support an indictment for conspiracy there must be indictable crime, either in the end proposed or the means to be used.[5] But all the above are cases upon which later decisions have thrown great doubt, and neither, perhaps, would now be followed except upon its exact facts.[6]

It may be that some unlawful acts or means might be held too trivial to support a charge of conspiracy; but what they are, and how trivial, we have no means of determining.[7]

[1] Reg. *v.* Bunn, 12 Cox C. C. 316; s. c. 1 Green's Cr. Law Rep. 52; Reg. *v.* Warburton, Law Rep. 1 C. C. 274; Com. *v.* Hunt, 4 Met. (Mass.) 111; State *v.* Mayberry, 48 Me. 218; State *v.* Rowley, 12 Conn. 101; People *v.* Mather, 4 Wend. (N. Y.) 229; Smith *v.* People, 25 Ill. 17; State *v.* Burnham, 15 N. H. 396.

[2] Rex *v.* Turner, 13 East, 228.

[3] State *v.* Straw, 42 N. H. 393.

[4] Rex *v.* Pywell, 1 Stark. 402.

[5] State *v.* Rickey, 4 Halst. 293.

[6] See Reg. *v.* Kenrick, 5 Q. B. 62; Reg. *v.* Rowlands, 5 Cox C. C. 490; Lambert *v.* People, 9 Cow. (N. Y.) 577, in addition to cases cited *ante*, § 85.

[7] See Reg. *v.* Kenrick, *ubi supra*.

However that may be, it seems to be settled that all combinations to defeat or obstruct the course of public justice, as by the presentation of false testimony,[1] or tampering with witnesses,[2] or with jurors,[3] or with the making up of the panel, or preventing the attendance of witnesses,[4] or by destroying evidence;[5] all agreements to cheat or injure the public or individuals, as by imposing upon the public a spurious article for the genuine,[6] or, by manufacturing false news or using coercive means to enhance or depress the price of property or labor,[7] or by unlawful means to compel an employer to increase,[8] or employés to reduce,[9] the rate of wages; all agreements to injure or disgrace others in their character, property, or business, as by seducing a female,[10] or by abducting a minor daughter, for the purpose of marrying her against the wish of her parents,[11] or by hissing an actor or injuring a play,[12] or by destroying one's property or depreciating its value,[13] or

[1] Rex *v.* Manbey, 6 T. R. 619.

[2] Rex *v.* Johnson, 1 Show. 1.

[3] Rex *v.* Gray, 1 Burr. 510.

[4] Rex *v.* Stevenson, 12 East, 362.

[5] State *v.* DeWitt, 2 Hill (S. C.), 282.

[6] Com. *v.* Judd, 2 Mass. 329.

[7] Reg. *v.* Blake, 6 Q. B. 126; Morris River Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Levi *v.* Levi, 6 C. & P. 239; Rex *v.* De Beranger, 3 M. & S. 68.

[8] People *v.* Fisher, 14 Wend. (N. Y.) 9; Reg. *v.* Brown, 12 Cox C. C. 316; Com. *v.* Hunt, 4 Met. 111; State *v.* Donaldson, 32 N. J. 151.

[9] Rex *v.* Hammond, 2 Esp. 719.

[10] Smith *v.* People, 25 Ill. 17; Anderson *v.* Com., 5 Rand. (Va.) 627.

[11] Mifflin *v.* Com., 5 W. & S. (Pa.) 461.

[12] Clifford *v.* Brandon, 2 Camp. 358.

[13] State *v.* Ripley, 31 Me. 386.

by falsely charging a man with being the father of a bastard child,[1] or by getting him drunk in order to cheat him;[2] and, of course, all agreements to commit acts in themselves criminal, or to be accomplished by criminal means, and all acts *contra bonos mores*,[3] — are indictable conspiracies.

§ 87. **Agreement the Gist of the Offence.** — The law regards this unlawful combination of two or more evil-disposed persons as especially dangerous, since increase of numbers, mutual encouragement and support, and organization, increase the power for, and the probability of, mischief. And the conspiracy is punished to prevent the accomplishment of the mischief. It is, therefore, entirely immaterial whether the agreement be carried out, or whether any steps be taken in pursuance of the agreement. When the agreement is made, the crime is complete.[4] And it seems to be settled, without substantial dissent, that persons may be indictable for conspiring to do that which they might have individually done with impunity.[5]

If the conspiracy be executed, and a felony be committed in pursuance of it, the conspiracy disappears, being merged in, and punishable as part of, the felony.[6]

[1] Reg. *v.* Best, 2 Ld. Raym. 1167.

[2] State *v.* Younger, 1 Dev. (N. C.) 357.

[3] State *v.* Buchanan, 5 H. & J. (Md.) 317; State *v.* Murphy, 6 Ala. 765; Young's Case, 2 T. R. 734.

[4] United States *v.* Cole, 5 McLean C. Ct. 213; State *v.* Noyes, 25 Vt. 415; Rex *v.* Best, 2 Ld. Raym. 1167; Hazen *v.* Com., 23 Pa. St. 355; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Ridgway, 2 Ashm. (Pa.) 247.

[5] State *v.* Buchanan, 5 H. & J. (Md.) 317; Reg. *v.* Gompertz, 9 Q. B. 824; Morris River Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173.

[6] Com. *v.* Blackburn, 1 Duv. (Ky.) 4; Com. *v.* Kingsbury, 5 Mass. 106; State *v.* Mayberry, 48 Me. 218.

It is otherwise, however, when a misdemeanor is committed. Here there is no merger, and the conspiracy is separately punishable.[1]

§ 88. **Intent.** — As in common-law offences generally there must be an actual wrongful intent in order to render the conspiracy criminal. Thus, if a person be deceived into becoming a conspirator, and is himself acting in good faith, he is not guilty.[2] So, if two parties conspire to procure another to violate a statute, in order that they may extort money from him by threats of prosecution, they are indictable. But if the object be to secure the detection and punishment of suspected offenders, they are not.[3]

§ 89. **All equally Guilty.** — All conspirators are equally guilty, whether they were partakers in its origin, or became partakers at a subsequent period of the enterprise; and each is responsible for all acts of his confederates, done in pursuance of the original purpose.[4]

§ 90. **Effect of Local Laws.** — In determining what is indictable as a conspiracy, much depends upon the local laws of the place of the conspiracy. It may well be that in one jurisdiction that may be unlawful, and even criminal, which in another is not; and therefore it does not follow that because in one State or country where the common law is in force an

[1] State *v.* Murray, 15 Me. 100; People *v.* Mather, 4 Wend. (N. Y.) 265; People *v.* Richards, 1 Mann. (Mich.) 216; State *v.* Murphy, 6 Ala. 765; State *v.* Noyes, 25 Vt. 415.

[2] Rex *v.* Whitehead, 1 C. & P. 67.

[3] Hazen *v.* Com., 23 Penn. St. 355.

[4] People *v.* Mather, 4 Wend. (N. Y.) 229; Ferguson *v.* State, 32 Ga. 658; Frank *v.* State, 27 Ala. 37; State *v.* Wilson, 30 Conn. 500.

agreement to do a particular act may be a conspiracy, the same would be true of another. This would depend upon local considerations. An indictment and conviction in one State may not be a precedent in another. Upon this point the following observations[1] are worthy of careful consideration: "Although the common law in regard to conspiracy is in force in this Commonwealth, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or parties or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it must depend on the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All these laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship, — not being adapted to the circumstances of our colonial condition, — were not adopted, unless approved, and therefore do not come within the description of the laws adopted and

[1] Shaw, C. J., Com. *v.* Hunt, 4 Met. (Mass.) 111.

confirmed by the provision of the Constitution already cited. This construction will do something towards reconciling the English and American cases, and may show . . . why a conviction in England, in many cases, would not be a precedent for a like conviction here."

CONTEMPT OF COURT.

§ 91. **Contempt of court** is both a crime indictable at common law when it amounts to an obstruction of public justice, and it is also, in many cases, summarily punishable, without indictment, by the court, when its rules are violated, its authority defied, or its dignity offended.

It is the latter class of cases which constitute what are technically called contempts of court, and, though not well defined, may be said to embrace all corrupt acts tending to prevent the court from discharging its functions.

In the former case, it belongs to the category of crimes, though not bearing any specific name, and is included in the general class of offences against public justice.

In the latter case, it is not strictly a crime, — though substantially so, being punishable by fine and imprisonment, — but is noticed summarily by the courts as an infraction of order and decorum, which every court has the inherent power to punish, within certain limits, — a power necessary to their efficiency and usefulness, and resorted to in case of violation of their rules and orders, disobedience of their process, or disturbance of their proceedings.[1]

[1] *Ex parte* Robinson, 19 Wall. (U. S.) 505; s. c. 2 Green's Cr. Law Rep. 135. In Pennsylvania, it is held that a court not of record, as

§ 92. **What are Contempts.** — All disorderly conduct, or conduct disrespectful to the court, or calculated to interrupt or essentially embarrass its business, whether in the court-room or out of it, yet so near as to have the same effect, such as making noises in its vicinity,[1] refusal by a witness to attend court,[2] or to be sworn or to testify,[3] or of any officer of court to do his duty,[4] or of a person to whom a *habeas corpus* is directed, to make return;[5] assaulting an officer of the court, or any other person in its presence,[6] or one of the judges during recess;[7] improperly communicating with a juror,[8] or by a juror with another person,[9] — will usually be dealt with, upon their occurrence, *pendente lite*, in order to prevent the evil consequences of a wrongful interference with the course of justice.

In other cases, proceedings more or less summary will be had, whenever a corrupt attempt, by force, fraud, bribery, intimidation, or otherwise, is made to obstruct or impede the due administration of justice. Thus, the courts will take notice of, and punish, in a summary way, the use by an attorney of contemptuous

a justice of the peace, has not the power to proceed summarily to punish for contempt, the power not being necessary, as the justice may proceed immediately to bind over for indictment. But the case is unsupported elsewhere, and must stand, if it can stand at all, upon some peculiarity of the statutes of that State.

[1] State *v.* Coulter, Wright (Ohio), 421.

[2] Johnson *v.* Wideman, Dudley (S. C.), 70.

[3] Stansbury *v.* Marks, 2 Dall. (U. S.) 213; Lott *v.* Burrel, 2 Mill (S. C.), 167.

[4] Chittenden *v.* Brady, Ga. Dec. 219.

[5] State *v.* Philpot, Dudley (Ga.), 46.

[6] People *v.* Turner, 1 Cal. 152.

[7] State *v.* Garland, 25 La. Ann. 532.

[8] State *v.* Doty, 32 N. J. 403.

[9] State *v.* Helvenston, R. M. Charlt (Ga.) 48.

language in the pleadings,[1] or a resort to the public press, in order to influence the proceedings in a pending case,[2] or any libellous publication, though indictable as such, relative to their proceedings, tending to impair public confidence and respect in them.[3] So the courts will intervene in like manner if attempts are made to bribe or intimidate a judge, juror, or any officer of court, in relation to any matter pending before them, or upon which they are to act officially.[4] They will also punish the circulation of a printed statement of a pending case before trial, by one of the parties to the prejudice of the other;[5] the publishing a report of the proceedings of a trial, contrary to the direct order of court;[6] or publishing such proceedings with comments calculated to prejudice the rights of the parties;[7] the preventing the attendance of a witness, after summons, or procuring his absence, so that he could not be summoned;[8] and, generally, all such acts of any and all persons as tend substantially to interfere with their efficient service in the administration of justice for which they are established.

§ 93. **Proceedings.** — When the contempt is com-

[1] State *v.* Keene, 6 La. 375.

[2] Matter of Darby, 3 Wheeler Cr. Cas. 11.

[3] State *v.* Morrill, 16 Ark. 384; State *v.* Earl, 41 Ind. 464; *In re* Sturock, 48 N. H. 428; Oswald's Case, 1 Dall. (Pa.) 319; People *v.* Freer, 1 Caines (N. Y.), 484; People *v.* Wilson, 64 Ill. 195; s. c. 1 Am. Cr. Rep. 107; Reg. *v.* Skipworth, 12 Cox C. C. 371; s. c. 1 Green's Cr. Law Rep. 121; *In re* Moore, 63 N. C. 397.

[4] Charlton's Case, 2 M. & C. 316; Reg. *v.* Onslow, 12 Cox C. C. 358; s. c. 1 Green's Cr. Law Rep. 110; State *v.* Doty, 32 N. J. 403.

[5] Rex *v.* Jollieffe, 4 T. R. 285.

[6] Rex *v.* Clement, 4 B. & Ald. 218.

[7] Reg. *v* O'Doherty, 5 Cox C. C. 348.

[8] McConnell *v.* State, 46 Ind. 298.

mitted in the presence of the court, the offender may be ordered into custody, and proceeded against at once.

But if the offence be not committed in presence of the court, it is usually proceeded against by an attachment preceded by an order to show cause, but without an order to show cause if the exigency demands it.[1]

Whether proceedings will be had in the last class of cases for a contempt whereby the proceedings in a particular case are improperly obstructed or otherwise interfered with, after the case is concluded, is perhaps not perfectly clear; but the better opinion seems to be that they may, at any time before the adjournment of the court for the term at which the contempt is committed.[2] In a case apparently to the contrary[3] there was no contempt, and the *dictum* is not supported by the citation of any authority.

COUNTERFEITING.

§ 94. **Counterfeiting** is the making of a false coin in the similitude of the genuine, with intent to defraud. It is a species of forgery, and its distinguishing characteristic is that there must be some appearance of similitude to the thing counterfeited;[4] whereas in forgery no such similitude is requisite,[5] and no genuine

[1] State *v.* Matthews, 37 N. H. 450; People *v.* Huckley, 24 N. Y. 74; Whittem *v.* State, 36 Ind. 196.

[2] Reg. *v.* O'Dogherty, 5 Cox C. C. 348; Clarke's Case, 12 Cush. (Mass.) 320; Johnson *v.* Wideman, Dudley (Ga.), 70.

[3] Robertson *v.* Dingley, 1 McCord (S. C.) Ch. 333.

[4] Rex *v.* Welsh, 1 East P. C. 164; United States *v.* Marigold, 9 How. (U. S.) 560, per Daniel, J.; United States *v.* Morrow, 4 Wash C. Ct. 733; Rex *v.* Varley, 2 W. Bl. 682.

[5] See *post*, FORGERY.

instrument may have ever existed. Whether there is such similitude seems to be a question of fact for the jury. Before the adoption of the Constitution of the United States the offence was punishable in the several colonies under the common law; but by the adoption of that Constitution the power to coin money was prohibited to the States, and reserved to the United States. Strictly speaking, therefore, there is no such offence as counterfeiting at common law in this country; but it is wholly an offence created by the statutes of the United States. But the offence is punishable as a cheat, or an attempt to cheat, by the States as well; and, in point of fact, most of the States, if not all, have statutes against the making and uttering of counterfeit coin.[1]

Punished at common law as a cheat, it is a misdemeanor, unless clearly made a felony by statute.[2]

DETAINER.

See FORCIBLE ENTRY AND DETAINER.

EAVESDROPPING.

§ 95. **Eavesdropping** is a kind of nuisance which was punishable at common law, and was defined to be a listening under the eaves or windows of a house, for the purpose of hearing what may be said, and thereupon to form slanderous and mischievous tales, to the common nuisance.[3] The offence is no doubt one at common law in this country. It has, indeed, been

[1] Fox *v.* Ohio, 5 How. (U. S.) 410; United States *v.* Marigold, 9 How. (U. S.) 560; Moore *v.* Illinois, 14 How. (U. S.) 13; State *v.* McPherson, 9 Iowa, 53.

[2] Wilson *v.* State, 1 Wis. 184.

[3] 1 Hawk. P. C., Table of Matters to vol. i., Eavesdropper.

expressly so held;[1] and it would seem that any clandestine listening to what may be said in a meeting, of the grand jury for instance, required by law to be secret, or, perhaps, which may lawfully be held in secret, with an intent to violate that secrecy, to the public injury or common nuisance,[2] would constitute the offence.

EMBEZZLEMENT.

§ 96. **Embezzlement**, though not an offence at common law, is now so universally made such by statute as to be of general interest, subject to special statutory differences or limitations. It may be defined generally as the fraudulent appropriation of another's property by one who has the lawful possession; and is distinguished from larceny by the fact that in the latter there is no possession, but this is taken. The statutes creating the crime of embezzlement, it has been well said, "have all been devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person, by whom it was converted to his own use in such a manner that he could not be convicted of larceny for appropriating it." If the property, at the time it is taken, is in the possession, actual or constructive, of the owner, it is larceny; if it is not, it is embezzlement.[3]

§ 97. **Possession and Custody distinguished.** — Nice questions have arisen as to what constitutes the posses-

[1] State *v.* Williams, 2 Tenn. 108.

[2] State *v.* Pennington, 3 Head (Tenn.), 299; Com. *v.* Lovett, 4 Pa. L. J. Rep. 5.

[3] Com. *v.* Berry, 99 Mass. 428; Com. *v.* Hays, 14 Gray (Mass.), 62; Rex *v.* Bazely, 2 Leach, 835.

sion which is violated in larceny, but which in embezzlement is in the alleged delinquent. Where there is no general relationship, as that of principal and agent, or employer and employé, other than that of a special and particular trust, little difficulty arises. The party trusted has the possession by delivery for a purpose, and, having the right to the possession, violates the trust by fraudulently converting the property to his own use, whereby the crime of embezzlement becomes complete. Where, however, this general relationship of employer and employé exists, it often becomes a question of some difficulty to determine which party has the possession,—a difficulty which can be best illustrated by reference to a few decided cases. Thus, if a teller in a bank, to whom the funds of the bank are intrusted during business hours, for the purpose of transacting the business of the bank, abstracts the funds from the vault after business hours, and after they have been withdrawn from his possession and put under the control of the cashier,[1]— this is larceny, because the funds were in the possession of the bank. So, if a clerk ordinarily intrusted with the sale of goods, after the store is closed, enter the store and take away the goods.[2] Money taken from the till of the master by a servant is stolen, because it is taken from the possession of the master, the servant having only the custody. Money taken from a customer by the servant, and put in his own pocket before it reaches the till, is embezzled,—the servant having possession for delivery to the master; the latter, however,

[1] Com. *v.* Barry, 116 Mass. 1.
[2] Com. *v.* Davis, 104 Mass. 548.

never having possessed it.[1] The distinction is very fine, though clear, and seems to be supported by the authorities. In some States, however, the peculiarities of the statute seem to authorize an indictment for embezzlement, where the possession has reached the master, and the servant holds for him,[2] by what is elsewhere generally regarded as a mere custody or bare charge.[3] The theory of constructive possession was early carried to a great length, in order to make the law of larceny apply to acts which as yet no statute of embezzlement had covered. Thus, a watch placed in the hands of a watchmaker to be cleaned was held to be in the possession of the owner, so that the conversion of it was larceny in the watchmaker.[4]

§ 98. Clerk. Servant. Agent. Officer. — What constitutes the several relationships of master and servant, employer and clerk, principal and agent, and the exact meaning of the several terms, have also been the subject of much discussion. There seems to be little or no distinction, so far as the law of embezzlement is concerned, between the words "clerk" and "servant," though in popular parlance they would hardly be confounded; but between them and the word "agent" there is a distinction made. Just where the line is drawn, however, as between the one and the other, is not very well defined. Though, in general, the idea of

[1] Rex *v.* Murray, 5 C. & P. 145; Reg. *v.* Watt, 4 Cox C. C. 336; Reg. *v.* Hawkins, 1 Den. C. C. 584; Com. *v.* Berry, 99 Mass. 430; People *v.* Hennessy, 15 Wend. (N. Y.) 147; Com. *v.* King, 9 Cush. (Mass.) 284; United States *v.* Clew, 4 Wash. C. Ct. 701.

[2] Lowenthal *v.* State, 32 Ala. 589; People *v.* Hennessy, 15 Wend. (N. Y.) 147.

[3] Hawk. P. C. bk. 1, c. 33, § 6.

[4] Hawk. P. C. bk. 1, c. 33, § 5, n. 1.

continuity of service underlies the relation of clerkship or service, yet this is by no means necessary; and an agency may be general and continuous as well; so that such continuity is not decisive as a criterion, though doubtless of some importance. In fact, continuity is not essential to the quality of servant or clerk.[1] Perhaps the idea of control is more distinctively characteristic of the relationship of master and servant than in that of principal and agent.[2] Yet even here the agency may be such as to give the principal as full control of his agent as if he were a servant. An agent is always acting for his principal, with authority to bind him to the extent of his agency; while a servant, though in a certain sense acting for his master, has not the representative character of an agent, and has no authority, as servant, to bind his master. His negligence, however, may be imputed to the master. Personal presence and supervision also belong more especially to the idea of mastership.[3] Still it is only the circumstances of each particular case which will determine under which category a particular person comes; and no better aid, in this particular, can be given than by a reference to cases which involve special circumstances. Thus, although an apprentice is not technically a servant, he may be, under special circumstances, one within the meaning of the statute of embezzlement.[4] But a general agent of an insurance company resident abroad is not a servant;[5] and

[1] Reg. *v.* Negus, L. R. 2 C. C. 34.
[2] Reg. *v.* Bowers, L. R. 1 C. C. 41.
[3] Reg. *v.* Squire, 2 R. & R. 349.
[4] Rex *v.* Mellish, R. & R. 80.
[5] Reg. *v.* May, L. & C. 13.

though a person employed to sell goods on commission and collect the purchase-money is not,[1] a commercial traveller, who does not live with his employers, or transact business at their store, may be, a clerk;[2] while one who receives material to be wrought upon in his own shop, and to be returned to the owner in the shape of manufactured goods, is neither a clerk, servant, nor agent.[3] Nor is a constable who receives a warrant to collect, with instructions to have it served if not paid. He is rather a public officer.[4] So the keeper of a county poor-house stands rather in the relation of a public officer than of servant to the superintendent who appoints him.[5]

§ 99. **Agency.** — But not all agencies come within the purview of this statute.

One whose business is that of a general agent for divers persons, and from its very nature carries with it the implied permission to treat the moneys received as a general fund, out of which all obligations are to be paid, such fund to be used and denominated as his own, is not held to be an agent within the meaning of the statute of embezzlement. Thus, an auctioneer, who is the agent of the buyer and the seller for effecting the sale, would find it wholly impracticable to carry on his business if he were obliged to keep separate the funds of each particular seller.[6] So a general collector of accounts is not such an agent of those for whom he collects,[7] nor is a

[1] Reg. *v.* Bowers, *ubi supra*.
[2] Rex *v.* Carr, R. & R. 198.
[3] Com. *v.* Young, 9 Gray (Mass.), 5.
[4] People *v.* Allen, 5 Den. (N. Y.) 76.
[5] Coats *v.* People, 22 N. Y. 245.
[6] Com. *v.* Stearns, 2 Met. (Mass.) 343.
[7] Com. *v.* Libbey, 11 Met. (Mass.) 64.

general insurance agent receiving premiums for divers companies.[1] Nor would a general commission-merchant be; nor any person who, from the nature of his business or otherwise, has authority to confound and deposit in one account, as his own, funds received from divers sources.[2]

The word "officer," as used in statutes of embezzlement, has been held to apply to the sheriff of a county,[3] the directors of a bank,[4] and the treasurers of railroads and other bodies politic.[5] Perhaps "servant" would aptly describe such persons, if the word "officer" was not in the statute.[6]

§ 100. **Employment.** — Embezzlement, as we have seen, is substantially a breach of trust; and is the peculiar crime of those who are employed or trusted by others. Many of the statutes limit the crime to cases where the fraudulent commission is by one who gets possession of the money or property "by virtue of his employment." Under this limitation it has been held, by a very strict construction, that if a servant employed to sell goods at a fixed price, sells them at a less price, and embezzles the money, — that money not being the master's, but the purchaser still remaining bound for the full fixed price, — the servant does not come in possession of his master's money by virtue of his employment.[7]

[1] People *v.* Howe, 2 N. Y. Sup. Ct. N. S. 383.

[2] Com. *v.* Foster, 107 Mass. 221. Otherwise by statute in Illinois, as to commission-merchants, warehousemen, &c. Wright *v.* People, 61 Ill. 382.

[3] State *v.* Brooks, 42 Tex. 62.

[4] Com. *v.* Wyman, 8 Met. (Mass.) 247.

[5] Com. *v.* Tuckerman, 10 Gray (Mass.) 173.

[6] Rex *v.* Squire, R. & R. 349; Reg. *v.* Welch, 2 C. & K. 296.

[7] Reg. *v.* Aston, 2 C. & K. 413; Rex *v.* Snowley, 4 C. & P. 390.

So, when a servant receives money for the use of his master's property, but in a manner contrary to his right or authority, and in violation of his duty, it is said not to be his master's money, but rather his.[1] But this strictness of interpretation has not been followed in this country, where it has been held that if an agent obtains money in a manner not authorized, and in violation of his duty, yet under the guise of his agency, he gets it by virtue of his employment;[2] and other English cases seem now in accord with this view.[3]

§ 101. **Subject-matter of Embezzlement.** — It is generally provided that all matters which may be subjects of larceny may also be subjects of embezzlement. Some statutes, however, are not so comprehensive. Save these differences, which cannot here be particularized, it may be said that whatever may be stolen may be embezzled; and what may be stolen will be considered under the title LARCENY.

§ 102. **Intent to defraud** is an essential element of the case. And if the money is taken under a claim of right, as where a cashier of a mercantile establishment intercepts funds of his employers, and without their knowledge and against their wish appropriates them to the payment of his salary, by charging them to his account, this is no embezzlement.[4]

[1] Reg. *v.* Harris, 6 Cox C. C. 363.

[2] *Ex parte* Hedley, 31 Cal. 108.

[3] Reg. *v.* Beechey, R. & R. 319; Rex *v.* Salisbury, 5 C. & P. 155; Reg. *v.* Wilson, 9 C. & P. 27.

[4] Ross *v.* Innis, 35 Ill. 487.

EMBRACERY.

§ 103. **Embracery** is an offence analogous to maintenance, and, in some aspects, to bribery, and consists in an attempt, by corrupt means, to induce a juror to give a partial verdict. Any form of tampering with a jury, whether successful or not is immaterial, constitutes the crime.[1] The means most commonly resorted to are promises, entertainments, presents, and the like. But any means calculated and intended to cause a juryman to swerve from his duty, if used, will make the person using them for that purpose indictable at common law. As the crime is in itself an attempt, it is complete whether successful or not in its purpose, whether the verdict be just or unjust, and even if there be no verdict.[2] A juror may be guilty of embracery, by the use of corrupt and unlawful methods of influencing his fellows, or of obtaining a position on the jury with intent to aid either party.[3]

ENGROSSING. FORESTALLING. REGRATING.

§ 104. These were severally offences at the common law, and describe different methods of speculation and artificial enhancement or depression of the prices of merchandise, by resort to false news, extraordinary combinations, and other indirect means outside of the regular action of the laws of trade.[4] They were based upon early English statutes, and notably 5 and 6 Edward VI. c. 14, which are cited by Hawkins,[5] and of

[1] Hawk. P. C. bk. 1, c. 85.
[2] State *v.* Sales, 2 Nev. 269; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503
[3] Rex *v.* Opie et al., 1 Saund. 301.
[4] 1 Hawk. P. C. c. 80.
[5] *Ubi supra.*

which a very good summary may be found in Bishop.[1] These statutes are now repealed in England, and the offences abolished. They were undoubtedly a part of the common law brought to this country; but seem, nevertheless, not to have been enforced,— perhaps on account of the greater freedom of trade, and the infrequency of the occurrence of the evils connected with them in a new country. There is no reason in principle, however, why they should not be applicable to many of the practices of the stock and other markets of the present day.[2]

EXTORTION.

§ 105. **Extortion** is the demanding and taking of an illegal fee, under color of office, by a person clothed by the law with official duties and privileges.[3] The fee is illegal, if demanded and taken before it is due, or if it be a greater amount than the law allows, and, of course, if not allowed at all by law. Thus, it is extortion for a justice of the peace to exact costs where they are not properly taxable, or from the party to whom they are not taxable;[4] or for a jailer to obtain money of his prisoner, by color of his office;[5] or for a ferry-man[6] or miller[7] to collect tolls not war-

[1] 1 Cr. Law, § 518 *et seq.*

[2] City of Louisville *v.* Roupe, 6 B. Mon. (Ky.) 591; 7 Dane, Abr. 39. For the learning on this subject, in addition to the authorities already cited, see Rex *v.* Waddington, 1 East, 143; Rex *v.* Webb, 14 East, 406; Pratt *v.* Hutchinson, 15 East, 511; 2 Chitty Cr. Law, 527; Rex *v.* Rusby, Peake, Add. Cas. 180.

[3] Ming *v.* Truett, Mont. 323; Rex *v.* Baines, 6 Mod. 192.

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

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

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

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

ranted by custom; or for a county treasurer to exact fees for acts required in the collection of taxes, but which had not been done;[1] or for a coroner[2] or sheriff to refuse to do their official duty unless their fees are prepaid;[3] or to demand and receive fees where none are by law demandable.[4] So it is extortion for an officer to avail himself of his official position to force others, by indirect means, to contribute to his pecuniary advantage, to an amount and in a manner not authorized by law, — as, for instance, for a sheriff to receive a consideration from A. for accepting A. as bail for C., whom he has arrested.[5] That the illegal fee is in the form of a present, or other valuable thing than money, is immaterial;[6] unless the gift be voluntary,[7] in which case there is no offence committed. By a very strict construction, the taking a promissory note for illegal fees is held not to constitute the offence, as the note is void, cannot be enforced, and is therefore of no value.[8] And the taking must be with a wrong intent,[9] and not through mistake of fact,[10] or of law.[11]

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

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

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

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

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

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

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

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

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

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

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

FALSE IMPRISONMENT.

§ 106. **False imprisonment**, which consists in the unlawful restraint of the liberty of a person, is an indictable offence at common law.[1] No actual force is necessary. The force of fraud or fear is sufficient. Thus, to stop a person on the highway and prevent him from proceeding by threats, constitutes the offence;[2] though it has been held in England, by a divided court, that the mere prevention from going in one direction, while there remained liberty of going in any other, is no imprisonment.[3] So is the unlawful confinement of a child by its parents;[4] and, no doubt, of a prisoner by a jailer.

Most of the States have now statutes upon the subject under which prosecutions are had.[5]

FALSE PRETENCES.

§ 107. Mere verbal lying, whereby one is defrauded of his property, without the aid of some visible token, device, or practice, — as when one falsely pretends that he has been sent for money,[6] or falsely states that goods sold exceed the amount actually delivered,[7] or falsely asserts his ability to pay for goods he is about to buy,[8]

[1] Com. *v.* Nickerson, 5 Allen (Mass.), 510; 3 Chitty Cr. Law, 835; Redfield *v.* State, 24 Tex. 133; Baden *v.* State, 13 Fla. 675.

[2] Blower *v.* State, 3 Sneed (Tenn.), 66; Searls *v.* Viats, 2 T. & C. (N. Y. S. C.) 224; Moses *v.* Dubois, Dud. (Ga.) 209.

[3] Bird *v.* Jones, 7 Q. B. 742.

[4] Fletcher *v.* People, 52 Ill. 395.

[5] See ABDUCTION, KIDNAPPING.

[6] Reg. *v.* Jones, 1 Salk. 379.

[7] Rex *v.* Osborn, 3 Burr. 1697.

[8] Com. *v.* Warren, 6 Mass. 72.

—was not formerly an indictable offence. But as many frauds were practised in this way which were mere private frauds, and which the court, with every disposition to punish, could not stretch the law of larceny to cover, it was at length enacted[1] that designedly obtaining money, goods, wares, or merchandises, by false pretences, with intent to defraud any person, should be indictable. The provisions of this statute have been so generally adopted in this country, that, if it cannot be said to be strictly part of the common law, it may be considered as the general law of the land. And though the terms in which the enactment is made may slightly differ in the different States, yet they are so generally similar that in most cases the decisions in one State will serve to illustrate and explain the statutes in others. And as the words of the statute cover cheats as well by words as by acts and devices, indictments under the statute are now usually resorted to, unless special circumstances or special provisions compel a resort to the old form of pleading. Under the statutes, in order to constitute the offence, it must appear (1) that the pretence is false; (2) that there was an intent to defraud; (3) that an actual fraud was committed; (4) that the false pretences were made for the purpose of perpetrating the fraud; (5) and that the fraud was accomplished by means of the false pretences.[2]

§ 108. (1.) **Pretence must be False.**—A false pretence is a false statement about some past or existing fact, in contradistinction from a promise, an opinion, or a statement about an event that is to take place. Thus, a pretence that one has a warrant to arrest, if false, is

[1] 30 Geo. II. c. 24.

[2] Com. *v.* Drew, 19 Pick. (Mass.) 179.

within the statute,[1] while a pretence that his goods "are about to be attached" is not.[2] Nor is a statement that something could, would, or should be done.[3]

The shades of distinction are sometimes very nice. Thus, "I can give you employment," is no pretence;[4] but, "I have a situation for you in view," is.[5] And perhaps the false statement of an existing desire or intention, to accomplish some present purpose, may be a false pretence.[6] The belief by the party making the statement that it is false is of no moment, if it is in fact true.[7] On the contrary, if it be false, yet he believes it to be true, this is not within the statute, as in such case there is no intent to defraud. But opinions as to quality, value, quantity, amount, and the like, are held not to be false pretences.[8] The fact, however, that one does or does not hold an opinion is as much an existing fact as any other; and if it is falsely stated with intent to defraud, and does defraud, it is in every particular within both the letter and spirit of the law.[9] It may be difficult to prove that an opinion is known by the person who asserts it to be false, and that it was

[1] Com. *v.* Henry, 10 Harris (Pa.), 253.

[2] Burrow *v.* State, 7 Eng. (Ark.) 65.

[3] State *v.* Evers, 49 Mo. 542; Johnson *v.* State, 41 Tex. 65; Ryan *v.* State, 45 Ga. 128; State *v.* Magee, 11 Ind. 154.

[4] Ranney *v.* People, 22 N. Y. 413.

[5] Com. *v.* Parker, Thatcher Cr. Cas. (Mass.) 124.

[6] State *v.* Rowley, 12 Conn. 131.

[7] Rex *v.* Spencer, 3 C. & P. 420.

[8] Reg. *v.* Williamson, 11 Cox C. C. 328; Reg. *v.* Oates, 6 Cox C. C. 540; Reg. *v.* Bryan, 7 Cox C. C. 589; Reg. *v.* Goss, 8 Cox C. C. 208; Scott *v.* People, 62 Barb. (N. Y.) 62; Reese *v.* Wyman, 9 Ga. 430; State *v.* Estes, 46 Me. 150.

[9] State *v.* Tomlin, 5 Dutch. (N. J.) 13; Reg. *v.* Ardley, Law Rep. 1 C. C. 301.

falsely asserted with intent to defraud. But this is a question of procedure.

The pretence must be false at the time when the property is obtained. If it be false when made, but becomes true at the time when the property is obtained, — as where one states "that he has bought cattle, when in fact he had not at the time of the statement, but had when he obtained the money, — there is no offence.[1] *Vice versa*, however, if the statement be true when made, but becomes false at the time of the obtaining the property, — as if, in the case supposed, the cattle had been bought, but had been sold at the time when the property was obtained, — then the offence would no doubt be committed.

§ 109. **Subject-matter.** — Any lie about any subject-matter, by word or deed, — as by showing a badge, or wearing a uniform, or presenting a check or sample or trade-mark, or by a look or a gesture, — subject to the foregoing limitations, is a false pretence. Thus, if one falsely assert as an existing fact that he possesses supernatural power,[2] or that he has made a bet,[3] or that he is pecuniarily responsible,[4] or irresponsible,[5] or is a certain person,[6] or that he is agent for or represents a certain person,[7] or belongs to a certain community [8] or military organization,[9] or is married,[10] or unmarried,[11] or engaged

[1] Snyder, *In re*, 17 Kan. 542.
[2] Reg. *v.* Giles, 10 Cox C. C. 44; Reg. *v.* Bunce, 1 F. & F. 523.
[3] Young *v.* Rex, 3 T. R. 98.
[4] State *v.* Pryor, 30 Ind. 350.
[5] State *v.* Tomlin, 5 Dutch. (N. J.) 13.
[6] Com. *v.* Wilgus, 4 Pick. (Mass.) 177.
[7] People *v.* Johnson, 12 Johns. (N. Y.) 292.
[8] Rex *v.* Barnard, 7 C. & P. 784.
[9] Hamilton *v.* Reg., 9 Q. B. 271; Thomas *v.* People, 34 N. Y. 351
[10] Reg. *v.* Davis, 11 Cox C. C. 181.
[11] Reg. *v.* Copeland, C. & M. 516.

in a certain business,[1] or that a horse which he offers to sell is sound,[2] or that a flock of sheep is free from disease,[3] or any other lie about any matter, where money is fraudulently obtained,— the offence is complete. "Why should we not hold that a mere lie about any existing fact, told for a fraudulent purpose, should be a false pretence?"[4]

§ 110. (2.) **Intent to defraud.** — If the money be obtained by the false pretence, the intent being to obtain it thereby, as where one obtains a loan upon a forged certificate of stock in a railroad company, the offence is complete, though the party obtaining the money fully intended and believed he should be able to pay the note at maturity and redeem the stock.[5] If the object in getting possession of the property be not to defraud, but to compel payment of a debt, — as when a servant gets possession of the goods of his master's debtor, to enable his master to collect his debt, — the offence is not committed.[6]

§ 111. (3 and 4.) **Actual Perpetration of the Fraud.** — If the fraud be not actually accomplished by obtaining the goods, money, &c., as the charge may be, it is but an attempt, and only indictable as such. And if a person is merely induced by the false pretence to pay a debt which he previously owed, or to indorse a note which he had agreed to indorse, it is no offence under the statute.[7] So it has been held in New York[8] that part-

[1] People *v.* Dalton, 2 Wh. Cr. Cas. (N. Y.) 161.

[2] State *v.* Stanley, 64 Me. 157.

[3] People *v.* Crissie, 4 Den. (N. Y.) 525.

[4] Alderson, B., Reg. *v.* Woolley, Den. C. C. 55.

[5] Com. *v.* Coe, 115 Mass. 481; State *v.* Thatcher, 35 N. J. 445.

[6] Rex *v.* Williams, 7 C. & P. 354; *post*, § 111.

[7] People *v.* Thomas, 3 Hill (N. Y.), 169; *ante*, § 110; People *v.* Getchell, 6 Mich. 496.

[8] People *v.* Clough, 17 Wend. 351.

ing with money for charitable purposes is not within the statute. But this case rests upon the supposed restraining force of the preamble of the statute; and elsewhere the law has been held to be the reverse.[1] So the obtaining a promissory note from a minor has been held to be no actual fraud, as the minor is not bound to pay.[2] But it may well be doubted if the paper upon which the note is written is not "goods," within the meaning of the statute.[3]

From the rule that the false pretence must be the inducement for parting with the property, it follows that after possession and property — though under a voidable title — is obtained, false representations, whereby the owner is induced to permit the property to be retained, does not amount to the offence, — as where a vendor, suspecting the solvency of the vendee, proposes to retake his goods, but is induced by false pretences to abandon his purpose; though it might be otherwise if the right to the property had not passed.[4]

§ 112. **Fraud in both Parties.** — When in a transaction each party makes false pretences, and each defrauds the other, — as when two parties exchange watches, each falsely pretending that his watch is gold of a certain fineness, — each is indictable, and neither can defend on the ground of the other's deceit.[5] It is, however, held in New York that if the money parted with is for the purpose of inducing the false pretender

[1] Reg. *v.* Jones, 1 Den. C. C. 551; Reg. *v.* Hensler 11 Cox C. C. 570; Com. *v.* Whitcomb, 107 Mass. 486. So in New York now by statute 1851, c. 144, § 1.

[2] Com. *v.* Lancaster, Th. Cr. Cas. (Mass.) 428.

[3] Reg. *v.* Danger, 7 Cox C. C. 303.

[4] People *v.* Haynes, 14 Wend. (N. Y.) 546.

[5] Com. *v.* Merrill, 8 Cush. (Mass.) 571.

to violate the law, as, for instance, a pretended officer not to serve a warrant, the indictment will not lie.[1] But this case proceeds upon the ground that the object of the statute is to protect the honest, while the better view is that the law is for the protection of all, by the punishment of rogues. The application of the principle that one man may escape punishment of crime because the person upon whom he committed it was guilty of the same or a different crime, would paralyze the law. The true rule is to punish each for the crime he commits.

§ 113. **Delivery with Knowledge. Ordinary Prudence.** — If the party who delivers the goods is not deceived by the false pretence, but is aware of its falsity, the offence is not committed, though there would be an attempt;[2] and so, perhaps, if he has the means of knowledge, — as when one falsely represents that on a former occasion he did not receive the right change, and thereby obtained additional change.[3] Yet if the change thus obtained is through actual deceit, operating on the mind of the party who delivers, it is within both the letter and the spirit of the law.[4]

The false pretence it was once generally, and is now sometimes, said must be of such a character as is calculated to deceive a man of ordinary intelligence and caution.[5] One man, it has been intimated by high

[1] McCord *v.* People, 46 N. Y. 470, Peckham, J., dissenting, with whom is the weight both of reason and authority; Com. *v.* Henry, 10 Har. (Pa.) 253; 2 Bishop Cr. Law, § 469.

[2] Reg. *v.* Mills, D. & B. 205; State *v.* Young, 76 N. C. 258.

[3] Com. *v.* Norton, 11 Allen (Mass.), 266; Com. *v.* Drew, 19 Pick (Mass.) 179.

[4] Reg. *v.* Jessop, D. & B. 442; 2 Bishop Cr. Law, § 432*a*.

[5] Jones *v.* State, 50 Ind. 473.

authority, is not to be indicted because another man has been a fool.[1] But in the practical application of the rule, the courts seem to have been guided in determining whether the false pretence was an indictable one, more by the fact that the deceit and fraud were intended and actually accomplished, than that they were calculated generally to deceive. And the doctrine which formerly obtained, that if the party from whom the goods were obtained is negligent, or fails in ordinary prudence, the offence is not committed, seems now to be generally discarded, as a doctrine which puts the weak-minded and the incautious at the mercy of rogues. The tendency of the more recent authorities is to establish the rule that, whatever the pretence, if it be intended to defraud, and actually does defraud, the offence is committed. The shallowness of the pretence, and its obvious falsity, may be evidence that the party must have had knowledge, and so was not deceived or defrauded by the pretence; but it is only evidence upon the question whether in fact the person parting with his property was deceived. If, in fact, the party is induced by the pretence to part with his money, — if the pretence takes effect, — then the money is obtained by it. Thus, it was held that a pretence that a one-pound note, reading so upon its face, was a five-pound note, to a party who could read, was a false pretence.[2] It was also held an indictable false pretence to represent to a person who could not read, as a Bank of England note, the following instrument: —

[1] Per Lord Holt, Rex *v.* Jones, 2 Ld. Raym. 1013.

[2] Reg. *v.* Jessop, D. & B. C. C. 442.

"£5.] BANK OF ELEGANCE. [No. 230.

"I promise to pay on demand the sum of five Rounds, if I do not sell articles cheaper than anybody in the whole universe.

"Five. For MYSELF & CO.

"Jan. 1, 1850. M. CARROLL."[1]

§ 114. (5.) **The Fraudulent Pretence as the Means.** — The false pretence must have been the means whereby the defrauded party was induced to part with his property. It is not meant by this that the false pretence should have been the sole inducement which moved the promoter. It is enough if, co-operating with other inducements, the fraud would not have been accomplished but for the false pretence.[2] So when property is sold with a written covenant of title and against incumbrances, and at the same time it is also fraudulently represented verbally that the property is unincumbered, the offence is committed if the verbal representation was the inducement.[3] It is doubtful, however, whether a written covenant of title, or against incumbrances merely, can be fairly regarded as a representation that the property sold is unincumbered, so as to be the foundation of an indictment. It would seem

[1] Reg. *v.* Coulson, 1 Den. C. C. 572. See also Reg. *v.* Woolley, 1 Den. C. C. 559; *In re* Greenough, 31 Vt. 279; State *v.* Mills, 17 Me. 218; Cowen *v.* People, 14 Ill. 348; Colbert *v.* State, 1 Tex. App. 341; 2 Bishop Cr. Law, § 464; Steph. Dig. Cr. Law, art. 330; Roscoe's Cr. Ev. (9th ed.) 498.

[2] State *v.* Thatcher, 35 N. J. 445; People *v.* Haynes, 11 Wend. (N. Y.) 557; Reg. *v.* Lince, 12 Cox C. C. 451; Fay *v.* Com., 28 Grat. (Va.) 912; Snyder, *In re*, 17 Kan. 542.

[3] State *v.* Dorr, 33 Me. 498; Com. *v.* Lincoln, 11 Allen (Mass.), 233; Reg. *v.* Abbott, 1 Den. C. C. 173.

to be only an agreement which binds the party civilly in case of breach.[1]

§ 115. **Property obtained.** — In general, the property obtained must be such as is the subject of larceny.[2] The obtaining a credit on account,[3] for instance, is not within the statute, unless its scope is sufficient to embrace such a transaction; nor is the procurement of an indorsement of payment of a sum of money on the back of a promissory note.[4] The statutes of the several States must control in this particular.

§ 116. **False Pretence. Larceny.** — The distinction between the crimes of obtaining money by false pretence and larceny is fine but clear. If a person by fraud induces another to part with the possession only of goods, this is larceny; while to constitute the former offence, the property as well as the possession must be parted with.[5] In larceny the owner has no intention to part with his property, and the thief cannot give a good title. If the owner delivers his property under the inducement of a false pretence, with intent to part with his property, the person who obtains it by fraud may give a good title.[6] If the owner is tricked out of the possession, and does not mean to part with the property, it is larceny; but if he is tricked out of both, yet means to part with his property, it is obtaining property by false pretences.[7]

[1] Rex *v.* Codrington, 1 C. & P. 661; State *v.* Chunn, 19 Mo. 233.

[2] See LARCENY.

[3] Reg. *v.* Eagleton, Dears. 515.

[4] State *v.* Moore, 15 Iowa, 412.

[5] Reg. *v.* Kilham, L. R. 1 C. C. 261; State *v.* Vickery, 19 Tex. 326.

[6] Zink *v.* People, N. Y. Ct. of App. 1879, 8 Reptr. 275.

[7] Reg. *v.* Prince, 11 Cox C. C. 193. See also the very recent and elaborately considered case of Reg. *v.* Middleton, 12 Cox C. C. 260; s. c. 1 Green's Cr. Law Rep. 4.

§ 117. This, though not strictly a common-law offence, was made so at an early date by statute in England;[1] and is now in many of the States, by adoption, a part of their common law. It consists in "violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law."[2]

§ 118. **Force and Violence.** — The entry or detainer must, in order to constitute an indictable offence, be with such force and violence, or demonstration of force and violence, threatening a breach of the peace or bodily harm, and calculated to inspire fear, and to prevent those who have the right of possession from asserting or maintaining their right, as to become a matter of public concern in contradistinction to a mere private trespass.[3] Such force as will tend to a breach of the peace may not be used; but only such force is permissible as would sustain a plea in justification of *moliter manus imposuit*.[4] That degree of force which the law allows a man to use in defence of his lawful possession, it does not allow him, if it be tumultuous or riotous, or tends to a breach of the peace, to use in recovering a possession of which he has been dispossessed. It does not allow a breach of the peace to regain possession of property, or in redress of private wrongs.[5] Like cir-

[1] 4 Bl. Com. 148. [2] 4 Bl. Com. 148.

[3] Com. *v.* Shattuck, 4 Cush. (Mass.) 145; State *v.* Pearson, 2 N. H. 35; Com. *v.* Keeper, &c., 1 Ashm. (Pa.) 140; State *v.* Cargill, 2 Brev. (S. C.) 445; 1 Hawk. P. C. c. 28, § 27; Benedict *v.* Hart, 1 Cush. (Mass.) 487; Wood *v.* Phillips, 43 N. Y. 152.

[4] Fifty Associates *v.* Howland, 5 Cush. (Mass) 214.

[5] Sampson *v.* Henry, 11 Pick. (Mass.) 379; Gregory *v.* Hill, 8 T. R. 209; Hyatt *v.* Wood, 3 Johns. (N. Y.) 239; 3 Bl. Com. 4; Davis *v.* Whittredge, 2 Strobh. (S. C.) 232; *ante*, § 63.

cumstances accompanying the detention of the possession of real property will constitute a forcible detainer.[1]

It is immaterial how the intimidation is produced, whether by one or many, by actual force or by threats, or tumultuous assemblies, or by weapons, or in what other way it may be produced, provided it actually occurs, or might reasonably be expected to occur, if the parties entitled to possession should be present and in a position to be affected by it. And entry and detainer by such demonstrations of force and violence are equally indictable, although no one be actually present and in possession of the premises entered to be intimidated thereby.[2]

Nor need the display of force be upon the actual premises; for if the owner be seized and kept away, for the purpose of thwarting his resistance, and an entry be then made during such enforced absence, though peaceably, it will amount to a forcible entry and detainer.[3] And a peaceable entry followed by a forcible expulsion of the owner will also constitute the offence.[4] The threats of violence must be personal. No threats of injury to property will be sufficient.[5]

§ 119. **What may be entered upon or detained.** — Peaceable occupancy, without reference to title, is the possession which the law says shall not be taken away

[1] 1 Hawk. P. C. c. 28, § 30; Kline *v.* Rickets, 8 Cow. (N. Y.) 226; Com. *v.* Dudley, 10 Mass. 403.

[2] People *v.* Field, 52 Barb. (N. Y.) 128; 1 Hawk. P. C. c. 28, §§ 26, 29.

[3] People *v.* Field, 52 Barb. (N. Y.) 128; 1 Hawk. P. C. c. 28, §§ 26, 29.

[4] 3 Bac. Abr. For. Entry (B).

[5] 1 Hawk. P. C. c. 28, § 28.

or detained by force.[1] And this possession may be constructive as well as actual; as where the owner of a building, which he does not personally occupy, but rents to tenants, while waiting for a new tenant, is forcibly kept out by a stranger and trespasser.[2] Mere custody, however, is not enough. Therefore, if a servant withholds possession against his employer, the latter is not guilty of the offence in asserting his right to the possession which is already his, and which the servant has not.[3] So if the owner has gained peaceable possession of the main house, this carries with it the possession of the whole; and he is not liable under the law for the forcible entry of a shed adjoining, in which a tenant had entrenched himself.[4]

One co-tenant may be guilty of the offence as against another who is in peaceable possession and resists;[5] and so may a wife as against her husband.[6]

§ 120. **Personal Property. Forcible Trespass.**— These rules and principles are strictly applicable only to the forcible entry and detention of real property; and it has been said that the forcible detainer of personal property is not indictable.[7] But the seizure of personal property under like circumstances, and with similar demonstrations, may be indicted as a forcible tres-

[1] Rex *v.* Wilson, 8 T. R. 357; People *v.* Leonard, 11 Johns. (N.Y.) 504; Beauchamp *v.* Morris, 4 Bibb (Ky.), 312; State *v.* Pearson, 2 N. H. 550; Com. *v.* Bigelow, 3 Pick. (Mass.) 31.

[2] People *v.* Field, 52 Barb. (N. Y.) 198.

[3] State *v.* Curtis, 4 Dev. & Bat. (N. C.) 222; Com. *v.* Keeper, &c., 1 Ashm. (Pa.) 140.

[4] State *v.* Pridger, 8 Ired. (N. C.) 84.

[5] Reg. *v.* Marrow, Cas. temp. Hardw. 174.

[6] Rex *v.* Smyth, 1 M. & R. 155.

[7] State *v.* Marsh, 64 N. C. 378.

pass.[1] And there seems to be no reason why its forcible detention may not be also indictable, by an analogous change in the description of the offence. It is not less a public injury. It has been suggested that the offence can only be committed when the party trespassed upon is present;[2] but upon principle as well as upon authority the reverse seems to be the better law.[3]

FORGERY.

§ 121. **Forgery** is "the fraudulent making or alteration of a writing to the prejudice of another man's right,"[4] — the word "writing" including printed and engraved matter as well,[5] but not a painting, with the name of the artist falsely signed.[6] The instrument forged, it is generally held, must purport upon its face in some way to prejudice the legal rights or pecuniary interest of the supposed signer, or of the person defrauded. Thus, a recommendation of one person to another as a person of pecuniary responsibility, may be the subject of forgery.[7] And it has been held in England that the false making of a letter of recommendation, whereby to procure an appointment as school-teacher,[8] or as constable;[9] and a certificate of good character, whereby to enable the

[1] State *v.* Ray, 10 Ired. (N. C.) 39; State *v.* Widenhouse, 71 N. C. 279.

[2] State *v.* McAdden, 71 N. C. 207.

[3] *Ante*, § 118; State *v.* Thompson, 2 Tenn. 96.

[4] 4 Bl. Com. 247.

[5] Com. *v.* Ray, 3 Gray (Mass.), 441.

[6] Reg. *v.* Closs, 7 Cox C. C. 494.

[7] State *v.* Ames, 2 Greenl. (Me.) 365.

[8] Reg. *v.* Sharman, Dears. C. C. 285.

[9] Reg. *v.* Moak, D. & B. C. C. 550.

person in whose favor it is made to obtain a certificate of qualification for a particular service, — are indictable forgeries at common law:[1] — extreme cases, no doubt, and founded, perhaps, on an old statute of Henry VIII. c. 1 (not, however, so far as appears by the reports, referred to in either case), whereby cheating by false "privy tokens and counterfeit letters in other men's names" is made an indictable offence. But the false making of a mere recommendation of one person to the hospitalities of another, with a promise to reciprocate, has been held in this country to be no forgery.[2] Whether in a case precisely analogous to the English cases just referred to our courts would follow them, remains to be seen. Undoubtedly they would, wherever a substantially similar statute may be found.[3] *The "prejudice to another man's right"* may apply as well to the party imposed upon as to the person whose name is forged. As to the latter, no doubt the writing must import his legal liability in some way. But as to the former, if he is defrauded or imposed upon, or the forgery is made with the fraudulent intent, the act seems to come clearly within the definition. It is certainly to be questioned whether the law will allow a man to live upon the hospitalities of his fellows, which he has obtained by forged letters of recommendation. The forgery is not the less a forgery because it is made use of as a false pretence.[4]

§ 122. **Forgery must be Material.** — The false making, however, must be of some instrument having pecu-

[1] Reg. *v.* Toshack, 1 Den. C. C. 492.

[2] Waterman *v.* People, 67 Ill. 91.

[3] Com. *v.* Hartnett, 3 Gray (Mass.), 450.

[4] Com. *v.* Coe, 115 Mass. 481; s. c. 2 Green's Cr. Law R. 292

niary importance, or its alteration in some material respect.

A very slight alteration, however, may be material. It has been held in England that the alteration of the name of the person to whom a note is payable, — the alteration being from the name of an insolvent to a solvent firm,[1] — and in this country, that the alteration of the name of the place where payable, is material. And alteration by erasure constitutes the offence.[2] So does any other erasure, or detachment from or leaving out, as from a will, of a material part of the instrument, whereby its effect is changed.[3] If the instrument do not purport to be of any legal force, whether its invalidity be matter of form or substance, — as if it be a contract without consideration,[4] or a will not witnessed by the requisite number of witnesses,[5] or a bond or other instrument created and defined by statute, but not executed conformably to the statute, — then the false making or alteration is not a forgery.[6] The addition, moreover, of such words as the law would supply,[7] or of a word or words otherwise immaterial, and such as would not change the legal effect of the instrument, — as where the name of a witness is added to a promissory note, in those States where the witness is immaterial, — would not constitute the offence;[8] though,

[1] Rex *v.* Treble, 2 Taunt. 328; State *v.* Robinson, 1 Harr. (N. J.) 507.

[2] White *v.* Huss, 32 Ala. 470.

[3] State *v.* Strotton, 27 Iowa, 420; Coomb's Case, Noy, 101.

[4] People *v.* Shall, 9 Cow. (N. Y.) 778.

[5] Rex *v.* Wall, 2 East P. C. 953; State *v.* Smith, 8 Yerg. (Tenn.) 150.

[6] Cunningham *v.* People, 11 N. Y. Sup. Ct. N. S. 455.

[7] Hunt *v.* Adams, 6 Mass. 519.

[8] State *v.* Gherkin, 7 Ired. (N. C.) 206.

doubtless, in those States where such addition would be material, by making, as in Massachusetts, the security good for twenty instead of six years, such an alteration would be held a forgery. Nor, it seems, would the alteration of the marginal embellishments or marks of a bank-note, not material to the validity of the note, constitute forgery.[1]

If the instrument forged does not appear upon its face to have any legal or pecuniary efficacy, it must be shown by proper averments in the indictment how it may have.[2]

§ 123. **Legal Capacity. Fictitious Name.** — It is not essential that the person in whose name the instrument purporting to be made should have the legal capacity to act, nor that the person to whom it is directed should be bound to act upon it, if genuine, or should have a remedy over.[3] Indeed, the forged name may be that of a fictitious person,[4] or of one deceased,[5] or of an expired corporation.[6] But signing to a note the name of a firm which in fact does not exist, one of the names in the alleged firm being that of the signer of the note, is not forgery.[7] Even the signing one's own name, it being the same as that of another person, the intent

[1] State *v.* Waters, 3 Brev. (S. C.) 507.

[2] State *v.* Wheeler, 19 Minn. 98; State *v.* Pierce, 8 Clarke (Iowa), 231; Com. *v.* Ray, 3 Gray (Mass.), 441; People *v.* Tomlinson, 35 Cal. 503; *post*, § 125.

[3] People *v.* Krummer, 4 Park. C. R. (N. Y.) 217; State *v.* Kimball, 50 Me. 409.

[4] Rex *v.* Bolland, 1 Leach C. C. 83; Rex *v.* Marshall, Russ. & Ry. 75; Sasser *v.* State, 13 Ohio, 453; People *v.* Davis, 21 Wend. (N. Y.) 309.

[5] Henderson *v.* State, 14 Tex. 503.

[6] Buckland *v.* Com., 8 Leigh (Va.), 734.

[7] Com. *v.* Baldwin, 11 Gray (Mass.), 197.

being to deceive and defraud, by using the instrument as that of the other person,[1] may constitute the offence. But the alteration of one's own signature to give it the appearance of forgery, though with a fraudulent intent, is not forgery.[2] Nor where two persons have the same name but different addresses, and a bill is directed to one, with his proper address, is the acceptance by the other, adding his proper address, a forgery.[3]

§ 124. **The alteration** may be by indorsing another name on the back of a promissory note,[4] or by falsely filling up an instrument signed in blank, as by inserting or changing the words of a complete instrument,[5] or by writing over a signature on a piece of blank paper,[6] or by tearing off a condition from a non-negotiable instrument, whereby it becomes so altered as to purport to be negotiable,[7] or by pasting one word over another,[8] or by making the mark instead of a signature,[9] or by photographing.[10] So the alteration of an entry, or making a false entry, by a clerk, in the books of his employer, with intent to defraud, is a forgery.[11] And so is the obtaining by the grantee from the grantor his

[1] People *v.* Peacock, 6 Cow. (N. Y.) 72; Mead *v.* Young, 4 T. R. 28.

[2] Brittain *v.* Bank of London, 3 F. & F. 46.

[3] Rex *v.* Webb, 3 B. & B. 228.

[4] Powell *v.* Com., 11 Gratt. (Va.) 822.

[5] State *v.* Krueger, 47 Mo. 552.

[6] Caulkins *v.* Whistler, 29 Iowa, 416.

[7] State *v.* Stratton, 27 Iowa, 420; Benedict *v.* Cowden, 49 N. Y. 396.

[8] State *v.* Robinson, 1 Harr. (N. J.) 507.

[9] Rex *v.* Dunn, 2 East P. C. 963.

[10] Reg. *v.* Rinaldi, 9 Cox C. C. 391.

[11] Reg. *v.* Smith, 1 L. & C. 168; Biles *v.* Com., 32 Pa. St. 529.

signature to a deed different from that which had been drawn up and read to the grantor,[1] or by the promisee from the promisor his signature to a note for a greater amount than had been agreed upon.[2] And in England it has been quite recently held, upon much consideration, that where a man who had deeded away his property, afterwards, by another deed, falsely antedated, conveyed to his son a part of the same property, he was guilty of forgery,[3] — a doctrine which, however, has not only not been adopted, but has been doubted, in this country,[4] where the received doctrine is, that a writing, in order to be the subject of forgery, must in general be, or purport to be, the act of another; or it must at the time be the property of another; or it must be some writing under which others have acquired rights, or have become liable, and where these rights and liabilities are sought to be changed by the alteration, to their prejudice, and without their consent.[5] Under this rule it seems that the maker of an instrument may be guilty of forgery by altering it after it has been delivered and becomes the property of another;[6] but the alteration of a draft by the drawer, after it has been accepted and paid and returned to him, is no forgery, but rather the drawing of a new draft.[7]

§ 125. **The intent to defraud** is a necessary element in the crime of forgery. But it is not necessary that

[1] State *v.* Shurtliff, 18 Me. 368.

[2] Com. *v.* Sankey, 22 Pa. St. 390.

[3] Reg. *v.* Ritson, Law Rep. 1 C. C. 200.

[4] 2 Bishop Cr. Law, §§ 584, 585.

[5] State *v.* Young, 46 N. H. 66; Com. *v.* Baldwin, 11 Gray (Mass.), 197.

[6] State *v.* Young, 46 N. H. 266; Com. *v.* Mycall, 2 Mass. 136.

[7] People *v.* Fitch, 1 Wend. (N. Y.) 198.

the fraud should become operative and effectual, so that some one is in fact defrauded, nor need the intent be to defraud any particular person, or other than a general intent to defraud some person or another.[1] An alteration, therefore, by one party to an instrument, to make it conform to what was mutually agreed upon, being without fraudulent intent, lacks the essential quality of fraud.[2]

The lack of similitude between a genuine and a forged signature is immaterial, except as bearing upon the question of intent. The fact of no resemblance at all gives rise to the inference that there was no fraudulent intent. But if the signature be proved, the presumption of fraud arises, whether there is any resemblance or not between the genuine and forged signatures.[3]

And even if the resemblance be close and calculated to deceive, the act may be shown to have been done without any fraudulent intent.[4] As the essence of forgery is the intent to defraud, the mere imitation of another's writing, or the alteration of an instrument whereby no person can be pecuniarily injured, does not come within the definition of the offence. And if this probability of injury does not appear on the face of the instrument, it must be shown in the indictment, by proper averments, how the injury may

[1] Com. *v.* Ladd, 15 Mass. 526; Rex *v.* Ward, 2 Ld. Raym. 1461; Henderson *v.* State, 14 Tex. 503.

[2] Pauli *v.* Com. (Pa.), 8 Reptr. 247.

[3] Mazagora's Case, R. & R. 291; Com. *v.* Stevenson, 11 Cush. (Mass.) 481; Reg. *v.* Jessop, D. & B. 442; Reg. *v.* Coulson, 1 Den. 592; State *v.* Anderson (La.), 5 Reptr. 525.

[4] Reg. *v.* Parish, 8 C. & P. 94; Rex. *v.* Harris, 7 C. & P. 428; Com *v.* Goodenough, Thatch. Cr. Cas. (Mass.) 132.

happen. Thus, the alteration of the date of a check in a check-book does not of itself import injury to any one, and in order to make it the foundation of an indictment, it must be set forth in the indictment how this may happen.[1] Nor does an alteration of an instrument to the prejudice alone of him who alters constitute forgery; as when the holder and payee of a promissory note alters the amount payable to a smaller sum.[2]

FORNICATION.

§ 126. Fornication is the unlawful sexual intercourse of an unmarried person with a person of the opposite sex, whether married or unmarried. In some States such intercourse with a married person is made adultery. Like adultery, it was originally of ecclesiastical cognizance only; and without circumstances of aggravation, which will make it part and parcel of another offence, it is not believed to have been recognized as an offence at common law in this country.[3] The statutes of the several States, however, generally if not universally, make it punishable under certain circumstances of openness and publicity, which, perhaps, would make it indictable if there were no statute.[4] And where it is indictable, it has been frequently held that, on failure to prove the marriage of the party indicted for adultery, he may be found guilty of forni-

[1] Com. *v.* Mulholland (Pa.), 5 Weekly Notes of Cases, 208.

[2] 1 Hawk. P. C. bk. 1, c. 70, § 4. See also COUNTERFEITING.

[3] State *v.* Rahl, 33 Tex. 76; State *v.* Cooper, 16 Vt. 551.

[4] Anderson *v.* Com., 5 Rand. (Va.) 627; State *v.* Cooper, *ubi supra*; Try. of Mont *v.* Whitcomb, 1 Mon. 359; State *v.* Moore, 1 Swan (Tenn.), 136; 4 Bl. Com. 65, and note by Chitty. See also Cook *v.* State, 11 Ga. 53.

cation, if the circumstances alleged and proved would warrant a conviction on an indictment for fornication.[1]

HOMICIDE.

§ 127. **Homicide** is the killing of a human being.

It may be *lawful*, as when one shoots an enemy in war, or the sheriff executes another in pursuance of the mandate of the court, or kills a prisoner charged with felony, in the effort to prevent his escape, and hence called *justifiable* homicide, in contradistinction to *excusable* homicide, or a homicide committed in protecting one's person, or the security of his house.

Justifiable Homicide.—In addition to the illustrations already given, it may be said, generally, that wherever in the performance of a legal duty, it becomes necessary to the faithful and efficient discharge of that duty to kill an assailant or fugitive from justice, or a riotous or mutinous person, or where one interposes to prevent the commission of some great and atrocious crime, amounting generally, though not necessarily, to felony,[2] and it becomes necessary to kill to prevent the consummation of the threatened crime,[3] —in all these cases the homicide is justified on the ground that it is necessary, and in the interest of the safety and good order of society. But homicide can never be justifiable, except when it is strictly law-

[1] Respublica *v.* Roberts, 2 Dall. (U. S.) 124; State *v.* Cowell, 4 Ired. (N. C.) 231. See also Com. *v.* Squires, 97 Mass. 59; State *v.* Cox, 2 Taylor (N. C. T. R.), 165.

[2] *Post*, § 143.

[3] United States *v.* Wiltberger, 3 Wash. C. C. 515.

ful and necessary. The soldier who shoots his adversary must strictly conform to the laws of war;[1] and the sheriff who executes a prisoner must follow the mode prescribed by his warrant.[2]

The distinction between justifiable and excusable homicide rested, in the early common law, upon the fact that the latter was punishable by the forfeiture of goods, while the former was not punishable at all.[3] It long since, however, became very shadowy, and has now an interest rather historical than practical, — the verdict of not guilty being returned whenever the circumstances under which the homicide takes place constitute either a justification or an excuse.[4]

§ 128. **Human Being. Time. Suicide.** — In order to constitute homicide, the killing must be of a person in being; that is, born and alive. If the killing be of a child still unborn, though the mother may be in an advanced state of pregnancy,[5] or if the child be born, and it is not made affirmatively to appear that it was born alive, it is no homicide.[6] Death, however, consequent on exposure, after premature birth, alive, unlawfully procured, is criminal homicide.[7]

It is also a rule of the common law, valid, no doubt, at the present day, that the death must happen within a year and a day after the alleged crime, otherwise it cannot be said — such was the reasoning — to be con-

[1] State *v.* Gut, 13 Minn. 341; 4 Bl. Com. 198.
[2] 1 Hale P. C. 433.
[3] 1 Hawk. P. C. c. 28.
[4] 4 Bl. Com. 186.
[5] 1 Russell on Crimes, 424; Evans *v.* People, 49 N. Y. 86.
[6] United States *v.* Hewson, 7 Law Reporter (Boston), 361.
[7] Reg. *v.* West, 2 C. & K. 784.

sequent upon it.[1] In the computation of the time, the whole day on which the hurt was received is reckoned the first.[2]

Deliberate suicide is self-murder, and though not punishable, one who advises and, being present, aids and abets another to commit suicide, is guilty of murder.[3] So, also, one who kills another at his request is as guilty of murder as if the act had been done merely of his own volition.[4]

§ 129. **Murder.** — Of unlawful homicides, *murder* is the most criminal in degree, and consists in the unlawful killing of a human being with malice aforethought; as when the deed is effected by poison knowingly administered, or by lying in wait for the victim, or in pursuance of threats previously made, and, generally, where the circumstances indicate design, preparation, intent, and, hence, previous consideration.[5]

§ 130. **Malice. Express and Implied.** — This malice may be *express*, as where antecedent threats of vengeance or other circumstances show directly that the criminal purpose was really entertained; or *implied*, as where, though no expressed criminal purpose is proved by direct evidence, it is indirectly but necessarily inferred from facts and circumstances which are proved.

[1] Coke's Third Inst. p. 33; State *v.* Shepherd, 8 Ired. (N. C.) 195; People *v.* Kelley, 6 Cal. 210.

[2] 1 Russ. Crimes, 428.

[3] Rex *v.* Dyson, Russ. & Ry. 523; Com. *v.* Bowen, 13 Mass. 356.

[4] 1 Hawk. P. C. c. 27, § 6; Rex *v.* Sanger, 1 Russ. 424; Blackburn *v.* State, 23 Ohio St. 146.

[5] 4 Bl. Com. 195; Com. *v.* Webster, 5 Cush. (Mass.) 316

Where the killing can only be accounted for on the supposition of design or intent, the law conclusively implies malice; or, in other words, the courts instruct the jury that, certain facts being proved, malice is to be implied. And malice is implied by the law when, though no personal enmity may be proved, the perpetrator of the deed acts without provocation or apparent cause, or in a deliberately careless manner, or with a reckless and wicked hostility to everybody's rights in general, or under such circumstances as indicates a wicked, depraved, and malignant spirit.[1]

And the better opinion is that under the modern statutes, defining murder in the first degree, as well as at common law, this implied malice is effectual to constitute murder in the first degree, all doubts as to guilt of the higher degree being resolved in favor of the prisoner, and of the lower degree.[2]

§ 131. **Malice Aforethought.** — It is not necessary that the design, preparation, or intent, which constitutes malice aforethought, should have been entertained for any considerable period of time prior to the killing. It is enough to constitute this sort of malice that a conscious purpose, design, or intent to do the act should have been completely entertained, for however limited a period prior to the execution.[3] Yet, in Pennsylvania, where deliberate premeditation is made a necessary characteristic of murder in the first degree,

[1] State *v.* Smith, 2 Strob. (S. C.) 77; 4 Bl. Com. 198.

[2] Whart. Hom. §§ 660–664, and cases there cited.

[3] People *v.* Williams, 43 Cal. 314; Com. *v.* Webster, 5 Cush. (Mass.) 295; People *v.* Clark, 3 Seld. (N. Y.) 385; Shoemaker *v.* State, 12 Ohio, 41.

it seems to be held that those words imply something more than malice aforethought.[1]

§ 132. **Presumptive Malice.** — It was formerly held that every homicide is to be presumed to be of malice aforethought, unless it appears from the circumstances of the case, or from facts shown by the defendant in explanation that such malice does not exist.[2] But the better doctrine now is, doubtless, in accordance with the dissenting opinion of Mr. Justice Wilde, in the case just cited, that when the facts and circumstances attendant upon the killing are equivocal, and may or may not be malicious, it is for the government to show that they are malicious; otherwise, the defendant is entitled to the most favorable construction of which the facts will admit. If, for instance, two persons are in a room together, and one is seen to emerge therefrom, holding a knife in his hand, leaving behind him the other dead, and wounded in such a manner that it is certain that the death must have been caused by the knife in the hand of the person who is seen to emerge, yet as the homicide may have been murder, manslaughter, or in self-defence, it is for the government to produce evidence that it was the former, before it will be entitled to a verdict of guilty of murder; and it cannot rely, for such verdict, upon the mere presumption that, the killing being shown without explanation, it was malicious.[3] The

[1] Jones *v.* Com., 75 Pa. St. 403. See also Atkinson *v.* State, 20 Texas, 522.

[2] Com. *v.* York, 9 Met. (Mass.) 93, Mr. Justice Wilde dissenting; Com. *v.* Webster, 5 Cush. (Mass.) 316.

[3] See Bennett & Heard's Leading Cr. Cas. vol. i. p. 322; Wharton, Homicide (2d ed.), §§ 664–669; Stokes *v.* People, 57 N. Y. 164; State *v.* Porter, 34 Iowa, 131; People *v.* Moody, 45 Cal. 289.

law does not presume the worst of several possible solutions against the prisoner; it rather presumes that that state of facts is the true one which would be most favorable to him.[1]

§ 133. **Degrees of Murder.** — Formerly murder, the least as well as the most atrocious, was punished by death. Now, however, in many of the States, murder has, by statute, been made a crime punishable with greater or less severity, according to the circumstances of atrocity under which it is committed, — death being inflicted only in the most atrocious cases. Hence the different degrees of murder of which the books speak. Manslaughter has also, by the statutes of some of the States, its several degrees, founded upon the same principle of greater or less depravity indicated by the attendant circumstances. These several statutes are held not to have changed the form of pleading at common law; but the jury are to find the crime as of the degree which the facts warrant, the court instructing them that such and such facts if proved would show the crime to be of a particular degree. Nor have those statutes changed the rules of evidence. Yet in considering cases decided in these States, it is worth while to consider that in matters of definition the common law of murder may have been modified, so that, in determining what is murder and what manslaughter at common law, these cases are not always safe guides.[2]

[1] United States *v.* Mingo, 2 Curtis C. C. 1; Read *v.* Com., 22 Gratt. (Va.) 924.

[2] Dawes *v.* State, 39 Md. 355; Green *v.* Com., 12 Allen (Mass.), 155. In Ohio, there are no crimes at common law. Points *v.* State, 8 Ohio, 111.

§ 134. **Manslaughter** is any unlawful killing without malice aforethought; as when one strikes his wife, and death results from the blow, though not intended,[1] or kills another in a fight arising upon a sudden quarrel,[2] or upon mutual agreement,[3] or in the heat of passion, or upon great provocation.[4]

Every unlawful homicide is either murder or manslaughter, and whether it is one or the other depends upon the presence or absence of the ingredient of malice.[5]

Manslaughter may be *voluntary* or *involuntary*. Voluntary manslaughter is when the act is committed with a real design to kill, but under such circumstances of provocation that the law, in its tenderness for human frailty, regards them as palliating the criminality of the act to some extent.

Involuntary manslaughter is when one causes the death of another by some unlawful act, but without the intention to take life.[6]

§ 135. **Mitigating Circumstances.** — What are the circumstances of provocation which reduce this crime from murder to manslaughter it is not easy to define. It seems to be agreed that no words, however opprobrious, and no trespass to lands or goods, however

[1] Com. *v.* McAfee, 108 Mass. 458.

[2] State *v.* Massage, 65 N. C. 480.

[3] Gunn *v.* State, 30 Ga. 67.

[4] Maria *v.* State, 28 Texas, 698; Holly *v.* State, 10 Humph. (Tenn.) 141; Preston *v.* State, 25 Miss. 383; Com. *v.* Webster, 5 Cush. (Mass.) 295; State *v.* Murphy, 61 Me. 56.

[5] Read *v.* Com., 22 Grat. (Va.) 924; Com. *v.* Webster, 5 Cush (Mass.) 198.

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

aggravating, will be sufficient. To mitigate a murder to manslaughter, the excited and angry condition of the person committing the act must proceed from some cause which would naturally and instantly produce in the minds of men, as ordinarily constituted, a high degree of exasperation. Otherwise, a high-tempered man, who habitually indulges his passion, would be entitled to the same consideration as one who habitually controls his passion. The law seeks to arrive at such a result as will lead men to cultivate habits of restraint rather than indulgence of their passions. Hence the question ordinarily is not so much whether the party killing is actually under the influence of a great passion, as whether such a degree of passion might naturally be expected had he exercised such self-control as a due regard to the rights, and a due consideration of the infirmities, of others, in the interest of public safety, require. There must also be a reasonable proportion between the mode of resentment and the provocation.[1]

§ 136. **Provocation.** — The homicide, moreover, is not entitled to this reduction in the degree of its criminality, unless it be done under the influence of the provocation. If it be done under its cloak, it will not avail to excuse to any extent. If it can be reasonably collected from the weapon made use of, or from any other circumstances, that there was a deliberate intent to kill, or to do some great bodily harm, such homicide will be murder, however great may have been

[1] Com. *v.* Webster, 5 Cush. (Mass.) 295; State *v.* Starr, 38 Mo. 270; Fralick *v.* People, 65 Barb. (N. Y.) 714; Flannagan *v.* State, 46 Ala. 73; Preston *v.* State, 22 Miss. 383; People *v.* Butler, 8 Cal. 435; Nelson *v.* State, 10 Humph. 518; Preston *v.* State, 25 Miss. 383.

the provocation.[1] Nor does provocation furnish any extenuation, unless it produces passion.[2] And seeking a provocation through a quarrel or otherwise, or going into a fight dangerously armed and taking one's adversary at unfair advantage, is such evidence of malice as to deprive the guilty party of all advantage of the plea of provocation.[3] Where two parties, as in the case of a duel, enter into a conflict deliberately, and death ensues to either, it is murder by the other; while the same result, if the conflict be sudden and in hot blood, is but manslaughter.[4]

Upon this point, also, the fact that the injured party is greatly the inferior of his assailant — as if he be a child, or woman, or a man physically or mentally enfeebled — is an important element in determining how much is to be deducted from the criminality of the offence on the score of provocation.[5]

And however great may have been the provocation, if sufficient time and opportunity have transpired to allow the aroused passions to subside, or the heated passions to cool, death afterwards inflicted is murder, whether the passions have subsided or the heated blood cooled or not; and it is a question of law for the court to say whether that time has elapsed.[6]

[1] 1 Russell on Crimes, pp. 423, 440; State *v.* Cheatwood, 2 Hill (S. C.), 459; Felix *v.* State, 18 Ala. 720; People *v.* Austin, 1 Parker C. C. (N. Y.) 154.

[2] State *v.* Johnson, 1 Ired. (N. C.) 354.

[3] Price *v.* State, 36 Miss. 531; State *v.* Hildreth, 9 Ired. (N. C.) 429.

[4] United States *v.* Mingo, 2 Curtis C. C. 1; State *v.* Underwood, 57 Mo. 40.

[5] Com. *v.* Mosler, 4 Barr (Pa.), 264.

[6] State *v.* McCarty, 1 Speer (S. C.), 384; Rex *v.* Haywood, 6 C. & P. 157; State *v.* Moore, 69 N. C. 267.

§ 137. **Provocation. Unlawful Arrest.** — But there are cases where the provocation does not produce that heated passion of which we have just been speaking, and where, although the homicide be deliberately committed, and is not shown to be necessary, the act is held by the law to be manslaughter and not murder. Thus it has been held, in some quite recent cases, that where an unlawful arrest is attempted or made, the party pursued or arrested may kill his assailant, either in resistance to the arrest or in the attempt to escape, although the act be done under such circumstances as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder.[1]

This doctrine, however, does not meet with universal approval, and it is held in other cases that the mere fact that an attempted arrest is unlawful does not necessarily reduce the killing of the officer to manslaughter. In such case, the assailed party may use such, and only such, reasonable force, in proportion to the injury threatened, as is necessary to effect his escape. This, however, does not warrant him in the use of a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest.[2] And probably the killing in such case, with express malice, would be held to be murder.[3] So, in defence of one's own house, or his castle, the law will not justify a killing of the assailant, unless the assault be of such a nature as to threaten death or great bodily harm to

[1] Com. *v.* Carey, 12 Cush. (Miss.) 246; Rafferty *v.* People, 69 Ill. 111.

[2] Galvin *v.* State, 6 Cold. (Tenn.) 283.

[3] Roberts *v.* State, 14 Mo. 138.

the inmate. A mere threatened injury to the house, which does not also threaten the personal safety of the inmates, does not make necessary, and therefore does not justify, the killing of the assailant to prevent the possible injury. A mere trespass upon the property, without a felonious purpose, cannot be repelled by taking the life of the assailant.[1]

§ 138. **The Death must be the Direct Result of the Unlawful Act.** — It was formerly held that if a witness, by false testimony, with the express purpose of taking life, procure the conviction and execution of a prisoner, this would be murder by the false witness. But aside from the fact that the direct connection between the testimony and the execution could, in few if any cases, be shown with that certainty of proof required in criminal cases, the perils of such a rule would tend to deter honest witnesses from testifying to what they believe to be true. The injury to society, to say nothing of the injustice of such a rule, is so out of proportion to any possible advantage, that modern jurisprudence has discarded it.

So, though one who owes a personal public duty may incur criminal responsibility by neglecting it, yet where road commissioners, whose duty it was to keep a road in repair, with power to contract, neglected to contract, and suffered the road to become out of repair, it was held that, when injury resulted from the want of repair, neglect to contract was not the cause of the injury, in such a sense as to be imputable to their neglect.[2]

[1] State *v.* Patterson, 45 Vt. 308. See also Carroll *v.* State, 23 Ala. 28; 1 Russell on Crimes, 447, 502; *post*, § 143.

[2] Reg. *v.* Pocock, 17 Q. B. 34.

Where death follows a wound adequate to produce it, the wound will be presumed to be the cause, unless it be shown that the death was the result of improper treatment, or some other cause, and not of the wound.[1] The wound being an adequate, primary, or contributory cause of the death, the intervention of another cause, preventing possible recovery or aggravating the wound, will not relieve the defendant. If death be caused by a dangerous wound, or from a disease produced by the wound, gross ignorance or carelessness of the deceased and his attendants in its treatment does not relieve the party who inflicted the wound from responsibility.[2] But death from a cause independent of the wound will.[3] Mortal illness, either from a prior wound or other cause, is no excuse for one who produces death by another independent wound or other source.[4] But it will be no excuse to show that if proper treatment had been had the death would not have ensued.[5] If death is the result of prior fatal disease, though hastened by a wound, the person inflicting the wound is not responsible for the death.[6] It is also said that it is not murder to work on the imagination so that death ensues, or to excite the feelings so as to produce a fatal malady.[7] But it is apprehended that if the

[1] Parsons *v.* State, 21 Ala. 300; Com. *v.* Hackett, 2 Allen (Mass.), 136.

[2] Bowles *v.* State, 58 Ala. 335; Kee *v.* State, 28 Ark. 155.

[3] Com. *v.* Costley, 118 Mass. 1; State *v.* Scates, 5 Jones (N. C.), 423; Com. *v.* Hackett, 2 Allen (Mass.), 126.

[4] People *v.* Ah Fat, 48 Cal. 61.

[5] 1 Hale P. C. 428.

[6] Livingston *v.* Com., 14 Gratt. (Va.) 572.

[7] 1 Hale P. C. 425.

death be traceable to the acts done as the direct and primary cause, and if it can be shown that the acts done were done for the purpose of accomplishing the result, it would be murder. The question must always be whether the means were designedly, or, in the sense of the law, maliciously and successfully used to produce the result. If they were, then the guilt of murder is incurred; otherwise, life might be deliberately taken by some means, with impunity. To deliberately frighten one to death must be as much murder as to choke or starve him.[1] The difficulty of proof that death results from a particular cause constitutes sufficient reason for caution; but if the truth be clear, the law should not fail to attach the penalty.[2] An indictment charging that the prisoner caused the death by some means unknown (and therefore undescribed) to the grand jury, is sufficient upon which to find a verdict of guilty of murder, if the case will not admit of greater certainty in stating the means of causing the death.[3]

Though it was formerly doubted by some distinguished judges, it seems now to be settled that the mere omission to do a positive duty, whereby one is suffered to starve or freeze, or to suffocate or otherwise perish, is manslaughter, if merely heedlessly done; while it is murder, if the omission is with intent to bring about the fatal result.[4]

§ 139. **Unlawfulness.** — The unlawfulness which is a necessary ingredient in the crime of murder or man-

[1] See 2 Bishop Cr. Law, §§ 642, 643, and note 2 to § 643.

[2] But see Whart. Hom. §§ 308–372, and notes.

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

[4] Reg. *v.* Conde, 10 Cox C. C. 547.

slaughter may arise out of the mode of doing a lawful act. Thus, if one is engaged in the repair of a building situated in a field away from any street, and where there is no reason to suppose people may be passing, and being upon the roof, and in ignorance of the fact that any person is below, throws down a brick or piece of timber, whereby one not known or supposed to be there is killed, the act being in itself lawful and unattended with any degree of carelessness, he is guilty of no offence. The death is the result of accident or misadventure. If we suppose the circumstances to be somewhat changed, and the building to be situated upon the highway in a country town, where passengers are infrequent, and the same act is done with the same result, the precaution, however, being taken of first looking to see if any one is passing, and calling out to give warning of danger, the killing would still be by misadventure, and free from guilt, because the act done is lawful and with due care. Yet were the same act to be done in a populous town where people are known to be continually passing, even though loud warning were to be given, and death should result, it would be manslaughter; and if no warning at all were given, it would be murder, as evincing a degree of recklessness amounting to general malice towards all.[1] So when a parent is moderately correcting his child, and happens to occasion his death, it is only misadventure; for the act of correction is lawful. But if he exceeds the bounds of moderation either in the manner, the instrument used, the quantity of punishment, or in any other way, and death ensues, it is manslaughter

[1] 4 Bl. Com. 192.

at least, and, under circumstances of special atrocity, might be murder.[1] The same act, therefore, which under certain circumstances would be lawful and proper, and involve no guilt even if death should ensue, might under other circumstances involve the guilt of manslaughter or even murder.[2]

The condition of the person ill-treated, as where, being in a debilitated condition, he is compelled to render services for which he is for the time being incompetent, is often a controlling circumstance in determining the guilt of the offender.[3]

So though one is not in general criminally liable for the death of a servant by reason of the insufficiency of food provided, yet if the servant be of such tender age, or of such bodily or mental weakness, as to be unable to take care of himself, or is unable to withdraw from his master's dominion, the master may be criminally responsible.[4]

§ 140. **Negligence. Carelessness.** — The point at which, in the performance of a lawful act, one passes over into the region of unlawfulness is so uncertain, the line of demarcation is so shadowy, that it has been, and from the very nature of the case must continue to be, a most prolific source of legal controversy. It is often said that the negligence or carelessness must be so gross as to imply a criminal intent; but the question still is, when it reaches that point, and

[1] 4 Bl. Com. 182.

[2] State *v.* Vance, 17 Iowa, 138; Ann *v.* State, 11 Humph. (Tenn.) 150; Com. *v.* York, 9 Met. (Mass.) 93; State *v.* Harris, 63 N. C. 1.

[3] United States *v.* Freeman, 4 Mason C. C. 505; Com. *v.* Fox, 7 Gray (Mass.), 585.

[4] Reg. *v.* Smith, 10 Cox C. C. 82.

no rule by which to test it has been or can be given. Each particular case must be determined upon its particular circumstances; and precedents, though multitudinous, are so generally distinguishable by some special circumstance, that in a given case they seldom afford any decisive criterion, though in many instances they may afford substantial aid.[1] Self-defence is lawful, but, if carried beyond the point of protection, it becomes in its turn an assault, unlawful and criminal. If a man has a dangerous bull and do not tie him up, but leaves him at liberty, according to some opinions, says Hawkins, he is guilty of murder,[2] but certainly of a very gross misdemeanor, if a man is gored to death by the bull.[3] On the other hand, says Mr. Justice Willes, if the bull be put by the owner into a field where there is no footpath, and some one else let the bull out, and death should ensue, the owner would not be responsible. Yet, doubtless, guilt or innocence, and the degree of guilt, would depend upon what, under all the circumstances, the owner had reason to believe might be the result of his act, whether or not it would be inappreciably, appreciably, or in a higher degree, hazardous to the lives of others. And this again would depend upon a variety of circumstances, — as the degree of viciousness of the bull; the time, whether day or night, when he might be put in the field; the probability that he might be let out, or that some one would pass through the field; the size of the field; its nearness to or remoteness from a popu-

[1] See Reg. *v.* Shepard, L. & C. 147.
[2] 1 P. C. c. 31, § 8.
[3] Reg. *v.* Spencer, 10 Cox C. C. 525.

lous neighborhood; and many others which might be suggested but which cannot be foreseen or properly estimated except in their relation to other concomitant circumstances.[1]

Carelessness in a physician, whether licensed or unlicensed, may be criminal, if it be so gross and reckless as amounts to a culpable wrong and shows an evil mind.[2]

And it seems that gross ignorance may be;[3] and that, though the intent be good, one who is not a regularly educated physician has no right to hazard medicine of a dangerous character, unless it be necessary.[4] But this, doubtless, would depend upon the intent, degree of intelligence, and other circumstances. Reckless disregard of consequences would be criminal in a regularly educated physician, while the best efforts of a pretender, made in good faith, and in an emergency would be entirely free from fault.[5] And if a man voluntarily undertakes to perform the duties of a position to which he is unsuited by his ignorance, he cannot avail himself of the plea of ignorance as an excuse. So held in the case of an engineer of a steamboat.[6]

§ 141. **Neglect of Duty.** — The refusal or omission to act when legal duty requires may be as criminal as

[1] See for cases illustrative upon this point the valuable and elaborate note of Judge Bennett to Rex *v.* Hull, 1 Leading Cr. Cas. 50.

[2] Reg. *v.* Spencer, 10 Cox C. C. 525; Rex *v.* Van Butchell, 3 C. & P. 626; Rice *v.* State, 8 Mo. 561.

[3] Rex *v.* Spiller, 5 C. & P. 629.

[4] Simpson's Case, 1 Lewin, 172.

[5] Com. *v.* Thompson, 6 Mass. 134; 1 Hawk. P. C. c. 31, § 62.

[6] United States *v.* Taylor, 5 McLean C. C. 242.

an act positively committed. Thus, where it was the duty of a miner to cause a mine to be ventilated, and he neglected to do it, and as a consequence the fire-damp exploded, causing the death of several persons, this was held criminal,[1] and it would be murder if the result was intended.[2] So an engineer, by whose omission of duty an explosion takes place,[3] or a railway train runs off the track;[4] or any person bound to protect, succor, or support, neglects his duty, whereby death ensues, is criminally liable.[5]

§ 142. **Self-defence. Necessity.** — The limitations to the exercise of the right of self-defence have already been stated under the title of Assault. To what has there been said it should be here added that it was the ancient, and by the weight of authority it is the modern doctrine, that before the assaulted party will be justified in availing himself of such means of self-defence as menace the life of his assailant, he must retreat, except, perhaps, in defence of one's dwelling-house,[6] if it can be done with safety. He must not avail himself of the right to kill his assailant, if he can escape with safety to himself, the extreme necessity. The point of honor, that retreating shows cowardice, is of less public concern than would be the extension of

[1] Reg. *v.* Haines, 2 C. & K. 368.

[2] Reg. *v.* Conde, 10 Cox C. C. 547.

[3] United States *v.* Taylor, 5 McLean C. C. 242.

[4] Reg. *v.* Benge, 4 F. & F. 504.

[5] State *v.* Hoit, 3 Fost. (N. H.) 355; Reg. *v.* Mabbett, 5 Cox C. C. 339; State *v.* Shelledy, 8 Iowa, 477; State *v.* O'Brien, 32 N. J. 169. See also Judge Bennett's note to Reg. *v.* Lowe, in 1 Leading Cr. Cas. 60, where the cases illustrative of this point are very fully collected and stated.

[6] See *post*, § 143.

the right to take the life of another beyond the limit of clear necessity.[1] Perhaps the tendency of modern decisions is toward less strictness in requiring the assailed party to retreat; and to hold that a man who, entirely without fault, is feloniously assaulted may kill his assailant, without first attempting to avoid the necessity by retreating, it being possible to retreat with safety.[2]

† But the necessity which excuses homicide in self-defence is not a justification of the party who seeks and brings on the quarrel out of which the necessity arises.[3] He cannot excuse himself by a necessity which he has himself created. Nor can he be justified or excused for a homicide done upon the plea of necessity, if the necessity arises from his own fault.[4] †

§ 143.* **Self-defence. Proper Mode.** — And the defence must be not only necessary, but also by appropriate means, — that is to say; in order to excuse a homicide as done in self-defence, it must be made to appear that the taking of the life of the assailant in the mode adopted appeared, upon reasonable grounds, to the person taking, and without negligence on his part,

[1] 1 Hale P. C. 481; Stoffer *v.* State, 15 Ohio St. n. s. 47; People *v.* Cole, 4 Parker C. C. (N. Y.) 35; Coffman *v.* Commonwealth, 10 Bush (Ky.), 495; State *v.* Ferguson, 9 Nev. 106; State *v.* Hoover, 4 D. & B. (N. C.) 365; Vaiden *v.* Com., 12 Gratt. (Va.) 717; United States *v.* Mingo, 2 Curtis C. Ct. (U. S.) 1; Wharton Homicide, § 485 *et seq.*

[2] Runyan *v.* State, 57 Ind. 80; Erwin *v.* State, 29 Ohio St. 186.

[3] State *v.* Underwood, 57 Mo. 40; State *v.* Smith, 10 Nev. 106; Vaiden *v.* Com., 12 Gratt. (Va.) 717; State *v.* Neeley, 20 Iowa, 108; State *v.* Hill, 2 D. & B. (N. C.) 491.

[4] People *v.* Lamb, 17 Cal. 323; State *v.* Cox, Sup. Ct. Ga., May, 1879, 8 Reptr. 4; 1 Hawk. P. C. c. 28, § 22.

necessary to save himself from immediate slaughter or from great bodily harm, — the actual existence of the danger being immaterial, if such were the appearances to him.[1]

In defence of property, merely as property, homicide is not excusable. But where a man's house, in so far as it is his asylum, or his property, is assailed, and in such a manner that his personal security is threatened, or that of those whom he has the right to protect, and the assault may be said to be in some sense an assault upon him, and to threaten his life, or to do him, or those he has the right to protect, some great bodily harm, it will be held excusable. But the excuse rests upon the fact that personal injury is threatened. The law does not allow human life to be taken except upon necessity. You may kill to save life or limb; to prevent a great and atrocious crime, — a felony open and forcible; and in the discharge of a legal public duty. But one man cannot be excused for intentionally killing another for a mere trespass upon his property.[2]

It is said in some cases that if a man be assaulted in

[1] United States *v.* Mingo, 2 Curtis C. C. 1; People *v.* Lombard, 17 Cal. 316; Stewart *v.* State, 1 Ohio, N. S. 66; State *v.* Sloane, 47 Mo. 604; State *v.* Harris, 59 Mo. 550; Coffman *v.* Com., 10 Bush (Ky.), 495; Yates *v.* People, 32 N. Y. 500; Com. *v.* Drum, 58 Pa. St. 9; State *v.* Chopin, 10 La. An. 458; Munden *v.* State, 37 Texas, 353; Hurd *v.* People, 25 Mich. 405; Pistorious *v.* Com., 84 Pa. St. 158; Darling *v.* Williams, Ohio, 1879, 8 Reptr. 179. This we think to be the law, by the weight of authority. But there are cases to the contrary. The cases are collected and thoroughly discussed in Wharton Homicide, § 493 *et seq.*

[2] State *v.* Patterson, 45 Vt. 49; State *v.* Vance, 17 Iowa, 138; State *v.* Underwood, 57 Mo. 40; 1 Bishop Cr. Law, § 857, and cases there cited; *ante*, § 137; *post*, § 146; Wharton Homicide, § 414 *et seq.*

his dwelling-house, he is not bound to retreat in order to avoid the necessity of killing his assailant, and that an assault upon one in his dwelling-house is thus distinguished from an assault upon him elsewhere.[1] This assault in one's dwelling-house may be in some sense an assault upon the person actually in charge.[2]

§ 144. **Struggle for Life.** — Blackstone[3] approves the case, put by Lord Bacon, of two persons being at sea upon a plank which cannot save both, and one thrusting the other off, as a case of excusable homicide. But it is difficult to see where one gets the right to thrust the other off. The right of self-defence arises out of an unlawful attack made on one's personal security, not out of accidental circumstances, which, whether threatening or not to the life of one or more persons, are in no way attributable to the fault or even the agency of either. Two men may, doubtless, under such circumstances struggle for the possession of the plank until one is exhausted; but neither can have the right to shoot the other to make him let go, because no right of him who shoots is invaded.

§ 145. **Accident.** — Homicide is also excusable where it happens unexpectedly, without intention, and by accident, or, as the old law has it, by misadventure in the performance of a lawful act in a proper manner; as where one is at work with a hatchet and the head flies off and kills a bystander;[4] so if a physi-

[1] Pond *v.* People, 8 Mich. 150; State *v.* Martin, 30 Wis. 216; Bohannon *v.* Com., 8 Bush (Ky.), 481.

[2] State *v.* Patterson, *ubi supra.*

[3] 4 Bl. Com. 186.

[4] 4 Bl. Com. 182.

cian, in good faith, prescribes a certain remedy which, contrary to expectation and intent, kills, instead of curing.[1] But if the lawful act be performed in so improper a manner as to amount to culpable carelessness, then the homicide becomes manslaughter.[2]

§ 146. **Prevention of Felony.** — Homicide in the prevention of felony is not strictly homicide in self-defence, or in the defence of property, but rests upon the duty and consequent right which devolves upon every good citizen in the preservation of order, and is upon these grounds excusable.[3] Yet not every felony may be thus prevented, but only those open felonies, accompanied by violence, which threaten great public injury not otherwise preventable. Secret felonies, unaccompanied by force, such, for instance, as forgery or secret theft, and offences generally sounding in fraud, cannot be thus prevented.[4] Even if the crime about to be committed do not amount to a felony, if it be of such forceful character as to be productive of the most dangerous and immediate public consequences, — a riot, for instance, — it is held that death may be inflicted even by a private citizen, if necessary to prevent or suppress it.[5] Indeed, a riot is a sort of general assault upon everybody, and so resistance may be made upon the ground of self-defence.

[1] 4 Bl. Com. 197.

[2] 4 Bl. Com. 192; *ante*, § 139.

[3] Pond *v.* People, *ubi supra*.

[4] Ibid.; Priester *v.* Angley, 5 Rich. (S. C.) Law, 44; State *v.* Vance, 17 Iowa, 144; State *v.* Moore, 31 Conn. 479.

[5] Patterson *v.* People, 18 Mich. 314.

KIDNAPPING.

§ 147. **Kidnapping** is defined by Blackstone as the forcible abduction or stealing away of a man, woman, or child from their own country and sending them away to another.[1] And this definition has been adopted with the modification that the carrying away need not be into another country.[2] It is false imprisonment, with the element of abduction added.[3] And here, as in false imprisonment, fraud or fear may supply the place of force.[4]

LARCENY.

§ 148. **Larceny** is commonly defined to be the felonious taking and carrying away of the personal goods of another.[5] Notwithstanding the frequency of the offence, neither law-writers nor judges are entirely agreed on its exact definition, and as in case of "assault," it is still a matter of debate.[6] It seems to be agreed, however, that the definition given above is accurate, so far as it goes.

Formerly, larceny was either *petit*, or larceny of property the value of which did not exceed a certain sum, — *twelve pence*, — and *grand*, or larceny of property the value of which exceeded that sum; a distinction which

[1] 4 Bl. Com. 219; Chick *v.* State, 3 Texas, 282.

[2] State *v.* Rollins, 8 N. H. 550.

[3] Chick *v.* State, 3 Texas, 282.

[4] Moody *v.* People, 20 Ill. 315; Hadden *v.* People, 25 N. Y. 373; Payson *v.* Macomber, 3 Allen (Mass.), 69. See also ABDUCTION; FALSE IMPRISONMENT.

[5] 4 Bl. Com. 229.

[6] 2 Bishop Cr. Law, § 758 and note.

was of consequence only as determining the degree of punishment. — grand larceny being punishable with death, while *petit* larceny was only punishable by fine and imprisonment. Now, however, as no larceny is punishable with death, the distinction is practically done away with. Still the value of the property at the present day determines, to some extent, the degree of punishment to be inflicted for the commission of the offence, and also the jurisdiction of the tribunal which is to take cognizance, and hence continues to be a matter material to be stated in the indictment.

Larceny is also *simple*, or plain theft, without any circumstances of aggravation; or *compound*, usually termed aggravated larceny, or larceny accompanied by circumstances which tend to increase the heinousness of the offence, as larceny from the person or larceny from the house, — taking property from under the protection of the person or house being justly considered as indicating a greater degree of depravity in the thief than the taking of the same articles when not under such protection.

§ 149. **Taking and carrying away.** — The taking and carrying away which constitute larceny must be the actual caption of the property by the thief into his possession and control, and its removal from the place where it was at the time of the caption. The possession, however, need be but for an instant, and the removal need extend no further than a mere change of place. Thus, if a horse be taken in one part of a field and led to another, the taking and carrying away is complete; or if goods be removed from one part of a

house, store, or wagon to another;[1] or if money in a drawer or in the pocket of a person be actually lifted in the hand of the thief from its place in the drawer or pocket, though not withdrawn from the drawer or pocket, and though dropped or returned to the place from which it was lifted or taken on discovery, after a merely temporary possession, however brief,[2]—the larceny is complete. The lifting of a bag from its place would be a larceny,[3] while the raising it up and setting it on end, preparatory to taking it away, would not.[4]

Taking ordinarily implies a certain degree of force, such as may be necessary to remove or take into possession the articles stolen; but the enticement or toling away of a horse or other animal, by the offer of food, is, doubtless, as much a larcenous taking as the actual leading it away by a rope attached.[5] So taking by stratagem; or through the agency of an innocent party; or by a resort to and use of legal proceedings, whereby, under forms of law, possession is got by a person, with the intent of stealing,— is a sufficient taking to make the act larcenous.[6] In such cases the fraud is said to supply the place of force. So is taking gas by tapping a gas-pipe larcenous.[7]

[1] People *v.* Johnson, 4 Denio (N. Y.), 364; State *v.* Jones, 65 N. C. 395; State *v.* Gazell, 30 Mo. 92.

[2] Eckels *v.* State, 20 Ohio, N. S. 508; Com. *v.* Luckis, 99 Mass. 431; Harrison *v.* People, 50 N. Y. 518.

[3] Rex *v.* Walsh, Ry. & Moo. C. C. 14.

[4] Cherry's Case, 2 Russ. Cr. 96.

[5] State *v.* White, 2 N. & McC. (S. C.) 174; State *v.* Wisdom, 8 Porter (Ala.), 511.

[6] Rex *v.* Summers, 3 Salk. 194; Com. *v.* Barry, 125 Mass. 390.

[7] Com. *v.* Shaw, 4 Allen (Mass.), 308; Reg. *v.* Firth, Law Rep. 1 C. C. 172.

But where title as well as possession is secured by consent obtained by fraud, it is held, as we shall hereafter see, that the fraud is not the equivalent of force.[1]

§ 150. **Taking. Finding Lost Property.** — Lost property found and appropriated may, under certain circumstances, be said to be taken. Thus, if a person find a piece of personal property, about which there are marks or circumstances which afford a clew to the ownership, and from which he has reason to believe that inquiry might result in ascertaining the ownership, and immediately upon finding, without inquiry, appropriate it to his own use, this is a taking sufficient to constitute the act larceny. On the other hand, if there be no mark or circumstance giving any reason to suppose that the ownership can be ascertained, an immediate appropriation is not a taking which is larcenous.[2] If there is not a purpose at the time of finding to appropriate, a subsequent appropriation will not amount to larceny.[3]

§ 151. **Property left by Mistake.** — It is important to observe the distinction between lost and mislaid property. In the latter case, as where a customer unintentionally leaves his purse upon the counter of a store,[4] and the trader takes it and appropriates it to his own use without knowing whose it was, or a passenger unintentionally leaves his baggage at a railway station,[5]

[1] *Post*, § 155.

[2] Com. *v.* Titus, 116 Mass. 45; s. c. 1 Am. Cr. Repts. (Hawley), 416, and note; Reed *v.* State, Ct. of App. Texas, 1880, 10 Reptr. 26.

[3] Ibid.; Baker *v.* State, 29 Ohio St. 184.

[4] Reg. *v.* West, 6 Cox C. C. 415.

[5] Reg. *v.* Pierce, 6 Cox C. C. 117.

and a servant of the company, whose duty it is to report the fact to his superior, neglects to do so, and appropriates the baggage to his own use, the act in each case is larceny, because there was a likelihood that the owner would call for the property, and, therefore, in neither case, at the time of appropriation, was the property strictly lost property. There was a probability known to the taker in each case that the owner might be found, *i. e.* would appear and claim property which he had by mistake left. So if a person convert to his own use property left with him by mistake, and, as he knows, intended for another person, this is larceny.[1]

So where one receives from another — the delivery being by mistake and therefore unintentional — a sum of money or other property, and the receiver at the time knows of the mistake, yet intends to keep it and to appropriate it to his own use, this is a taking sufficient to constitute larceny; as where a depositor in a savings bank, presenting a warrant for ten dollars, receives through a mistake of the clerk a hundred dollars.[2]

§ 152. **Taking. Servant.** — Where property is taken by a servant, in whose custody it is placed by the master, as of goods in a store for sale, or of horses in a stable for hiring, or of securities of a banker, or of money in a table, all the property being still in the possession of the owner, by and through the servant, the act of taking by the servant is larceny. The servant

[1] Wolfsten *v.* People, 13 N. Y. Sup. Ct. 121.

[2] Reg. *v.* Middleton, 12 Cox C. C. 260, 477; s. c. 1 Green's Cr. Law Rep. 4.

has custody merely for the owner, who has the possession and property.[1]

§ 153. **Taking. Bailee.** — The appropriation by a carrier, however, or other bailee of property of which he has possession, and in which he has a *quasi* property, is embezzlement and not larceny.[2] The possession of a servant is different from that of a bailee. That of the former is mere custody, while that of the latter is a real possession. Thus, money in the till is in the possession of the master but in the custody of the clerk.[3] But where property is delivered to another who is not his servant, to be kept, the possession is in the employé as a trustee, and if he fraudulently converts it, it is embezzlement and not larceny.[4]

But it has been held that if the bailee do any act which violates the trust, as where a carrier breaks open a package delivered to him for transportation and abstracts a part of its contents, he thereby terminates the bailment, and the act is larceny.[5]

§ 154. **Taking. Temporary Delivery upon Conditions.** — If, however, the property be delivered merely for a temporary purpose, without intention to part with it or the possession, except upon certain implied conditions, as where a trader hands a hat over his counter to a customer for the purpose of examination, and the

[1] Com. *v.* Berry, 99 Mass. 428; Marcus *v.* State, 26 Ind. 101; State *v.* Jarvis, 63 N. C. 556; People *v.* Belcher, 37 Cal. 51.

[2] People *v.* Dalton, 15 Wend. (N. Y.) 581.

[3] *Ante*, § 152.

[4] State *v.* Fann, 65 N. C. 317; Ennis *v.* State, 3 Green (N. J.), 67.

[5] State *v.* Fairclough, 29 Conn. 47; Nichols *v.* People, 17 N. Y. 114; Com. *v.* Brown, 4 Mass. 580. See also *post*, § 159; Com. *v.* James, 1 Pick. (Mass.) 375, and a valuable note of Mr. Heard to the same case, 2 Bennett & Heard Lead. Cr. Cas. 181.

customer walks off with it, or a customer hands to a trader a bill out of which to take his pay for goods bought, and to return the change, and the trader refuses the change, it is in each case larceny.[1] The possession is in each case fraudulently obtained, which is equivalent to a taking without the consent of the owner, in the view of the law. If the possession be fraudulently obtained with intent on the part of the person obtaining it, at the time he receives it, to convert it to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny.[2]

Perhaps it might justly be said that in such cases the possession is not parted with, the property being in such proximity to the owner that he still has dominion and control over it.[3]

The law holds, somewhat inconsistently, that if possession only be obtained by fraud, the offence is larceny, but if possession and a title to the property be obtained by fraud, it is not, as the fraud nullifies the consent to the taking, but not the consent that the title should pass. And this inconsistency arises out of the doctrine generally received that trespass is a necessary ingredient in larceny, and while a man may be a trespasser who holds goods by a possession fraudulently obtained, he cannot be a trespasser by holding goods

[1] Com. *v.* O'Malley, 97 Mass. 586; People *v.* Call, 1 Denio (N. Y.), 120; Reg. *v.* Thompson, 9 Cox C. C. 244.

[2] Loomis *v.* People, 67 N. Y. 322; Hildebrand *v.* People, 56 N. Y. 394; Rex *v.* Robson, R. & R. C. C. 413; Com. *v.* Barry, 124 Mass. 325; Lewer *v.* Com., 15 S. & R. (Pa.) 93; Farrell *v.* People, 16 Ill. 506; State *v.* Fenn, 41 Conn. 590.

[3] Hildebrand *v.* People, *ubi supra;* 2 East P. C. 683.

by a title fraudulently obtained.[1] The consent of the owner, procured by fraud, that he shall have title, takes the case out of the category of larceny. But if by the same fraud the possession and title to goods are obtained from a servant, agent, or bailee of the owner, who has no right to give either possession or title, as where a watch-repairer delivers the watch to a person who personates the owner, it is larceny.[2] It is difficult to see, except upon the technical ground above stated, why a title procured by fraud is any more by consent of the owner than a possession so procured. The distinction is a source of confusion, not to say a ground of reproach.[3]

In Iowa, and perhaps other States, the rule that there is no larceny where there is no trespass, and no trespass where there is consent obtained by fraud, has been abrogated by statute;[4] and in Tennessee it is said that the fraud constitutes a trespass, such as it is.[5]

§ 155. **Taking by Owner.** — A general owner may be guilty of larceny of his own goods, if at the time of taking he has no right to their possession, as where one whose property has been attached takes it away with intent to deprive the attaching creditor of his security.[6]

[1] See 2 Bishop Cr. Law, §§ 808–812.

[2] Ibid.; Com. *v.* Collins, 12 Allen (Mass.), 181.

[3] For the distinction between larceny and obtaining money by false pretences, see *ante*, § 116, and Loomis *v.* People, 67 N. Y. 322.

[4] State *v.* Brown, 25 Iowa, 561.

[5] Defrese *v.* State, 3 Heisk. 53. See also State *v.* Williams, 35 Mo. 229.

[6] Com. *v.* Green, 111 Mass. 392. See also Palmer *v.* People, 10 Wend. (N. Y.) 166; People *v.* Thompson, 34 Cal. 671.

§ 156. **Felonious.** — The taking must also be felonious; that is, with intent to deprive the owner of his property, and without color of right or excuse for the taking.[1] But taking it for the purpose of destroying it,[2] or to be used as a means of escape and then left,[3] or for the purpose of inducing the owner to follow it,[4] or to facilitate the commission of another theft, do not constitute larceny.[5] Taking property, however, with a design to apply it on a note due to the taker from the owner, is depriving the owner of the specific property;[6] and to conceal it from the owner until the latter shall offer a reward for its recovery, or to sell it at a reduced price, is depriving him of a part.[7] So is the taking of a railway ticket, with intent to use it, though coupled with the intent to return it after use.[8]

§ 157. **Taking Lucri Causa.** — The taking need not be for pecuniary gain or advantage of the thief, if it is with design wholly to deprive the owner of his property.[9] Logically, the taking to one's self the absolute and permanent control and disposition of the property of another, with no intention of returning it to

[1] Johnson *v.* State, 36 Texas, 375; State *v.* Ledford, 67 N. C. 60; Reg. *v.* Holloway, 2 C. & K. 942; State *v.* Smith, 4 Dutch. (N. J.) 28.

[2] State *v.* Hawkins, 8 Porter (Ala.), 461; *post*, § 157.

[3] State *v.* York, 5 Harr. (Del.) 493; Rex *v.* Phillips, 2 East P. C. 662.

[4] Rex *v.* Dickenson, R. & R. 420.

[5] Rex *v.* Crump, 1 C. & P. 658.

[6] Com. *v.* Stebbins, 8 Gray (Mass.), 422.

[7] Com. *v.* Mason, 105 Mass. 163.

[8] Reg. *v.* Beecham, 5 Cox C. C. 181.

[9] People *v.* Jaurez, 28 Cal. 380; Reg. *v.* Jones, 1 Den. C. C. 188; Hamilton *v.* State, 35 Miss. 214.

him, is an addition to the property of the taker, and in that sense necessarily a gain or advantage, without reference to the mode of control or subsequent disposition. The larceny is complete, and is not the less a larceny because it is committed as a step in the accomplishment of some other act, criminal or otherwise.[1] Unless, however, it appears that it would be of some sort of advantage,[2] as to enable him to make a gift, or to destroy evidence which may be used against him,[3] the offence would more properly, perhaps, be malicious mischief.[4]

This advantage may be of a very trifling character. Thus, it was held in England [5] that where it was the duty of a servant to take such beans as were doled out to him by another servant, and split them and feed them to the horses, and the former clandestinely took a bushel of the beans and fed them to the horses whole, whereby he possibly injured his employer's horse, and saved labor to himself, this was held to be a sufficient taking to constitute larceny, — an extreme case of doubtful law.

But not every supposed advantage will be enough. A man who takes an execution from an officer who is about to levy upon his goods, and keeps it, under the mistake that he can thereby prevent the levy, hopes to reap an advantage; but such an act is no more

[1] But see *ante*, § 156.

[2] Reg. *v.* White, 9 C. & P. 344.

[3] Reg. *v.* Jones, 1 Den. C. C. 188; Reg. *v.* Wynn, 1 Den. C. C. 365; Rex *v.* Cabbage, R. & R. 292.

[4] Reg. *v.* Godfrey, 8 C. & P. 567; People *v.* Murphy, 47 Cal. 103; State *v.* Hawkins, 8 Porter (Ala.), 461.

[5] Rex *v.* Morfit, R. & R. 30.

larceny than the taking a stick out of a man's hand with which to beat him.[1]

§ 158. **Taking. Claim of Right. Custom.** — Taking under a claim of right, if the claim be made in good faith, however unfounded it may be, is not larcenous.[2] But a custom to take fruit, as from boxes of oranges on board a vessel *in transitu*, is neither good in itself, nor as a foundation for a claim of right.[3]

§ 159. **Taking. Concealment.** — Although the taking be open, and without secrecy or concealment, it may still be theft; and that the act is furtively done is only evidence of the criminal intent.[4] Yet there is undoubtedly in the popular, if not in the legal, idea of theft — *furtum* — an element of secrecy in the taking.[5] But if the act be fraudulent, and known to the taker to be without right, or against right, it is immaterial whether the taking be open or secret. Nor does it seem to be essential that the taker should be animated by any motive of mere pecuniary gain.[6] And the fraudulent purpose — the element without which there can be no theft, the act, in the absence of fraud, being only a trespass — must exist at the time of the taking. The taking must be with a fraudulent intent. The taking without a fraudulent intent, and a conversion afterwards with a fraudulent intent, does not, in general, constitute larceny.[7]

[1] Reg. *v.* Bailey, L. & R. 1 C. C. 347.

[2] Severance *v.* Carr, 43 N. H. 65; State *v.* Homes, 17 Mo. 379 Reg. *v.* Halford, 11 Cox C. C. 88; People *v.* Carabin, 14 Cal. 438· Hall *v.* State, 34 Ga. 208; State *v.* Fisher, 70 N. C. 78.

[3] Com. *v.* Doane, 1 Cush. (Mass.) 5.

[4] State *v.* Fenn, 41 Conn. 590.

[5] State *v.* Ledford, 67 N. C. 60.

[6] Reg. *v.* Jones, 1 Den. C. C. 193; *ante*, § 157.

[7] Wilson *v.* People, 39 N. Y. 459; State *v.* Sherman, 55 Mo. 83.

It is, however, held in some cases that while, if the original taking be rightful, a subsequent fraudulent conversion will not make it larceny, if the original taking be wrongful, as by a trespass, it will. Thus, if a man hires a horse in good faith to go to a certain place, and afterwards fraudulently converts him to his own use, this is no larceny. If he takes the horse without leave, and afterwards fraudulently converts him, this is larceny.[1] So if, under color of hiring, he gets possession with intent to steal.[2] And it has even been held by very high authority that if possession, without intent to steal, be obtained by a false pretence of hiring for one place, when in fact the party intended to go to another and more distant place, and the property be subsequently converted with a felonious intent, this is larceny.[3] So if, after a hiring and completion of the journey without felonious intent, instead of delivering the horse to the owner the hirer converts him to his own use.[4] This case proceeds upon the ground that the bailment is terminated. Upon the same ground, a common carrier who breaks open a package committed to him for transportation and takes to his own use a portion of the contents, thereby puts an end to his baileeship, and becomes guilty of larceny.[5] And it may be said, generally,

[1] Com. *v.* White, 11 Cush. (Mass.) 483; Reg. *v.* Riley, Dearsley C. C. 149.

[2] State *v.* Gorman, 2 Nott & McCord (S. C.), 99; State *v.* Williams, 35 Mo. 229; People *v.* Smith, 23 Cal. 280. See also State *v* Fenn, 41 Conn. 590.

[3] State *v.* Coombs, 55 Me. 477.

[4] Reg. *v.* Haigh, 7 Cox C. C. 403.

[5] State *v.* Fairclough, 29 Conn. 47.

that a bailee, who receives or gets possession with intent to steal, or fraudulently converts to his own use after his right to the possession as bailee has terminated, is guilty of larceny. In neither case does he hold possession by consent of the owner.[1]

§ 160. **Personal Goods.** — At common law there could be no larceny of the realty, or any part of it not detached. Only personal property could be the subject of larceny, and this, with few limitations, might be. If portions of the realty become detached, not by natural causes, as blinds from a house,[2] or a nugget of gold from the vein,[3] they may become the subject of larceny, unless the detachment or severance be part and parcel of the act of taking,[4] in which case the taking is but a trespass, — "a subtlety in the legal notions of our ancestors."[5] The lapse of time between the act of severance and the act of taking need be only so long as is necessary to make the two acts appreciably distinct, and successive, the latter to the former.[6]

So the milking a cow and the plucking of wool from a sheep are larcenies of the milk and the wool.[7] Turpentine which has been collected from a tree,[8] illuminating gas drawn from a pipe through which it is

[1] See 2 Bishop Cr. Law, §§ 834, 835. See also *ante*, § 152.

[2] Reg. *v.* Wortley, 1 Den. C. C. 162.

[3] State *v.* Burt, 64 N. C. 619; State *v.* Berryman, 8 Nev. 262; s. c. and note, 1 Green's Cr. Law Rep. 335.

[4] Reg. *v.* Townley, 1 L. R. C. C. R. 315; State *v.* Hall, 5 Harr. (Del.) 492.

[5] 4 Bl. Com. 232.

[6] State *v.* Berryman, *ubi supra;* Jackson *v.* State, 11 Ohio St. 104.

[7] Rex *v.* Pitman, 2 C. & P. 423.

[8] State *v.* Moore, 11 Ired. (N. C.) 70.

transmitted,[1] ice collected in an ice-house,[2] a key in the lock of a door,[3] a coffin,[4] and the grave-clothes in which a person is buried,[5] are also all subjects of larceny; but not a dead body.[6]

Subject to these qualifications, and to the few exceptions hereafter stated, all articles of personalty reduced to possession and not abandoned — such as can be said to be the present property of some owner at the time of the taking — may be subject-matters of larceny.

Upon the ground of non-reduction to possession, sea-weed found floating on the shore between high and low water mark cannot be claimed as belonging to the owner of the fee between high and low water mark, and it is no larceny to take it.[7]

At common law, *choses in action* and muniments of title generally, being the evidence merely of rights of property and not the property itself, were held not to be subjects of larceny; and if the *chose in action* or muniment of title was still a security, no indictment could be had for the larceny of the paper upon which it was printed or written, while, if it was *functus officii*, and valueless as a security, an indictment might be had.[8]

[1] Com. *v.* Shaw, 4 Allen (Mass.), 308; Hutchinson *v.* Com., 82 Pa. St. 472.

[2] Ward *v.* People, 3 Hill (N. Y.), 395.

[3] Hoskins *v.* Tarrance, 5 Blackf. (Ind.) 417.

[4] State *v.* Doepke, 68 Mo. 208.

[5] Wonson *v.* Sayward, 13 Pick. (Mass.) 402.

[6] 2 East P. C. 652.

[7] Reg. *v.* Clinton, Irish Rep. 4 C. L. 6. See also Com. *v.* Sampson, 97 Mass. 407; and *post*, § 161.

[8] Reg. *v.* Green, 6 Cox C. C. 296; Reg. *v.* Perry, 1 Den. C. C. 69; Payne *v.* People, 6 Johns. (N. Y.) 103; State *v.* Wilson, 3 Brev. (S. C.) 196; United States *v.* Davis, 5 Mason (C. Ct.), 358; *post*, § 162.

In the absence of statutes, the courts of this country have been inclined to follow the common law. But statutes here, as also indeed in England, have generally interposed, and made not only goods and chattels, as by the common law, but also *choses in action* and muniments of title, whether they savored of realty or not, and in fact almost everything which constitutes personalty in contradistinction to the realty, subject-matters of larceny. Indeed, in many if not most of the States, the felonious taking of parts of the realty may be indicted as larceny.

§ 161. **Wild Animals**, in a state of nature, are not subjects of larceny; but when such of them as are fit for food, or for producing property, have been reclaimed, or brought into control and custody, so that they can be fairly said to be in possession, they then become property, and may be stolen. Bees,[1] pea-fowl,[2] doves,[3] oysters,[4] when reduced to possession, belong to this category. And so, doubtless, would fish be, if caught and kept in an artificial pond, as they certainly are if captured for food or for oil.[5] So if wild animals fit for food are shot, and thus reduced to possession, they become subjects of larceny;[6] but chasing, without capture, gives no right of property.[7]

But dogs, cats, foxes, bears, and the like, *feræ*

[1] State *v.* Murphy, 5 Blackf. (Ind.) 498.

[2] Com. *v.* Beaman, 8 Gray (Mass.), 497.

[3] Com. *v.* Chace, 9 Pick. (Mass.) 15; Rex *v.* Brooks, 4 C. & P 131.

[4] State *v.* Taylor, 3 Dutch. (N. J.) 117.

[5] Taber *v.* Jenny, 1 Sprague Dec. 315.

[6] Reg. *v.* Townley, 12 Cox C. C. 59.

[7] Buster *v.* Newkirk, 20 Johns. (N. Y.) 76.

naturæ, were not by the common law, and are not in this country, subjects of larceny, unless by some statute they are made so,[1] or unless by the bestowal of care, labor, and expense upon them, or some part of them, they have by that treatment acquired value as property, as by being stuffed or skinned.[2] And it has been generally held that though they may by statute become property and subjects of a civil action, and liable to taxation, they are not subjects of larceny.[3] Otherwise in New York.[4]

§ 162. **Value.** — The goods must be of some value, else they cannot have the quality of property. The common law held bills, notes, bonds, and *choses in action* generally as of no intrinsic value, and therefore not subjects of larceny.[5] Now, by statute, most of the old limitations and restrictions are done away with. Many articles savoring of the realty, and most if not all *choses in action*, are made subjects of larceny. The value may be very trifling,[6] yet, no doubt, must be appreciable,[7] though, perhaps, not necessarily equal to the value of the smallest current coin.[8] It has been held, however, in Tennessee, that the value of a drink of whiskey is too small to lay the foundation for a

[1] 2 Bl. Com. 193; Norton *v.* Ladd, 6 N. H. 203; Ward *v.* State, 48 Ala. 161.

[2] State *v.* House, 65 N. C. 315; Reg. *v.* Gallears, 1 Den. C. C. 501.

[3] Norton *v.* Ladd, *ubi supra;* Warren *v.* State, 1 Iowa, 166; State *v.* Lynus, 26 Ohio St. 400.

[4] People *v.* Maloney, 1 Parker C. C. 503; People *v.* Campbell, 4 Parker C. C. 386.

[5] 4 Bl. Com. 234; *ante*, § 160.

[6] People *v.* Wiley, 3 Hill (N. Y.), 194.

[7] Payne *v.* People, 6 Johns. (N. Y.) 103.

[8] Reg. *v.* Bingley, 5 C. & P. 602.

complaint for obtaining goods by false pretences, upon the ground that the severity of the penalty shows that the legislature could not have intended that the statute should apply to so trivial an act.[1]

§ 163. **Ownership.** — A general or special ownership by another is sufficient to sustain the allegation that the property is his.[2] Even a thief has sufficient ownership to support the allegation as against another thief.[3]

§ 164. **Larcenies** from the person, from a vessel, and, under special circumstances, from a building, are but aggravated forms of larceny, of statutory growth, and by statutes generally similar, but in particulars different, are specially defined, and made specially punishable; and are, so far as the larceny is concerned, to be tried by the tests heretofore stated. They are sometimes called compound larcenies, as being made up of two or more distinct crimes, — as in case of larceny from the person, which, technically at least, includes an assault upon the person, — and are said to be *aggravated*, because it indicates a higher degree of depravity to take property from under the protection of the person or of the building, than to take the same property when it is found not under such protection. There is, however, the violation of the security of the person and of the

[1] Chapman *v.* State, 2 Head (Tenn.), 36.

[2] Com. *v.* O'Hara, 10 Gray (Mass.), 469; Reg. *v.* Bird, 9 C. & P. 44; State *v.* Gorham, 55 N. H. 152; State *v.* Furlong, 19 Me. 25; State *v.* Mullen, 30 Iowa, 207; People *v.* Bennett, 37 N. Y. 117; State *v.* Williams, 2 Strobh. (S. C.) 229; United States *v.* Foye, 1 Curtis C C. 364; Owen *v.* State, 6 Humph. (Tenn.) 330.

[3] Ward *v.* People, 3 Hill (N. Y.), 395.

building, which enhances, in the estimation of the law, the gravity of the offence. But these subdivisions of the law of larceny have become so general, that a few observations will be of use.

§ 165. **Larceny from the person,** though it can be perpetrated only by force, is nevertheless an offence requiring no other but the mere force of taking the thing stolen, and is distinguishable from robbery, in that the latter is an offence compounded of two distinct offences, — assault and larceny, — the assault being, as it were, preparatory to and in aid of the larceny.[1] If, for instance, a thief — pickpocket — in passing another person snatches a pocket-book from his hand or from his pocket, this is larceny from the person; while if the thief knocks the person down or seizes him, and then takes the pocket-book from his possession, this is robbery.[2] Technically, no doubt, larceny from the person involves an assault, but it is the mere force of taking the thing. In robbery, the force or fear is prior to the larceny, and preliminary to, and distinct from, the taking.[3] And a thing is said to be on the person if it is attached, as a watch by a chain, or is otherwise so related to the person as to partake of its protection.[4] We have already seen that the actual taking of a thing on the person in the hand, and removing it from contact or connection with the person, is a sufficient taking.[5]

[1] 4 Bl. Com. 243.

[2] Reg. *v.* Walls, 2 C. & K. 214; Com. *v.* Dimond, 3 Cush. (Mass.) 235.

[3] Rex *v.* Harmon, 1 Hawk. P. C. c. 34, § 7; 2 Russ. on Crimes, 64.

[4] Reg. *v.* Selway, 8 Cox C. C. 235. See also *post*, § 166.

[5] *Ante*, § 149. See also Flynn *v.* State, 42 Texas, 301.

§ 166. **Larceny from Building.** — Taking property in or from a building is not necessarily larceny in a building. To constitute larceny in a building, the property taken must be in some sense under the protection of the building, and not under the eye or personal care of some one in the building. Thus, if a pretended purchaser, having got manual possession of a watch in a store for the purpose of looking at it, leaves the store with the watch, he is not guilty of larceny in a building. The watch having been delivered into his custody for a special purpose, cannot be said to be under the protection of the building. And even though it had not been so delivered, but had been merely placed on the counter for inspection, it then might be more properly said to be under the personal protection of the owner, than that of the building.[1] So the snatching of property hung out upon the front of a store for the purpose of attracting customers, is not larceny from a building. The goods are not under the protection of the building.[2] The distinctions are very fine. Thus, if a person, on retiring to bed, places his watch upon a table by his bedside, even within his reach, the taking it while he is asleep is larceny from the building.[3] The taking it while he is awake would probably amount to simple larceny only,[4] the property not being so related to the person as to be under his protection; while if taken from under the pillow of the owner while he is asleep, especially if the taking in-

[1] Com. *v.* Lester, Sup. Ct. Mass., June, 1880.
[2] Martinez *v.* State, 41 Texas, 126.
[3] Reg. *v.* Hamilton, 8 C. & P. 49.
[4] Com. *v.* Smith, 111 Mass. 429.

volved a disturbance of the person, it might be larceny from the person. The question in all cases is whether the property is so situated that it may be taken without a violation of the protection supposed, by the law, to be afforded by being kept in a building, or being within the personal custody of the owner. If so, then simple larceny only is committed. If, on the other hand, the protection afforded by the building or by personal custody be violated, then the larceny is from the building or from the person, as the case may be.[1] The personal custody need not be actual, but may be constructive, as the cases just cited show. And perhaps a case might be supposed where the protection of the building would be constructive also.[2] The old notion that in order to constitute larceny from the person the larceny must be by stealth, privily or clandestinely, and without the knowledge of the owner, which was embodied in some early statutes, is probably not now recognized by the law of any State.[3]

§ 167. **Place.** — That larceny in one jurisdiction, of goods thence transported to another jurisdiction, may be larceny in the latter, has already been shown.[4]

§ 168. The larceny at the same time of property of different owners, though sometimes held to be separate larcenies of the property of the different owners, is but a single act; and, both upon the reason of the thing and the tendency of the modern authorities, consti-

[1] Reg. *v.* Selway, 8 Cox C. C. 235.

[2] See also United States *v.* Jones, 3 Wash. C. Ct. 209; and *post*, ROBBERY.

[3] Com. *v.* Dimond, 3 Cush. (Mass.) 235; 2 Bishop Cr. Law, § 895 *et seq.*

[4] *Ante*, § 41.

tutes but a single offence. The act, as an offence, is against the public, and not against the several owners, with reference to whom it is but a trespass. The allegation of ownership is for the purpose of identification of the property, and is but matter of pleading.[1]

LASCIVIOUSNESS.

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§ 169. **Lasciviousness** is punishable at common law, and embraces indecency and obscenity, both of word and act; as the indecent exposure of one's person in a public place,[2] or the use of obscene language in public.[3] It is immaterial how many or how few may see or hear, if the act be done in public where many may see or hear.[4] And the permission of those, for whose decent appearance one is responsible, to go about publicly in a state of nudity has been held to be lewdness on the part of the person so permitting.[5] Under statutes against lascivious behavior and lascivious carriage, — substantially the same, — it seems to be the law that the offence may be committed by exposure of the person and solicitation to sexual intercourse, without the consent of the party so solicited, although it be not done in a public place.[6] This, however, would

[1] Nichols *v.* Com., Sup. Ct. Ky., November, 1879, 9 Reptr. 114; State *v.* Hennessy, 23 Ohio St. 339; State *v.* Morrill, 44 N. H. 624; Bell *v.* State, 42 Ind. 335; State *v.* Morphin, 37 Mo. 373; Wilson *v.* State, 45 Texas, 77; Lowe *v.* State, 57 Ga. 171.

[2] State *v.* Rose, 32 Mo. 560.

[3] State *v.* Appling, 25 Mo. 315.

[4] State *v.* Millard, 18 Vt. 574; *post*, § 132.

[5] Brittain *v.* State, 11 Humph. (Tenn.) 203.

[6] State *v.* Millard, *ubi supra*; Fowler *v.* State, 5 Day (Conn.), 81 See also Dillard *v.* State, 41 Ga. 278.

not amount to open and gross lewdness.[1] Lascivious *cohabitation* implies something more than a single act of sexual intercourse.[2]

LIBEL AND SLANDER.

§ 170. A general and comprehensive definition of libel is that of Hamilton, in the argument in the case of The People *v.* Crosswell,[3] which has been repeatedly approved by the courts of New York, and is as follows: "A censorious or ridiculing writing, picture, or sign, made with a mischievous or malicious intent, toward government, magistrates, or individuals."[4]

Within the scope of this definition, printed and published blasphemy is also indictable as a libel;[5] and so is printed obscenity or other immoral matter, — both on the ground that they tend to deprave or corrupt the public morals.[6] So is a publication against the government, tending to degrade and vilify it, and to promote discontent and insurrection;[7] or calumniating a court of justice, tending to weaken the administration of justice.[8] So libels upon distinguished official foreign personages have repeatedly been held in England punishable at the common law, as tending to disturb

[1] Com. *v.* Catlin, 1 Mass. 8.

[2] State *v.* Marvin, 12 Iowa, 499; Com. *v.* Calef, 10 Mass. 153.

[3] 3 Johns. Cas. 354.

[4] Cooper *v.* Greeley, 1 Denio (N. Y.), 347.

[5] Com. *v.* Kneeland, 20 Pick. (Mass.) 211; People *v.* Ruggles, 8 Johns. (N. Y.) 290; *ante*, BLASPHEMY.

[6] Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 S. & R. (Pa.) 91.

[7] Respublica *v.* Dennis, 4 Yeates (Pa.), 270.

[8] Rex *v.* Watson, 2 T. R. 199.

friendly international relations.[1] It remains to be seen whether the State courts (the United States courts having no jurisdiction) will in this country follow such a precedent.

But the more common and restricted definition of libel at common law, as against individuals, is: The malicious publication of any writing, sign, picture, effigy, or other representation tending to defame the memory of one who is dead, or the reputation of one who is living, and to expose him to ridicule, hatred, or contempt. It is punishable as a misdemeanor, on the ground that such a publication has a tendency to disturb the public peace.[2]

Words that would not be actionable as slanderous, may, nevertheless, if written and published, be indictable as libellous. Written slander is necessarily premeditated, and shows design. It is more permanent in its effect and calculated to do much greater injury, and "contains more malice."[3] Thus, it is libellous to write and publish of a juror that he has misbehaved, as such, by staking the verdict upon a chance;[4] or of a stage-driver, that he has been guilty of gross misconduct and insult towards his passengers;[5] or that a bishop has attempted to convert others to

[1] Rex *v.* D'Eon, 1 W. Bl. 510; Peltier's Case, 28 Howell St. Tr. 29.

[2] 1 Hawk. P. C. c. 73, §§ 23, 24; People *v.* Crosswell, 3 Johns. Cas. (N. Y.) 354; Com. *v.* Clap, 4 Mass. 168; Giles *v.* State, 6 Ga. 276; State *v.* Henderson, 1 Rich. (S. C.) 179; Cooper *v.* Greeley, 1 Denio, 347; State *v.* Avery, 7 Conn. 266.

[3] King *v.* Lake, Hardr. 470.

[4] Com. *v.* Wright, 1 Cush. (Mass.) 46.

[5] Clement *v.* Chivis, 9 B. & C. 172.

his religious views by bribes;[1] or that a man is a "rascal;"[2] or that "he is thought no more of than a horse-thief;"[3] or to charge a lawyer with divulging the secrets of his client;[4] or to say of a member of a convention to frame a constitution, that he contended in the convention that government had no more right to provide for worship of the Supreme Being than of the devil;[5] or to print of a man that he did not dare to bring an action in a certain county "because he was known there."[6] And it has even been held that it is libellous to charge a man with a gross want of feeling or discretion.[7] So if a portrait-painter paints the ears of an ass to a likeness he has taken, and exposes it to the public, this is a libel.[8] So is it to say of a historian that he disregards justice and propriety, and is insensible to his obligations as a historian.[9] So it is libellous to publish a correct account of judicial proceedings, if accompanied with comments and insinuations tending to asperse a man's character;[10] or for an attorney to introduce such matter into his pleadings.[11] So to say of a candidate for office that he would betray his trust from motives of

[1] Tabart *v.* Tupper, 5 Bing. 17.

[2] Williams *v.* Carnes, 4 Humph. (Tenn.) 9.

[3] Nelson *v.* Musgrave, 10 Mo. 648.

[4] Riggs *v.* Denniston, 3 Johns. (N. Y.) Cas. 198.

[5] Stow *v.* Converse, 3 Conn. 325.

[6] Steel *v.* Southwick, 9 Johns. (N. Y.) 214.

[7] Weaver *v.* Lloyd, 2 B. & C. 678. See also DeBouillon *v.* People, 2 Hill (N. Y.), 248.

[8] Mezzara's Case, 2 City Hall Rec. 113.

[9] Cooper *v.* Stone, 24 Wend. (N. Y.) 434.

[10] Thomas *v.* Crosswell, 7 Johns. (N. Y.) 264

[11] Com. *v.* Culver, 2 Pa. Law Jour. 362.

political aggrandizement, or to accomplish some sinister or dishonest purpose, or to gratify his private malice, is a libel; but not, to publish the truth concerning his character and qualifications for the office he aspires to, with a view to inform the electors.[1]

The form of expression in charging is immaterial, whether interrogative or direct, or by innuendo, or ironical, or allegorical, or by caricature, or by any other device whatever. The question always is, what is the meaning and intent of the author, and how will it be understood by people generally.[2]

§ 171. Malicious. — To constitute a malicious publication it is not necessary that the party publishing be actuated by a feeling of personal hatred or ill-will towards the person defamed, or even that it be done in the pursuit of any general evil purpose or design, as in the case of malicious mischief.[3] It is sufficient if the act be done wilfully, unlawfully, and in violation of the just rights of another, according to what, as we have seen,[4] is the general definition of legal malice. And malice is presumed as matter of law by the proof of publication.[5] Under modern statutes, and, in some

[1] Powers *v.* Dubois, 17 Wend. (N. Y.) 63; Com. *v.* Clap, 4 Mass. 163; State *v.* Burnham, 9 N. H. 34; Com *v.* Odell, 3 Pitts. (Pa.) 449; Wilson *v.* Noonan, 23 Wis. 105.

[2] 1 Hawk. P. C. c. 73, §§ 23, 24; Rex *v.* Lambert, 2 Camp. 403; State *v.* Chase, Walk. (Miss.) 384; Gathercole's Case, 2 Lewin, 255.

[3] See *post*, Malicious Mischief.

[4] *Ante*, § 9.

[5] Com. *v.* Snelling, 15 Pick. (Mass.) 337; Smith *v.* State, 32 Texas, 594; Layton *v.* Harris, 3 Harr. (Del.) 406; Root *v.* King, 7 Cow. (N. Y.) 613; Com. *v.* Sanderson, 3 Pa. Law Jour. 269; Rex *v.* Harvey, 2 B. & C. 257.

cases, constitutional provisions, however, the whole question of law and fact, *i.e.* whether the matter published was illegal and libellous, and whether it was malicious or not, as well as whether it was written or published by the defendant, is left to the jury, they having in such cases greater rights than in other criminal prosecutions.[1]

It is not essential that the charge should be false or scandalous: it is enough if it be malicious. Indeed, the old maxim of the common law was, "the greater the truth the greater the libel," on the ground that thereby the danger of disturbance of the public peace was greater. The truth, therefore, is no justification by the common law. But this rule has in some cases, in this country, been so far modified as to permit the defendant to show, if he can, that the publication, under the circumstances, was justifiable and from good motives, and then show its truth, in order to negative the malice and intent to defame.[2] And statutes in most if not all of the States now admit the truth in defence if the matter be published for a justifiable end and with good motives, and give the jury the right to determine these facts, as well as whether the publication be a libel or not.

§ 172. **Publication.** — The placing a libel where it may be seen and understood by one or more persons other than the maker is a publication, without refer-

[1] State *v.* Gould, 62 Me. 509; 2 Greenl. Ev. § 411; State *v.* Lehre, 2 Brev. (S. C.) 446.

[2] Com. *v.* Clap, 4 Mass. 163; Com. *v.* Blanding, 3 Pick. (Mass.) 304; Barthelemy *v.* People, 2 Hill (N. Y.), 248. See also State *v.* Lehre, 2 Brev. (S. C.) 446; Com. *v.* Morris, 1 Va. Cas. 176; Codd's Case, 2 City Hall Rec. 171.

ence to the question whether in fact it is seen or not.[1] It has been held that to send a libellous letter to the person libelled is a sufficient publication.[2] But it may be doubted, in the absence of statutory provision to that effect, if the mere delivery of a letter containing libellous matter to the libelled party is a technical publication, though doubtless the sending of such a letter is an indictable offence, as tending to a breach of the peace.[3] But there can be no doubt that a sealed letter addressed and delivered to the wife, containing aspersions upon her husband's character, is a publication.[4]

§ 173. **Privileged Communications.** — Certain publications are privileged, that is to say, are *prima facie* permissible and lawful. If the occasion and circumstances under which they are made rebut the inference of malice drawn from its libellous character, the publications are privileged and lawful, unless the complainant shows that the defendant was actuated by improper motives. But no one can intentionally injure under cover of a privileged communication; and if he avail himself of this course he is chargeable, although the matter published be true and privileged.[5] Thus a fair and candid criticism, though severe, of a literary

[1] Giles *v.* State, 6 Ga. 276; Rex *v.* Burdett, 4 B. & A. 126; Whitfield *v.* S. E. Ry. Co., E., B. & E. 115; *ante*, § 169; *post*, § 182.

[2] State *v.* Avery, 7 Conn. 266.

[3] Hodges *v.* State, 5 Humph. (Tenn.) 112; McIntosh *v.* Matherly, 9 B. Mon (Ky.) 119; Fouville *v.* M'Nease, Dudley (S. C.), 303; Lyle *v.* Cleason, 1 Caines (N. Y.), 581; Sheffil *v.* Van Deusen, 13 Gray (Mass.), 304.

[4] Schenck *v.* Schenck, 1 Spencer (N. J.), 208; Wenman *v.* Ash, 13 C. B. 386.

[5] Wright *v.* Woodgate, 2 C., M. & R. 573; Com. *v.* Blanding, 3 Pick. 304.

work, exposing its demerits, is privileged; but if the criticism is made the vehicle of personal calumny against the author aside from the legitimate purpose of criticism, it becomes libellous.[1] A communication made in good faith by a person in the discharge of some private duty, legal or moral, or in the conduct of his own affairs, and in matters wherein he is interested, is privileged.[2] Therefore, one may write to a relation warning her not to marry a certain person, for special reasons affecting the character of that person;[3] or complain to a superior, against an inferior, officer in order to obtain redress;[4] or give the character of a servant in answer to a proper inquiry;[5] or report a servant's conduct to his master;[6] or tell the truth to defend his own character and interests;[7] or to enforce the rules of a society;[8] or to aid in the exposure or detection of crime, or protect the public or a friend from being swindled or otherwise injured.[9] These communications and the like, though they may be to some extent false, are all privileged if made without malice, and for justifiable ends. Though a man is protected in making a libellous speech in a legislative

[1] Carr *v.* Hood, 1 Camp. 355.

[2] Bodwell *v.* Osgood, 3 Pick. (Mass.) 379; Toogood *v.* Spyring, 4 Tyrw. 582.

[3] Todd *v.* Hawkins, 8 C. & B. 68.

[4] Fairman *v.* Ives, 5 B. & A. 642.

[5] Child *v.* Affleck, 9 B. & C. 403.

[6] Cockayne *v.* Hodgkinson, 5 C. & B. 543.

[7] Coward *v.* Wellington, 7 C. & P. 531.

[8] Remington *v.* Congdon, 2 Pick. (Mass.) 310; Streety *v.* Wood, 15 Barb. (N. Y.) 105.

[9] Com. *v.* Blanding, 3 Pick. (Mass.) 324; Lay *v.* Lawson, 4 A. & E. 795.

assembly, if he publish it, he is guilty of libel.[1] And fair reports of judicial and other proceedings, as matter of news, will be privileged, while if unfair, or interlarded with malicious comment, they will be punishable as libellous.[2] If, however, the matter published is in itself indecent, blasphemous, or contrary to good morals, it has been held upon very careful consideration to be indictable.[3]

§ 174. **Slander.** — No instance has been found of an indictment for mere verbal slander against an individual in this country, nor is it indictable in England, unless the individual sustained such a relation to the public, or the slander was of such a character, as to involve something more than a private injury, as where one was held indictable for calling a grand jury as a body a set of perjured rogues.[4]

MAINTENANCE.

§ 175. **Maintenance**, as we have seen,[5] is the officious intermeddling by a person, without interest, in the promotion of the prosecution or defence of a suit. In addition to what was then said, it may be worth while to add here a few observations and illustrations.

§ 176. **Officious.** — The intermeddling is not officious

[1] Rex *v.* Creavey, 1 M. & S. 273.

[2] Clark *v.* Binney, 2 Pick. (Mass.) 113; Thomas *v.* Croswell, 7 Johns. 272; Lewis *v.* Walter, 4 B. & A. 605; Curry *v.* Walter, 1 B. & P. 523.

[3] Rex *v.* Carlile, 3 B. & A. 167.

[4] Rex *v.* Spiller, 2 Show. 207. See also 2 Bishop Cr. Law, § 945 *et seq.*

[5] *Ante*, § 66.

or unjustifiable, if prompted by personal sympathy growing out of relationship, or long association, as between master and servant,[1] or by motives of charity.[2] And if the party intermeddling has a special interest in the general question to be decided, though not otherwise in the result of the particular suit, his intervention is not unlawful.[3] If the party have an interest, legal or equitable, though it be but a contingent interest, he may assist another in a lawsuit. Any substantial privity or concern in the suit will justify him.[4] The common law of champerty and maintenance is still recognized in some of the States, though a much less degree of interest will now justify the intervention than formerly.[5] In most of the States, however, the offences have become a matter of statutory regulation, and in some of them the common law is not regarded as in force.[6] The practices out of which originated the common and early English statute laws against the offences of champerty and maintenance — among which a common one was for a party litigant to interest some "great person" to come in and aid him to overwhelm his antagonist by giving him a share of the proceeds — are not now so common as to require the interposition of the aid of the criminal law. And it

[1] Campbell *v.* Jones, 4 Wend. (N. Y.) 306; Thallhimer *v.* Brinkerhoof, 3 Cow. (N. Y.) 623.

[2] Perine *v.* Dunn, 3 Johns. Ch. (N. Y.) 508.

[3] Gower *v.* Nowell, 1 Greenl. (Me.) 292.

[4] Wickham *v.* Conklin, 8 Johns. (N. Y.) 220.

[5] Lathrop *v.* Amherst Bank, 9 Met. (Mass.) 489; Wood *v.* McGuire, 21 Ga. 576.

[6] Richardson *v.* Rowland, 40 Conn. 565. See also note to same case, 14 Am. Law Reg. N. S. 78.

.s, to say the least, very doubtful whether, at the present day, an indictment for either offence, pure and simple, and unattended by circumstances of aggravation which would amount to a hindrance or perversion of justice, would be sustained in any of our courts.[1]

Questions concerning them have usually arisen in civil actions, in which a champertous contract has been set up as a defence. And here the courts are inclined, without much regard to the old common-law precedents, to hold such, and only such, contracts as are clearly against a sound public policy as champertous.[2]

Thus, where an attorney agrees to carry on a suit at his own expense for a share of the proceeds, this seems generally held to be champertous.[3] But even in such case, if the suit is against the government, and there is no danger that a "great person" may bear down and oppress a weak defendant, the reason of the law failing, the rule itself fails; and accordingly it has been recently held that an agreement by an attorney to carry on a suit against the United States in the Court of Claims, at his own expense, for a portion of the proceeds, is not champertous.[4] Nor is an agreement to pay an attorney a fixed sum for his services, "out of the proceeds of sales of the property [real estate], as such proceeds shall be realized."[5]

[1] Ibid.; Maybin *v.* Raymond, 15 N. B. R. (U. S. C. Ct., South Dist. Miss.) 354; 2 Bishop Cr. Law, §§ 129, 130.

[2] Key *v.* Vattier, 1 Ohio, 132.

[3] Martin *v.* Clark, 8 R. I. 389; Stearns *v.* Felkner, 28 Wis. 594

[4] Maybin *v.* Raymond, *ubi supra.*

[5] McPherson *v.* Cox, 96 U. S. 404.

MALICIOUS MISCHIEF.

§ 177. **Malicious mischief**, at common law, was confined to injuries to personal property. Injuries to the realty were held to be matters only of trespass. And such, perhaps, were all injuries to personal property, short of their destruction.[1] But such injuries, both to personal and real property, came to be of such frequency and seriousness, that they were made matters of special statute regulation, for the purpose of providing a more adequate remedy and a severer punishment than was permitted by the common law. And from the time of Henry VIII. down to the present time, both in England and this country, a great number of statutes have been passed touching the subject, covering such forms of mischief as then existed and from time to time grew out of the changing circumstances of society, till now almost every form of such mischief is made the subject of statute regulation, and but few cases arise which are cognizable only by the common law. Nevertheless, the common law is looked to, so far as it is applicable, in aid of the interpretation of the statutes. In many cases the dividing line between malicious mischief and larceny is very shadowy, as where there is a total destruction of the property without any apparent advantage to the destroyer.[2] Indeed, it has been held that the same facts might support an indictment for either offence.[3]

[1] State *v.* Manuel, 72 N. C. 201. But see People *v.* Smith, 5 Cow. (N. Y.) 258; Loomis *v.* Edgerton, 13 Wend. (N. Y.) 419.

[2] *Ante*, § 159.

[3] State *v.* Leavitt, 32 Me. 183; State *v.* Helms, 5 Ired. (N. C.) 364; Snap *v.* People, 19 Ill. 80; People *v.* Moody, 5 Parker C. C. 568; Parris *v.* People, 76 Ill. 274.

§ 178. **Malice**, in all that class of crimes included under the general category of "malicious mischief," is not adequately interpreted by the ordinary legal definition of malice; to wit, the voluntary doing of an unlawful act without lawful excuse.[1] But it is a more specific and less general purpose of evil. It is defined by Blackstone as a "spirit of wanton cruelty, or black and diabolical revenge."[2] And, in a case where the prosecution was for wilfully and maliciously shooting a certain animal, the court held that to constitute the offence the act must be not only voluntarily unlawful and without legal excuse, but it must be done in a spirit of wanton cruelty or wicked revenge.[3]

And such has been held to be the true interpretation of a statute which punishes mischief done "wilfully *or* maliciously,"[4] and even where it punishes mischief "wilfully" done, — the history of the legislation, of which the statute formed a part, showing that such was the intent of the legislature.[5] Doing or omitting to do a thing, knowingly and wilfully, implies not only a knowledge of the thing, but a determination, with a bad intent or purpose, to do it, or omit doing it.[6]

There is, undoubtedly, in most cases, an element of personal hostility and spite, of actual ill-will and resentment towards some individual or particular com-

[1] *Ante*, MALICE, § 9.

[2] 4 Bl. Com. 244.

[3] Com. *v.* Walden, 3 Cush. (Mass.) 559. See also Goforth *v.* State, 8 Humph. (Tenn.) 37; Branch *v.* State, 41 Texas, 622; Duncan *v.* State, 49 Miss. 331.

[4] Com. *v.* Williams, 110 Mass. 401.

[5] State *v.* Clarke, 5 Dutch. (N. J.) 96.

[6] Felton *v.* United States, 96 U. S. 699; Com. *v.* Kneeland, 20 Pick (Mass.) 206.

munity, and in some cases this is held to be essential;[1] but, unless restricted to these by statute, there seems to be no reason to doubt that wanton cruelty or injury to or destruction of property, committed under such circumstances as to indicate a malignant spirit of mischief, indiscriminate in its purpose, as where one goes up and down the street throwing a destructive acid upon the clothes of such as may be passing to and fro, for no other purpose than to do the mischief, would be held to constitute the offence.[2] Yet it has been held that proof of malice towards a son is not admissible on an indictment for malicious injury to the property of the father,[3] while, on the other hand, it has been held that proof of malice towards a bailee is admissible on an indictment for injury of property described in the indictment as belonging to the bailor.[4] Mere malice towards the property injured, however, as where one injures a horse out of passion or dislike of the horse, is not sufficient to constitute the offence.[5]

In order to bring the act within the purview of the law against malicious mischief, it must appear that the mischief is done intentionally, and — perhaps it is not too much to say — for the purpose of doing it, and not as incidental to the perpetration of some other act, or the accomplishment of some other purpose, however

[1] State *v.* Robinson, 3 Dev. & Batt. (N. C.) 130; Holson *v.* State, 44 Ala. 380; State *v.* Newby, 64 N. C. 23; State *v.* Pierce, 7 Ala. 728.

[2] State *v.* Landreth, Car. L. R. 331; Moseley *v.* State, 28 Ga. 190; Duncan *v.* State, 49 Miss. 331.

[3] Northcot *v.* State, 42 Ala. 330.

[4] Stone *v.* State, 3 Heisk. (Tenn.) 457.

[5] 2 East P. C. 1072; State *v.* Wilson, 3 Yerger (Tenn.), 278; Shepard's Case, 2 Leach Cr. L. 609.

unlawful. Thus, where one breaks a door or window to gratify his passion for theft, or his lust, or while he is engaged in an assault, or if the injury be done in the pursuit of pleasure, as in hunting or fishing, or for the protection of his crops, or in any other enterprise, lawful or unlawful, where the injury is not the end sought, but is merely incidental thereto, the act does not constitute the offence of malicious mischief.[1] And where the injury is done under a supposed right, claimed in good faith, there is no malice in the sense of the law.[2]

§ 179. **Malice inferrible from Circumstances.** — Direct proof of express malice by actual threats is not necessary, but it may be inferred from the attendant facts and circumstances.[3]

MANSLAUGHTER.

See HOMICIDE.

MAYHEM.

§ 180. **Mayhem** is defined by Blackstone[4] as "the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary." Amongst these members were included a finger, an

[1] Reg. *v.* Pembliton, 12 Cox C. C. 607; s. c. 2 Green C. L. R. 19; State *v.* Clark, 5 Dutch. (N. J.) 96; Wright *v.* State, 30 Ga. 325; State *v.* Beech, 29 Ind. 110; Duncan *v.* State, 49 Miss. 331.

[2] State *v.* Flynn, 28 Iowa, 26; Sattler *v.* People, 59 Ill. 68; State *v.* Newkirk, 49 Mo. 84; State *v.* Hause, 71 N. C. 518; Goforth *v.* State, 8 Humph. (Tenn.) 37; Palmer *v.* State, 45 Ind. 388; Reg. *v.* Langford, 1 C. & M. 602.

[3] State *v.* Pierce, 7 Ala. 728; State *v.* McDermott, 36 Iowa, 107.

[4] 4 Com. 205.

eye, a foretooth, and those parts which are supposed to give courage. But cutting off the ear or the nose are not mayhems at common law, since the loss of these tends only to disfigure, but not to weaken.[1] The injury must be permanent in order to constitute the offence.[2] Under the statute, however, in Texas, the fact that the injured member, having been put back, grew again in its proper place was no defence.[3] The offence is now almost universally, in this country, defined by statute, and generally treated as an aggravated assault. In many States the statutes cover cases not embraced by the common law, as the biting off an ear or the slitting the nose, if the injury amounts to a disfigurement.[4]

Mayhem, at common law, was punishable in some cases as a felony, — an eye for an eye, and a tooth for a tooth, — and in others as a misdemeanor.[5] But if the offence is made a felony in this country, the punishment is defined by statute. It is doubtless, generally, a misdemeanor, unless done with intent to commit a felony.[6]

Under the statute in New York, the injury must have been done by "premeditated design" and "of purpose." Hence, if done as the result of an unexpected encounter, or of excitement produced by the fear of bodily harm, the offence is not committed.[7] So

[1] Ibid. See also 2 Bishop Cr. Law, § 1001, and notes.

[2] State *v.* Briley, 8 Porter (Ala.), 472.

[3] Slatterly *v.* State, 41 Texas, 619.

[4] State *v.* Gerkin, 1 Ired. (N. C.) 121; State *v.* Ailey, 3 Heisk. (Tenn.) 8.

[5] 4 Bl. Com. 205; Com. *v.* Newell, 7 Mass. 245.

[6] Ibid.; Stephen's Dig. Cr. Law, c. 25 and 26.

[7] Godfrey *v.* People, 63 N. Y. 207.

under the statute 5 Henry IV. c. 5, malice *prepense* was said by Lord Coke to mean "voluntarily and of set purpose."[1] But in North Carolina, where the statute prescribes the act done "on purpose and unlawfully, but without malice aforethought," it has been held that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, and it is not necessary to prove a preconceived intention to disfigure.[2]

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NUISANCE.

§ 181. A nuisance is anything that works hurt, inconvenience, or damage. If to the public, as the obstruction of a highway or the pollution of the atmosphere, it is a common nuisance, and punishable by indictment at common law. If the hurt is only to a private person or interest, the remedy is by civil proceedings.[3] And that is hurtful which substantially interferes with the free exercise of a public right, which shocks or corrupts the public morals, or injures the public health. And the hurt may be wrought as well by acts of omission as by acts of commission; as by failing to repair a road, or to entertain a stranger at an inn, both being regarded as disorderly acts.[4]

§ 182. Illustrations. — Certain acts are said to be nuisances *per se*, because they are in violation of the

[1] Coke, 3 Inst. 62. See also Godfrey *v.* People, *ubi supra*.

[2] State *v.* Gerkin, 1 Ired. (N. C.) 121. See also State *v.* Simmons, 3 Ala. 497.

[3] 3 Bl. Com. 216; 4 Bl. Com. 166; State *v.* Schlotman, 52 Mo. 164.

[4] 4 Bl. Com. 167; State *v.* Madison, 63 Me. 546; State *v.* Morris Canal Co., 2 Zabr. (N. J.) 537; Hill *v.* State, 4 Sneed (Tenn.), 443.

public right. Thus, an obstruction in a street is a nuisance, because it may interfere with public travel, although it does not affirmatively appear that it certainly has interfered with it, or even if it appears that there has been no travel to obstruct since the obstruction was erected.[1] So of the obstruction of navigable waters, although the inconvenience may be inappreciable.[2] So the doing any act in the street or in a building adjoining the street, as the exhibition of pictures in a window;[3] or the holding an auction sale on the street;[4] or erecting houses on a public square;[5] or the delivering out of merchandise or other material, as of brewer's grain from a brewery, in such a manner as to cause the street to be constantly obstructed by men or vehicles, — will amount to a nuisance.[6] A mere transitory obstruction, however, resulting from the ordinary and proper use of a highway, as in the unloading of goods from a wagon, or the dumping coal into a street to be removed to the house, if the obstruction be not permitted to remain more than a reasonable time, does not amount to a nuisance.[7] The pollution of a stream of water, by discharging into it offensive and unwholesome matter, if the water be used by the public, is also indictable as a nuisance.[8] So is the damming up of a

[1] Knox *v.* New York City, 55 Barb. (N. Y. S. C.) 404; *ante*, § 172.

[2] People *v.* Vanderbilt, 28 N. Y. 396; Woodman *v.* Kilbourn, 1 Abb. (U. S.) 158; State *v.* Merrit, 35 Conn. 314.

[3] Rex *v.* Carlile, 6 C. & P. 636.

[4] Com. *v.* Williams, 13 S. & R. (Pa.) 403.

[5] Com. *v.* Rush, 14 Pa. St. 186.

[6] People *v.* Cunningham, 1 Denio (N. Y.), 524; Rex *v.* Russell, 6 East, 427.

[7] Rex *v.* Carlile, 6 C. & P. 636; People *v.* Cunningham, 1 Denio (N. Y.), 524.

[8] State *v.* Taylor, 29 Ind. 519; State *v.* Buckman, 8 N. H. 203.

stream, so as to make the water stagnant and pestiferous.[1] In New Hampshire, the prevention of the passage of fish by a dam constructed across a non-navigable stream is indictable at common law.[2]

Other acts may or may not be nuisances, according to the attendant circumstances. A lawful business conducted in a proper manner, in a proper place, and at a proper time, without inconvenience to the public, may be perfectly innocent; while the same business if carried on in an improper manner, or at an improper place, or at an improper time, to the annoyance or injury of the public, will become abatable as a nuisance. The manufacturing of gunpowder, refining oils, tanning hides, making bricks, are examples of this class.[3] So the setting of spring-guns.[4] No act, however, authorized by the legislature can be punished as a nuisance, even though at common law a nuisance *per se*.[5] In the case of offensive odors, they become a nuisance if they make the enjoyment of a right — as of a passage along the highway, or of life elsewhere — uncomfortable, though the odors may not be unwholesome.[6]

Profanity, or profane cursing and swearing, is a special form of nuisance, indictable at common law.[7]

[1] State *v.* Rankin, 3 S. C. 438.

[2] State *v.* Franklin Falls Co., 49 N. H. 240.

[3] Attorney-General *v.* Stewart, 20 N. J. Eq. 415; Wier's Appeal, 74 Pa. St. 230; State *v.* Hart, 34 Me. 36.

[4] State *v.* Morse, 31 Conn. 479.

[5] Com. *v.* Boston, 97 Mass. 555; Danville, &c. R. R. *v.* Com., 73 Pa. St. 29; People *v.* New York Gas Light Co., 64 Barb. (N. Y.) 55.

[6] Rex *v.* White, 2 C. & P. 485; State *v.* Payson, 37 Me. 361; State *v.* Purse, 4 McCord (S. C.), 472.

[7] State *v.* Powell, 70 N. C. 47.

But it has been held that a single instance of swearing will not constitute the offence: there must be such repetition as to make the offence a common nuisance.[1] Eavesdroppers, common scolds, railers and brawlers, common drunkards, common barrators, and the like, persons guilty of open obscenity of conduct or language, of blasphemy, of profanity, or who keep disorderly houses, as for gaming or prostitution, or make disorderly and immoral exhibitions, or promote lotteries, or carry about persons affected with contagious disease, or make unseemly noises at improper times and places, — may all be included under the general category of common nuisances, if the several acts work injury to the public, punishable at common law, unless otherwise provided for by statute.[2]

§ 183. **Prescription. Public Benefit.** — The lapse of time does not give the right to maintain a nuisance. No one can prescribe against the State, against which the Statute of Limitations does not run, and which is not chargeable with laches. It has indeed been said by high authority, that where a useful trade or business has been established, away from population, it may be continued, notwithstanding the approach of population.[3] So, too, it has been held that a business established in a neighborhood where offensive trades already exist, which, though individually offensive, does not materially add to the already existing nuisance, may be permitted.[4] And in one case at least

[1] State *v.* Jones, 9 Ired. (N. C.) 38; State *v.* Graham, 3 Sneed (Tenn.), 134.

[2] 4 Bl. Com. 167 *et seq* and notes, Sharswood's ed.; Barker *v.* Com., 19 Pa. 412; Rex *v.* Moore, 3 B. & A. 184.

[3] Abbott, C. J., Rex *v.* Cross, 2 C. & P. 483.

[4] Rex *v.* Watts, M. & M. 281.

in this country the doctrine of the first case seems to have been accepted.[1] But it is questionable whether this is now the law in England.[2] And the very decided weight of authority in this country is to the contrary on both points.[3] Nor is it any excuse that the public benefit is equal to the public inconvenience;[4] nor that similar nuisances have been tolerated.[5]

6897

PERJURY.

§ 184. "Perjury, by the common law, seemeth to be a wilful false oath, by one who being lawfully required to depose the truth, in any proceeding in a course of justice, swears absolutely in a matter of some consequence, to the point in question, whether he be believed or not."[6] Modern legislation has allowed persons having conscientious scruples against taking an oath, to substitute an affirmation for the oath.

An oath is a declaration of a fact made under the religious sanction of an appeal to the Supreme Being for its truth.

An affirmation is substantially like an oath, omitting the sanction of an appeal to the Supreme Being, and

[1] Ellis *v.* State, 7 Blackf. (Ind.) 534.

[2] Reg. *v.* Fairie, 8 E. & B. 486.

[3] Taylor *v.* People, 6 Parker C. C. 347; Com. *v.* Upton, 6 Gray (Mass.), 476; People *v.* Cunningham, 1 Denio (N. Y.), 524; Com. *v.* Van Sickle, 1 Bright (Pa.), 69; Ash-Brook *v.* Com., 1 Bush (Ky.), 139; Douglas *v.* State, 4 Wis. 387.

[4] State *v.* Kaster, 35 Iowa, 221; Hart *v.* Albany, 9 Wend. (N. Y.) 571; Respublica *v.* Caldwell, 1 Dall. (U. S.) 150.

[5] People *v.* Mallory, 4 T. & C. (N. Y.) 567; Com. *v.* Deerfield, 6 Allen (Mass.), 449.

[6] 1 Hawk. P. C. c. 69, § 1; Com. *v.* Pollard, 12 Met. (Mass.) 225; State *v.* Wall, 9 Yerg. (Tenn.) 347; State *v.* Simons, 30 Vt. 620.

substituting therefor the "pains and penalities" of perjury.

The proper form of administering either is that which is most binding on the conscience of the affiant, and in accordance with his religious belief. But the form is not essential, even though it be prescribed by statute, if there be a substantial compliance, — the prescription being regarded as directory merely.[1] And, therefore, if a book other than the Evangelists be unwittingly used it does not vitiate the oath.[2] Nor can a prosecution for perjury be sustained upon testimony given orally, which the law requires to be in writing,[3] nor upon an affidavit not required by law.[4] But when the witness is sworn generally to tell the truth, instead of to make true answers, according to the usual practice, false testimony is still perjury.[5]

§ 185. **Lawfully required.** — But, to be valid, the oath must be administered by a court or magistrate duly authorized. If a court having no jurisdiction of the person or subject-matter, or magistrate not duly authorized or qualified, administer the oath, it has no binding force or legal efficacy, and no prosecution for perjury can be predicated upon it. It is extra-judicial, if the law does not require the oath, or, if the oath be required, an unauthorized person administer it.[6] But

[1] Com. *v.* Smith, 11 Allen (Mass.), 243; Rex *v.* Haley, 1 C. & D. C. C. 194.

[2] People *v.* Cook, 4 Seld. (N. Y.) 67; Ashburn *v.* State, 15 Ga. 246.

[3] State *v.* Trask, 42 Vt. 152; State *v.* Simons, 30 Vt. 620.

[4] Ortner *v.* People, 6 T. & P. (N. Y. S. C.) 548; People *v.* Gaige, 26 Mich. 30.

[5] State *v.* Keene, 26 Me. 33.

[6] People *v.* Travis, 4 Parker C. C. 213; State *v.* Hayward, 1 N. & McC. (S. C.) 546; Com. *v.* Pickering, 8 Gratt. (Va.) 628; Muir *v*

if jurisdiction and authority exist, formal irregularities, — as where the witness is sworn to tell the truth and the whole truth, omitting from the oath the words "and nothing but the truth,"[1] or there is error in some of the proceedings, of which the oath is a part,[2] — are immaterial.

§ 186. "Judicial proceeding" embraces not only the main proceeding, but also subsidiary proceedings incidental thereto; as a motion for continuance,[3] or an affidavit initiatory of a proceeding,[4] or in aid of one pending,[5] or a motion for removal,[6] or for a new trial,[7] or a hearing in mitigation of sentence,[8] or for taking bail,[9] or on a preliminary inquiry as to the competency of a witness or juror.[10] It also embraces any proceeding wherein an oath is required by statute, if the oath is to an existing fact, and not merely promissory.[11] It has

State, 8 Blackf. (Ind.) 154; Pankey *v.* People, 1 Scammon (Ill.), 80; United States *v.* Babcock, 4 McLean (C. Ct.), 113; State *v.* Plummer, 50 Me. 217; State *v.* Wyatt, 21 Hay. (N. C.) 56.

[1] State *v.* Gates, 17 N. H. 373.

[2] State *v.* Lavelly, 9 Mo. 824. See also United States *v.* Babcock, 4 McLean (C. Ct.), 113; State *v.* Hall, 7 Blackf. (Ind.) 25; State *v.* Dayton, 3 Zabr. (N. J.) 49; Van Steenburgh *v.* Kortz, 10 Johns. (N. Y.) 167.

[3] State *v.* Sharpe, 16 Iowa, 36.

[4] Rex *v.* Parnell, 2 Burr. 806; Carpenter *v.* State, 4 How. (Miss.) 163.

[5] White *v* State, 1 S. & M. (Miss.) 149; Rex *v.* White, M. & M 271.

[6] Pratt *v.* Price, 11 Wend. (N. Y.) 127.

[7] State *v.* Chandler, 42 Vt. 446.

[8] State *v.* Keenan, 8 Rich. (S. C.) 456

[9] Com. *v.* Hatfield, 107 Mass. 227.

[10] Com. *v.* Stockley, 10 Leigh (Va.), 678; State *v.* Wall, 9 Yerg (Tenn.) 347.

[11] Rex *v.* Lewis, 1 Strange, 70; State *v.* Dayton, 3 Zabr. (N. J.) 49.

also been held to embrace a proceeding required or sanctioned by "the common consent and usage of mankind." [1]

§ 187. **Wilful. False.** — The oath must be wilfully false to constitute the offence. If it be taken by mistake, or in the belief that it is true, or upon advice of counsel, sought and given in good faith, that it may lawfully be taken, the offence is not committed.[2]

Some authorities hold that one may commit perjury notwithstanding he believes what he swears to to be true, if it be made to appear that he had no probable cause for his belief.[3] But it certainly cannot be considered as established law that one who swears inconsiderately, or even rashly, to what he believes, though upon very insufficient data, or even negligently, to be true, is guilty of perjury.[4]

Oaths of office, being in the nature of promises of future good conduct, and not affirming or denying the truth or falsehood of an existing fact within the knowledge of the affiant, do not come within the provision of the law of perjury.[5]

[1] State *v.* Stephenson, 4 McC. (S. C.) 165; Arden *v.* State, 11 Conn. 408.

[2] Tuttle *v.* People, 36 N. Y. 434; United States *v.* Connor, 3 McLean (C. Ct.), 573; Hood *v.* State, 44 Ala. 81; Cothran *v.* State, 39 Miss. 541.

[3] State *v.* Knox, Phil. (N. C.) 312; People *v.* McKinney, 3 Parker C. C. 510; Com. *v.* Cornish, 6 Binn. (Pa.) 249.

[4] Com. *v.* Brady, 5 Gray (Mass.), 78; United States *v.* Shellmire, 1 Bald. (C. Ct.) 370; State *v.* Lee, 3 Ala. 602; State *v.* Cochran, 1 Bailey (S. C.), 50; Com. *v.* Cook, 1 Rob. (Va.) 729; United States *v.* Atkins, 1 Sprague, 558; Jesse *v.* State, 20 Ga. 156; United States *v.* Stanley, 6 McLean, 409; 1 Hawk. P. C. c. 69, § 2; State *v.* Chamberlain, 30 Vt. 559; Com. *v.* Thompson, 3 Dana (Ky.), 301.

[5] 1 Hawk. P. C. c. 69, § 3; State *v.* Dayton, 3 Zabr. (N. J.) 49.

It is immaterial whether the witness gives his testimony voluntarily or under compulsion, if his testimony be required by law;[1] as also, it has been held, whether he is legally competent or incompetent to testify, if his testimony be actually taken.[2] But this last proposition is not universally accepted as sound. Thus, if a party to the record be sworn, the law not admitting him as a competent witness, false testimony by him is no perjury.[3] So it has been held that it is no perjury to swear falsely to a place of residence in obtaining a certificate of naturalization, the oath to that fact being voluntary and immaterial under the law.[4] So if an immaterial allegation of fact be introduced and sworn to in a petition to court.[5] Nor will a false answer in chancery, the bill not calling for a sworn answer, amount to perjury.[6] Swearing that a certain fact is true according to the affiant's knowledge and belief, is perjury, if he knows to the contrary, or if he believes to the contrary, even though the fact be true.[7] So, perhaps, if he have no knowledge or belief in the matter.[8]

[1] Com. *v.* Knight, 12 Mass. 274.

[2] Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220; State *v.* Molier, 1 Dev. (N. C.) 263.

[3] State *v.* Hamilton, 7 Mo. 300.

[4] State *v.* Helle, 2 Hill (S. C.), 290.

[5] Gibson *v.* State, 44 Ala. 17. See also State *v.* Hamilton, 7 Mo. 300.

[6] Silver *v.* State, 17 Ohio, 65.

[7] State *v.* Cruikshank, 6 Blackf. (Ind.) 62; Patrick *v.* Smoke, 3 Strobh. (S. C.) 147; United States *v.* Shelmire, 1 Bald. (C. Ct.) 370; Wilson *v.* Nations, 5 Yerg. (Tenn.) 211; Rex *v.* Pedley, 1 Leach, 325.

[8] State *v.* Gates, 17 N. H. 373; 1 Hawk. P. C. c. 69, § 6.

§ 188. **Materiality.** — That is material which tends to prove or disprove any fact in issue, although this fact be not the main fact in issue, but only incidental. Thus, where a woman was charged with larceny, and the defence was that the goods stolen belonged to her husband, falsely swearing, by the alleged husband, that he had never represented that she was his wife is perjury whether she was or was not in fact his wife. And it is also material whether it has any effect upon the verdict or not.[1] So where three persons were indicted for a joint assault, and it was contended that it was immaterial, if all participated in it, by which certain acts were done, it was held that evidence attributing to one acts which were done by another was material.[2] So all answers to questions put to a witness on cross-examination, which bear upon his credibility, are material.[3] But substantial truth is all that is necessary, and slight variations, as to time, place, or circumstance will not, in general, be material; as where one swears to a greater or less number, or a longer or shorter time, or a different place, or a different weapon, than the true one, — these circumstances not bearing upon the main issue.[4] A false statement as to the terms of a contract which is void by the Statute of Frauds, made in a proceeding to enforce the contract, has been held to be immaterial, and no perjury, whichever way the party swears,

[1] Com. *v.* Grant, 116 Mass. 17; Wood *v.* People, 59 N. Y. 117; 1 Hawk. P. C. c. 69, §§ 8 and 9.

[2] State *v.* Norris, 9 N. H. 96.

[3] Reg. *v.* Overton, C. & M. 655.

[4] 1 Hawk. P. C. c. 69, § 8

the contract being void;[1] while a like false statement in a proceeding to avoid the contract would be material.[2] And the fact that an indictment is bad, or that a judgment is reversed, does not affect the question of the materiality of the evidence given to sustain it;[3] nor does the fact that the evidence is withdrawn from the case.[4] Whether materiality is a question of law for the court or of fact for a jury, is a point upon which the authorities are about equally divided.[5]

§ 189. **Evidence.** — In prosecutions for perjury, a single witness (contrary to the general rule of evidence) to the falsehood of the alleged oath is not sufficient to maintain the case, since this would be but oath against oath. There must be two witnesses to the falsity, or circumstances corroborating a single witness.[6] Nor can a man be convicted of perjury by showing that he has sworn both ways. It must be shown which was the false oath.[7]

§ 190. **Subornation.** — Subornation of perjury is the procuring of perjured testimony. In order to the

[1] Rex *v.* Dunston, Ry. & M. 109.

[2] Reg. *v.* Yates, C. & M. 132.

[3] Reg. *v.* Meek, 9 C. & P. 513; Com. *v.* Tobin, 108 Mass. 426.

[4] Reg. *v.* Philpott, 3 C. & K. 135.

[5] See the cases collected in 2 Greenl. Ev. (13th ed.) § 196, note; also 2 Bishop Cr. Law, § 1039 *a*.

[6] State *v.* Raymond, 20 Iowa, 582; Com. *v.* Pollard, 12 Met. (Mass.) 225; State *v.* Molier, 1 Dev. (N. C.) 263; State *v.* Heed, 57 Mo. 252.

[7] Reg. *v.* Hughes, 1 C. & K. 519; Jackson's Case, 1 Lewin, 270; State *v.* J. B., 1 Tyler (Vt.), 269; State *v.* Williams, 30 Mo. 364; Schwartz *v.* Com., 27 Grat. (Va.) 1025. But see People *v.* Burden, 9 Barb. (N. Y.) 467, which, however, is examined and denied to be law in Schwartz *v.* Com., *ubi supra*.

incurring of guilt under this charge, it must appear that the party procuring the false testimony must know not only that the testimony will be false, but also that it will be corrupt, or that the party giving the testimony will knowingly, and not merely ignorantly, testify falsely.[1] And a conviction may be had upon the testimony of a single witness,[2] unless that witness be the party who committed the perjury; in which case he will need corroboration.[3] But a person cannot be convicted of attempted subornation of perjury by proof that he attempted to procure a person to swear falsely in a suit not yet brought, but which he intends to bring. There must be some proceeding pending, or the procured false testimony must constitute a proceeding in itself.[4]

PIRACY.

§ 191. "Piracy at the common law consists in committing those acts of robbery and depredation upon the high seas which, if committed on the land, would have amounted to felony there."[5] It was originally punishable at common law as petit treason, but not as a felony; and later, by statute,[6] it is made triable according to the course of the common law, subject to the

[1] Com. *v.* Douglass, 5 Met. (Mass.) 241; Stewart *v.* State, 22 Ohio St. 477.

[2] Com. *v.* Douglass, *ubi supra.*

[3] People *v.* Evans, 40 N. Y. 1.

[4] State *v.* Joaquin, 69 Me. 218; People *v.* Chrystal, 8 Barb. (N. Y S. C.) 545. But see State *v.* Whittemore, 50 N. H. 345.

[5] 1 Russ. Crimes, bk. 2, c. 8, § 1.

[6] 28 Hen. VIII. c. 15.

punishment — capital — provided by the civil law.[1] Under the law of nations (which is part of the common law), it may be committed by an uncommissioned armed vessel attacking another vessel,[2] or by feloniously taking from the possession of the master the ship or its furniture, or the goods on board, whether the taking be done by strangers, or by the crew or passengers of the vessel.[3]

Robbery on board a vessel sailing under a foreign flag is not piracy,[4] but the category of piratical acts has been much extended by statutes.[5]

As the offence, if committed at all, is committed on the high seas, that is, out of the jurisdiction of the States, the adjudications and judicial decisions in this country have been mostly confined to cases arising under the statutory jurisdiction of the courts of the national government.[6]

A pirate is an outlaw, and may be captured and brought to justice by the ship of any nation.[7]

[1] 1 Russ. Crimes, bk. 2, c. 8, § 1. This statute has been repealed by Stat. 1 Vict. c. 88, § 1.

[2] Savannah Pirates, Warburton's Trial, 370.

[3] Attorney-General *v.* Kwok-a-Sing, L. R. 5 P. C. 179; Rex *v.* Dawson, 13 How. St. Tr. 451. See also United States *v.* Tully, 1 Gall. C. Ct. 247; United States *v.* Jones, 3 Wash. C. Ct. 209; United States *v.* Gibert, 2 Sumner C. Ct. 19; United States *v.* Procter, 5 Wheat. (U. S.) 184; The Antelope, 10 Wheat. (U. S.) 66.

[4] United States *v.* Palmer, 3 Wheat. (U. S.) 610.

[5] United States *v.* Brig Malek Abdel, 2 How. (U. S.) 210. On the question of jurisdiction of a crime committed on board a foreign vessel, see the very learned and elaborate case of Com. *v.* McLoon, 101 Mass. 1.

[6] For the statutory law upon this subject see U. S. Rev. Stat. § 5368.

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

A commission purporting to be issued by an unknown government, or by a province of an unacknowledged nation, affords no protection.[1]

POLYGAMY.

See BIGAMY.

RAPE.

§ 192. **Rape** is the unlawful carnal knowledge of a woman by force, without her consent.[2]

§ 193. **Carnal Knowledge.** — Carnal knowledge, it is now generally held, both in this country and in England, is accomplished by penetration without emission,[3] though it was formerly doubted if both were not necessary, — a doctrine still held in Ohio.[4] And penetration is sufficient, however slight.[5]

The conclusive presumption of the common law that a boy under the age of fourteen is incapable of committing rape may have been based upon the theory that emission as well as penetration was necessary to the commission of the crime.[6]

§ 194. **Force and Violence.** — The force must be such as overcomes resistance, which, when the woman has the power to exert herself,[7] should be with such vigor

[1] United States *v.* Klintock, 5 Wheat. (U. S.) 144.

[2] See *post*, § 195.

[3] Penn. *v.* Sullivan, Add. (Pa.) 143; Walter *v.* State, 40 Ala 325; Com. *v.* Thomas, Va. Cas. 307; State *v.* Hargrave, 65 N. C. 466; St. 9 Geo. IV. c. 31.

[4] Blackburn *v.* State, 22 Ohio, N. S. 102.

[5] State *v.* Hargrave, 65 N. C. 466; Reg. *v.* Hugh, 2 Moody, 190.

[6] Com. *v.* Green, 2 Pick. (Mass.) 380; Williams *v.* State, 14 Ohio, 222, where the presumption is held to be rebuttable by proof of puberty. See also People *v.* Randolph, 2 Park. C. R. (N. Y.) 194.

[7] See next section.

and persistence as to show that there is no consent. Any less resistance than with all the might gives rise to the inference of consent.[1] Where, however, there is no resistance, from incapacity, the only force necessary is the force of penetration. And fraud does not here, as in some other cases, supply the place of force. If the consent be procured, although by fraud, there is no rape.[2] Yet it has been held that where the ravishment was under the pretence of medical treatment, consented to in the belief of its necessity, this was an assault, and, it seems, a rape.[3] But where the will is overcome by the force of fear, though there be no resistance, the offence may be committed.[4]

§ 195. **Without consent.** — According to the old definition, the act must be against the will of the woman; but these words are now held to mean without her consent.[5] If the woman be in a state of insensibility, so that she is incapable of exercising her will, whether that incapacity is brought about by the act of the accused, intentionally or unintentionally, or by the voluntary act of the woman herself, and the ravishment is effected with a knowledge of such incapacity, the of-

[1] People *v.* Dohring, 59 N. Y. 374; Taylor *v.* State, 50 Ga. 79; State *v.* Burgdorf, 53 Mo. 65; People *v.* Brown, 47 Cal. 447; Com. *v.* McDonald, 110 Mass. 405.

[2] McNair *v.* State, 53 Me. 453; State *v.* Burgdorf, *ubi supra;* Don Moran *v.* People, 25 Mich. 356; Reg. *v.* Saunders, 8 C. & P. 265; Clark *v.* State, 30 Texas, 448.

[3] Reg. *v.* Case, 4 Cox C. C. 220.

[4] Reg. *v.* Woodhurst, 12 Cox C. C. 443; Wright *v.* State, 8 Humph. (Tenn.) 194; Croghan *v.* State, 22 Wis. 444; People *v.* Dohring, *ubi supra;* Pleasant *v.* State, 8 Eng. (Ark.) 360.

[5] Reg. *v.* Fletcher, 10 Cox C. C. 248; Reg. *v.* Barrow, 11 Cox C. C. 191; Com. *v.* Burke, 116 Mass. 376; *post*, § 207.

fence is committed.[1] And the same would be true if the woman were idiotic, insane, or asleep.[2] Against the will or without consent means an active will. There is a difference between consent and submission. The submission of a child overcome by fear, perhaps, or one of tender years, ignorant of the nature of the act, is no consent.[3] By the law of England, a child under ten years of age is conclusively presumed to be incapable of consenting.[4] In this country, the authorities differ, the weight of authority being in favor of the English doctrine.[5]

RECEIVING STOLEN GOODS.

§ 196. **Receiving stolen goods**, knowing them to be stolen, was originally an accessorial offence, of which the receiver could only be convicted after the conviction of the thief; but it long since became, both in England and in this country, a substantive offence, triable separately, and without reference to the crime of the principal.[6]

[1] Reg. *v.* Champlin, 1 Den. C. C. 89; Com. *v.* Burke, *ubi supra*; Reg. *v.* Barrett, 12 Cox C. C. 498.

[2] Ibid.; Reg. *v.* Fletcher, 8 Cox C. C. 131; Reg. *v.* Mayers, 12 Cox C. C. 311; s. c. 1 Green's Cr. Law Rep., and valuable note by Mr. Green.

[3] Reg. *v.* Day, 9 C. & P. 722; Reg. *v.* Lock, 12 Cox C. C. 244; Reg. *v.* Banks, 8 C. & P. 574.

[4] 1 Bl. Com. 212.

[5] Hays *v.* People, 1 Hill (N. Y.), 351, denied in Smith *v.* State, 12 Ohio, N. S. 406. See also Williams *v.* State, 47 Mo. 609; Fizele *v.* State, 25 Wis. 364; Gorsha *v.* State, 56 Ga. 36; People *v.* McDonald, 9 Mich. 150.

[6] Reg. *v.* Caspar, 2 Moody C. C. 101; s. c. 2 Leading Cr. Cas. 451 and note; Reg. *v.* Hughes, 8 Cox C. C. 278; Com. *v.* King, 9 Cush. (Mass.) 284; Loyd *v.* State, 42 Ga. 221; State *v.* Coppenburg, 2 Strobh. (S. C.) 273; State *v.* Weston, 9 Conn. 527.

Receiving stolen goods, knowing them to be stolen, for the purpose of aiding the thief in concealing them or in escaping with them, is equally an offence as if the receiving be done with the hope of obtaining a reward from the owner, or other pecuniary gain or advantage.[1] But there must be a fraudulent intent to deprive the true owner of his interest in them.[2]

§ 197. **Receiving.** — To constitute one a receiver, the stolen goods need not have come into his actual manual possession. It is enough if they have come under his observation and control, as where a person allows a trunk of stolen goods to be placed on board a vessel as part of his luggage.[3] If one finds property which he has reason to believe was stolen, and seeks to turn it to his pecuniary advantage, he may be convicted of receiving stolen goods.[4] The owner may be a receiver as well as a thief, if the goods be received from one who stole them from the owner's bailee.[5] But as the wife cannot, under any circumstances, steal from the husband, one who receives from her cannot be convicted of receiving stolen goods.[6]

§ 198. **Jurisdiction. Evidence.** — As in the case of larceny, so in receiving the stolen goods the receiver

[1] People *v.* Wiley, 3 Hill (N. Y.), 194; State *v.* Rushing, 69 N. C. 29; Com. *v.* Bean, 117 Mass. 141; Rex *v.* Davis, 6 C. & P. 177; People *v.* Caswell, 21 Wend. (N. Y.) 86; State *v.* Hancock, 2 R. I. 474.

[2] Rice *v.* State, 3 Heisk. (Tenn.) 215; People *v.* Johnson, 1 Parker C. R. (N. Y.) 564; Pelts *v.* State, 3 Blackf. (Ind.) 28.

[3] State *v.* Scovel, 1 Mill (S. C.), 274; State *v.* St. Clair, 17 Iowa, 149; Reg. *v.* Smith, 6 Cox C. C. 554.

[4] Com. *v.* Moreland, 27 Pitts. L. J. (Pa.) No. 45.

[5] People *v.* Wiley, 3 Hill (N. Y.), 194; *ante*, § 155.

[6] Queen *v.* Kenny, 25 W. R. 679.

in one State may be convicted though the goods were stolen in another.[1] Recent possession, without any evidence that the property stolen had been in the possession of some person other than the owner, before it came to the alleged receiver, or other circumstances to rebut the presumption of larceny, is rather evidence of larceny than of receiving stolen goods.[2]

RESCUE. ESCAPE. PRISON BREACH.

§ 199. These are analogous offences under the general category of hindrances to public justice. Few cases at common law have occurred in this country, the several offences being generally matter of statutory regulation.

§ 200. **Rescue** is "the forcibly and knowingly freeing another from an arrest or imprisonment."[3] If, therefore, the rescuer supposes the imprisonment to be in the hands of a private person and not of an officer, he is not guilty, as the imprisonment must be a lawful one.[4] It is essential that the deliverance should be complete, otherwise the offence may be an attempt merely.[5]

§ 201. **Escape** is the going away without force out of his place of lawful confinement by the prisoner himself, or the negligent or voluntary permission by the

[1] Com. *v.* Andrews, 2 Mass. 14; People *v.* Wiley, 3 Hill (N. Y.), 194.

[2] Rex *v.* Cordy, cited in note to Pomeroy's edition of Archbold Cr. Pr. & Pl. vol. ii. p. 479; Reg. *v.* Langmaid, 9 Cox C. C. 464.

[3] 4 Bl. Com. 131.

[4] State *v.* Hilton, 26 Mo. 199.

[5] State *v.* Murray, 15 Me. 100.

officer having custody, of such going away.[1] The escape must be from a lawful confinement. And if the arrest be by a private person without warrant, though legal, yet if the custody, without bringing the party before a magistrate, be prolonged for an unreasonable period, the escape will be no offence; and although it seems to have been held, in this country, that after an arrest voluntarily made by a private person without warrant, he may let the prisoner go without incurring guilt, by the common law,[2] such private person will be guilty, if he do not deliver over the arrested party to a proper officer.[3] If the warrant on which the arrest is made be void, neither the prisoner nor the officer is liable for an escape.[4]

§ 202. **Prison breach** is the forcible breaking and going away out of his place of lawful confinement by the prisoner. It is distinguished from escape by the fact that there must be a breaking of the prison. There must also be an exit,[5] in order to constitute the offence. The imprisonment must be lawful, but it is immaterial whether the prisoner be guilty or innocent.[6]

[1] Com. *v.* Sheriff, 1 Grant (Pa.), 187; State *v.* Doud, 7 Conn. 384; Riley *v.* State, 16 Conn. 47; Null *v.* State, 34 Ala. 262; Luckey *v.* State, 14 Texas, 400.

[2] Habersham *v.* State, 56 Ga. 61.

[3] 2 Hawk. P. C. c. 20, §§ 1–6.

[4] Housh *v.* People, 75 Ill. 487; Hitchcock *v.* Baker, 2 Allen (Mass.), 431. State *v.* Leach, 7 Conn. 752; Com. *v.* Crosby, 10 Allen (Mass.), 403.

[5] 2 Hawk. P. C. c. 18, § 12.

[6] Com. *v.* Miller, 2 Ash. (Pa.) 61; Habersham *v.* State, 56 Ga. 61; Reg. *v.* Waters, 12 Cox C. C. 390. Upon the general subject see 2 Hawk. P. C. c. 18–21; 1 Gab. Cr. L. 305 *et seq.*

A prison is any place where a person is lawfully confined, whether it be in the stocks, in the street, or in a public or private house. Imprisonment is but a restraint of liberty.[1]

At common law, the punishment of the several offences was the same as would have been inflicted upon the escaped or rescued prisoner.[2] It is now, however, generally a subject of special statute regulation.

RIOT. ROUT. UNLAWFUL ASSEMBLY.

§ 203. **A riot** is a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent, mutually, to assist one another against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful.[3]

A rout is a similar meeting upon a purpose, which, if executed, would make them rioters, and which they actually make a motion to execute. It is an attempt to commit a riot.

An unlawful assembly is a mere assembly of persons upon a purpose, which, if executed, would make them rioters, but which they do not execute, or make any motion to execute.[4]

A like assembly for a public purpose, as where it is

[1] 2 Hawk. P. C. c. 18, § 4.
[2] 2 Hawk. P. C. c. 19, § 22; Com. *v.* Miller, 2 Ash. (Pa.) 61.
[3] 1 Hawk. P. C. c. 65, § 1; State *v.* Russell, 45 N. H. 83.
[4] 1 Hawk. P. C. c. 68, §§ 1, 8, 9; 4 Bl. Com. 146.

the intent of a riotous assembly to prevent the execution of a law by force, or to release all prisoners in the public jail, is treason.[1]

It has been held that an unlawful assembly, armed with dangerous weapons, and threatening injury, to the terror of the people, amounts to a riot, even before it proceeds to the use of force.[2]

Two persons, it has also been held, with a third aiding and abetting, may make a riot.[3]

That the assembly is in its origin and beginning a lawful one, is immaterial, if it degenerates, as it may, into an unlawful and riotous one.[4]

§ 204. The violence necessary to constitute a riot need not be actually inflicted upon any person. Threatening with pistols, or clubs, or even by words or gestures, to injure, if interfered with in the prosecution of the unlawful purpose, or any other demonstration calculated to strike terror and disturb the public peace, is a sufficient violence to constitute the assembly riotous.[5] Indeed, it has been held that a trespass to property in the presence of a person in actual possession, where there is no actual force,

[1] 4 Bl. Com. 147; Judge King's Charge, 4 Pa. L. J. 35, an admirable paper.

[2] Com. *v.* Hershberger, Lewis Cr. L. (Pa.) 72; State *v.* Brazil, Rice (S. C.), 258.

[3] State *v.* Straw, 33 Me. 554.

[4] Judge King's Charge, 4 Pa. L. J. 31; State *v.* Snow, 18 Me. 346; Reg. *v.* Soley, 2 Salk. 594; State *v.* Brooks, 1 Hill (S. C.), 361; 1 Hawk. P C. c. 15, § 3. But see State *v.* Stalecup, 1 Ired. (N. C.) 30.

[5] State *v.* Calder, 2 McCord (S. C.), 402; State *v.* Jackson, 1 Speer (S. C.), 13; Bell *v.* Mallory, 61 Ill. 167; Rex *v.* Hughes, 4 C. & P. 372

amounts to a riot.[1] The disturbance of the peace by exciting terror, is the gist of the offence.[2] To disturb another in the enjoyment of his lawful right is a trespass, which, if done by three or more persons unlawfully combined, with noise and tumult, is a riot; as the disturbance of a public meeting,[3] or making a great noise and disturbance at a theatre for the purpose of breaking up the performance, though without offering personal violence to any one,[4] or even the going in the night upon a man's premises and shaving his horse's tail, if it be done with so much noise and of such a character as to arouse the proprietor and alarm his family.[5]

Violent, threatening, and forcible methods of enforcing rights, whether public or private, are not lawful.[6]

ROBBERY.

§ 205. **Robbery** is larceny from the person or personal presence by force and violence and putting in fear.[7]

What constitutes larceny, what may be stolen, and what constitutes ownership; that the taking must be

[1] State *v.* Fisher, 1 Dev. (N. C.) 504.

[2] State *v.* Renton, 15 N. H. 169; State *v.* Brooks, 1 Hill (S. C.), 362.

[3] State *v.* Townsend, 2 Harr. (Del.) 543; Com. *v.* Runnels, 10 Mass. 520; State *v.* Brazil, Rice (S. C.), 258; Judge King's Charge, 4 Pa. L. J. 38.

[4] Clifford *v.* Brandon, 2 Camp. 358; State *v.* Brazil, Rice (S. C.), 258.

[5] State *v.* Alexander, 7 Rich. (S. C.) 5.

[6] Judge King's Charge, 4 Pa. L. J. 31.

[7] Com. *v.* Humphries, 7 Mass. 242; State *v.* Gorham, 55 H. H. 152· Com. *v.* Holland, 1 Duvall (Ky.), 182.

felonious, against the will or without the consent of the owner, and with intent to deprive him of his property, has been shown under that title.[1] We are now to consider the additional circumstances which elevate larceny into robbery.

§ 206. **Force and Violence.** — There must be force and violence or putting in fear, and this force and violence or putting in fear must be the means by which the larceny is effected, and must be prior to or simultaneous with it. If the larceny is effected first, and the fear or force is applied afterwards for the purpose of enabling the thief to retain possession of his booty, or for any other purpose, there is no robbery.[2]

While mere snatching from the hand or picking from the pocket of a person will be but larceny from the person,[3] it seems to be the law that if the article be attached to the person, and the force be such as to break the attachment, or to injure the person from whom the property is taken, as where a steel or silk chain attached to the stolen watch and around the neck was broken,[4] or a lady's ear from which a ring was snatched was torn, the offence is robbery, and not merely larceny from the person.[5] So, if there is a struggle for the possession of the property between the thief and the owner.[6] So, also, if force be applied for

[1] *Ante*, § 148.

[2] Harman's Case, 1 Hale P. C. 534; Rex *v.* Francis, 2 Str. 1015; Rex *v.* Gnosil, 1 C. & P. 304.

Ante, § 164.

[4] Rex *v.* Mason, R. & R. 419; State *v.* McCune, 5 R. I. 60.

[5] Rex *v.* Lapier, 2 East P. C. 557.

[6] Davies Case, C. B. 11 Anne, 1 Leach C. L. 290; State *v.* Broderick, 59 Mo. 318. But see State *v.* Johns, 5 Jones (N. C.), 163.

the purpose of drawing off the attention of the person being robbed.[1]

§ 207. **Putting in Fear.** — Neither actual violence nor the fear of actual violence is necessary to constitute the offence. The putting in fear is using a certain kind of force, or constructive violence.[2] Fear of personal injury is enough, as where there is a threat to shoot, or strike with a dangerous weapon, or in some other way inflict personal injury, even though it be in the future.[3] Time, place, and circumstance, as by the gathering about of a crowd apparently sympathizing with the thief, and showing that resistance would be vain,[4] are to be taken into account in determining whether this fear exists.[5] But the fear induced by a threat to injure one's character, or to deprive him of a situation whereby he earns his living, is also enough.[6] It is said, however, that the fear of injury to character, and consequent loss of means of livelihood, has never been held sufficient, except in cases where the threat was to charge with the crime of sodomy.[7] So, also, it has been said that fear, induced by the threatened destruction of a child, is sufficient.[8] And

[1] Mahoney *v.* People, 5 T. & C. 329; Anonymous, 1 Lewin, 300; Com. *v.* Snelling, 4 Binn. (Pa.) 379.

[2] Donnally's Case, 1 Leach, 196; Long *v.* State, 12 Ga. 293.

[3] State *v.* Howerton, 58 Me. 581.

[4] Hughes's Case, 1 Lew. 701.

[5] Long *v.* State, 12 Ga. 293.

[6] Rex *v.* Egerton, R. & R. 375; People *v.* McDaniels, 1 Parker C. R. (N. Y.) 198; Rex *v.* Gardiner, 1 C. & P. 479.

[7] Britt *v.* State, 7 Humph. (Tenn.) 45; Long *v.* State, 12 Ga. 293; Rex *v.* Wood, 2 East P. C. 732.

[8] Hatham, B., in Donnally's Case, 1 Leach C. L. 196; Eyre, C. J., Reanes's Case, 2 Leach C. L. 616.

there seems to be no doubt that fear induced by threats to destroy one's property, as by threats of a mob to pull down one's house, is sufficient.[1]

It is sometimes said that there must exist the element of fear in every case, in order to constitute the crime of robbery.[2] But there may be cases where there seems to be no opportunity for the action of fear; as where one is, without warning, knocked senseless by a single blow,[3] or is not aware of the purpose and has actually no fear, that being only a diversion of the force which is used,[4] or is already, when assaulted, in such a state of insensibility as to be incapable of fear;[5] and the weight of authority, both ancient and modern, is that it need not be alleged in the indictment under the common law.[6] And those courts which hold that fear is necessary make the force which would ordinarily excite fear conclusive evidence of it.[7]

The cases just cited also show that "against the will," means without consent.[8] Where three parties get up a pretended robbery for the sake of obtaining a reward, the taking is not against the will or without consent.[9] Nor is it where the property is

[1] Rex *v.* Astley, 2 East P. C. 729; Rex *v.* Winkworth, 4 C. & P. 892.

[2] 1 Hawk. P. C. c. 34.

[3] Foster C. L. 128; McDaniel *v.* State, 8 S. & M. (Miss.) 401.

[4] Com. *v.* Snelling, 4 Bin. (Pa.) 379; Mahoney *v.* People, 5 T. & C. 329.

[5] Bloomer *v.* People, 1 Abb. Ap. Dec. (N. Y.) 146.

[6] Donnally's Case, 1 Leach C. L. 229; McDaniel's Case, Foster C. L. 128; Com. *v.* Humphries, 7 Mass. 242; State *v.* Broderick, 59 Me. 318; State *v.* Gorham, 55 N. H. 152.

[7] Long *v.* State, 12 Ga. 293; Reanes's Case, 2 Leach C. L. 617.

[8] See also LARCENY, *ante*, §§ 148, 195.

[9] Rex *v.* McDaniel, Foster C. L. 128.

parted with for the purpose of making a case for prosecution.[1]

§ 208. **The taking** must be from the person or from the personal presence. Thus, if a man assaults another, and, having put him in fear, drives away his cattle from the pasture,[2] in his presence, or picks up a purse from the ground, which had fallen, or been thrown into a bush during the scuffle, the taking is complete.[3] But the possession of the robber, if complete, need be only momentary; and if it be immediately taken away from him, it is still robbery.[4] Though the thief obtain possession by delivery from the owner, as where he points a pistol, and either directly demands money,[5] or demands it under pretence of asking alms,[6] even after having resorted to force ineffectually,[7] — the delivery in each case being induced by fear, — it is a taking within the meaning of the law, and he is in each case guilty of robbery. And so may a forced sale be robbery, where the delivery is obtained by fear,[8] if the full value be not given in return for the property taken.[9] And where a man who is attempting rape, to whom the woman

[1] Rex *v.* Fuller, R. & R. 408.

[2] 1 Hawk. P. C. c. 34, § 6.

[3] 2 East P. C. 707; United States *v.* Jones, 3 Wash. C. Ct. 209; Owens *v.* State, 3 Cold. (Tenn.) 350; 1 Hale P. C. 532; Long *v.* State, 12 Ga. 293.

[4] Peat's Case, 1 Leach C. L. 228.

[5] Norden's Case, Foster C. L. 129.

[6] 1 Hale P. C. 533.

[7] 1 Hawk. P. C. c. 34, § 8.

[8] Rex *v.* Simons, 2 East P. C. c. 16, § 128.

[9] Fisherman's Case, 2 East P. C. c. 16, § 98; 4 Bl. Com. 244.

gives money to induce him to desist, continues his assault, he is guilty of robbery.[1]

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SEDUCTION.

§ 209. It is at least doubtful whether seduction was an indictable offence by the old common law.[2] It seems, however, to have been the subject of statutory prohibition as long ago as the time of Philip and Mary,[3] whereby, after reciting that "maidens and women" are, "by flattery, trifling gifts, and fair promises," induced by "unthrifty and light personages," and by those who "for rewards buy and sell said maidens and children," it is made unlawful for any person or persons to "take or convey away, or cause to be taken or conveyed away, any maid or woman-child, being under the age of sixteen years," out of the possession of their lawful custodian. There seems to be no reason to doubt that this statute became a part of the common law of the colonies,[4] and it seems to have been adopted by statute, and acted upon in South Carolina with certain modifications, — the limitation to heiresses, for instance, being regarded as not applicable to the condition of society in that jurisdiction. Indeed, it was held that such a limitation was not in the act itself fairly interpreted.[5] The distinction be-

[1] Rex *v.* Blackham, 2 East P. C. 117.

[2] Rex *v.* Moore, 2 Mod. 128; Rex *v.* Marriot, 4 Mod. 144; 1 East P. C. 448.

[3] 4 & 5 Ph. & M. c. 8, §§ 1, 2.

[4] Com. *v.* Knowlton, 2 Mass. 534.

[5] State *v.* Findley, 2 Bay (S. C.), 418; O'Bannon's Case, 1 Bail. 144. See also State *v.* Tidwell, 5 Strobh. (S. C.) 1, which, however, is a case for abduction under the third and fourth sections of the statute.

tween abduction and seduction seems to be that the former is presumed to be by force, or its equivalent, for the purposes of marriage or gain; while the latter is presumed to be without force, and by enticement, for the purpose of illicit intercourse.[1] The distinction is by no means clearly made, and the decisions in indictments for abduction and seduction will be found interchangeably useful to be consulted. In Connecticut, the statute punishes "whoever seduces a female;" and seduction is held *ex vi termini* to imply sexual intercourse, and is defined to be "an enticement" of the female "to surrender her chastity by means of some art, influence, promise, or deception, calculated to effect that object;" and the seduction is proved, though it appear that it followed a promise of marriage made in good faith.[2] Here, too, as in the cases cited illustrative of the statutes against abduction, by "previous chaste character," is meant actual personal virtue,[3] which is presumed to exist, unless it be shown that the woman has had illicit intercourse with the defendant or another prior to the seduction,[4] and may still exist if it be shown that, though at some former time she may have yielded to the defendant, she had reformed, and was a chaste woman at the time of the seduction.[5] And it seems that, if the alleged seducer be a married

[1] State *v.* Crawford, 34 Iowa, 40.

[2] State *v.* Bearce, 27 Conn. 319; Dinkey *v.* Com., 17 Pa. St. 146; Croghan *v.* State, 22 Wis. 444.

[3] People *v.* Kenyon, 26 N. Y. 203; Crozier *v.* People, 1 Parker C. C. 457.

[4] Wood *v.* State, 48 Ga. 192; State *v.* Higdon, 32 Iowa, 262; People *v.* Brewer, 27 Mich. 134; People *v.* Clark, 38 Mich. 112.

[5] State *v.* Timmens, 4 Minn. 325; State *v.* Cavinam, 18 Iowa, 372. But see Cook *v.* People, 2 N. Y. Sup. Ct. 404.

man, and known to be such by the female said to have been seduced, and the means of seduction are alleged to be a promise of marriage, this is not such a false and fraudulent act as could lead to the betrayal of the confidence of any virtuous woman, and has not therefore the element of fraud which is necessary to constitute the crime of seduction.[1]

SODOMY.

§ 210. **Sodomy**, otherwise called bestiality, buggery, and the crime against nature, is the unnatural carnal copulation of one human being with another, or with a beast.[2] It was anciently a felony at common law, punishable by burning or burying alive, and subsequently by hanging;[3] and till recently, in some of the States, has been a capital offence. To constitute the offence between human beings, the act must be *per anum*.[4] A fowl is not a beast.[5]

[1] Wood *v.* State, *ubi supra;* People *v.* Alger, 1 Parker C. C. (N. Y.) 337. See also Boyce *v.* People, 55 N. Y. 644, and Abduction, *ante*, § 44. The case of Wood *v.* State, 48 Ga. 192, is sometimes cited as holding the doctrine that it is not necessary, in order to show that a woman is not a virtuous woman, to prove that she has been guilty of previous illicit intercourse, but it is sufficient to show that her mind has become deluded by unchaste and lustful desires. But though this was the view of the judge who gave the opinion, it was distinctly disavowed by Warren, C. J., and Trippe, J., — a majority of the court, — who held to the contrary.

[2] 1 Hawk. P. C. bk. 1, c. 4.

[3] Ibid.

[4] Rex *v.* Jacobs, R. & R. 339.

[5] Rex *v.* Mulreaty, MSS., Bailey, J., cited in 1 Russ. Crimes, bk. 3, c. 7. Whether penetration is sufficient to constitute the crime without emission, see Rape. But few cases occur in the reports. Com. *v.* Thomas, 1 Va. Cas. 307; Lambertson *v.* People, 5 Parker (N. Y.) C. R

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TREASON.

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

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

200; Com. *v.* Snow, 111 Mass. 415; Fennell *v.* State, 32 Texas, 378, where it is held by a divided opinion not to be an offence on the ground that it is not defined by statute, no undefined offence being punishable there. See also Davis *v.* State, 3 H. & J. (N. Y.) 154.

[1] 4 Bl. Com. 75; Respublica *v.* Chapman, 1 Dall. (Pa.) 56.

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

By the Constitution of the United States,[1] treason is declared to consist only "in levying war against them, or in adhering to their enemies, giving them aid and comfort;" and this must be by a person owing allegiance to the United States.[2] Substantially the same definition is adopted by the several States, some of them, however, setting out, either in their constitutions or the statutes, at some length, the particular methods of adhesion and of giving aid and comfort which shall constitute treason.

§ 213. **War may be levied** not only by taking arms against the government, but under pretence of reforming religion or the laws, or of removing evil counsellors or other grievances, whether real or pretended. To resist the government forces by defending a fort against them is levying war, and so is an insurrection with an avowed design to put down all enclosures, all brothels, or the like; the universality of the design making it a rebellion against the State and a usurpation of the power of government. But a tumult, with a view to pull down a particular house or lay open a particular enclosure, amounts, at best, to riot, there being no defiance of public government.[3] An insurrection to prevent the execution of an act of Congress altogether, by force and intimidation, is levying war;[4] but the forcible resistance of the execution of such an act for a present purpose, and not for a purpose of a public

[1] Art. 3, § 3.

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

[3] 4 Bl. Com. 81, 82; *ante*, RIOT.

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

and general character, does not amount to treason;[1] nor does the mere enlistment of men into service.[2] There must be, to constitute an actual levy of war, an assemblage of persons met for a treasonable purpose, and some overt act done, or some attempt made by them, with force, to execute, or towards executing, that purpose. There must be a present intention to proceed to the execution of the treasonable purpose by force. The assembly must be in a condition to use force, if necessary, to further, or to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner for the express purpose of overawing or intimidating the public, and to attempt to carry into effect their treasonable designs, that will, of itself, amount to a levy of war, although no actual blow has been struck or engagement has taken place.[3] So, aiding a rebellion, by fitting out a vessel to cruise against the government rebelled against in behalf of the insurgents, is levying war, whether the vessel sails or not.[4] So is a desertion to, or voluntary enlistment in, the service of the enemy.[5]

In England, "levying war" is held to mean: 1st. Attacking, in the manner usual in war, the Queen herself or her military forces, acting as such by her orders in the execution of their duty; 2d. Attempting

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

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

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

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

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

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

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

§ 214. **Misprision of treason** is the concealment of, by one having knowledge, or the failure to make known to the government, any treason committed or (in some of the States) contemplated.[2]

§ 215. **Evidence.** — The rule is incorporated into the Constitution of the United States and into those of most of the States, that treason can only be proved by the evidence of two witnesses to the same overt act, or by confession in open court. Unless the overt act is so proved, all other evidence is irrelevant.[3] But an overt act being proved by two witnesses, all other requisite facts may be proved by the testimony of a single witness.[4]

The common-law rule was that there must be two

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

[2] See the constitutions and statutes of the several States.

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

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

witnesses; but it was held sufficient if one testified to one overt act, and another to another. And this may be the rule now in those States whose constitutions or statutes do not contain the explicit language of the Constitution of the United States.[1] The ordinary rules of evidence generally prevail in the proof of misprisions.[2]

A confession not in court may be proved by the testimony of one witness, as corroborating other testimony in the case; but in those States prohibiting conviction unless upon confession in open court, it cannot be made the substantive ground of conviction.[3]

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

[2] 3 Greenl. Ev. § 247.

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

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