

COMMENTARIES
ON
THE CRIMINAL LAW.

BY
JOEL PRENTISS BISHOP.

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CRIMINAL LAW.

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BOOK X.

SPECIFIC OFFENCES.

For ABDUCTION OF WOMEN, as to both law and procedure, see Stat. Crimes.
And see SEDUCTION.

ABORTION, as to both law and procedure, see Stat. Crimes.

ADULTERATED MILK, selling of, as to both law and procedure, see Stat. Crimes.

ADULTERY, fornication, and kindred offences, as to both law and procedure, see Stat. Crimes.

CHAPTER I.

AFFRAY.¹

§ 1. **How defined.** — An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.²

Distinguished from Assault — From Riot — How Public. — “An assault which happens in a private place, out of the hearing or seeing of any except the persons concerned, cannot be said to be to the terror of the people, and is thus distinguished from an affray; and an affray differs also from a riot in this, that three persons at least are necessary to constitute a riot, whereas two persons only may be guilty of an affray.”³ So there may be an affray on a falling out too sudden to amount to a riot.⁴

§ 2. **Further as to the Place.** — We have seen⁵ what is the meaning of the words “public place” in statutes against gaming,

¹ See RIOR; ROYR. For the pleading, practice, and evidence, see Crim. Proced. II. § 16 et seq. And for further views relating to Affray, see Stat. Crimes, § 539, 542, 560. As to the right to suppress affrays, see post, § 653 et seq., and Crim. Proced. I. § 166, 183.

² Vol. I. § 535.

³ 1 Gab. Crim. Law, 62. And see

1 Hawk. P. C. Curw. ed. p. 487, § 1.

⁴ 1 Hawk. P. C. Curw. ed. p. 514, § 3;

1 Russ. Crimes, 3d Eng. ed. 291.

⁵ Stat. Crimes, § 293; Vol. I. § 1128.

and in the common law which makes the public exposure of the person an indictable nuisance; and evidently their signification is the same in the common-law definition of affray. The indictment must charge the act to have been done at a public place, or in some locality which appears to have been public, and the proof must sustain this allegation.¹ A field one mile from the highway, and surrounded by a forest, has been held not to be a place in which this offence could be committed, though three spectators were casually present at the fight;² but an enclosed lot, ninety feet from the street, and visible from it, has been adjudged to be public within our definition.³ If the fight ends at a public place, though commencing at a private one, it is sufficient.⁴

§ 3. **The Fighting** — (Words — Blows — Minor Breaches of Peace). — Mere words are not a fighting within the definition of affray.⁵ And if one by insulting language provokes another to attack him in a public place, but offers no resistance to the attack when made, he does not become guilty of this offence.⁶ If he were himself ready to fight, while the other gave the first blow, it would be otherwise.⁷ The majority of the Tennessee judges apparently laid down the doctrine, that no acts creating terror, short of coming to blows, are sufficient.⁸ "But," says Hawkins, "granting that no bare words, in the judgment of the law, carry in them so much terror as to amount to an affray, yet it seems certain that, in some cases, there may be an affray where there is no actual violence; as, where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by many

¹ The State v. Sumner, 5 Strob. 53; The State v. Heflin, 8 Humph. 84; Wilson v. The State, 3 Heisk. 278; Train & Heard Prec. 27; Crim. Proceed. IL § 19.

² Taylor v. The State, 22 Ala. 15. See Vol. I. § 243-246; Simpson v. The State, 5 Yerg. 356; The State v. Heflin, 8 Humph. 84; The State v. Sumner, 5 Strob. 53; Reg. v. Hunt, 1 Cox C. C. 177.

³ Carwile v. The State, 35 Ala. 392.

⁴ Wilson v. The State, supra.

⁵ 1 Hawk. P. C. Curw. ed. p. 487, § 2. See post, § 25.

⁶ O'Neill v. The State, 16 Ala. 65. And see 1 Russ. Crimes, 3d Eng. ed. 292. Yet it has been held, that, if one by such abusive language toward another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow. The State v. Perry, 5 Jones, N. C. 9.

⁷ The State v. Sumner, 5 Strob. 53.

⁸ Simpson v. The State, 5 Yerg. 356. See The State v. Allen, 4 Hawks, 356; Cash v. The State, 2 Tenn. 198.

statutes."¹ The case thus put by Hawkins seems not to be one of affray, which requires two persons, but a mere indictable breach of the peace in the nature of a public nuisance, which may even be committed by a single individual.² Still it conducts us to the better doctrine; namely, that actual blows are not necessary, provided the combatants, arming themselves, proceed so far as reasonably to excite terror in persons who may witness them.³ Perhaps the true statement is, that what is done must sustain the same relation to a fighting which an assault does to a battery.⁴

§ 4. **The Terror**. — There seems to be required no actual terror among the spectators; but such as the law will infer from the fighting is sufficient in the absence of terror in fact.⁵

§ 5. **Aggravations of the Offence**. — Affray, like assault,⁶ may be committed under circumstances of special aggravation, when, ceasing to be known as affray, it will merely constitute an element in a higher crime; or, without changing its name, it will in fact become a higher offence, or appeal to the discretion of the court for a heavy punishment, thus, —

Illustrations — (Duel — Persons — Place, &c. — Rescue). — It "may receive," says Russell, "an aggravation from its dangerous tendency: as where persons coolly and deliberately engage in a duel,⁷ which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves. And an affray may receive an aggravation from the persons against whom it is committed: as where the officers of justice are violently disturbed in the due execution of their office by the rescue of a person legally arrested, or the bare attempt to make such a rescue; the ministers of the law being under its more immediate

¹ 1 Hawk. P. C. Curw. ed. p. 488, § 4.

² Vol. I. § 536-540.

³ Hawkins v. The State, 18 Ga. 322; O'Neill v. The State, 16 Ala. 65; The State v. Lanier, 71 N. C. 288; The State v. Davis, 65 N. C. 298. The reader who consults these cases, however, will see that this sort of offence is sometimes called affray.

⁴ Lord Coke says: "An affray is a public offence to the terror of the king's

subjects; and is an English word, and so called because it affrighteth and maketh men afraid." 3 Inst. 158. The word, however, is said to be derived from the French *effrayer*, to terrify. 1 Russ. Crimes, 3d Eng. ed. 291.

⁵ The State v. Sumner, 5 Strob. 53.

⁶ Post, § 43-54.

⁷ It is evident that a duel would not usually, at least not always, be an affray. And see post, **DUELLING**.

protection. And, further, an affray may receive an aggravation from the place in which it is committed. It is therefore severely punishable when committed in the king's courts, or even in the palace-yard near those courts; and it is highly finable when made in the presence of any of the king's inferior courts of justice. And upon the same account, also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated."¹

§ 6. **Aggravations, continued — Raised from Misdemeanor to Felony.** — When, however, the act, though an affray, amounts also to some higher crime, it will usually, in practice, be indicted as the higher crime. If it constitutes a felony, perhaps the result will follow from principles already explained,² that it can be proceeded against only as such; since an affray, at common law, is simply a misdemeanor.

§ 7. **Analogous Offences.** — We have seen,³ that there are unnamed misdemeanors indictable at the common law, in the nature of affray, while still they are not technically such. Moreover there are several distinct common-law offences analogous, in a greater or less degree, to this common-law nuisance of an affray. It may be well to examine, in this connection, such titles as Duelling, Riot, Rout, Unlawful Assembly, and the like.

Statutory Affrays. — So there are statutes, in some of the States, against fighting together, by two or more individuals, in pursuance of a previous appointment, and the like; creating offences differing, perhaps, in a greater or less degree from the common-law affray.⁴

Statutory Disturbances of the Peace. — And there are statutes⁵ and city ordinances⁶ against disturbances of the peace by loud noises and in other ways, differing more or less in their terms, and creating offences analogous to affray.

¹ 1 Russ. Crimes, 3d Eng. ed. 291, 292. 7 Gray, 324; Shelton v. The State, 30

² Vol. I. § 787, 815.

³ Ante, § 3.

⁴ And see Commonwealth v. Welsh

Texas, 431.

⁵ Noe v. People, 39 Ill. 96.

⁶ St. Charles v. Meyer, 58 Misso. 86.

CHAPTER II.

ARSON AND OTHER BURNINGS.¹

§ 8, 9. Introduction.

10. What is a Burning.

11. What is a House.

12, 13. Ownership or Occupancy of the House.

14-16. Means and Intent of the Burning.

17. Statutory Burnings.

18-21. Remaining and Connected Questions.

§ 8. **Definition.** — Arson, at the common law, is the malicious burning of another's house.²

§ 9. **How the Chapter divided.** — The inquiries suggested by this definition are, therefore, I. What is a Burning; II. What is a House; III. The Ownership or Occupancy of the House; IV. The Means and Intent of the Burning. After discussing these we shall consider, V. Statutory Burnings; VI. Remaining and Connected Questions.

I. *What is a Burning.*

§ 10. **General Doctrine.** — For the particular discussion of this question, the reader is referred to the work on Statutory Crimes.³ The burning must be, not merely of personal property in the

¹ See, for matter relating to this title, Vol. I. § 224, 318, 329, 334, 514, 559, 577, 640, 705, 781. For the pleading, practice, and evidence, see Crim. Proced. II. § 33 et seq. For various views relating to the law and procedure in statutory arson, see Stat. Crimes, § 207, 213, 277, 289, 310, 311, 363, 534-538.

² Vol. I. § 559. The books do not differ materially in their definitions of arson. Lord Coke treats of this offence under the title "Burning of Houses," and says: "Burning is a felony at the common law, committed by any that maliciously and voluntarily, in the night or day, burneth the house of another."

³ Inst. 66. Hawkins says: "Arson is a felony at common law, in maliciously and voluntarily burning the house of another, by night or by day." 1 Hawk. P. C. Curw. ed. p. 137. East: "Arson, which was felony at common law, and anciently punished with death, is described to be the malicious and voluntary burning the house of another." 2 East P. C. 1015. The same, 2 Russ. Crimes, 3d Eng. ed. 543. The definition in the text is identical with these in meaning, but in form it is a little more compact.

⁴ Stat. Crimes, § 310; Vol. I. § 224.

house, but of something which is of the realty.¹ There need not be a blaze; some wasting must take place of the fibres of the wood, it is immaterial to how small an extent. And if then the fire is extinguished, that makes no difference.²

II. *What is a House.*

§ 11. **General Doctrine.**—Likewise the meaning of the word “house,” in the definition of arson, is discussed in the work on Statutory Crimes.³ In general terms, it is a building, with its out-buildings, finished for habitation; possibly it must be actually inhabited, but probably not. In statutes creating arsons, the word “dwelling-house” is sometimes employed; and, in such a case, if the building is finished for habitation, yet if it has never been inhabited, it does not come within the statutory term.⁴

III. *The Ownership or Occupancy of the House.*

§ 12. **One's own House.**—How the ownership is to be alleged in the indictment is a question considered in another connection.⁵ Arson is an offence against the security of the habitation, rather than the property.⁶ When, therefore, we say that the house burned must be another's, the meaning is, that it must be another's to occupy. Consequently, at common law, a man cannot commit arson of his own house, even when it is insured.⁷ But, in some of our States, there are statutes in such terms that under them a man can commit arson of his own house.⁸ Thus, in New Hampshire, the words of the statute are, “wilfully and maliciously burn any dwelling-house,” and this is held to include the burning of one's own habitation when done “wilfully and maliciously;” as, said Doe, J., “if he burns it for the purpose of destroying the home and lives of his wife and children; . . . and there may be malice in other cases.”⁹

¹ Graham v. The State, 40 Ala. 659. 218, 2 East P. C. 1025; Rex v. Proberts, 2 East P. C. 1030; Roberts v. The State, 7 Coldw. 359. And see Bloss v. Tobey, 2 Pick. 320, 325.
² People v. Haggerty, 46 Cal. 354.
³ Stat. Crimes, § 213, 277, 289.
⁴ Commonwealth v. Barney, 10 Cus. 478; Stat. Crimes, § 289.
⁵ Crim. Proceed. II. § 38-39.
⁶ Vol. I. § 577; The State v. Toole, 29 Conn. 342.
⁷ Rex v. Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025; Rex v. Proberts, 2 East P. C. 1030; Roberts v. The State, 7 Coldw. 359. And see Bloss v. Tobey, 2 Pick. 320, 325.
⁸ The State v. Elder, 21 La. An. 157; Shepherd v. People, 19 N. Y. 537.
⁹ The State v. Hurd, 51 N. H. 176, referring to The State v. Avery, 44 N. H. 392.

Insured.—Especially there are statutes making it arson for one to burn his house or other building with the intent to defraud an insurance office.¹ The intent to defraud being the gist of this form of the offence, it has been held in Illinois to be immaterial, when this intent exists, whether the policy on the building is valid or not.² But the contrary is believed to be the better doctrine, namely, that the insurance must be valid;³ because this is an attempt to defraud, and in attempts there must be a real or apparent possibility of accomplishing the wrong undertaken,⁴—as, a boy under fourteen cannot in law attempt to commit a rape,⁵ and forgery cannot be committed of an instrument which if genuine would be of no legal validity.⁶

§ 13. **Tenant — Mortgagor in Possession.**—Whether a mere tenant at sufferance can, at common law, be guilty of arson by burning the premises, is, perhaps, a point not expressly adjudicated, though it seems he cannot.⁷ A man cannot commit it of a house in which he has a lawful claim to abide: as a tenant from year to year, or from month to month,⁸ be his term however short; or under an agreement for a lease;⁹ or as mortgagor in possession, though the mortgage divested him of the legal title;¹⁰ or otherwise.

Wife — Husband.—Neither does a wife become guilty of this

¹ People v. Schwartz, 32 Cal. 160; People v. Hughes, 29 Cal. 257. In New York, by force of the statute, such an act may be arson of the first degree. Shepherd v. People, 19 N. Y. 537, 542, overruling People v. Henderson, 1 Parker, 560, and a dictum in People v. Gates, 15 Wend. 159.
² McDonald v. People, 47 Ill. 533. See People v. Hughes, supra.
³ If this proposition has not been directly adjudged, it appears to have been assumed in various cases. Evans v. The State, 24 Ohio State, 458; Johns v. People, 25 Mich. 499; The State v. Watson, 63 Maine, 128; Rex v. Ellicombe, 5 Car. & P. 522, 1 Moody & R. 260; Rex v. Doran, 1 Esp. 127; Reg. v. Kitson, Dears. 187, 20 Eng. L. & Eq. 590.
⁴ Vol. I. § 738.
⁵ Vol. I. § 746.
⁶ Vol. I. § 748; post, § 538.
⁷ See Sullivan v. The State, 5 Stew.

& P. 175; Rex v. Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025; People v. Van Blaricum, 2 Johns. 105, where the court said of the question of ownership: “It is enough that it was his [the occupant's] actual dwelling at the time;” and declined to inquire into the terms on which he held it. But see Ritchey v. The State, 7 Blackf. 168; 2 East P. C. 1022.
⁸ Rex v. Pedley, 1 Leach, 4th ed. 242, Cald. 218, 2 East P. C. 1026; McNeal v. Woods, 3 Blackf. 485; Holmes's Case, Cro. Car. 376, W. Jones, 351; 1 Hawk. P. C. Curw. ed. p. 138, § 7, 10. It seems, however, that he may be an accessory before the fact to the crime of another who burns the house. Allen v. The State, 10 Ohio State, 287, 302.
⁹ Rex v. Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1026.
¹⁰ Rex v. Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025.

offence by burning her husband's house.¹ So also, if, under the late statutes which prevail in most of our States, a wife owns the house in which she and her husband reside, he cannot commit arson by burning it, though the statute of arson has the words "dwelling-house of *another*."²

Servant. — A servant, however, who merely dwells within the building while the legal possession remains in the master, sustains to it a different relation, and he commits the offence when he maliciously burns it.³

Landlord. — There is little doubt, though the point appears not to have been directly decided, that, if a person maliciously sets fire to a house of which he is the general owner, but which is lawfully in the possession of another, as tenant or otherwise, it is arson.⁴

Widow dowerable. — A widow, entitled to dower, cannot claim to occupy any part of the premises, until the dower is assigned to her;⁵ therefore she has not such an interest therein as frees her from the guilt of this offence, if she maliciously burns the house.⁶

IV. *The Means and Intent of the Burning.*

§ 14. **Not Specific Intent** — (**Accidental Burning** — **Degree of Malice**). — Arson does not belong to that class of offences, spoken of in the preceding volume,⁷ which require a specific intent to do the particular thing, in distinction from general malice.⁸ Therefore if one, not meaning to burn a house, accidentally burns it while endeavoring to do some other wrong, he is guilty of arson, provided the wrong he intends is of sufficient magnitude.⁹ But because arson is a felony at the common law, and because there is at the common law no low degree of it (such as man slaughter is in felonious homicide), the courts have required a

¹ *Rex v. March*, 1 Moody, 182, decided on Stat. 7 & 8 Geo. 4, c. 30, § 2.

² *Snyder v. People*, 26 Mich. 106. And see 2 *Bishop Mar. Women*, § 152.

³ *Rex v. Gowen*, 2 East P. C. 1027, 1 Leach, 4th ed. 246, note.

⁴ *Rex v. Harris*, 2 East P. C. 1023, 1024, Foster, 113, 115; 1 *Gab. Crim. Law*, 76; 4 *Bl. Com.* 221; *Sullivan v. The State*, 5 Stew. & P. 175; *Sweetapple v. Jesse*, 5 B. & Ad. 27. Commonwealth

v. Erskine, 8 Gratt. 624, decided under a statute, may perhaps be deemed an adjudication of the exact point in the text.

⁵ *Bolster v. Cushman*, 34 Maine, 428; 1 *Bishop Mar. Women*, § 349-352.

⁶ *Rex v. Harris*, supra.

⁷ Vol. I. § 320, 335, 342, 411.

⁸ *Thomas v. The State*, 41 Texas, 27; *Reg. v. Regan*, 4 Cox C. C. 335.

⁹ Vol. I. § 327, 330, 334.

greater evil in the intent, to constitute it where the act is not specifically meant, than is necessary to constitute most other crimes of this class.¹

§ 15. **Burning through Negligence, while committing a Civil Trespass.** — Thus, although mere carelessness is criminal,² Lord Coke has said, what is no doubt correct as a general proposition, that a burning "done by mischance or negligence" is not arson.³ And the same is true where the burning results accidentally from the intentional commission of a mere civil trespass.⁴ But if, to defraud an insurance office, where the common law on the subject prevails, a man sets fire to his own house, whereby his neighbor's is burned, he is guilty of arson in burning the neighbor's;⁵ so that it is not absolutely necessary the intent should be to commit a felony.

Intent to commit Felony — **Burning House not meant.** — *A fortiori*, if one, intending to burn the house of a particular person, accidentally burns another's, he commits the offence;⁶ as doubtless he does in all cases where his intent is to do an act which is a felony.⁷

Burning Jail to escape.⁸ — If a prisoner burns a hole in his cell, or otherwise burns the building in which he is confined, not from a desire to consume the building, but to effect his escape, his offence must be, according to the foregoing doctrines, arson. And so it has been held.⁹ On the other hand, the contrary has also been held;¹⁰ and, unhappily, on this side are the majority of the cases. One learned judge, after yielding to the authorities which sustain this erroneous view, added: "If, however, a prisoner, or a number of prisoners in concert, should set fire to a jail without

¹ Vol. I. § 334. In New York, a statute regulates the offence; and, under it, there are different degrees. *People v. Henderson*, 1 Parker, 560; *Shepherd v. People*, 19 N. Y. 537. It is so likewise in some of the other States.

² Vol. I. § 216, 217, 313, 321.

³ 3 Inst. 67. And see 2 East P. C. 1019. "By statute 6 Anne, c. 31, § 3," says Mr. East, *ib.*, "any servant negligently setting fire to a house or out-house, shall, on conviction before two justices of the peace, forfeit 100l. or be sent to the house of correction eighteen months."

⁴ 2 East P. C. 1019; Vol. I. § 334.

⁵ *Rex v. Proberts*, 2 East P. C. 1030, 1031; *Rex v. Isaac*, 2 East P. C. 1031.

⁶ 3 Inst. 67.

⁷ Vol. I. § 334; 2 East P. C. 1019.

⁸ A jail is an "inhabited dwelling-house," within the statutes of arson. Stat. Crimes, § 207.

⁹ *Luke v. The State*, 49 Ala. 30.

¹⁰ *People v. Cotteral*, 13 Johns. 115. *The State v. Mitchell*, 5 Ire. 350, decided, however, under a statute, which possibly influenced the result; *Delany v. The State*, 41 Texas, 601. See *Jenkins v. The State*, 63 Ga. 33.

such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson."¹ It is difficult to see why this admission should not carry with it the entire better doctrine.

Two Intent. — And hence we see, that, in arson, as in other crimes,² if the accused had the law's evil intent, his guilt remains, though he had also some other intent. Thus, if the primary object of a prisoner in setting a fire is to obtain a reward for giving the earliest information of the fire at an engine station, he thereby commits arson. And "the jury," said Erle, J., "will be perfectly justified in finding that his intent was to injure the person whose property the premises were, and who would necessarily be injured by such an act, although he might have an ulterior object of obtaining the reward."³

§ 16. **Kindling Fires incautiously — Burning own House to burn Neighbor's.** — There is another class of cases, governed partly by the principle laid down in the last two sections; and partly by the doctrine, that, as a question of proof, a man is presumed to intend the natural and probable consequences of his own voluntary act.⁴ If, therefore, one kindles a fire in a stack, situated so that it is likely to communicate, and communicates in fact, to an adjoining building, he is chargeable with burning the building.⁵ And for a still stronger reason, if he applies the torch to his own house, intending to burn his neighbor's also, and the neighbor's is burned, he commits this offence.⁶

V. Statutory Burnings.

§ 17. **General View.** — In the work on Statutory Crimes, the topic of the present sub-title is somewhat discussed.⁷ There are, in the several States, statutes against the burning of shops, dwell-

¹ Roberts, C. J., in *Delany v. The State*, supra, at p. 604.

² Vol. I. § 337-341.

³ *Reg. v. Regan*, 4 Cox C. C. 335.

⁴ Vol. I. § 734, 735.

⁵ *Rex v. Cooper*, 5 Car. & P. 535.

And see *Reg. v. Price*, 9 Car. & P. 729; *Reg. v. Fletcher*, 2 Car. & K. 215; The

State v. Laughlin, 8 Jones, N. C. 354; *Overstreet v. The State*, 46 Ala. 30.

⁶ *Holmes's Case*, Cro. Car. 376, W. Jones, 351; *Rex v. Pedley*, Cald. 218, 2 East P. C. 1026; *Rex v. Schofield*, Cald. 397.

⁷ Stat. Crimes, § 535 et seq., and at other places.

ing-houses,¹ and the like; but the common-law rules concerning arson are ordinarily sufficient guides in their interpretation.² Thus, where an act of the Connecticut legislature provided a punishment for "every person who shall wilfully burn, being the *property of another*, any ship or other vessel, any office, store, shop," &c., the court decided, following the common-law rule concerning arson, that a mere special property in the person alleged to be the owner is enough.³

¹ Stat. Crimes, § 289 et seq.

² Stat. Crimes, § 130-141, 242, 268.

³ *The State v. Lyon*, 12 Conn. 487.

Let us look at a few points adjudged under statutes: —

Inhabited Dwelling. — In Georgia, a house from which the occupants are temporarily absent, while their effects remain, has been deemed to be an occupied dwelling-house, within a statute against arson. *Johnson v. The State*, 48 Ga. 116. But in New York, where a statute provided that one convicted of "wilfully burning any *inhabited dwelling*" shall suffer death; the court, in construing it, observed: "By the addition of the word 'inhabited,' the legislature evidently intended to make a distinction between the act of burning a dwelling-house when persons were actually in it at the time, and burning an uninhabited dwelling-house; the one offence being punishable by death, and the other by imprisonment." It was held, however, that the burning need only be the common-law burning, it not being necessary that the entire building should be consumed. *People v. Butler*, 16 Johns. 203, 204. In a later New York case, where the offence alleged was arson of the first degree, which, by the statute, "consists in wilfully setting fire to, or burning, in the night-time, a dwelling-house in which there shall be at the time some human being; and every house, prison, jail, or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein;" it was held by the majority of the court, one judge dissenting, that, contrary to the common-law rule, a man may commit this offence of statutory arson in the first degree by burning his own

house. *Shepherd v. People*, 19 N. Y. 537, 540; overruling a dictum in *People v. Gates*, 15 Wend. 159, and the decision in *People v. Henderson*, 1 Parker, 560.

In one's own Occupation. — We have seen (ante, § 12), that under various statutes one may commit arson of his own house. So in Ohio, a tenant may commit arson of the premises he occupies, by force of a statute which has superseded the common law. The statute is: "If any person shall wilfully and maliciously burn, &c., any dwelling-house, &c., &c., every person so offending shall be deemed guilty of arson." It will be remembered, that there are no common-law offences in Ohio. Vol. I. § 35. Said Sutherland, J.: "Our statute against the burning of buildings is not confined to the common-law offence of arson, or felonious burning. It seems to comprehend that kind of burning, which, at common law, constituted merely a high misdemeanor, as well as those which were arson, or felonies, at common law." *Allen v. The State*, 10 Ohio State, 287, 302.

Time of the Burning. — At common law, the burning is equally arson whether done in the night or day. Herein this offence differs from burglary. But, in some of the States, there are statutes which make a burning in the night a heavier crime than in the day. *Brooks v. The State*, 51 Ga. 612; *Commonwealth v. Horrigan*, 2 Allen, 159; *Commonwealth v. Flynn*, 3 Cush. 525.

Other Provisions. — As to other statutes, see *The State v. Mitchell*, 5 Ire. 350; *People v. Van Blaricum*, 2 Johns. 105; *People v. Cotteral*, 18 Johns. 115; *Commonwealth v. Posey*, 4 Call, 109; *Commonwealth v. Curran*, 7 Grat. 619; *Commonwealth v. Erskine*, 8 Grat. 624; *Commonwealth v. Van Shaack*, 16 Mass.

VI. *Remaining and Connected Questions.*

§ 18. *Degree of Crime and Punishment.* — Arson is a common-law felony; ¹ punishable, therefore, originally with death. But it is now dealt with more mildly in most of the States, as the reader will see on referring to the statutes.² The other burnings mentioned are of such degree of crime, and subject to such punishment, as the particular legislative act, or the general statutory law of the State prescribes.³

§ 19. *Degrees.* — The statutes of New York divide arson into four degrees; but it is not necessary to explain them here. This is a provision of a kind, which, in most of the States, is constantly shifting.⁴

§ 20. *Attempts.* — According to principles laid down in the preceding volume,⁵ an attempt to commit arson or a statutory burning is an indictable misdemeanor.⁶ Thus, to solicit another to perpetrate such an offence, though the one soliciting does not intend to be present, and the offence is not in fact committed, is indictable as an attempt.⁷ So is the burning of one's own house

105; *Commonwealth v. Squire*, 1 Met. 258; *The State v. O'Brien*, 2 Root, 516; *Jones v. Hungerford*, 4 Gill & J. 402; *Wallace v. Young*, 5 T. B. Monr. 155; *Rex v. Taylor*, 1 Leach, 4th ed. 49, 2 East P. C. 1020; *Rex v. Judd*, 1 Leach, 4th ed. 484, 2 T. R. 255, 2 East P. C. 1018; *Rex v. March*, 1 Moody, 182; *Reg. v. Clayton*, 1 Car. & K. 128; *Reg. v. Paice*, 1 Car. & K. 73; *The State v. Taylor*, 45 Maine, 322.

¹ 3 Inst. 66; 2 East P. C. 1015; 1 Hale P. C. 566, 570; *Sampson v. Commonwealth*, 5 Watts & S. 385.

² See Vol. I § 615, 616, 933, 939. As to South Carolina, see *The State v. Bosse*, 8 Rich. 276; as to North Carolina, *The State v. Seaborn*, 4 Dev. 305; as to Virginia, *Commonwealth v. Posey*, 4 Call, 109; as to the District of Columbia, *United States v. White*, 5 Cranch, C. C. 73; as to Massachusetts, *Commonwealth v. Wyman*, 12 Cush. 237.

³ See Vol. I § 611-628.

⁴ See the proposed Penal Code of New York, reported by Field and others, commissioners, A. D. 1864, p. 191-193; ante,

§ 14, note. "Adjoining." — A statute providing that the firing of a building not the subject of arson in the first degree, but adjoining to or within the curtilage of a dwelling-house, shall be arson in the second degree; the court held, that the word "adjoining" means in actual contact with. *Peverelly v. People*, 8 Parker, 59.

⁵ Vol. I. § 224, 728 et seq.

⁶ 1 Hale P. C. 568; *Commonwealth v. Flynn*, 3 Cush. 625; *Reg. v. Clayton*, 1 Car. & K. 128.

⁷ *People v. Bush*, 4 Hill, N. Y. 133.

This case was, indeed, decided under a statute, which exists in several other States as well as in New York, providing that "every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, shall," &c.; yet this statute is itself only declaratory of the common law. See Vol. I. § 743; *Reg. v. Clayton*, 1 Car. & K. 128.

with the intent thereby to consume another's, though the other's house be not in fact burned.¹ And if one lights a match to set the fire, but abandons the undertaking on discovering that he is watched, he commits the indictable attempt.²

§ 21. *The Intent in Attempt* — "To the Terror of the Inhabitants" — *Public Nuisance.* — We have seen,³ that, to constitute an attempt, strictly speaking, there must be the intent in fact, as distinguished from a mere intent in law, to do the particular thing. But the books say, that, if one, to the terror of the inhabitants, burns his own house contiguous to other houses, he commits thereby an indictable misdemeanor.⁴ The principle on which this conclusion rests, probably is, that the act of burning is a public nuisance, and not merely an attempt to commit arson; though the like conclusion might, under the facts of some cases, be sustained on the latter, as well as on the former, ground. When the act is viewed as a nuisance, however, there is no necessity that the person should really mean to burn any other house than his own.

¹ *Holmes's Case*, Cro. Car. 376, W. Jones, 351.

² Vol. I. § 727-735.

³ 2 East P. C. 1027; *Rex v. Proberts*,

⁴ *Reg. v. Taylor*, 1 Fost. & F. 511; 2 East P. C. 1030; *Rex v. Isaac*, 2 East P. C. 1031. *The State v. Johnson*, 19 Iowa, 230.

For ASSEMBLY UNLAWFUL, see UNLAWFUL ASSEMBLY.

CHAPTER III.

ASSAULT.¹

§ 22-24. Introduction.

- 25-29. The Force as being Physical.
- 30, 31. The same as being put in Motion.
- 32-34. The Peril or Fear it creates.
- 35, 36. Effect of consenting to the Force.
- 37-41. The Force as being Unlawful.
- 42-54. Aggravations of the Offence.
- 55-62. Remaining and Connected Questions.

§ 22. **Scope of this Chapter.** — The two offences of assault and battery are usually treated of in the books together, under the double title "Assault and Battery." And the present author, in his work on Criminal Procedure, treated of the pleading, practice, and evidence relating to these offences in this way. But the law of the subject may be simplified by considering "Assault" first and "Battery" afterward. Still, under this single title Assault, most of what is usually placed under the double title will be here discussed.

§ 23. **How defined.** — An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being:² as, raising a

¹ For matter relating to this title, see Vol. I § 413, note, 422, 470, 548-550, 553, 686, 736, 746, 748, 788, 795, 808, 809, 881, 882, 887, 891, 1001. See this volume, BATTERY. For the procedure, see Crim. Proc. II. § 54 et seq. And see the discussions in Stat. Crimes, § 216, 463, 480-493, 500-508, 511-514, 518, 560, 568, 751, 752.

² Vol. I. § 548. The books contain various —

Other Definitions. — "It seems," says Hawkins, "that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another: as, by striking at him with or without a weapon; or presenting a gun at him at such distance to which the gun will carry; or pointing

a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner."

1 Hawk. P. C. Curw. ed. p. 110, § 1. This definition has been generally followed by later writers. See also Johnson v. Tompkins, Bald. 571, 600; The State v. Malcolm, 8 Iowa, 413. In an Alabama case, Stone, J., said: "An assault is an attempt, or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault; neither is a conditional offer of violence. There must be a present intention to strike." Johnson v. The State, 35 Ala. 363, 365. Another learned Alabama judge once observed: "To con-

came to strike him; pointing, in a threatening manner, a loaded gun at him; and the like.

§ 24. **How the Chapter divided.** — We shall consider, I. The Force as being Physical; II. The Force as being put in Motion; III. The Peril or Fear it creates; IV. The Effect of consenting to the Force; V. The Force as being Unlawful; VI. Aggravations of the Offence; VII. Remaining and Connected Questions.

stitute an assault, there must be the commencement of an act, which, if not prevented, would produce a battery." Walker, J., in Lawson v. The State, 30 Ala. 14. Again: "An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." Peck, C. J., in Tarver v. The State, 43 Ala. 354, 366. We have likewise the following: "The definition of an assault is an offer or attempt, by force, to do a corporal injury to another; as, if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is an offence of a higher grade." Washington, J., in United States v. Hand, 2 Wash. C. C. 435, 437. "An assault is an intentional attempt, by violence, to do an injury to the person of another. It must be intentional; for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no assault. . . . And it must also amount to an attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault." Gaston, J., in The State v. Davis, 1 Ire. 125, 127. And the learned judge goes on to say: "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed; for, until the execution of it is begun, there can be no assault. We think, however, that, where an unequivocal purpose of violence is accompanied by an act, which, if not stopped or diverted, will be followed by

personal injury, the execution of the purpose is then begun, and the battery is attempted." p. 127. In a California case, Sanderson, C. J., said: "In order to constitute an assault, there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, the violence is commenced, and the assault is complete." People v. Yslas, 27 Cal. 630, 633. In The State v. Gorham, 55 N. H. 152, my own definition, in the text, was adopted.

A better but not permissible Definition. — If it were competent for a text-writer to give new shape to the law, I should, after defining a battery, say: An assault is any indictable attempt to commit a battery. We could then resort to the doctrine of attempt, as defined in our previous volume, for the settlement of undecided points respecting assault. If this definition were adopted, it would not make any thing indictable which is not so now; but it would probably bring within the title "assault" some acts, which, though now punishable by the criminal law, have not hitherto been known by this name. The New York commissioners, in their proposed Penal Code, give a definition which comes very near the one which I thus recommend. It is as follows: "An assault is any wilful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another." Draft of a Penal Code, p. 105. But a text-writer is not permitted to take such liberties. He must adhere to the divisions of the law as he finds them already drawn,—not do as he would draw them were he framing an original code.

I. *The Force as being Physical.*

§ 25. **Words alone.**—The force must be physical. Or, as expressed by Hawkins, “notwithstanding the many ancient opinions to the contrary,¹ it seems agreed at this day that no words whatsoever can amount to an assault.”² Even a threat is not such, if unaccompanied by an attempt or offer to strike.³ Yet—

Words with Conduct.—Words may explain and give character to physical acts;⁴ and may so combine with circumstances as to make that an assault which, without them, would not be such.⁵ For example,—

§ 26. **Arrest—False Imprisonment.**—As, to constitute an arrest the party need not be touched by the officer,⁶ it being sufficient if he is commanded to give himself up and does; so there may be a false imprisonment, understood to include in law an assault,⁷ without direct physical contact. Such is the doctrine in the civil suit for false imprisonment,⁸ and equally in the criminal.⁹ Thus, in a criminal case for false imprisonment, in which the defendant was not an officer, the Tennessee court held, that the

¹ Pulton, who wrote more than two hundred years ago, said: “He that is wronged in his own person, his servants, or tenants, by the menace of another, whereby he suffereth loss, shall have his action of trespass against the offender for the said menace and the hurt which he receiveth thereby; and the king also shall have a fine of the offender, for that the menace was of life and member, and suggested to be done *vi et armis*, and so tended to the breach of the peace. But if it be such a menace as doth not tend to the breach of the peace, then the law is otherwise; for then the party menaced shall neither have an action of trespass or other remedy against the menacer, neither shall the king have a fine of him. . . . As menace in words is accounted in many cases to be a mean of the breach of the peace, and so punishable by the laws of the realm; so menace by deeds, by behavior, gesture, wearing of armor, or unusual and extraordinary number of servants or attendants, is accounted to be in affray and fear of the people, a mean of the breach of the

peace, and so punishable.” Pulton de Pace, ed. of 1615, 3 b. 4.

² 1 Hawk. P. C. Curw. ed. p. 110, § 1; *People v. Bransby*, 32 N. Y. 526, 532; *Warren v. The State*, 33 Texas, 517; *Smith v. The State*, 39 Missis. 521; *The State v. Milsaps*, 82 N. C. 549; ante, § 3.

³ *The State v. Mooney*, Phillips, 434; *Smith v. The State*, 39 Missis. 521.

⁴ *The State v. Crow*, 1 Ire. 375; *Commonwealth v. Eyre*, 1 S. & R. 347; *The State v. Baker*, 65 N. C. 332; *Colquitt v. The State*, 34 Texas, 550.

⁵ Post, § 34; *The State v. Rawles*, 65 N. C. 334; *The State v. Shipman*, 81 N. C. 513.

⁶ *Gold v. Bissell*, 1 Wend. 210, 215; *United States v. Benner*, Bald. 234. As to what constitutes an arrest, and how it is made, see *Crim. Proced. I. § 155 et seq.*

⁷ 1 Russ. Crimes, 3d Eng. ed. 763; 1 *Gab. Crim. Law*, 82; post, § 747.

⁸ *Pike v. Hanson*, 9 N. H. 491; *Homer v. Battyn*, Buller's N. P. 62; 2 *Kent Com.* 26; *Bird v. Jones*, 7 Q. B. 742.

⁹ Vol. I. § 560-564, 587; post, § 748. And see 1 Russ. Crimes, 3d Eng. ed. 764; *Long v. Rogers*, 17 Ala. 540.

physical touch is not requisite to the offence; and suffered to remain unreversed a conviction against him for detaining the prosecutor on board the defendant's ferry-boat, by words and threats alone, for the purpose of compelling payment of toll not due.¹

§ 26 a. **Continued—(Present abetting).**—A man may, in assault, the same as in any other crime, by mere words make himself a principal in the second degree, should the assault be under circumstances of such aggravation as to be a felony; or the equivalent of such principal where it is a misdemeanor.² Thus, if one of a tumultuous crowd, seeing a police officer attacked, encourages the assailants by words, he becomes guilty of the assault which the others personally inflict.³

§ 27. **Standing Passive, &c.**—But to stand passively, like an inanimate object,—“like a door or wall,”—and thus obstruct the going of another into a room which he has the right to enter, does not, as observed by Lord Denman, C. J., in an English case, constitute an assault.⁴ Yet, in Tennessee a defendant was held to have committed an assault, who, with an open knife in his hand, and within striking distance of a man, stopped him in the public way, and threatened him till he delivered up a marriage license demanded.⁵

§ 28. **Different Kinds of Physical Force.**—If, however, there is actual physical force, its particular kind is immaterial.⁶ Thus, not only is the raising of the hand or a weapon to strike, which is a common illustration, an assault; but so is also the pointing of a gun or pistol at the person within shooting distance;⁷ the reckless riding of a horse so near him as to create a reasonable apprehension of personal danger;⁸ the cutting off of the hair of a female pauper in a poor-house by force and against her will;⁹ the taking of indecent liberties with a woman;¹⁰ even laying hold

¹ *Smith v. The State*, 7 Humph. 43. And see *The State v. Rollins*, 8 N. H. 550; *Bird v. Jones*, 7 Q. B. 742.

² Vol. I. § 629 et seq., 648, 656, 685, 686.

³ *Commonwealth v. Hurley*, 99 Mass. 433.

⁴ *Inness v. Wylie*, 1 Car. & K. 257.

⁵ *Bloomer v. The State*, 3 Sneed, 66. See also *The State v. Taylor*, 3 Sneed, 662; *The State v. Benedict*, 11 Vt. 235.

⁶ See Vol. I. § 548, 553.

⁷ *Genner v. Sparks*, 6 Mod. 173; *Anonymous*, 1 Vent. 256; *Blake v. Barnard*, 9 Car. & P. 626; *Morison's Case*, 1 Broun, 394.

⁸ *The State v. Sims*, 3 Strob. 137; *Morton v. Shoppee*, 3 Car. & P. 373; *People v. Lee*, 1 Wheeler *Crim. Cas.* 264.

⁹ *Forde v. Skinner*, 4 Car. & P. 239.

¹⁰ *Rex v. Nichol*, Russ. & Ry. 130.

of and kissing her against her will; ¹ recklessly whipping a pony, it has been held in Scotland, so as to make the animal run away with its rider, and throw him, or fall with him; ² or perhaps the putting of a deleterious drug into the drink of another, if he actually takes it to his injury, ³—in some of which illustrations the thing done includes also a battery. ⁴ And “there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c., against the carriage of another person, and thereby causing bodily injury to the persons travelling in it.” ⁵

§ 29. **Neglect, Abandonment, &c.** — While it is indictable simply to neglect or refuse to provide food and clothing for one, in pursuance of a legal duty, whereby he suffers injury, ⁶ this is possibly not a technical assault in law. But an assault appears to be committed ⁷ where the party so exposes such one to the inclemency of the weather — as, for instance, so abandons a child whom he is under legal obligation to maintain — that injurious consequences follow. ⁸ The Scotch doctrine, contrary to the English, seems not to require any actual evil consequences following. ⁹

¹ Reg. v. Dungey, 4 Fost. & F. 99, 103.
² Keay's Case, 1 Swinton, 543. And see *Dodwell v. Berford*, 1 Mod. 24; *Anonymous v. Jones*, 444; *Green v. Goddard*, 2 Salk. 641; *Kirland v. The State*, 43 Ind. 146.

³ So held by Serg. Arabin, after consulting with the Recorder, in *Reg. v. Button*, 8 Car. & P. 660; but the doctrine was afterward overruled at nisi prius, in *Reg. v. Walkden*, 1 Cox C. C. 282; *Reg. v. Dilworth*, 2 Moody & R. 531; and *Reg. v. Hanson*, 2 Car. & K. 912. See also *Edsall v. Russell*, 6 Jur. 996, 999. On principle, where, under the circumstances mentioned in these cases, the intent and the act are together sufficiently evil in degree for the criminal law to notice, see Vol. I. § 760, no good reason appears why the offence should not be deemed an assault, and also a battery.

⁴ In a civil action it has been held, that trespass lies for an injury sustained by firing a gun, and thereby frightening the plaintiff's horse, if the defendant has reasonable ground to believe the firing would produce the fright. *Cole v. Fisher*, 11 Mass. 137.

⁵ 1 Russ. Crimes, 3d Eng. ed. 751, cit-

ing *Crown Circ. Comp.* 82; 3 Chit. Crim. Law, 823, 825; 2 Stark. Crim. Pl. 388, 389, 2d ed. 406 et seq. **Torture.** — Torture to extort confessions is indictable at the common law, — doubtless as an assault, though it may include also a false imprisonment. *The State v. Hobbs*, 2 Tyler, 380.

⁶ Vol. I. § 567; *Rex v. Friend*, 1 Russ. Crimes, 3d Eng. ed. 46, Russ. & Ry. 20; *Reg. v. Phillpot*, 20 Eng. L. & Eq. 591; *Reg. v. Hogan*, 2 Den. C. C. 277, 5 Eng. L. & Eq. 553. And see *Reg. v. Troy*, 1 Crawford & Dix C. C. 556; *Reg. v. Pelham*, 8 Q. B. 959; *Commonwealth v. Stoddard*, 9 Allen, 280. And see, as to the neglect of an overseer to provide for a pauper, *Rex v. Warren*, Russ. & Ry. 47, note; *Rex v. Meredith*, Russ. & Ry. 46; *Rex v. Booth*, Russ. & Ry. 47, note.

⁷ Vol. I. § 884.

⁸ *Rex v. Ridley*, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653. And see *Reg. v. Mulroy*, 3 Crawford & Dix C. C. 318; *Reg. v. Renshaw*, 20 Eng. L. & Eq. 598, 2 Cox C. C. 285, 11 Jur. 615. See post, § 33.

⁹ 1 Alison Crim. Law, 162. And see, on this point, *Reg. v. March*, 1 Car. & K. 406.

II. *The Force as being put in Motion.*

§ 30. **General Doctrine.** — In the next place, there is no assault unless the physical force is actually put in motion; neither is there an assault unless the force is of such a sort and proceeds so far as to render the peril, either in fact or in appearance, imminent and immediate. ¹ There must be “violence begun to be executed,” in distinction from violence menaced. ²

§ 31. **Illustrations** — (**Presenting Pistol — Rushing on, &c.**) — Therefore it has been held, that merely to draw a pistol, without presenting or cocking it, comes short of an assault. ³ Yet one who rushes upon his adversary to strike, though not near enough for the blow to take effect, commits the offence; provided he is sufficiently near to create in a person of ordinary firmness a fear of immediate violence unless he strikes in self-defence. ⁴ And a man who was advancing with clenched fist to beat another, but was stopped by persons present a second or two before he got within reach, was held, by Tindal, C. J., to have committed an assault. ⁵

III. *The Peril or Fear.*

§ 32. **Actual Peril — Apprehended.** — There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. For his suffering is the same in the one case as in the other, and the breach of the public peace is the same. ⁶

Illustrations — (**Pointing Gun not loaded — Not within Shooting distance.**) — Therefore, if, within shooting distance, one menacingly points at another with a gun, apparently loaded, yet not loaded in fact, he commits an assault the same as if it were loaded.

¹ Vol. I. § 548.

² *Gaston, J.*, in *The State v. Davis*, 1 Ire. 125.

³ *Lawson v. The State*, 30 Ala. 14. See *Higginbotham v. The State*, 23 Texas, 574. The circumstances may be such, however, that this will be an assault. *The State v. Church*, 63 N. C. 15.

⁴ *The State v. Davis*, 1 Ire. 125; *People v. Yslas*, 27 Cal. 630.

⁵ *Stephens v. Myers*, 4 Car. & P. 349. To the like effect is *The State v. Van-noy*, 65 N. C. 532. And see *Morton v. Shoppee*, 3 Car. & P. 373.

⁶ See Vol. I. § 548; *The State v. Hampton*, 63 N. C. 13; *Keefe v. The State*, 19 Ark. 190; *Smith v. The State*, 32 Texas, 393.

There must in such a case be some power, actual or apparent, of doing bodily harm; but apparent power is sufficient.¹ In the instances we are referring to, the person assaulted is really put in fear. So in a Scotch case it was said: "The presenting of a pistol, even if it were not loaded, provided the party at whom it was presented supposed it to be loaded, was undoubtedly in law an assault."² It has been said that the gun must be within shooting distance;³ but plainly if it is not, yet seems to be so to the person assaulted, or danger otherwise appears imminent, that will be sufficient.⁴

§ 33. **Injury without Fear.** — On the other hand, though no fear is created, if an injury is inflicted it is sufficient;⁵ for where there is a battery there is an assault.⁶

Illustrations — (Abandoning Child — Assault proceeding to Battery or not). — Thus, where, in England, a woman was delivered of a child at the house of the defendants, who told her they would take it to an institution to be nursed, instead of which they put it in a bag and hung it on some park-palings at the side of a foot-path, and there left it, — Tindal, C. J., ruled, that they were guilty of assaulting the child; though plainly it could have no knowledge of what was done.⁷ There was battery, therefore also an assault. And we may doubt, whether, if there is neither any person put in fear, nor any injury done, the transaction being a mere private one, and not in any public place, the act, however adapted in its nature to produce harm, can constitute an assault; since there has been created neither personal suffering nor a

¹ *Beach v. Hancock*, 7 Fost. N. H. 223; *The State v. Smith*, 2 Humph. 457; *Reg. v. St. George*, 9 Car. & P. 433; *The State v. Shepard*, 10 Iowa, 126. As once observed: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace." *Wells, J.*, in *Commonwealth v. White*, 110 Mass. 407, 409. *Contra*,

Blake v. Barnard, 9 Car. & P. 626; and perhaps *Vaughan v. The State*, 3 Sm. & M. 553; *Shaw v. The State*, 18 Ala. 547. *Quare*, *The State v. Cherry*, 11 Ire. 475. And see *The State v. Sims*, 3 Strob. 137; *The State v. Crow*, 1 Ire. 375; *The State v. Blackwell*, 9 Ala. 79; *Crow v. The State*, 41 Texas, 468; *Agitone v. The State*, 41 Texas, 501; Vol. I. § 738-750.

² *Morison's Case*, 1 Broun, 394, 395.

³ *Tarver v. The State*, 43 Ala. 354.

⁴ See, as illustrative, *The State v. Vannoy*, 65 N. C. 532; *The State v. Rawles*, 65 N. C. 334; *People v. Yelas*, 27 Cal. 630.

⁵ *The State v. Gorham*, 55 N. H. 152.

⁶ Vol. I. § 548; post, § 56, 71.

⁷ *Reg. v. March*, 1 Car. & K. 496.

breach of the public peace.¹ But on this point we have probably no direct adjudications; and, opposed to the view suggested, there is some ground of principle for looking at the act in the light, at least, of an indictable attempt to commit a battery.²

§ 34. **Words explaining away Act.** — If a man does what would ordinarily amount to an assault, but accompanies the doing with words which show that he has no intention of inflicting a battery, and there is no real or apparent danger,³ — as, if he shakes his whip over one and says, "were you not an old man, I would knock you down;"⁴ or lays his hand on his sword, saying, "If it were not assize time, I would not take such language from you,"⁵ — he does not become chargeable with this offence. Where, however, a person within striking distance raised a weapon, and told another to do a particular thing, and then he would not strike, which thing being done no blow was given, the assault was held to be complete.⁶ The same was ruled, where the defendant doubled up his fist at another, and said, "If you say so again, I will knock you down."⁷ For in assault there is a real or apparent attempt to do personal violence.⁸

IV. *The Effect of consenting to the Force.*

§ 35. **General Doctrine — Exceptions — (Indecent Assault — Prize-Fight.)** — We saw, in the preceding volume, that, if one consents to be beaten, the person who inflicts the battery is not ordinarily chargeable with an offence; the limit to this doctrine being, that the beating must be one to which the party has the right to consent.⁹ If, therefore, a woman consents to her own dishonor, however immoral the act, her ravisher does not thus commit an assault.¹⁰ No concurrence of wills can justify a

¹ See, as confirming this view, the doctrine stated ante, § 29, of the exposure of infants, &c., where no injury has come to them.

² See ante, § 23, note; post, § 62; Vol. I. § 738-750.

³ *Blake v. Barnard*, 9 Car. & P. 626.

⁴ *The State v. Crow*, 1 Ire. 375; *Commonwealth v. Eyre*, 1 S. & R. 347.

⁵ *Tuberville v. Savage*, 1 Mod. 3; s. c. nom. *Tubervell v. Savadge*, 2 Keb. 545; 1 Russ. Crimes, 3d Eng. ed. 750.

⁶ *The State v. Morgan*, 3 Ire. 186.

And see *Read v. Coker*, 24 Eng. L. & Eq. 213.

⁷ *United States v. Myers*, 1 Cranch C. C. 310. s. p. *United States v. Richardson*, 5 Cranch C. C. 348.

⁸ *The State v. Blackwell*, 9 Ala. 79.

⁹ Vol. I. § 260-262 and note. And see *Pillow v. Bushnell*, 5 Barb. 156; *Commonwealth v. Collberg*, 119 Mass. 350.

¹⁰ *People v. Bransby*, 32 N. Y. 525; *Reg. v. Cockburn*, 3 Cox C. C. 543; *Reg. v. Wollaston*, 12 Cox C. C. 130, 2 Eng. Rep. 234.

public tumult and alarm; therefore persons who voluntarily engage in a prize-fight, and their abettors, are all guilty of assault.¹

§ 36. **Fraud in obtaining Consent.** — We saw, also, that consent obtained by fraud, or other overpowering of the will of the injured one, does not avail the other.² And slight facts are in some circumstances sufficient to show the will to have been overpowered.

Illustrations — (Teacher and Pupil — Indecent Liberties — Physician and Patient.) — Thus, if a schoolmaster takes indecent liberties with a female pupil who does not resist, her tender years and relative subjection to him may justify a jury, heeding her testimony that what was done was really against her wishes, in pronouncing him guilty.³ Likewise, where a medical practitioner had a sexual connection with a girl of fourteen, his patient, who forbore resistance under the belief that he was treating her medically, as he represented himself to be, the English judges held him guilty of an assault. And Wilde, C. J., said, it was properly not left to the jury to find, whether he really believed he was curing her; for “the notion, that a medical man may lawfully adopt such a mode of treatment, is not to be tolerated in a court of justice.”⁴ But where, no such relationship existing, a girl nine years old consented, according to the finding of the jury, to sexual commerce with some boys, “from her tender age not knowing what she was about,” the court refused to sustain a conviction of the boys for assault.⁵

V. The Force as being Unlawful.

§ 37. **General Doctrine** — (Mariners — Defence of Property, &c. — Arrest — Bail — Removing Railway Passenger). — Finally, the force must be unlawful. Any violence, therefore, which, from

¹ Rex v. Perkins, 4 Car. & P. 537; Rex v. Hunt, 1 Cox C. C. 177. And see Rex v. Billingham, 2 Car. & P. 234; Reg. v. Brown, Car. & M. 314. But see Duncan v. Commonwealth, 6 Dana, 295.

² Vol. I. § 262.
³ Rex v. Nichol, Russ. & Ry. 130; 1 Bennett & Heard Lead. Cas. 513, and see the note of Mr. Heard. And see Reg. v. Lock, Law Rep. 2 C. C. 10.

⁴ Reg. v. Case, 1 Eng. L. & Eq. 544, Temp. & M. 318, 1 Den. C. C. 580, 4 New Sess. Cas. 847, 14 Jur. 489, 4 Cox

C. C. 220. See also, as to the relation of physician and patient, Rex v. Rosinski, 1 Moody, 19; Reg. v. Ellis, 2 Car. & K. 470.

⁵ Reg. v. Read, 1 Den. C. C. 877, 2 Car. & K. 957, Temp. & M. 52, 3 New Sess. Cas. 405, 13 Jur. 68. And see Reg. v. Martin, 9 Car. & P. 213, 2 Moody, 123; Reg. v. Johnson, Leigh & C. 632, 10 Cox C. C. 114. As to kidnapping a child under ten years of age, see The State v. Rollins, 8 N. H. 550.

the relations of the parties or otherwise, one has the right to inflict on the other, — as, in the exercise of discipline in the naval and merchant services;¹ in the defence of one's person or property;² in the making of arrests, by those lawfully empowered, and in the detaining of persons arrested;³ in taking possession, by bail, of those under bail;⁴ in the exclusion or removal, by the conductor of a railway train, of a person whom he has a right under the circumstances to exclude or remove;⁵ in resisting an unlawful arrest,⁶ — is not deemed an assault.⁷

§ 38. **Carrying Lawful Force too Far** — (Chastisement, &c.) — But if a person, in thus doing what he has a right to do, proceeds too far, — as, if he inflicts legal chastisement to an illegal extent, — he becomes guilty of an assault.⁸ And, generally, any excess of authorized force will be criminal.⁹

§ 39. **Defence in itself Unlawful** — (Resisting Arrest — Co-tenant.) — Especially, therefore, if by personal violence a man undertakes a defence when he has no right to make any, of himself or property,¹⁰ — as, where he resists by such violence a lawful

¹ Wilkes v. Dinsman, 7 How. U. S. 89; Hannen v. Edes, 15 Mass. 347; Broughton v. Jackson, 11 Eng. L. & Eq. 886; Brown v. Howard, 14 Johns. 119; Sampson v. Smith, 15 Mass. 365; United States v. Wickham, 1 Wash. C. C. 316; United States v. Taylor, 2 Sumner, 584; United States v. Ruggles, 5 Mason, 192. Flogging is now forbidden by United States statute in the army, the navy, in military prisons, and on board vessels of commerce. Rev. Stats. of U. S. p. 239, 248, 283, 900.

² The State v. Briggs, 3 Ire. 357; Rex v. Milton, Moody & M. 107; s. c. nom. Rex v. Milton, 3 Car. & P. 31; The State v. Elliot, 11 N. H. 540; The State v. Gibson, 19 Ire. 214; The State v. Quin, 3 Brev. 515; Commonwealth v. Clark, 2 Met. 23; Yoes v. The State, 4 Eng. 42; McIlvoy v. Gockran, 2 A. K. Mar. 271, 274; Robinson v. Hawkins, 4 T. B. Monr. 134; Baldwin v. Hayden, 6 Conn. 453; Causee v. Anders, 4 Dev. & Bat. 246; United States v. Liddle, 2 Wash. C. C. 205; United States v. Ortega, 4 Wash. C. C. 531; Alderson v. Waistell, 1 Car. & K. 358; Corey v. People, 45 Barb. 262.

³ Hannen v. Edes, 15 Mass. 347; Commonwealth v. Randall, 4 Gray, 36.

⁴ Scribner v. Beach, 4 Denio, 448; Likes v. Dike, 17 Ohio, 454; Bartlett v. Churchill, 24 Vt. 218; French v. Marston, 4 Post. N. H. 440; Boles v. Pinkerton, 7 Dana, 453; The State v. Ross, 2 Dutcher, 224; Golden v. The State, 1 S. C. 292, 302; Commonwealth v. Dougherty, 107 Mass. 243.

⁵ The State v. Stalcup, 2 Ire. 50;

⁶ As to what defence a man may

arrest,¹ or thus prevents a co-tenant from going upon the common estate,²—he commits an assault.

§ 40. **Words not justify Assault.**— Mere words from one will not justify a physical attack upon him;³ even threats, antecedently made, will not authorize an assault in the absence of any demonstration showing an intent to carry the threats into execution.⁴ But words may be important when considered in connection with acts.⁵ And in Alabama, by force of a statute, opprobrious words will in some circumstances justify an assault and battery.⁶

Character bad.— Plainly, it is no justification for assaulting one that his character is bad.⁷

§ 41. **When Violence justifies Assault.**— But where violence is used toward person or property, it may sometimes be returned by violence;⁸ and even an assault will, under some circumstances, not all, justify a battery.⁹ The person beset is permitted to act only in self-defence; he cannot take the law into his own hands to inflict punishment for the injury.¹⁰ Therefore, if he strikes when all danger is past, he is guilty.¹¹ And where a woman asked a man who was riding by on horseback why he had talked about her, and then threw at him first a stone and next a stick, whereupon he dismounted and struck her on the head with the stick, the majority of the court held that he became thereby guilty of assault and battery.¹²

lawfully make of himself and property, see Vol. I. § 836 et seq.

¹ *The State v. Hooker*, 17 Vt. 658; *Commonwealth v. Kirby*, 2 Cush. 577; *Reg. v. Mabel*, 9 Car. & P. 474; *Anonymous*, 1 East P. C. 305.

² *Commonwealth v. Lakeman*, 4 Cush. 597. See *Scribner v. Beach*, 4 Denio, 448.

³ *The State v. Wood*, 1 Bay, 351; *Cushman v. Ryan*, 1 Story, 91; *Coleman v. The State*, 28 Ga. 78; *The State v. Herrington*, 21 Ark. 195. See also *Winfield v. The State*, 8 Greene, Iowa, 339.

⁴ *People v. Wright*, 45 Cal. 260.

⁵ *Ante*, § 25; *Crow v. The State*, 41 Texas, 468.

⁶ *Riddle v. The State*, 49 Ala. 389.

⁷ *McKenzie v. Allen*, 3 Strob. 546.

And see *Givens v. Bradley*, 3 Bibb, 192, 195.

⁸ *Scribner v. Beach*, 4 Denio, 448; *Bartlett v. Churchill*, 24 Vt. 218; *People v. Gulick*, Hill & Denio, 229; *Commonwealth v. Mann*, 116 Mass. 58.

⁹ *Hazel v. Clark*, 3 Harring. Del. 22; *Gallagher v. State*, 3 Minn. 270; *Allen v. The State*, 28 Ga. 395; *Anonymous*, 2 Lewin, 48.

¹⁰ *The State v. Quin*, 3 Brev. 515; *The State v. Wood*, 1 Bay, 351; *Rex v. Milton*, Moody & M. 107; s. c. nom. *Rex v. Mitton*, 3 Car. & P. 31; *Reg. v. Driscoll*, Car. & M. 214; *The State v. Gibson*, 10 Ire. 214; *Reg. v. Mabel*, 9 Car. & P. 474; *Scribner v. Beach*, 4 Denio, 448; *Bartlett v. Churchill*, 24 Vt. 218; *Commonwealth v. Ford*, 5 Gray, 476.

¹¹ *Reg. v. Driscoll*, Car. & M. 214; *The State v. Gibson*, 10 Ire. 214.

¹² *The State v. Gibson*, 10 Ire. 214.

VI. Aggravations of the Offence.

§ 42. **In General.**— It is not strictly correct to say, that any circumstance aggravates an offence, unless the law, as distinguished from judicial discretion, visits the offence thus aggravated with an added punishment; and, when it does, the offence becomes a distinct one, usually having a separate name. Still, from early times, when misdemeanors were punished with such fine and imprisonment as the judge might see fit to inflict, it has been the habit of the courts to look upon assault as more or less aggravated by those attendant facts, which appeal to the discretion of the judge to inflict a heavy penalty. Practically, therefore, we look upon assault as aggravated both when it appeals to the judicial discretion for a heavy sentence and when it constitutes a part of a higher crime.

§ 43. **Nature of Aggravations.**— The law, therefore, may be said to deem the assault more or less enormous according to the facts of the particular transaction.¹ And the aggravating facts, even when they do not elevate the assault to a distinct crime, are usually set forth in the indictment² as a guide to the court in pronouncing the sentence. If they demand, in matter of law, a higher punishment, they must be so set out.³

§ 44. **Old English Statutes.**— There are, in considerable numbers and of various forms of provision, old English statutes which may have some force in this country, whereby assaults on particular persons and in special places are punished more heavily than common assaults. Mr. East, in his *Pleas of the Crown*, has a convenient collection of most of these old statutes, and the reader may consult his book with advantage.⁴ Let us look at a few of the provisions here.

§ 45. **Assaults on Legislators, &c.**— Stats. 5 Hen. 4, c. 6, and 11 Hen. 6, c. 11, were directed specially against assaults upon members of parliament and their servants and attendants. From these statutes and the accompanying common law we derive the doctrine, that assaults on such persons are to be more heavily

¹ See *Norton v. The State*, 14 Texas, 887.

² *Crim. Proced. I. § 77-88.*

³ 1 East P. C. 407.

⁴ For illustrations, see § Chit. Crim. Law. 821 et seq.

dealt with than assaults on ordinary private individuals; though, doubtless, these statutes do not bodily and in exact form constitute parts of our unwritten law.¹

§ 46. **On Clerical Persons.**—Of a nature still more local, yet not without its effect on our unwritten law, is Stat. 9 Edw. 2, c. 3, which provides, that, “if any lay violent hands on a clerk [clergyman], the amends for the peace broken shall be before the king [in the temporal courts], and for the excommunication before a prelate [in the ecclesiastical courts] that penance corporal may be enjoined; which, if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king’s prohibition [that is, to prevent the spiritual court from proceeding to this extent in the case] shall not lie.” Now, while no one will contend that this statute belongs bodily to our common law, which knows neither an established religion nor ecclesiastical courts, yet, as it provides for a special protection to the ministers of the form of religion which the law recognized, so, in like manner, does our unwritten law, drawing its spirit from the law of our forefathers, cast a certain degree of special protection over the ministers of all forms of the Christian religion,² since all are with us objects of equal regard.

§ 47. **In Churches, &c.**—Of a like spirit is 5 & 6 Edw. 6, c. 4. It provides, § 1, that, “if any person whatsoever shall, &c., by words only, quarrel, chide, or brawl in any church or church-yard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done,” to inflict on the offender ecclesiastical pains, in a way pointed out. § 2 provides excommunication “if any person, &c., shall smite or lay violent hands upon any other, either in any church or church-yard.” § 3. “If any person, &c., shall maliciously strike any person with any weapon in any church or church-yard, or shall draw any weapon, &c., then every person so offending, and thereof being convicted, &c., before the justices, &c., shall be adjudged by the same justices, &c., to have one of his ears cut off. And if the person or persons so offending have none ears, whereby they should receive such punishment as is before declared, that then he or they to be marked and burned in the cheek with an hot iron, having the letter F. therein, whereby he or they may be known and taken

¹ And see post, § 48, note.

² See Vol. I. § 496, 497.

for Fray-makers and Fighters; and, besides that, every such person to be and stand *ipso facto* excommunicated, as is aforesaid.” This statute shows, that, at the time when our country was settled, a special protection was cast by the law over places of public worship, and assemblies there met; and, though it cannot be deemed to be bodily a part of our common law,¹ it is still not to be entirely disregarded by us.

§ 48. **In Places occupied by Officers of State.**—Then we have Stat. 33 Hen. 8, c. 12, embodying provisions to suppress “all malicious strikings, by which blood is shed, against the king’s peace, within any of the king’s palaces or houses, or any other house at such time as the royal person shall happen to be there demurrant or abiding.” The observations made in the last two sections apply also to this statute.²

¹ See post, § 48, note.

² **Old Statutes as Common Law—Persons attending Legislature.**—The statutes of 6 Hen. 4, c. 6; 8 Hen. 6, c. 1; and 11 Hen. 6, c. 11 (see Pulton de Pace, 9 b), concerning assaults upon persons going to and attending parliament and the king’s council, and upon their servants, are sufficiently early in date to be common law with us; but *query*, whether they have any applicability in this country. See also 1 Deac. Crim. Law, 69; 1 East P. C. 407; 1 Hawk. P. C. Curw. ed. p. 118. Kilty deems them not to have been found applicable in Maryland. Kilty Rep. Stats. 64, 60, 61. Of the last-mentioned statute he says: “It is referred to by Blackstone, 1 vol. 165; but, although the lower house in the province frequently claimed all the privileges of the house of commons in England, I do not find that this statute was extended.” Stat. 33 Hen. 8, c. 12, against striking in the king’s palace, 1 East P. C. 408, is not applicable to this country; as see Kilty Rep. Stats. 75. Stat. 5 & 6 Edw. 6, c. 4, against striking, &c., in churches and church-yards, 1 East P. C. 410, 1 Russ. Crimes, 3d Eng. ed. 461, is also not applicable; as see Kilty Rep. Stats. 79. **Assaults in Gaming.**—The statute of 9 Anne, c. 14, § 8, provides, that, “In case any person or persons whatsoever shall assault and beat, or shall challenge or provoke to fight, any other person or persons whatsoever, upon ac-

count of any money won by gaming, playing, or betting at any of the games aforesaid [i. e. by § 1, at cards, dice, tables, tennis, bowls, or other game or games whatsoever]; such person or persons assaulting and beating or challenging, &c., upon the account aforesaid, shall, being thereof convicted upon an indictment or information, &c., forfeit all his goods, chattels, and personal estate whatsoever,” and be imprisoned in the common jail of the county where the conviction is had, for two years. See 1 Hawk. P. C. Curw. ed. p. 116, and 1 East P. C. 423. In the construction of which enactment it has been held, that the assault must arise out of the play, and during the time of playing; and it is not sufficient where it arises out of a dispute concerning a game already finished. *Rex v. Randall*, 1 East P. C. 423. Kilty considers this section and part of the rest of the statute applicable to this country, and says, that in Maryland “there was an indictment in 1719 for an assault as mentioned in the 8th section, on which the party was found not guilty.” Kilty Rep. Stats. 237, 243. Still its date (1710) is subsequent to the settlement of Maryland, as well as of the other older colonies; and we may doubt, therefore, whether it became the common law of all the other States. And as the forfeiture it provides would doubtless not be enforced generally here, Vol. I. § 944, 970, the importance of the statute,

§ 49. **In Courts of Justice.** — Says Lord Coke: "If any man in Westminster Hall or in any other place, sitting the courts of chancery, the exchequer, the king's bench, the common bench, or before justices of assize, or justices of oyer and terminer (which courts are mentioned in the statute of 25 Edw. 3, *De preditionibus*), shall draw a weapon upon any judge or justice, though he strike not; this is a great misprision, for the which he shall lose his right hand, and forfeit his lands and goods, and his body to perpetual imprisonment; the reason hereof is, because it tendeth *ad impedimentum legis terræ*. So it is, if, in Westminster Hall, or any other place, sitting the said courts there, or before justices of assize, or oyer and terminer, and within the view of the same, a man doth strike a juror, or any other, with weapon, hand, shoulder, elbow, or foot, he shall have the like punishment; but, in that case, if he make an assault, and strike not, the offender shall not have the like punishment."¹

§ 50. **Summary.** — The result is, that, by the common law as it has come to us, in principles embodied partly in judicial decisions and partly in old statutes, an assault is more or less aggravated according to its circumstances. Illustrations of aggravated simple assaults are those committed in courts of justice, and upon officers of the courts,² and upon other official characters.³ And

if it is common law in any locality, cannot be great; since the assault would everywhere be an indictable misdemeanor, without the statute. In England, it was repealed by Stat. 9 Geo. 4, c. 31, § 1. 1 Deac. Crim. Law, 72.

¹ 3 Inst. 140.

² **Further of Assaults and Affrays in Court.** — Pulton says: "The law hath specially provided, that those persons and places which be designed to the administration of justice, shall be so guarded and protected from force and violence offered unto them or in them, that she hath inflicted deeper and more grievous punishment to those who shall break or disturb the peace in the presence of those magistrates or in those places, than to them who shall break the peace in the king's own palace, where he is in person abiding, or in the parliament time ordained for the making of laws.

And therefore it hath been adjudged, that, if one draw his sword to strike a justice assigned, sitting in place of judgment, and be thereof found guilty, he shall forfeit his lands and chattels, and have his right hand cut off. And likewise if one in the presence of the justices do strike a juror, he shall forfeit his lands and goods, have his right hand stricken off, and be committed to perpetual prison. And the same law is, if one of the king's justices assigned doth arrest any person which hath made a fray before him, and a stranger will rescue that prisoner, whereby he doth escape, in this case as well the prisoner as he that made the rescue shall be disherited, and be perpetually imprisoned; for that the attachment of such a justice is the king's own attachment, in the construction of the law. And if one do strike another in Westminster Hall, dur-

³ Vol. I. § 470. And see *Commonwealth v. Kirby*, 2 Cush. 577.

such assaults, like others, may be aggravated by proceeding to a battery, or to some other higher offence.¹

§ 51. **Assault on Ambassador, &c.** — **On Officers of our own Government.** — An assault upon the ambassador of a foreign government, committed within our territory, is a distinct offence in the law of nations, and is likewise punishable under a statute of the United States.² Though the assailant is ignorant of the official character of the person assaulted, it has been held that he still commits this graver offence,³ — a doctrine not quite clear in principle, and perhaps not fully established by the authorities. If sound, it proceeds on the fact that the defendant meant to violate the law, though in a less degree. To constitute the aggravated assault upon one of the officers of our own government, the transgressor, it seems, must know of the official character.⁴ And in this the Scotch law appears to be in harmony with our own.⁵

§ 52. **An Element in Attempt.** — Both under the common law, and by force of numerous statutes, assault is one of various overt acts, which, blending with an intent to accomplish some ulterior unlawful purpose, constitute the indictable attempt.⁶ This class of assaults is very diverse, but they are discussed in part in our first volume under the title Attempt, and in part in this volume and in the work on Statutory Crimes under the titles of the several offences, as, Homicide, Larceny, Rape, and the like.

§ 53. **Statutory Aggravations which are not Attempts.** — There

ing the time that the king's courts do sit, he shall forfeit to the king his lands and goods, have his right hand cut off, and be committed to perpetual prison." Pulton de Pace, ed. of 1615, 9 b, 10. And see 1 Deac. Crim. Law, 68; 2 Inst. 549; 3 Inst. 140; 4 Bl. Com. 125; 1 Hawk. P. C. 6th ed. c. 21; 1 East P. C. 408-410; 1 Russ. Crimes, 3d Eng. ed. 762. The reader will notice, that these punishments cannot generally be all inflicted at the present day, and in this country. See Vol. I. § 933, 940-944, 970.

¹ The stabbing of a justice of the peace used to be punishable by the cutting off of the right hand, if done after coming into Westminster Hall, but otherwise if before Oldfield's Case, 12 Co. 71.

² *United States v. Hand*, 2 Wash. C. C. 435; *Respublica v. De Longchamps*, 1 Dall. 111. A secretary of legation is an ambassador within this rule. *Respublica v. De Longchamps*, supra. And see Vol. I. § 126-129.

³ *United States v. Liddle*, 2 Wash. C. C. 205; *United States v. Ortega*, 4 Wash. C. C. 581; *United States v. Benner*, Bald. 234, 240. But see *United States v. Hand*, 2 Wash. C. C. 435.

⁴ *Commonwealth v. Kirby*, 2 Cush. 577; *Rex v. Gordon*, 1 East P. C. 315, 352. But see *Reg. v. Forbes*, 10 Cox C. C. 362.

⁵ *Alexander's Case*, 1 Broun, 28.

⁶ Vol. I. § 553, 733, 736, 748, 751; Stat. Crimes, § 490, 502-509.

are, besides, various statutory aggravations of assault, which are not attempts, but substantive crimes. For example, —

Stabbing — Wounding — Shooting. — In England and in our States generally, there are statutes against stabbing,¹ striking, wounding,² shooting,³ and the like. The meaning of the principal words in these statutes is explained in the work on Statutory Crimes.⁴ Some of these assaults admit, under the statutes, of aggravation by an ulterior intent.

With Deadly Weapon. — And the same observations apply to statutes, which are not infrequent, against assaults with a deadly weapon.⁵

To extort Confession. — Where, in Alabama, it was enacted, that “all persons, to the number of two or more, who abuse, whip, or beat any person, upon any accusation, real or pretended, or to force such person to confess himself guilty of any offence,” should receive a punishment mentioned in the statute, — the court held, that the accusation must be the motive for the assault; and, where its purpose was to chastise the person for having whipped a son of the assailant, the case was not within the provision.⁶

§ 54. **Punish summarily — Constitutional.** — A statute in Missouri directs, “that hereafter no assault, battery, affray, riot, rout, or unlawful assembly shall be held or considered an indictable offence, but the same shall be prosecuted and punished in a summary mode before a justice of the peace;” and this provision has been adjudged constitutional.⁷

¹ *Hodges v. The State*, 15 Ga. 117; *Humphries v. The State*, 5 Misso. 203; *Rex v. Dyson*, 1 Stark. 246; *The State v. Brown*, 21 La. An. 347; *Stat. Crimes*, § 815.

² *Reg. v. Bowen*, Car. & M. 149; *Commonwealth v. Gallagher*, 6 Met. 565; *Rex v. Collison*, 4 Car. & P. 565; *Rex v. Griffith*, 1 Car. & P. 298; *Reg. v. Ward*, Law Rep. 1 C. C. 356, 12 Cox C. C. 123; *The State v. Ray*, 37 Misso. 335; *Callahan v. The State*, 21 Ohio State, 306; *Stat. Crimes*, § 216, 814.

³ *Rex v. Voke*, Russ. & Ry. 531; *Robinson v. The State*, 31 Texas, 170; *Heller v. The State*, 23 Ohio State, 582; *Reg. v. Fretwell*, Leigh & C. 443, 9 Cox C. C. 471; *Reg. v. Lallement*, 6 Cox C. C. 204.

⁴ “Assault.” — As to the meaning of

the word assault in a statute, see *Humphries v. The State*, 5 Misso. 203; *The State v. Froels*, 3 Humph. 228; *Evans v. The State*, 1 Humph. 394; *Stat. Crimes*, § 216.

⁵ *People v. Congleton*, 44 Cal. 92; *The State v. Napper*, 6 Nev. 113; *The State v. Franklin*, 36 Texas, 155; *Prior v. The State*, 41 Ga. 155; *McKinney v. The State*, 25 Wis. 378.

⁶ *Underwood v. The State*, 25 Ala. 70.

⁷ *The State v. Ledford*, 8 Misso. 102. As to a like statute in Indiana, see *The State v. Hailstock*, 2 Blackf. 257; in Arkansas, see *The State v. Cox*, 3 Eng. 436. As to a Connecticut statute concerning secret assaults, see *Northrop v. Brush*, Kirby, 103.

VII. Remaining and Connected Questions.

§ 55. **Misdemeanor — How punished.** — Assault is misdemeanor, not felony.¹ It is therefore punishable, at the common law, by fine and imprisonment; to which may be added bonds to keep the peace.²

Aggravated. — Even aggravated assault is, at common law, a mere misdemeanor;³ but, by force of statutes, some of the aggravations are, in some of our States and in England, made felonies.⁴

Instigator. — Where, therefore, this offence is misdemeanor, one who excites another to commit it will, on its commission, be a principal therein, though he was not personally present.⁵

§ 56. **Connected with other Crimes** — (**Battery — Rape — Homicide — False Imprisonment — Riot — Affray — Burglary**). — This offence is one which forms a part of, and is included within, several others, as explained in the preceding volume.⁶ Thus, in every battery there is an assault.⁷ So there is, in every rape,⁸ and in most murders,⁹ but perhaps not in every murder;¹⁰ except as this consequence is, in a certain sense, and in some of the States, avoided by the rule that the same identical act cannot be both a felony and a misdemeanor at one time.¹¹ It appears to be the doctrine, not firmly established, that every false imprisonment includes an assault;¹² while there may be a false imprisonment which does not include a battery.¹³ Probably the law admits of

¹ *Commonwealth v. Barlow*, 4 Mass. 439; *Murphy v. Commonwealth*, 23 Grat. 960.

² Vol. I. § 940, 945. And see Vol. I. § 933; 1 East P. C. 406, 407; 1 Russ. Crimes, 3d Eng. ed. 760; *Petty v. San Joaquin Court*, 45 Cal. 245. How, where there is also a civil suit for the same assault, see Vol. I. § 264-266; *Rex v. Mahon*, 4 A. & E. 575.

³ *People v. Wilson*, 9 Cal. 259; *The State v. Swann*, 65 N. C. 330. See *Commonwealth v. McLaughlin*, 12 Cush. 612.

⁴ *Reg. v. Woodhall*, 12 Cox C. C. 240, 4 Eng. 529; *People v. War*, 20 Cal. 117; *The State v. Davis*, 29 Misso. 391.

⁵ *The State v. Lymburn*, 1 Brev. 397; Vol. I. § 685, 686.

⁶ Vol. I. § 773 et seq., 791 et seq.

⁷ Vol. I. § 548; ante, § 28, 33.

⁸ *Reg. v. Allen*, 2 Moody, 179.

⁹ Vol. I. § 781, 795; *The State v. Nichols*, 8 Conn. 496. And see *Reg. v. Mulroy*, 3 Crawford & Dix C. C. 318.

¹⁰ *Edsall v. Russell*, 6 Jur. 996, 999.

¹¹ Vol. I. § 787, 815.

¹² Ante, § 26. And see *Long v. Rogers*, 17 Ala. 540.

¹³ “It has been supposed, that every imprisonment includes a battery (*Bull. N. P. c. 4*, p. 22; and the opinion was adopted by Lord Kenyon in *Oxley v. Flower*, and another, 2 Selw. N. P. tit. Imprisonment, I.); — but this doctrine was denied in a recent case, where it was said by the court, that it was absurd to contend that every imprisonment included a battery (*Emmett v. Lyne*, 1

riots which are not likewise assaults; but, however this may be, if there is an indictment for riot and assault, the defendant may be convicted of the assault only;¹ and, if he is acquitted of the indictment generally, he cannot afterward be proceeded against for the assault.² Likewise, in the language of a learned judge, the charge, in an indictment, of an affray, "necessarily includes that of an assault and battery."³ There is no assault in the offence of burglariously breaking and entering a dwelling-house with the intent to commit therein a rape.⁴

§ 57. **Connected with Attempts.**—Where assault is the overt act in attempt, the offence is compound, and consists of two ingredients; namely, first, the assault; secondly, the intent to do the ulterior mischief.⁵

§ 58. **Statutory Assaults — Distinguished from Battery.**—In considering the statutes, the practitioner should remember that assault and battery are separate things. Therefore, if a statute provides a special punishment for one who shall commit an assault with intent to kill, there is no need for the assault to proceed to a battery, in order to make the offence complete.⁶

§ 59. **"Force and Violence."**—A statute provided, that, "if any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob or steal, he shall be deemed a felonious assaulter," &c.⁷ And it was adjudged that merely snatching a bank-bill from the hand of a man holding it—though the hand is touched in the operation, yet not with violence, nor with the intent to injure the person—does not constitute an assault such as is a necessary ingredient in the statutory offence.⁸

§ 60. **The Intent — Civil and Criminal.**—It is not necessary, in simple assault, that there should be the specific purpose to do a particular injury, but general malevolence or recklessness is sufficient. Thus, if one snaps a pistol at another, not knowing whether it is loaded and not seeking to know, and the pistol is discharged and the ball hits the other, this is an assault.⁹ The

New Rep. 255)." 1 Russ. Crimes, 8d Eng. ed. 754.

¹ Rex v. Hemings, 2 Show. 98; Vol. I. § 795.

² Rex v. Heaps, 2 Salk. 598.

³ Battle, J., in The State v. Stanly, 4 Jones, N. C. 290, 292.

⁴ Reg. v. Watkins, Car. & M. 264.

⁵ And see Vol. I. § 729, 735, 786; ante, § 52.

⁶ The State v. McClure, 25 Misso. 338.

⁷ Mass. Rev. Stats. c. 125, § 16.

⁸ Commonwealth v. Ordway, 12 Cush. 270.

⁹ Commonwealth v. McLaughlin, 5 Allen, 507.

precise bounds of this doctrine are not quite clear. An assault is one of those wrongs for which a civil suit may usually be maintained without prejudice to the criminal proceeding.¹ And, in the main, the principles which determine the civil and criminal liability are the same; indeed, an eminent American judge once observed, that the party is always answerable to the public by indictment when he is to the private person by action.² But we may doubt whether this is quite so as respects the intent. We have seen how, in this regard, civil jurisprudence and criminal differ; the wrong intent being always a necessary element in a crime, not always in a civil liability.³ The law indeed does not hold one liable in the civil action of trespass to the person, where the injury comes purely from an unavoidable accident, and there is no fault or carelessness whatever in him;⁴ yet, without drawing a very clear or nice distinction, we may conclude, that it admits of a civil liability where a less degree of mental mischief or negligence exists than is requisite to charge one criminally.⁵ If a mere accident, involving neither carelessness nor any other wrong in the intent, will not lay the foundation for a civil liability, plainly it cannot for a criminal.⁶ Yet, on the other hand, it is not always necessary to the criminal offence that there should

¹ Vol. I. § 264-266.

² Ruffin, C. J., in The State v. Gibson, 10 Irc. 214, 215. See, also, Vol. I. § 1073-1076.

³ Vol. I. § 210, 218-221, 286-288, 330, 349.

⁴ Wakeman v. Robinson, 1 Bing. 213; Brown v. Kendall, 6 Cush. 292; Dickenson v. Watson, T. Jones, 205; Underwood v. Hewson, 1 Stra. 596.

⁵ Weaver v. Ward, Hob. 134; Rex v. Gill, 3 Stra. 190; Bullock v. Babcock, 3 Wend. 391. In such a case as James v. Campbell, 5 Car. & P. 372, where it was held, that, if one of two persons fighting, unintentionally strikes a third, he is answerable in an action for damages, there would perhaps be also a criminal liability, as see Vol. I. § 327-335, 375, and note; 1 Russ. Crimes, 3d Eng. ed. 755, note. In Weaver v. Ward, above cited, it was held, that, if one trained soldier wounds another in skirmishing for exercise, an action of trespass will lie, unless it also appears that he was guilty of no negligence, and the injury was inevitable.

"For though," says the report, "it were agreed, that, if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall not be felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*: yet, in trespass which tends only to give damages according to hurt or loss, it is not so. And, therefore, if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault: as, if a man by force take my hand and strike you; or, if here the defendant had said that the plaintiff ran across his piece while it was discharging; or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." p. 134 a.

⁶ 1 Russ. Crimes, 3d Eng. ed. 754, 755.

be a specific determination to commit an assault, or a battery, or any other crime which in law includes an assault.¹

§ 61. *Civil and Criminal further distinguished.* — There are cases in which an indictment will lie, where the civil injury cannot be practically redressed; as, for instance, if a wife is assaulted and dies, the husband cannot pursue his civil remedy, which ceased with her life;² yet a criminal responsibility rests still on the offender.

§ 62. *Attempts to commit Assault.* — The reader has not failed to apprehend, that an assault is in itself a particular kind of attempt.³ It would seem, therefore, not possible there should be an indictable attempt to commit a simple assault.⁴ Yet there may, perhaps, be to commit an aggravated or compound assault; a matter, however, which requires no elucidation here, being referable to the general principles discussed under the title Attempt⁵ in the preceding volume.⁶ And the court of the District of Columbia has held, that an indictment at common law lies for a solicitation — which is one form of attempt⁷ — to inflict a battery.⁸

¹ In *Keay's Case*, 1 Swinton, 543, Scotch, Lord Cockburn said: "It may appear on proof, that the panel had no actual intention of injuring the boy. But there may be a constructive intention." *School-master.* — In a criminal case for assault and battery, against a school-master, on the ground of an alleged excessive punishment of a scholar, the court was requested by the defendant's counsel to instruct the jury, "that a school-teacher is amenable to the laws in a criminal prosecution, for punishing a scholar, only when he acts *malo animo*, from vindictive feelings, or under the violent impulse of passion or malevolence." This instruction the court refused to give; and, instead of it, said, "that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion," &c. The revising tribunal sanctioned the course of the court below; and Bigelow, J., observed: "It is undoubtedly true, that, in order to support an indictment for an assault and battery, it is necessary to show that it was committed *ex intentione*, and that, if

the criminal intent is wanting, the offence is not made out. But this intent is always inferred from the unlawful act. The unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases where the act was designedly committed. It then becomes an assault and battery, because purposely inflicted without justification or excuse." *Commonwealth v. Randall*, 4 Gray, 36, 38.

² *Higgins v. Butcher*, Yelv. 89.

³ See ante, § 23, note.

⁴ See *Rex v. Butler*, 6 Car & P. 868.

⁵ Vol. I. § 723 et seq.

⁶ And see *Rex v. Philipps*, 6 East, 464; *Rex v. Williams*, 2 Camp. 506.

⁷ Vol. I. § 768, 769.

⁸ *United States v. Lyles*, 4 Cranch C. C. 469, "Morsell, J., not very clear, and Thruston, J., doubting, Cranch, C. J., not doubting." *Conspiracy.* — So there may be an indictable conspiracy, another form of attempt, to commit the offence of assault and battery.

For ATTEMPT, see Vol. I. § 723 et seq.

CHAPTER IV.

BARRATRY.¹

§ 63. *General View.* — This offence, termed also common barratry, fell under the frequent animadversion of the law in ancient times. But we have few modern adjudications relating to it, therefore little can be said of it, further than to repeat what is found in the old books. No doubt exists, however, that in its leading features, it remains, at the present day, a common-law offence with us.²

§ 64. *How defined.* — In the preceding volume³ was repeated the definition of Blackstone; namely, "common barratry is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise."⁴

The Doctrine in Brief. — Lord Coke has reported a case in which the court said: "A common barrator is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in courts or in the country, — in courts of record, and in the county, hundred, and other inferior courts. In the country, in three manners: in disturbance of the peace; in taking or detaining of the possession of houses, lands, or goods, &c., which are in question or controversy, not only by force, but also by subtlety and deceit, and for the most part in suppression of truth and right; by false invention, and sowing of calumny, rumors, and reports, whereby discord and disquiet arise between neighbors."⁵

§ 65. *Analogous to what Offences.* — The reader will see, that common barratry is analogous to several other offences; as main-

¹ For matter relating to this title, see Vol. I. § 541, 974, 975. And see this volume, CHAMPERTY AND MAINTENANCE, and Vol. I. NUISANCE, § 1071 et seq. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 98 et seq. See, also, *Stat. Crimes*, § 560, 568.

² And see *Commonwealth v. Davis*, 11 Pick. 432.

³ Vol. I. § 541.

⁴ 4 Bl. Com. 134.

⁵ *Case of Barretty*, 8 Co. 85 b. And see 1 Gab. *Crim. Law*, 187; 1 Hawk. P. C. Curw. ed. p. 474, 475; Co. Lit. 368; *The State v. Chitty*, 1 Bailey, 379, 397.

tenance and champerty,¹ libel,² spreading false news,³ forcible entry and detainer,⁴ and some others. But it also differs from all these; and prominent among the points of difference is this, that, while they may severally be committed by a single act, or by a series of acts constituting one transaction, common barratry is a quarrel, as Lord Coke says, "not in one or two, but in many," cases.⁵

"Common" — **How many Instances.** — The indictment, therefore, must charge the offender with being a "common barrator;"⁶ and the proof must show at least three instances of offending. Three instances seem to be ordinarily sufficient, probably not always, — a point, however, not clearly settled by the authorities.⁷

§ 66. **Whether by Suits in One's own Right.** — "It hath been holden," says Hawkins, "that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However, if such actions be merely groundless and vexatious, without any manner of color, and brought only with a design to oppress the defendants, I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them."⁸ This view is evidently correct in principle,⁹ and is not without foundation in authority.¹⁰

§ 67. **Justice of Peace — Suits before Himself.** — Likewise a majority of the South Carolina court held, that a justice of the peace commits this offence by exciting criminal prosecutions to be brought before himself as magistrate; neither, in defence, is it sufficient for him that they were not groundless, if he stirred them up to exact fees for afterward having them discontinued.¹¹

§ 68. **Attorney.** — "But it seems," adds Hawkins, "that an attorney is in no danger of being judged guilty of barratry, in

¹ Vol. I. § 541; post, CHAMPERTY AND MAINTENANCE.

² Vol. I. § 540, 591, 734; post, LIBEL AND SLANDER.

³ Vol. I. § 472-478.

⁴ Vol. I. § 536-538, post, FORCIBLE ENTRY AND DETAINER.

⁵ Case of Barretry, 8 Co. 36 b, 37 b; Rex v. Roberts, 1 Camp. 399, 400.

⁶ Case of Barretry, supra; Train & Heard Prec. 55; Rex v. Hardwicke, 1 Sid. 282; 1 Hawk. P. C. Curw. ed. p. 475, § 9; Crim. Proc. II. § 99.

⁷ Commonwealth v. McCulloch, 15 Mass. 227; Commonwealth v. Davis, 11 Pick. 482, 485; Commonwealth v. Tubbs, 1 Cush. 2, 3; The State v. Chitty, 1 Bailey, 379.

⁸ 1 Hawk. P. C. Curw. ed. p. 475, § 8.

⁹ See Vol. I. § 588; Commonwealth v. McCulloch, 15 Mass. 227; 1 Gab. Crim. Law, 137; 3 Greenl. Ev. § 67.

¹⁰ Anonymous, 3 Mod. 97.

¹¹ The State v. Chitty, 1 Bailey, 379

respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy."¹

§ 69. **Misdemeanor — How punished — Lawyers.** — Barratry is a common-law misdemeanor, punishable by fine and imprisonment;² to which, of course, may be added bonds to keep the peace and be of good behavior.³ And if the offenders "be of any profession relating to the law, they ought also to be further punished by being disabled to practise for the future."⁴

¹ 1 Hawk. P. C. Curw. ed. p. 475, § 4. ² Vol. I. § 945; ante, § 55.
³ Case of Barretry, 8 Co. Fras. ed. ⁴ 1 Hawk. P. C. Curw. ed. p. 476, § 14; 36 b, note; The State v. Chitty, 1 Bailey, 379; 1 Gab. Crim. Law, 135; Vol. I. post, CONTEMPT OF COURT. § 940-947.

CHAPTER V.

BATTERY.¹

- § 69 a. Introduction.
70-72 d. Common-law Battery.
72 e. Statutory Batteries.

§ 69 a. **How Chapter divided.** — We shall consider, I. Common-law Battery; II. Something of Statutory Batteries.

I. *Common-law Battery.*

§ 70. **Defined.** — A battery was in the first volume defined to be any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent.² Hence, —

§ 71. **How related to Assault.** — In most instances, a battery is an assault which has travelled to the accomplishment of its purpose; being the substantive offence, to commit which the assault is the attempt.³ The distinction appears to be, that in every battery there is an assault,⁴ but there may be an indictable attempt to commit a battery which does not amount to assault.⁵ Hence also —

¹ See ASSAULT, under which title the doctrine of Battery is also considered. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 54 et seq. And see, for various forms of the statutory offence, *Stat. Crimes*, § 463-514, 1116.

² Vol. I. § 548. And see *Johnson v. Tompkins*, *Bald.* 571, 600. *Hawkins* says: "It seems that any injury whatsoever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." 1 *Hawk. P. C. Curw.* ed. p. 110, § 2. *Russell*, following this

exposition, defines: "A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law." 1 *Russ. Crimes*, 5th Eng. ed. 957, 958. And compare with definitions of assault, ante, § 23 and note.

³ Ante, § 57, 62.

⁴ Ante, § 33, 56; *Johnson v. The State*, 17 *Texas*, 515.

⁵ Ante, § 23, note.

Elsewhere — Here. — The doctrine of battery was necessarily in the main treated of under the title Assault. But there remain for this place a few explanations; in connection with which, to render the whole subject more clear, will be given some condensed repetitions, in altered forms of words, of what is laid down in the previous chapter.

§ 72. **Physical Touch** — (Combined with what). — A battery requires some sort of physical touch, not necessarily with the hand, or with any thing held in it, nor need it be upon the nude flesh. But the slightest touching of another,¹ or of his clothes or cane or any thing else attached to his person, if unlawful² or with intent to injure³ and against his will,⁴ — especially (elements not in strict law essential⁵) when angry, rude, insolent, or lustful,⁶ — will suffice.⁷ For example, —

Spitting — Throwing Water — Setting Dog on. — A common illustration of a battery is where one spits in another's face,⁸ or on his body,⁹ or throws water on him,¹⁰ or by encouraging a dog causes him to be bitten.¹¹ So —

§ 72 a. **Unlawful Act resulting in Injury.** — On principle, and in some degree on the authorities, which are not quite distinct as to the limits of the doctrine, any unlawful act of a sort immediately dangerous to another or others physically, is, if physical injury ensues to any one, a battery of him. A common illustration is

¹ 1 *Russ. Crimes*, 5th Eng. ed. 957, 958. "For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner." *Id.*

² Ante, § 37; *The State v. Shelton*, 79 *N. C.* 605; *Agnew v. Johnson*, 13 *Cox C. C.* 625, 19 *Eng. Rep.* 612. And see *Commonwealth v. Adams*, 114 *Mass.* 323.

³ *Richels v. The State*, 1 *Sneed*, 806. Compare with *Commonwealth v. McLaughlin*, 5 *Allen*, 507.

⁴ Ante, § 35; *The State v. Pickett*, 11 *Nev.* 255; *Duncan v. Commonwealth*, 6 *Dana*, 295; *Smith v. The State*, 12 *Ohio State*, 466.

⁵ See, among other authorities, *The State v. Shelton*, supra. *Agnew v. Johnson*, supra; *Forde v. Skinner*, 4 *Car. & P.* 289, *Gray v. Ayres*, 7 *Dana*, 375; *Hill*

v. The State, 63 *Ga.* 578. And see *The State v. Neff*, 58 *Ind.* 516; *Coward v. Baddeley*, 4 *Il. & N.* 478.

⁶ Ante, § 36; *Goodrum v. The State*, 60 *Ga.* 509; *Ridout v. The State*, 6 *Texas Ap.* 249; *Schuek v. Hagar*, 24 *Minn.* 339.

⁷ *Johnson v. The State*, 17 *Texas*, 515; *Republica v. De Longchamps*, 1 *Dall.* 111, 114; *The State v. Davis*, 1 *Hill, S. C.* 45; *United States v. Ortega*, 4 *Wash. C. C.* 531, 534; *McCulley v. The State*, 62 *Ind.* 428; *The State v. Phillely*, 67 *Ind.* 304; *Howard v. The State*, 67 *Ind.* 401; *Reg. v. Day*, 1 *Cox C. C.* 207, 208. And see *Rich v. Hogeboom*, 4 *Denio*, 453; *Marentille v. Oliver*, 1 *Penning*, 379.

⁸ 1 *Hawk. P. C. Curw.* ed. p. 110, § 2; *Reg. v. Cotesworth*, 6 *Mod.* 172.

⁹ *Cairns's Case*, 1 *Swinton*, 597, 610.

¹⁰ *Pursell v. Horne*, 3 *Nev. & P.* 564.

¹¹ 1 *Russ. Crimes*, 5th Eng. ed. by *Prentice*, 958.

where a blow aimed at one takes effect on another: it is a battery of the latter.¹ And it is the same where an indiscriminate, dangerous act injures a particular person, — as where a man discharges a gun² or throws a lighted squib³ into a crowd, — it is a battery of the one hit. In like manner, the wilful exposure of a helpless and dependent human being to the elements, whereby physical harm ensues, is a battery of him.⁴ So also it is a battery to leave a deleterious substance for an individual to find and take, if he takes it and is injured thereby.⁵ The inanimate thing which inflicts the injury is the innocent agent⁶ of him who, with criminal intent, causes it to act in the particular instance. Such is the plain doctrine of principle, but it seems to have been overlooked in some of the English cases cited.

§ 72 b. **Undue Force after Consent or other Justification.** — While, in the absence of fraud or other special facts, consent will prevent that from being a battery which otherwise would be such,⁷ force in malicious excess of the consent will take away its justifying effect. To put a palpable case, one permitting another to bleed him to a harmless extent does not thereby authorize the cutting of an artery from which the life itself may flow away. Or, to draw illustrations from the books, though a woman consents to an act of sexual intercourse, it will be a battery if performed in a brutal manner.⁸ Or if, not suspecting venereal disease, she consents to intercourse with an infected man who knows the fact and conceals it from her, he, by accepting her consent and communicating the infection, becomes guilty of a criminal battery.⁹ But, in a civil suit by the woman, she will be shut off from her remedy by reason of her voluntary participation¹⁰ in the immoral act the consequence whereof constitutes the ground of her com-

¹ James v. Campbell, 5 Car. & P. 372. See Commonwealth v. Morgan, 11 Bush, 601.

² The State v. Myers, 19 Iowa, 517.

³ And this equally as to the last person, when it is tossed from hand to hand by those whom it strikes. Scott v. Shepherd, 2 W. Bl. 892.

⁴ This sort of offence is so covered by statutes — as, for example, see 1 Russ. Crimes, 5th Eng. ed. 947 et seq. — that we have not so much direct authority to the point as one would otherwise expect. But there can be no doubt of the correctness of the doctrine of the text. Consult

Reg. v. Hogan, 2 Den. C. C. 277, 5 Cox C. C. 255; Rex v. Ridley, 2 Camp. 650, 653.

⁵ Reg. v. Button, 8 Car. & P. 660. But see Reg. v. Walden, 1 Cox C. C. 282; Reg. v. Hanson, 2 Car. & K. 912. See Reg. v. March, 1 Car. & K. 496; Commonwealth v. Adams, 114 Mass. 323.

⁶ Vol. I. § 310, 651.

⁷ Ante, § 35, 36; post, § 94.

⁸ Richie v. The State, 58 Ind. 355, 359.

⁹ Reg. v. Sinclair, 13 Cox C. C. 28.

Reg. v. Bennett, 4 Fost. & F. 1105.

¹⁰ 2 Bishop Mar. & Div. § 75.

plaint.¹ So also it is a battery to repel a trespasser on property or the person by unreasonable and needless force and injury;² or to inflict lawful chastisement with an unlawful weapon or in excess;³ or to do any other rightful act in a wrongful or injurious manner.⁴

§ 72 c. **Intent — (Drunkenness — Instances of Intent insufficient).** — At common law, and under a part of the statutes, battery is not among the crimes requiring a specific intent,⁵ but the general malevolence of the criminal law will suffice.⁶ Consequently the fact of the defendant being drunk will not justify or excuse him.⁷ But there must be some sort of evil in the intent. Therefore it is not a battery to lay the hand gently on one to attract his attention⁸ or to point him out to an officer who has a warrant of arrest against him,⁹ or unavoidably to ride upon a person with a horse which has suddenly taken fright,¹⁰ or for one soldier to hurt another accidentally by discharging his gun in exercise¹¹ wherein he is duly cautious,¹² or for a skin which one is with due care throwing down to hit another by being taken from its proper course by the wind.¹³

§ 72 d. **Rightful Force.** — The employment, by one upon another, of any force which under the circumstances is rightful, is not a battery,¹⁴ — a doctrine explained under the title Assault.¹⁵

¹ Hegarty v. Shine, 14 Cox C. C. 124; Ib. 145.

² Hairston v. The State, 54 Missis. 689; The State v. Taylor, 20 Kan. 643; Skidmore v. The State, 2 Texas Ap. 20; King v. The State, 4 Texas Ap. 54; Cotton v. The State, 4 Texas, 260; The State v. Lawry, 4 Nev. 161; Hendrix v. The State, 50 Ala. 143; Trogden v. Henn, 85 Ill. 237; Agee v. The State, 64 Ind. 340. See Filkins v. People, 69 N. Y. 101.

³ Neal v. The State, 54 Ga. 281; The State v. Hull, 34 Conn. 132; Commonwealth v. Seed, 5 Pa. Law Jour. Rep. 78; Stanfield v. The State, 43 Texas, 167. See Prewitt v. The State, 51 Ala. 33; Reg. v. Miles, 6 Jur. 243.

⁴ Commonwealth v. Coffey, 121 Mass. 66; Tarpley v. People, 42 Ill. 340; Raspberry v. The State, 1 Texas Ap. 664; The State v. Williams, 75 N. C. 134; The State v. Ross, 2 Dutcher, 224; Robinson v. The State, 54 Ala. 86.

⁵ Vol. I. § 320, 335, 408.

⁶ Crim. Proced. II § 55, ante, § 60; The State v. Sloanaker, 1 Houst. Crim. 62.

⁷ Vol. I. § 399 et seq.; Commonwealth v. Malone, 114 Mass. 295.

⁸ Coward v. Baddeley, 4 H. & N. 478.

⁹ 1 Hawk. P. C. Curw. ed. p. 110, § 2; 1 Russ. Crimes, 5th Eng. ed. 962, from which place I have extracted some of the other illustrations and authorities in this connection.

¹⁰ Gibbons v. Pepper, 4 Mod. 405; Holmes v. Mather, Law Rep. 10 Ex. 261.

¹¹ Weaver v. Ward, Hob. 134.

¹² Dickenson v. Watson, T. Jones, 205; Underwood v. Hewson, 1 Stra. 596; Scott v. Shepherd, 2 W. Bl. 892, 896.

¹³ Rex v. Gill, 1 Stra. 190.

¹⁴ Codd v. Cabe, 1 Ex. D. 352, 13 Cox C. C. 202; The State v. Stephenson, 20 Texas, 151; Townsend v. Jeffries, 24 Ala. 329; The State v. Neff, 58 Ind. 516.

¹⁵ Ante, § 37.

II. *Something of Statutory Batteries.*

§ 72 e. **Many Statutes.** — Battery, like assault, has been greatly legislated upon from early times both in England and this country. A very grave form of the offence, recognized at the common law and made heavily punishable by statutes, is mayhem.¹ And statutes almost numberless have created still other forms less than this in atrocity.² So, in some of the States, there are statutes more or less modifying the common-law offence itself.³ As far as deemed necessary, these statutes are explained in "Statutory Crimes."

¹ Post, § 1001 et seq.; *Godfrey v. People*, 63 N. Y. 207; *The State v. Bloedow*, 45 Wis. 279.

² As, for example, see *Rex v. Davis*, 1 Leach, 4th ed. 493; *Reg. v. Miller*, 14 Cox C. C. 356; *The State v. Jessie*, 30 La. An. 1170; *Starks v. The State*, 7 Baxter, 64.

³ *The State v. Wright*, 52 Ind. 307; *Buntin v. The State*, 68 Ind. 38; *Howard v. The State*, 67 Ind. 401; *Guy v. The State*, 1 Kan. 418; *The State v. Goddard*, 69 Maine, 181. See *Warrock v. The State*, 9 Fla. 404.

For BAWDY-HOUSE, see Vol. I. § 1088 et seq.

BESTIALITY, see SODOMY.

BETTING, see Stat. Crimes, and Vol. I. § 686, 821.

BIGAMY, see Stat. Crimes.

CHAPTER VI.

BLASPHEMY AND PROFANENESS.¹

§ 73-75. Introduction.

76-78. Blasphemy.

79. Profaneness.

80-84. Doctrines common to both.

§ 73. **Scope of this Chapter.** — The two common-law offences of blasphemy and profaneness differ only in this, that blasphemy is the word of larger meaning embracing more than the other. And our statutes do not much distinguish between them. Therefore it is deemed best to treat of the two together, in one chapter.

§ 74. **Indictable — Why.** — We have seen,² that these offences are indictable at the common law. Whether the principle which makes them so is, that they tend to undermine Christianity, which in a certain sense is a part of our common law,³ or that they disturb the peace and corrupt the morals of the community,⁴ or whether these two principles combine to impart the indictable quality, is a question on which opinions appear not to be quite in harmony. The true view probably is, that, in this instance as in many others, the legal doctrine may be deemed equally to result from any one of several causes; as, from either of the two above mentioned, or from the consideration that reverence toward God and religion — Christianity being our form of religion — is essential to man, who is injured in his nature and being when it is impaired; or, still another, that these offences so shock his purer and higher sensibilities as to create an injury to him against which he needs protection, precisely as against an assault.⁵

¹ For matter relating to this title, see Vol. I. § 498. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 123 et seq. And see *Stat. Crimes*, § 560.

² Vol. I. § 498.

³ Vol. I. § 497; *Rex v. Woolston*, 2 Stra. 834.

⁴ Vol. I. § 498.

⁵ See Vol. I. § 250-252, 548. In *People*

v. Ruggles, 8 Johns. 290, Kent, C. J., observed: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but even, in respect to the obligations due to

In any view, these offences belong to the general family of public nuisance.¹

§ 75. *Order of the Chapter.*—We shall further consider this subject as respects, I. Blasphemy; II. Profaneness; III. Doctrines common to both.

I. Blasphemy.

§ 76. *Definition.*—Blasphemy is any oral or written² reproach maliciously cast upon God, his name, attributes, or religion.³

society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. . . . Things which corrupt moral sentiment, — as obscene actions, prints, and writings, and even gross instances of seduction, — have, upon the same principle, been held indictable. . . . No government among any of the polished nations of antiquity, and none of the institutions of modern Europe (a single and monitory case excepted), ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence, with the ancient lawgivers and philosophers, embraced the religion of the country." See also the observations of Clayton, C. J., in *The State v. Chandler*, 2 Harring. Del. 553, 559. And see *Andrew v. New York Bible and Common Prayer Book Society*, 4 Sandf. 156; *Vidal v. Girard's Executors*, 2 How. U. S. 127, 198; *Ex parte Delaney*, 43 Cal. 478.

¹ *The State v. Graham*, 3 Sneed, Tenn. 134; *The State v. Powell*, 70 N. C. 67; *The State v. Pepper*, 68 N. C. 259.

² *The State v. Chandler*, 2 Harring. Del. 553.

³ 1. While it is plain, that, at common law, blasphemy is indictable, the books do not give us any very exact and neat definitions of it. Indeed, this and kindred offences are, in the books, more or less blended; rendering it not clear where

the lines separating them into their several classes should be drawn. Nor is it practically important to make the separation. The general doctrine seems to be, that, under one name or another, every oral or written representation whereby men's reverence for the Power which controls them and the world is ruthlessly shocked or impaired, is indictable at the common law. And within this general doctrine, it is indictable to revile the name of Jesus Christ, or to revile the Holy Scriptures, or the sacraments; because, though these may not, by all men among us, be deemed to pertain to natural religion, or be in any way accepted as a part of their faith, yet they pertain to Christianity, of which indeed they constitute the outward substance, and Christianity is the religion alike of our forefathers, and of the mass of the people among us, and consequently it constitutes in some sense a part of our common law. Vol. I. § 497.

2. Hawkins mentions, among the common-law offences against religion: "First, all blasphemies against God; as, denying his being or providence, and all contumelious reproaches of Jesus Christ. Secondly, all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule. Thirdly, impostures in religion; as falsely pretending to extraordinary commissions from God, and terrifying and abusing the people with false denunciations of judgment, &c." 1 Hawk. P. C. Curw. ed. p. 358, § 1-3.

3. There are some English statutes, early enough in date to be common law with us, pertaining to this matter I

General Description.—“In general,” said a learned judge, “blasphemy may be described as consisting in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words, concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent creator, governor, and judge of the world. It embraces the idea of de-traction, when used towards the Supreme Being; as, ‘calumny’ usually carries the same idea, when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of

quote from Hawkins: “By the Statute 1 Edw. 6, c. 1, repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1, it is enacted, ‘that whoever shall deprave, despise, or contemn the blessed sacrament of the Lord's supper, in contempt thereof, by contemptuous words, or by any words of depraving, despising, or reviling; or shall advisedly in any otherwise contemn, despise, or revile the said most blessed sacrament, shall suffer imprisonment, and make fine and ransom at the king's will and pleasure.’ By 3 Jac. 1, c. 21: ‘Whoever shall use the name of the Holy Trinity profanely or jestingly, in any stage play, interlude, or show, shall be liable to a *qui tam* penalty of ten pounds.’ By 1 Will. 3, c. 18, § 17 [subsequent to the settlement of the older colonies]: ‘Whoever shall deny in his preaching or writing, the doctrine of the blessed Trinity, shall lose all benefit of the act for granting toleration, &c.’” And Hawkins proceeds: “I shall not mention the offences against 2 & 3 Edw. 6, c. 19, and 5 Eliz. c. 5, relating to fasts and fish-days, because it is expressly declared that those statutes are enacted merely on a political account; and it is made penal to affirm that any eating of fish, or forbearing of fish, mentioned therein, is necessary to salvation, or that it is the service of God.” 1 Hawk. P. C. Curw. ed. p. 365, § 31-34. As to how statutes like these are to be regarded, see ante, § 44-48 and note.

4. Gentlemen who are searching through the English law on this subject, will not fail to look into the State Trials. See *Williams's Case*, for Blasphemy in

publishing Paine's *Age of Reason*, 26 Howell St. Tr. 653, embracing an able argument by Mr. Erskine, who appeared for the prosecution. Mr. Justice Ashurst, in pronouncing sentence against the prisoner, who had been convicted, said: “All offences of this kind are not only offences to God, but crimes against the law of the land; inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England.” And he added: “If the name of our Redeemer were suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depends, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments.” p. 715-719. See also *Eaton's Case*, 31 Howell St. Tr. 927; *Aikenhead's Case* (Scotch), 13 Howell St. Tr. 918; *Naylor's Case*, 5 Howell St. Tr. 802.

5. It must be obvious, that the English cases on this subject, especially the older ones, can be received in this country only in a sort of general way, not as being in all particulars applicable here. For example, it is not probable that generally in our courts a conviction could be obtained against a publisher of Paine's *Age of Reason*. And, as we have no established form of religion, libels on particular formalities of worship might not be indictable here to the extent to which they would be in England, if directed against the formalities of the English Church.

God, by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such."¹

§ 77. **Reviling Scriptures.** — And so a malicious reviling of the Sacred Scriptures, whether of the Old or New Testament, is blasphemy.² When, therefore, one with the evil intent necessary as the foundation of this offence, said, "that the Holy Scriptures were a fable; that they were a contradiction; and that, although they contained a number of good things, yet they contained a great many lies," — he was held, in Pennsylvania, to be indictable both at the common law and under the statute of that State.³

§ 78. **Jesus Christ.** — In like manner, words spoken against the author of Christianity come within the same condemnation. When, therefore, with intent to vilify the Christian religion, the defendant had said, "The Virgin Mary was a whore, and Jesus Christ a bastard," he was held to have been rightly convicted of blasphemy.⁴ And a malicious publication, in substance, that Jesus Christ was an impostor and a murderer in principle, was held to be blasphemous.⁵

II. Profaneness.

§ 79. **General Doctrine.** — We have seen,⁶ that profane swearing is an indictable nuisance at the common law. It is a species of blasphemy. There is little need to define it. Under the statute of Connecticut, "profane swearing" was said to be con-

¹ Shaw, C. J., in *Commonwealth v. Kneeland*, 20 Pick. 206, 213. "This species of offence," said Duncan, J., in *Updegraph v. Commonwealth*, 11 S. & R. 394, 406, "may be classed under the following heads: first, denying the being and providence of God; second, contumelious reproaches of Jesus Christ, profane and malevolent scoffing at the Scriptures, and exposing any part of them to contempt and ridicule; third, certain immoralities tending to subvert all religion and morality, which are the foundation of all governments."

² *Reg. v. Hetherington*, 5 Jur. 529; *People v. Ruggles*, 8 Johns. 299; 1 Hawk. P. C. Curw. ed. p. 358, § 2.

³ *Updegraph v. Commonwealth*, 11 S. & R. 394.

⁴ *The State v. Chandler*, 2 Harring. Del. 553; *People v. Ruggles*, 8 Johns. 299; *People v. Porter*, 2 Parker, 14.

⁵ *Rex v. Waddington*, 1 B. & C. 26. In this case Best, J., said: "It is not necessary for me to say, whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in the case have found), is by the common law a libel." See also *Reg. v. Gathercole*, 2 Lewin, 237, 254.

⁶ Ante, § 74; *The State v. Graham*, 3 Sneed, Tenn. 134.

stituted by any words importing an imprecation of future divine vengeance. Thus, — "You are a God-damned old rascal," — "You are a damned old rascal to hell," — "You are a damned old rascal," were severally held to be words of profane swearing.¹ But a single utterance of a profane word in a private place — or, it has even been held,² in a public street — is not *per se*, while spoken neither in a loud voice nor with repetitions, indictable; to be so, the profanity must take the form of a public nuisance.³

III. Doctrines common to both.

§ 80. **The Statutory Offence.** — In confirmation of common-law doctrine, the statutes of some of the States have special provisions making blasphemy and profaneness criminal.⁴

Illustrations — (**Massachusetts** — **How construed**). — Thus, the Massachusetts statutes provide a punishment, "if," among other things, "any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world." And it was held, that the wilful denial, by which is meant the denial with a bad purpose,⁵ of the existence of any God except the material universe, is within the prohibition; consequently an indictment was sustained for published words, the more important of which are the following: "Universalists believe in a god, which I do not; but believe that their god, with all his moral attributes (aside from nature itself), is nothing more than a mere chimera of their own imagination."⁶

§ 81. **Constitutional.** — It has been adjudged, that neither are these statutes nor is the common-law doctrine repugnant to the constitutions of States in which the question has arisen.⁷

¹ *Holcomb v. Cornish*, 8 Conn. 375. And see *Commonwealth v. Hardy*, 1 Ashm. 410. Under the statute of Indiana, "profane swearing three several oaths, by taking the name of God in vain," was held to be a sufficient description of the offence. *Odell v. Garnett*, 4 Blackf. 549.

² *The State v. Powell*, 70 N. C. 67.

³ *The State v. Powell*, supra; *The State v. Pepper*, 68 N. C. 259; *The State v. Jones*, 9 Ire. 38.

⁴ See *Commonwealth v. Kneeland*,

20 Pick. 206, *Thacher Crim. Cas.* 346, *Commonwealth v. Hardy*, 1 Ashm. 410; *Updegraph v. Commonwealth*, 11 S. & R. 394, *Odell v. Garnett*, 4 Blackf. 549; *Holcomb v. Cornish*, 8 Conn. 375; *The State v. Chandler*, 2 Harring. Del. 553; *The State v. Kirby*, 1 Murph. 254; *The State v. Ellar*, 1 Dev. 267; *The State v. Jones*, 9 Ire. 38.

⁵ And see Vol. I. § 428.

⁶ *Commonwealth v. Kneeland*, 20 Pick. 206, *Thacher Crim. Cas.* 346.

⁷ *Commonwealth v. Kneeland*, supra;

§ 82. *Liberty of the Press.* — But the law of blasphemy, statutory or common, will not be so administered as to abridge the liberty of speech and the press. For, as a learned judge once remarked, “No author or printer, who fairly and conscientiously promulgates opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious.”¹

Conscientious Convictions. — Still, one who should utter words or sentiments calculated, according to common judgment, to corrupt the public morals, or to shock the sensibilities of mankind in a Christian community, would doubtless not be permitted to excuse himself under the plea of conscientious conviction. Men must not allow their convictions to lead them to injurious acts; or, if they do so, they must take the consequences.²

Publicity. — In some cases, perhaps in most,³ it may be important to consider the degree and kind of publicity given to the matter charged as blasphemous.⁴

§ 83. *The Scotch Law.* — Blasphemy is a crime under the unwritten law in Scotland; and it has there been further provided against, to some extent, by statutes.⁵ It is said by Hume to consist in the denial of the being, attributes, or nature of God; or in uttering impious and profane things against him, and against the authority of the Holy Scriptures.⁶ Whether a mere candid denial of the Scriptures as a divine revelation is sufficient, is a point on which the Scotch authorities are not distinct; but it seems, that, in that country, as in this and in England, the denial, to be indictable, must go beyond fair and candid inquiry, indicating an “intention to bring them into ridicule and contempt.”⁷

The State v. Chandler, 2 Harring. Del. 553; People v. Ruggles, 8 Johns. 290.

¹ Duncan, J., in *Updegraph v. Commonwealth*, 11 S. & R. 394, 405, 406; s. p. Shaw, C. J., in *Commonwealth v. Kneeland*, 20 Pick. 206, 221.

² And see Vol. I. § 309 and note, 344. “Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country.” Best, J., in

Rex v. Burdett, 4 B. & Ald. 95, 132. And see *Reg. v. Collins*, 9 Car. & P. 456; 1 Gab. Crim. Law, 73.

³ Ante, § 79.
⁴ And see *The State v. Jones*, 9 Ire. 33; *The State v. Ellar*, 1 Dev. 267.

⁵ 1 Alison Crim. Law, 643; 2 Hume Crim. Law, 2d ed. 559.

⁶ 1 Hume Crim. Law, 2d ed. 559.

⁷ *Paterson's Case*, 1 Broun, 629; 2 Hume Crim. Law, 2d ed. 559.

§ 84. *Intoxication.* — In one case the Scotch court decided, that intoxication furnishes no defence for blasphemous words spoken, either as justifying them, or alleviating the crime.¹ Mr. Hume questions the correctness of this decision.² But the same was once ruled in New York; it “only aggravates the offence.”³ And plainly this is the true common-law doctrine,⁴ whatever may be the better Scotch view.

¹ *Kinninmount's Case*, 1 Hume Crim. Law, 2d ed. 517.

² *People v. Porter*, 2 Parker, 14.

³ Vol. I. § 397 et seq.

⁴ 1 Hume Crim. Law, 2d ed. 561.

For BREACH OF THE PEACE, see Vol. I. § 533 et seq.

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CHAPTER VII.

BRIBERY.¹

§ 85. **How Defined.** — Bribery is the voluntary giving or receiving of any thing of value in corrupt payment for an official act, done or to be done.²

¹ For matter relating to this title see Vol. I. § 246, 463, 471, 767, 974. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 126 et seq. And see *Stat. Crimes*, § 563, 573, 803.

² 1. And see *Dishon v. Smith*, 10 Iowa, 212. Blackstone defines: "Bribery is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office." 4 Bl. Com. 139. Coke: "Bribery is a great misprison, when any man in judicial place takes any fee or pension, robe or livery, gift, reward, or brocage of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and drink, and that of small value." 3 Inst. 145. An obvious defect in these definitions is, that the latter confines the offence to persons in "judicial place;" and the former, to persons "concerned in the administration of justice;" whereas it extends to all officers connected with the administration of the government, executive, legislative, and judicial, and, I presume, under the appropriate circumstances, military. The following is what is said in Burn's *Justice* upon the point: "This definition, in confining the offence to judicial officers, seems too narrow. See *Rex v. Beale*, cited 1 East, 183; *Rex v. Vaughan*, 4 Bur. 2494; *Com. Dig. Officer*, I. The attempt to bribe is an offence. Thus, an attempt to bribe a privy councillor to procure a reversionary patent of an office grantable by

the king under the great seal was held indictable, though it did not succeed. *Rex v. Vaughan*, 4 Bur. 2494; *Rex v. Pollman*, 2 Camp. 229; *Rex v. Plympton* 2 Ld. Raym. 1377. So is an offer of a bribe to a juryman. *Young's Case*, cited 2 East, 14, 16. An attempt to bribe at an election for Parliament is indictable. *Rex v. Vaughan*, 4 Bur. 2494, 2500; *Rex v. Plympton*, 2 Ld. Raym. 1377; and see *Henslow v. Fawcett*, 1 Har. & W. 125. So is an attempt to bribe an officer of customs. *Rex v. Cassano*, 5 Esp. 231." *Burn Just.* 28th ed. by Chitty, tit. Bribery. And see *The State v. Ellis*, 4 Vroom, 102.

2. Another defect in the definitions quoted from Coke and Blackstone is, that they do not cover the case of giving a bribe; which, in truth, is just as much bribery as the receiving of one. This offence, with the reason on which it rests, may be stated as follows: Whenever the motive of lucre is placed before the mind of an official person to influence his conduct, a danger to the state is created. And though official persons are entitled to compensation for their services; and the law does not deem the compensation which itself provides to be attended with danger, since this does not bend the officer to one course rather than another; yet, whenever there is presented to the official mind the idea of money, not merited, but as a return either for a wrong act or for fresh haste in doing a right one, this constitutes an endeavor to corrupt justice at her fountains, and danger

Giving or receiving. — "As it is a crime to take a bribe, it is clearly also a crime to give one; for the offences are reciprocal."¹

§ 86. **Gist of the offence.** — The gist of the offence seems to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. Thus, —

Voter. — If one pays money to a voter to vote at an election for a particular candidate,² or simply to vote,³ or to go out of town and forbear voting,⁴ the act tends to create a perturbation in the movements of the governmental machinery, and the parties are consequently indictable.

Appointment to Office. — And the Virginia court held, that a

to the entire community springs from the endeavor. If the judge spurns the bribe, he is innocent; if he accepts it, he is guilty; but, whether the bribe is taken or refused, he who offered it is equally an offender against the law.

3. Hawkins defines this offence and states the law thus: "Bribery, in a strict sense, is taken for a great misprison of one in a judicial place taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by color of his office, but of the king only. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing, which deserves the severest of punishments. Also bribery signifies the taking or giving of a reward for offices of a public nature." 1 Hawk. P. C. Curw. ed. p. 414, 415, § 1-8. See also 1 Russ. Crimes, 3d Eng. ed. 154. As to what office is meant by Stat. 49 Geo. 3, c. 126, § 3, against the corrupt sale of an office, see *Reg. v. Charretie*, 13 Jur. 450, 18 Law J. n. s. M. C. 160. As to the Virginia statute against buying and selling offices, see *Commonwealth v. Callaghan*, 2 Va. Cas. 460.

4. Growing out of the same reason, we have the condemnation in which all right-minded men hold those sinister approaches to official persons, in which people sometimes indulge; amounting to less than bribery, yet reprehensible morally if not legally. In our country especially, where the artificial dignity of office does not operate as powerfully to repel such things as in Europe, and where the desire for votes is always present with most in office, both the danger and the present evil from this source are very great. Neither public sentiment nor proper laws should be wanting with us, to restrain the wrong. In respect to the judicial office, Lord Cottenham once expressed an important truth as follows: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is to be treated, as, what it really is, a high contempt of court." *Matter of Dyce Sombre*, 1 Mac. & G. 116, 122.

¹ 1 Gab. *Crim. Law*, 163; *Rex v. Vaughan*, 4 Bur. 2494.

² *Rex v. Cripland*, 11 Mod. 887; *Commonwealth v. Shaver*, 3 Watts & S. 338. See *Hughes v. Marshall*, 2 Tyrw. 134, 5 Car. & P. 150.

³ *Rex v. Plympton*, 2 Ld. Raym. 1377.

⁴ *Rex v. Isherwood*, 2 Keny. 202. And see *Bush v. Ralling*, Say. 289, decided on Stat. 2 Geo. 2, c. 24, § 7.

corrupt agreement between two justices of the peace, having power to appoint a commissioner and a clerk, for the one to vote for A as commissioner in consideration of the other voting for B as clerk, and *vice versa*, is, if carried into execution, an indictable misdemeanor at the common law; the decision being, however, put principally upon the ground of corruption in office.¹

Recommendation to Office — Exchange of Prisoners. — A bribe to a privy councillor, to recommend to the king a particular person for a station within his gift;² or, to the agent having authority, to exchange prisoners of war out of their order;³ is indictable within the general law of bribery.⁴

§ 87. *Degree of the Crime and its Punishment:* —

Misdemeanor. — Hawkins says: “At common law, bribery in a judge, in relation to a cause pending before him, was looked upon as an offence of so heinous a nature that it was sometimes punished as high treason before the 25 Edw. 3; and, at this day, it is certainly a very high offence, and punishable, not only with forfeiture of the offender’s office of justice,⁵ but also with fine and imprisonment, &c.” But all other forms of bribery are misdemeanor, to be visited with imprisonment and fine.⁶ As treason includes felony, and an offence which was treason becomes felony when the law ceases to hold it treason,⁷ we might deem bribery in a judge, committed under the circumstances mentioned by Hawkins, to be felony, if the latter part of the quotation did not imply the contrary. But suppose it to be felony, there is, growing out of the exemption of judicial officers from the ordinary criminal process for official misconduct,⁸ a practical difficulty in punishing it as such. Indeed, little doubt can be entertained, that all kinds of bribery are, in this country, under our common law, merely misdemeanor; though some kinds are misdemeanors of a very high and aggravated nature.⁹

¹ Commonwealth v. Callaghan, 2 Va. Cas. 400. Conspiracy. — Here is a conspiracy also; and, assuming the doctrine of the text to be sound, an indictment for the conspiracy might have been maintained if no appointment had actually been made.

² Rex v. Vaughan, 4 Bur. 2494.

³ Rex v. Beale, cited 1 East, 183.

⁴ Approve a Claim. — An agreement to use a supposed influence with

the street commissioner to induce him to allow certain claims is illegal, and a note given in consideration of it is void. Devlin v. Brady, 32 Barb. 518.

⁵ See also Vol. I. § 971.

⁶ 1 Hawk. P. C. Curw. ed. p. 416, § 6, 7.

⁷ Vol. I. § 612.

⁸ See Vol. I. § 461-463.

⁹ See also Commonwealth v. Shaver, 3 Watts & S. 338, in which it was held,

§ 88. *Attempts:*¹ —

Offering Bribe. — There are cases from which it might be inferred, that to offer a bribe is bribery, — that is, is the substantive offence, — in distinction from the indictable attempt.² Since bribery is a misdemeanor, it is of little or no practical consequence whether this view is correct or not. It is believed, however, that the better form of the doctrine is to consider such an offer as an attempt, not as the substantive crime.³ And it is settled that, under the one name or the other, such offer, or the promising of a gift, is punishable the same as if it were actually accepted or delivered.⁴ And if the offer is made by letter through the post-office, the writer commits a complete offence at the place where he deposits the letter,⁵ as well as at the place where it is received.⁶

§ 89. **Offer in Cause not yet pending.** — The Alabama judges decided, that a tender of a bribe to a justice of the peace corruptly to decide a case not pending, but afterward to be instituted before him, — the bribe being declined, and the suit not undertaken, — is indictable at the common law. But they also held, that this transaction is not within the statute of the State against offering “any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment, on any matter, cause, or

that the bribing of a voter by a candidate for the office of sheriff is not an “infamous crime,” within the meaning of art. 6, § 9, of the Constitution of Pennsylvania, a conviction of which will disqualify him from holding the office.

¹ See Vol. I. § 723 et seq.

² The State v. Ellis, 4 Vroom, 102.

³ And see Collins v. The State, 25 Texas, Supp. 202; Dishon v. Smith, 10 Iowa, 212; Walsh v. People, 65 Ill. 58; Hutchinson v. The State, 36 Texas, 293; Commonwealth v. Harris, 1 Pa. Leg. Gaz. Rep. 455.

⁴ Vol. I. § 767; Rex v. Vaughan, 4 Bur. 2494; Rex v. Plympton, 2 Ld. Raym. 1377; Rex v. Isherwood, 2 Keny. 202; Rex v. Cripland, 11 Mod. 387; Reg. v. Gurney, 10 Cox C. C. 550. And see ante, § 85, note.

⁵ United States v. Worrall, 2 Dall. 384.

⁶ In a New Jersey case, an indictment at the common law was sustained which charged, that the defendant wickedly and corruptly offered fifty dollars, to a member of the common council of Hudson City, to vote for a certain application to lay a railroad track along one of the streets of the city. Even if the common council had no jurisdiction over the application, the offer was still indictable. Said Dalriddle, J.: “The act of the defendant in endeavoring to procure the grant asked for was only the more criminal; because he sought, by the corrupt use of money, to purchase from the council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them.” The State v. Ellis, 4 Vroom, 102, 105.

proceeding which may be then pending, or may by law come or be brought, before him, in his official capacity."¹

¹ *Barefield v. The State*, 14 Ala. 603. And see *People ex rel. Purley*, 2 Cal. 564

For BRIDGE, see *WAY*; also Stat. Crimes, § 801.

BUGGERY, see *SONOMY*.

BUILDING OF WOOD, &c., see Vol. I. § 1150, 1151.

CHAPTER VIII.

BURGLARY AND OTHER BREAKINGS.¹

§ 90. Introduction.

91-100. The Breaking and Entering.

101-103. The Time.

104-108. The Place.

109-117. The Intent.

118. Statutory Breakings.

119, 120. Remaining and Connected Questions.

§ 90. *How defined.* — Burglary is the breaking and entering, in the night, of another's dwelling-house, with intent to commit a felony therein.²

Order of the Discussion. — We shall consider, I. The Breaking and Entering; II. The Time; III. The Place; IV. The Intent. Then, V. Statutory Breakings; VI. Remaining and Connected Questions.

I. *The Breaking and Entering.*

§ 91. *The Breaking.* — The meaning of the verb "to break," as employed in the law of burglary, is explained in Statutory Crimes.³ It does not require a separation of particles, as when we break a stick; but, if, for example, one lifts a latch and opens the door, or presses it open without any removing of fastenings,⁴

¹ For matter relating to this title, see Vol. I. § 262, 342, 437, 559, 577, 676, 736, 757, 1062-1064. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 128 et seq. And see, as to both law and procedure, Stat. Crimes, § 221, 233, 234, 240, 276-278, 312, 532, 533.

² Vol. I. § 559. There are no wide differences as to the definition of burglary. Thus, Hawkins: "Burglary is a felony at the common law, in breaking and entering the mansion-house of another; or (as some say) the walls or gates of a walled town, in the night, to the intent to commit some felony within the

same, whether the felonious intent be executed or not." 1 Hawk. P. C. Curw. ed. p. 129. Lord Coke: "A burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony, within the same, whether his felonious intent be executed or not." 3 Inst. 63. And see 4 Bl. Com. 223, 224; 2 East P. C. 484.

³ Stat. Crimes, § 290, 312, 313.

⁴ *The State v. Reid*, 20 Iowa, 413.

or with his hand raises an unfastened window,¹ or thrusts himself down the chimney,² or by a fraud practised on the occupant procures him to open the door,³ he breaks the dwelling-house.⁴ On the other hand, there is no breaking when one enters through an open door, window, or other aperture;⁵ or pushes further open a door or window already open in part.⁶

§ 92. **The Entry.**—To constitute burglary, there must be also an entry.⁷ It need not be in the same night with the breaking; though both must evidently take place in the night, and both must be with felonious intent.⁸

What is an Entry.—The entry is complete, though the whole physical frame does not pass within the dwelling-house: if a hand or any part of the body goes within, or if the instrument intended to be used in the commission of the felony does, that is sufficient.⁹ Therefore a man commits this offence who cuts a hole in the shutters, thrusts in his hand, and feloniously takes away another's personal property;¹⁰ or thrusts in his hand, with the like intention, without accomplishing the object;¹¹ or puts "a hook in at a window to draw out goods, or a pistol to demand one's money."¹² And if the hand is thrust within the building to finish the breaking rather than extract the goods, still it completes the entry.¹³

§ 93. **What is not an Entry.**—But if only the tool used for breaking goes in, and neither any part of the person, nor the instrument by which the ulterior felony is to be perpetrated, does, there is no burglary.¹⁴ Thus, to raise a window by means of the

¹ Frank v. The State, 39 Missis. 705; Rex v. Hyams, 7 Car. & P. 441.

² Donohoo v. The State, 36 Ala. 231; Rex v. Brice, Russ. & Ry. 450.

³ The State v. Johnson, Phillips, 186; The State v. Mordecai, 68 N. C. 207. See, as to this point, and the consent implied in a plan to entrap the burglar, Vol. I. § 261-263; Allen v. The State, 40 Ala. 334.

⁴ Fisher v. The State, 43 Ala. 17; Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491.

⁵ Rex v. Lewis, 2 Car. & P. 628; Rex v. Johnson, 2 East P. C. 488.

⁶ Stat. Crimes, § 812; Commonwealth v. Strupney, 105 Mass. 588.

⁷ Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Anonymous, Dalison,

22; 1 Hale P. C. 551; Anonymous, J. Kel. 67.

⁸ 1 Gab. Crim. Law, 176; 2 East P. C. 508; 1 Hale P. C. 551; Rex v. Smith, Russ. & Ry. 417; Rex v. Jordan, 7 Car. & P. 432; Reg. v. Bird, 9 Car. & P. 44.

⁹ The State v. McCall, 4 Ala. 643; Franco v. The State, 42 Texas, 276; 1 Gab. Crim. Law, 174; 3 Inst. 64; 4 Bl. Com. 227.

¹⁰ Gibbon's Case, Foster, 107. And see Anonymous, 1 Anderson, 115.

¹¹ Rex v. Bailey, Russ. & Ry. 341.

¹² 4 Bl. Com. 227; 3 Inst. 64; Anonymous, 1 Hale P. C. 553.

¹³ Reg. v. O'Brien, 4 Cox C. C. 398.

¹⁴ Rex v. Roberts, Car. Crim. Law, 3d ed. 293; Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex v. Rust, 1

hands placed outside of it, and then thrust in a bar for forcing open the inside shutter;¹ or to make a hole through a door with a centre-bit, whereby some of the chips fall in,² is insufficient; because neither the bar nor the centre-bit was to be employed about the ulterior felony.

§ 94. **Shooting in a Ball to kill.**—Whether, if one, intending a felonious homicide, discharges a ball from a gun outside the building, through a hole previously broken by him for the purpose; or, without a previous breaking, sends the ball into it, making thus both a breach and an entry by one impulse; he commits burglary, is left uncertain on the authorities.³ On principle, there is less doubt; for the ball is meant and adapted to perpetrate the felonious homicide;⁴ and, according to a general doctrine of the criminal law, a physical agent set in action by the party is considered the same as the party himself; even causing him to commit the offence in the locality where the agent acts, though himself personally absent.⁵

§ 95. **How far inside.**—The entry need not extend to any defined distance inside. Therefore when a boy, intending to steal, pushed in with his fingers a pane of glass, and simply the fore part of one finger had passed within the sash when he was apprehended, a conviction of him for burglary was held to be correct.⁶

Shutters.—If there are inside shutters, it is enough to pass in the hand for the unaccomplished purpose of opening one of them;⁷ but the breaking of an outside shutter is not sufficient while the place remains unbroken.⁸

Chimney.—If the breaking is by coming in at the chimney,⁹ it is not necessary, to constitute an entry, that the burglar should

Moody, 183; 3 Inst. 64; 1 Hawk. P. C. Curw. ed. p. 132, § 11, 12. And see Reg. v. O'Brien, 4 Cox C. C. 398.

¹ Rex v. Rust, 1 Moody, 183; Rex v. Roberts, Car. Crim. Law, 3d ed. 293.

² Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491.

³ 1 Hale P. C. 555; 1 Hawk. P. C. Curw. ed. p. 132, § 11; 2 East P. C. 490; 1 Gab. Crim. Law, 174; 1 Russ. Crimes, 3d Eng. ed. 795 and note.

⁴ See 2 East P. C. 490; 1 Russ. Crimes, 3d Eng. ed. 795.

⁵ Vol. I. § 110-112, 310, 651. Sending

Child in. — It is the same if a man sends into the dwelling a child of tender years and innocent of any crime, but does not personally enter; he is still chargeable with burglary. 1 Hale P. C. 555, 556; 1 Russ. Crimes, 3d Eng. ed. 797.

⁶ Rex v. Davis, Russ. & Ry. 499.
⁷ Rex v. Perkes, 1 Car. & P. 300; Rex v. Bailey, Russ. & Ry. 341; Robert's Case, 2 East P. C. 487.

⁸ The State v. McCall, 4 Ala. 643.
⁹ Ante, § 91; Stat. Crimes, § 281, 312; post, § 98, note.

pass out of the chimney into any room, or even pass below the chimney-piece; entering the chimney itself is sufficient.¹

§ 96. **What must be broken.**—The breaking, as well as the entry, must be of something which constitutes a part of the dwelling-house.² Thus,—

Area Gate.—The area gate is not deemed a part of the mansion; and, where one by a skeleton-key made his way through this gate, and entered the dwelling at a door accidentally left open, he was held not to be guilty of burglary.³

§ 97. **Inside Doors**—(Servant—Guest at Inn).—But the breaking need not be of outside barriers; for if one is within, however lawfully, and there breaks an inner door through which he enters a room with burglarious intent,⁴—as where a servant lifts the latch and goes into a chamber⁵ to commit murder⁶ or a rape,⁷—it is burglary.⁸ *A fortiori*, therefore, a guest at a hotel becomes chargeable with this offence if he leaves his own room and breaks into the room of another guest, for the purpose of committing a felony therein.⁹

§ 98. **Inside Breakings, continued.**—Likewise, where the breaking is of inner barriers, the same as where it is of outside ones, the breach must be of something which constitutes a part of the dwelling-house; as,—

Trunk or Box.—If it is merely of a trunk or box, from which goods are stolen, the transaction will not be burglarious.¹⁰

Fixtures.—“With respect,” says Gabbett,¹¹ “to such fixtures as cupboards, presses, lockers, and the like, doubts have been entertained; and, in one case, the judges were divided upon the ques-

¹ *Rex v. Brice*, Russ. & Ry. 450; *Dunchoo v. The State*, 36 Ala. 281.

² *Stat. Crimes*, § 281, 312.

³ *Rex v. Davis*, Russ. & Ry. 322. And see *Rex v. Paine*, 7 Car. & P. 135; *Rex v. Brown*, 2 East, P. C. 487, 2 Leach, 4th ed. 1016, note.

⁴ *The State v. Scripture*, 42 N. H. 485.

⁵ Probably, if the chamber were his own lodging room, the case would be otherwise, because of his *quasi* interest in it. And see post, § 106. It is not burglary, says Hale, where “the opening of the door is within his trust.” 2 Hale P. C. 354, 355; 1 Russ. Crimes, 3d Eng. ed. 794 and note.

⁶ *Anonymous*, 1 Hale P. C. 554, J. Kel 67.

⁷ *Rex v. Gray*, 1 Stra. 481.

⁸ And see *Stat. Crimes*, § 290; *Rex v. Johnson*, 2 East P. C. 488; *The State v. Wilson*, Coxe, 439, 441; *Rex v. Cassey*, J. Kel. 63, 69; *Denton's Case*, Foster, 108. *Contra*, *People v. Fralick*, Hill & Denio, 63. The breaking must be before the felonious purpose ends. *Adkinson v. The State*, 5 Baxter, 599; but the felony need not be meant to be in the particular room broken. *Rolland v. Commonwealth*, 4 Norris, Pa. 66.

⁹ *The State v. Clark*, 42 Vt. 629.

¹⁰ 1 Hale P. C. 524, 554; *The State v. Wilson*, Coxe, 439, 441; 2 East P. C. 488.

¹¹ 1 Gab. Crim. Law, 172.

tion; but Mr. J. Foster is of opinion, that, in capital cases, such fixtures which merely supply the place of chests and other ordinary household utensils should, in favor of life, be considered in no other light than as mere movables;¹ though, in questions between the heir or devisee and the executor, these fixtures may, with propriety enough, be considered as annexed to and parts of the freehold. And Lord Hale² has expressed the same opinion; though he speaks doubtingly on the subject.³

§ 99. **Breaking Out.**—We have seen,⁴ that, while both the breaking and the entry must be with felonious intent, both need not transpire on the same day. Now, in the order of time, must the breaking be first, and the entry afterward, which is the common case? or, is the offence equally burglary where the entry was without a breaking, and afterward the wrong-doer breaks out? Anciently there was doubt on this question;⁵ therefore the statute of 12 Anne, stat. 1, c. 7, § 3, after mentioning the doubt, declared, “that, if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony; or, being in such house, shall commit any felony; and shall in the night-time break the said house to get out of the same,”—it shall be burglary.⁶ And though this statute is now repealed in England, the same provision in substance is contained in the later enactment of 7 & 8 Geo. 4, c. 29, § 11,⁷ superseded by the present stat. 24 & 25 Vict. c. 96, § 51.⁸ In the cases provided for by it, there need be no actual passing out from the premises, as the reader perceives; and a learned judge once made the very strong observation, that, if a thief, for instance, who was lawfully within, “even lifts the latch to get out of the house with the stolen prop-

¹ Foster, 109.

² 1 Hale P. C. 527, 555.

³ See also 2 East P. C. 489. **Chimney in Cabin.**—The majority of the North Carolina court has held, that an entry at night, through a chimney, into a log cabin in which the prosecutrix dwells, and stealing goods therein, will constitute burglary, although the chimney, made of logs and sticks, may be in a state of decay and not more than five and a half feet high. *The State v. Willis*, 7 Jones, N. C. 190.

⁴ *Ante*, § 92.

⁵ See 2 East P. C. 490; 1 Hale P. C.

554; *Dalt. Just.* c. 151, § 3; 4 Bl. Com. 227; 1 Gab. Crim. Law, 174; 1 Bennett & Heard Lead. Cas. 540.

⁶ 1 Hawk. P. C. Curw. ed. p. 132, § 15; 2 East P. C. 489.

⁷ 1 Russ. Crimes, 3d Eng. ed. 792.

⁸ Which provides, that “whoever shall enter the dwelling-house of another with intent to commit any felony therein, or, being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary.”

erty, that is a burglarious breaking out of the house."¹ This remark may be correct; but it carries the doctrine very far, and the question should be examined carefully. For, is the mere lifting of a latch, in such a case, a breaking of the dwelling-house?

How in our States.—The statute of 12 Anne is too recent (A.D. 1713) to be absolutely binding as common law in all our States,² though, where it is not, it must have its weight as declaratory of the sense of the English Parliament. Probably, in most of our States, the question is settled by statute. It is so, for example, in Georgia, where the words are, "breaking and entering *into*;" the consequence of which is, that a breaking *out* is not adequate in this State.³

§ 100. **Breaking Inner Doors without Entry.**—If the felon, to get out of the dwelling-house, should break an inner door, but not enter through it, the case would plainly be within the statute of Anne. But it seems not to be absolutely settled, whether, where the intent is not to get out, a person who has feloniously entered without a breaking commits burglary if he makes no entry through the inner door which he has broken. There are indications that the breaking alone in such circumstances may be deemed enough.⁴ On the other hand, in an English case before the Central Criminal Court, Gurney, Commissioner, on consultation with Crosswell, J., held, that burglary is not committed by an entry, with felonious intent, into a dwelling-house without breaking, followed by a mere breaking (not affirmatively appearing to be to get out), without entry, of an inside door.⁵ We have, in this case, a breaking, an entry, and a felonious intent; yet, not only is the breaking after the entry, but the breaking and entry are of different parts of the dwelling. If a breaking

¹ Erskine, J., in *Reg. v. Wheeldon*, 8 Car. & P. 747. And see 1 Hale P. C. 553; *Rex v. Johnson*, 2 East P. C. 488; *Rex v. Callan*, Russ. & Ry. 157; *Rex v. McKearney*, Jebb, 99, 1 Ben. & H. Lead. Cas. 540; *Rex v. Lawrence*, 4 Car. & P. 231.

² See ante, § 48, note; Bishop First Book, § 56; Deemed of force in Connecticut, *The State v. Ward*, 43 Conn. 489.

³ *White v. The State*, 51 Ga. 285, 288, 289. And see *The State v. McPherson*, 70 N. C. 239; *Brown v. The State*, 55 Ala. 123.

⁴ Anonymous, J. Kel. 67, seemingly supports this intimation; but the statement of the case in 1 Hale P. C. 554, shows that the facts did not raise the point. Erskine, J., might have held the breaking alone sufficient, as see *Reg. v. Wheeldon*, 8 Car. & P. 747; but probably his observations were founded on Stat. 7 & 8 Geo. 4, c. 29, § 11. And see Denton's Case, Foster, 108; Simeson's Case, 1 Hale P. C. 527.

⁵ *Reg. v. Davis*, 6 Cox C. C. 369.

out was not sufficient before the statute of Anne, this would not be sufficient after the statute any more than before; not being within the statutory terms.

II. *The Time.*

§ 101. **General Doctrine.**—The breaking and entering must both be in the night.¹

Night.—What is the night is a question discussed in detail in Statutory Crimes.² It is there seen, that, at the common law, those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above to enable one reasonably to discern the features of a man, belong to the day; but, in this calculation, no account is to be taken of light reflected from the moon. This rule, however, has been modified in England and some of our States by statutes.

§ 102. **Breakings by Day.**—While this country was being settled, the statute of 1 Edw. 6, c. 12, was in force in England.³ It provided, in § 10, that persons convicted, among other things, of the "breaking of any house by *day* or by night, *any person being then in the same house . . . thereby put in fear or dread*," should not be admitted to clergy; and Lord Hale treats this as creating a statutory burglary, which may be committed in the daytime. "It requires," he says, "1. An actual breaking of the house, and not an entry *per ostia aperta*. 2. An entry with intent to commit a felony, and so laid in the indictment.⁴ 3. A putting in fear."⁵ Kilty, as to Maryland, informs us that "there are, in the provincial records, some cases of prosecutions which appear to have been under this statute;"⁶ but probably the re-

¹ *Rex v. Segar*, Comb. 401; *Lewis v. The State*, 16 Conn. 32; *The State v. Bancroft*, 10 N. H. 105; *Reg. v. Polly*, 1 Car. & K. 77. "It was held in 4 Edw. 6, that the breaking of the house shall not be burglary unless it is by night. Bro. Cor. 185. This is the first passage in any book where burglary is confined to a breaking in the night. In the old books it is said to be the same whether by night or by day. According to this late determination, Staunforde has formed his description of this crime, collected from the many decisions since the time of

Britton and the Mirror, which is to this effect: 'Burglars are those who feloniously, in time of peace, break a house, church, walls, or towers, though they take nothing from thence; but then it must be done with intent to commit a felony, and in the night.'" 4 Reeves Hist. Eng. Law, 3d ed. 539.

² Stat. Crimes, § 276.

³ A.D. 1547.

⁴ *Powtler's Case*, 11 Co. 31 b.

⁵ 1 Hale P. C. 548. And see *ib. p.* 562, 563.

⁶ Kilty Report of Statutes, 164.

ports of none of the States contain any decisions on the question whether it is common law with us. It is not mentioned by the Pennsylvania judges, among the statutes in force in that State.¹

§ 103. *Continued.* — There are some other old English statutory house-breakings which may be committed in the daytime, and to them similar observations apply.² So, in our own States, may be found statutes of the like sort.³ The offences created by them differ, however, from common-law burglary in this essential particular, that the latter is a crime against the safety of the dwelling-house, perpetrated in hours of repose, when the vigilance of the occupants is, like their bodies, asleep.

III. *The Place.*

§ 104. *What.* — The breaking and entering must be into another's dwelling-house.⁴

Dwelling-house. — In the work on Statutory Crimes,⁵ the meaning of the term "dwelling-house," within this definition, was minutely discussed. It was seen, that, to constitute a dwelling-house, persons must, at times at least, sleep beneath the roof; or, in other words, the place must be used for habitation. And there is a slight distinction between this word, which is the proper common-law term in burglary, and "house," which is the common-law term in arson. The term "dwelling-house" also includes the entire cluster of buildings, not separated by a pub-

¹ Report of the Judges, 3 Binn. 595, 620. And see ante, § 48, note.

² Lord Hale, 1 Hale P. C. 548, mentions the following: —

1. "Robbing a person by day or night, in his dwelling-house; the dweller, his wife, or children being in the house and not put in fear. This requires: 1. An actual breaking of the house. 2. An actual taking of something, but the persons need not be put in fear; and, by the statute of 5 & 6 Edw. 6, c. 9, clergy is in this case taken from the principal that enters the house; and, by the statute of 4 & 5 Phil. and M. c. 4, from the accessory before.

2. "Robbing a dwelling-house, by day or night, and taking away goods, none being in the house. This requires an actual breaking, and an actual taking of

something, and without the latter it is not felony; but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 Eliz. c. 15." And see ante, § 100, note.

3. All these statutes mentioned by Lord Hale were, according to Kilty, used in the province of Maryland. Kilty Report of Statutes, 164, 166, 167, 169. But they are not mentioned by the judges as in force in Pennsylvania. Report of the Judges, 3 Binn. 595, 620, 622.

⁴ People v. Taggart, 43 Cal. 81; Davis v. The State, 3 Coldw. 77; Butler v. People, 4 Denio, 68; Williams v. The State, 46 Ga. 212; Wood v. The State, 46 Ga. 322.

⁵ The State v. Dozier, 73 N. C. 117.

⁶ Stat. Crimes, § 277-288.

lic way, which are used for purposes connected with habitation. For example, it may include a barn.¹ In cases of doubt, the reader should consult the discussions in that volume.

§ 105. *Church.* — According to the old books, this offence may also be committed by breaking into a church;² for, says Lord Coke, it is the mansion-house of Almighty God.³ There are few modern English cases,⁴ and no American ones, in which this form of burglary has been relied upon; but the law is probably not obsolete. It is within some of our statutes.⁵

Walled Town. — Likewise the books tell us, that it is burglary feloniously to break into a walled town.⁶

§ 106. *Another's.* — The dwelling-house must be another's.

Innkeeper. — Doubtless, therefore, the keeper of an inn is not a burglar, when, with felonious intent, he breaks into a guest's chamber.⁷

Rooms of Lodgers. — Suppose, again, a person not an innkeeper lets to lodgers rooms in a building with one common entrance from without, and retains other rooms for his own habitation, — here, when a burglary is committed by a third person in a lodger's room, the indictment must describe the place as the dwelling-house of the landlord;⁸ consequently the inference seems irresistible, "that, if he break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary."⁹

§ 107. *Further of Lodgers and Guests.* — On the other hand, we are not to infer, that, if the lodger or guest at an inn should

¹ Pitcher v. People, 16 Mich. 142.

² Anonymous, 1 Dy. 99a, pl. 58; Dalton Just. c. 151, § 1, 4; 1 Hawk. P. C. Curw. ed. p. 133, § 17; 1 Russ. Crimes, 3d Eng. ed. 785; 2 East P. C. 491.

³ 3 Inst. 64.

⁴ In Reg. v. Baker, 3 Cox C. C. 581, Alderson, B., observed: "I take it to be settled law, that burglary may be committed in a church at common law. I so held lately, on circuit."

⁵ Wilson v. The State, 34 Ohio State, 199.

⁶ 4 Bl. Com. 224; 1 Gab. Crim. Law, 169; 1 Hawk. P. C. Curw. ed. p. 129; ante, § 101, note.

⁷ And see Rex v. Prosser, 2 East P. C. 502. Dalton, however, says, what can hardly be law at the present day: "A guest cometh to a common inn, &c., and

the host appointeth him his chamber, and in the night the host breaketh into the guest's chamber to rob him; this is burglary." Dalton Just. c. 151, § 4.

⁸ Stat. Crimes, § 287; 1 Russ. Crimes, 3d Eng. ed. 816, 817; Rex v. Hawkins, 2 East P. C. 501; Rex v. Pickett, 2 East P. C. 501; Rex v. Witt, 1 Moody, 248; Rex v. Stock, 2 Leach, 4th ed. 1015, Russ. & Ry. 185, 2 Taunt. 339; Rex v. Margetts, 2 Leach, 4th ed. 930; Rex v. Ball, 1 Moody, 30; Rex v. Wilson, Russ. & Ry. 115; Crim. Proced. II. § 138.

⁹ 1 Russ. Crimes, 3d Eng. ed. 820; Anonymous, J. Kel. 83, 84; 2 East P. C. 502. And see The State v. Curtis, 4 Dev. & Bat. 222; Rex v. Jobling, Russ. & Ry. 525; Rex v. Canfield, 1 Moody, 42; Rex v. Jarvis, 1 Moody, 7; Rex v. Wilson, Russ. & Ry. 115.

simply break out of his own chamber with burglarious intent, but commit no other breaking, his offence would be burglary. It seems sufficiently clear that it would not be, even in the strong case of the guest; "because," says Lord Hale, "he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house."¹ And in New Hampshire, where the guest, besides passing out of his own room, entered the bar-room and there stole money, he was held not to be a burglar; since he had a legal right to go into the bar-room,—a decision, however, which rests somewhat upon the language of the statute.² But if, instead of entering the bar-room, he breaks into another guest's chamber to commit a felony, this is burglary.³

§ 108. **Entire Building let to Lodgers or Separate Families.**—The cases thus brought to view should be distinguished from those in which an entire building is let to lodgers or to separate families. Then the room or suit of rooms occupied by each lodger or family constitutes, of itself, the dwelling-house of such lodger or family.⁴

IV. *The Intent.*

§ 109. **Two Intents, &c.**—We saw, in the preceding volume, that in burglary there are two intents,—first, to break and enter; secondly, to commit, in the place entered, a felony.⁵ What we are principally to consider, under our present sub-title, is this second or ulterior intent.

§ 110. **To commit Misdemeanor**—(**Assault—Maiming—Adultery**).—Therefore if the object of the breaking is to commit some offence which in law is only a misdemeanor; as an assault and battery,⁶ or the cutting off of a person's ear,⁷ or adultery

¹ 1 Hale P. C. 554; ante, § 104. Both Mr. East and Mr. Russell criticise this proposition; and seem of opinion, that, because the landlord could not commit burglary by breaking the guest's door, therefore the guest could commit it by breaking his own door. I confess myself unable to see the force of the reasoning. As well say, that, because a wife cannot commit it by breaking her husband's house, therefore the husband can by breaking his own house; or because one tenant in common cannot, therefore the other tenant can. See 2

East P. C. 503; 1 Russ. Crimes, 3d Ed. ed. 816. Here, again, Dalton states the doctrine contrary to our text. Dalton Just. c. 151, § 4.

² The State v. Moore, 12 N. H. 42.

³ The State v. Clark, 42 Vt. 629.

⁴ Stat. Crimes, § 287; Commonwealth v. Bowden, 14 Gray, 103. And see Commonwealth v. Thompson, 9 Gray, 108; Mason v. People, 26 N. Y. 200.

⁵ Vol. I. § 342.

⁶ 2 East P. C. 509.

⁷ Commonwealth v. Newell, 7 Mass. 245.

where it is indictable only as a misdemeanor;¹ there is no burglary; though the act may be punishable as an attempt to commit a misdemeanor,² or otherwise.

Felony.—The intent must be to do some wrong which constitutes a felony,³ either at common law or by statute;⁴ but the felony intended need not be actually accomplished.⁵

§ 111. **Illustrations**—(**Servant embezzling—Rescue Goods from Excise Officer**).—When, therefore, a servant, whose business it was to sell goods, concealed in his master's house some money received for goods sold; and, after being discharged, broke into the house and took this money with criminal intent; he was held not to be guilty of burglary; because, as the money had never come into the master's possession, the carrying of it away could not be larceny.⁶ And where the object of a breaking and entering was to rescue goods which had been seized by an excise officer, and the rescue as set forth in the indictment was not a felony, the transaction, so set forth, was held not to be burglary.⁷

§ 112. **Element of Attempt.**—Though burglary, like most other crimes, admits of attempts proper to commit it, which come short of the full offence, yet it is itself a species of attempt. And the reader will derive great help from consulting the title Attempt, in the first volume.⁸ Thus,—

Repentance.—It follows from doctrines there set down,⁹ that, if a man has gone far enough to complete the offence of burglary, his crime remains, though, before he commits the ulterior felony intended, he abandons his criminal purpose.

Fear.—Especially, therefore, if one by night breaks and enters a dwelling-house intending to commit a felony in it, and, after entering, desists through fear or because he is resisted, the crime of burglary is nevertheless complete.¹⁰

§ 113. **Intending Misdemeanor, but committing Felony.**—Again, to constitute an indictable attempt, the person attempting must

¹ The State v. Cooper, 16 Vt. 551. See Vol. I. § 763.

² Vol. I. § 759, 760.

³ Anonymous, Dalison, 22; The State v. Eaton, 3 Harring. Del. 554; The State v. Wilson, Coxe, 439, 441; The State v. Bell, 29 Iowa, 316; People v. Jenkins, 16 Cal. 431.

⁴ Stat. Crimes, § 139; Rex v. Knight,

² East P. C. 510, 511; 1 Gab. Crim. Law, 192.

⁵ Olive v. Commonwealth, 5 Bush. 376. ⁶ Rex v. Dingley, cited 1 Show. 53, Gouldsb. 186, 2 Leach, 4th ed. 841.

⁷ Rex v. Knight, 2 East P. C. 510.

⁸ Vol. I. § 723 et seq.

⁹ Vol. I. § 733.

¹⁰ The State v. McDaniel, Winston, No. I. 249.

intend to do the particular thing which, in law, amounts to the ulterior crime.¹ Therefore, in burglary, when one undertakes to commit a misdemeanor, but accidentally he accomplishes a felony which he did not intend, still, although he is indictable for this felony done, yet, as it was not intended, he is not guilty of burglary.² The doctrine is, that there must be a particular intent to do a particular act, which act is a felony; and this intent must be proved to have existed in the mind of the defendant as matter of fact, not merely as matter of law.³

§ 114. **Impossible — (Fact unknown — Goods not in House).** — It seems to have been held, that, if there were facts unknown to the defendant, making it certain he could not commit the felony intended, — as, if his object were to steal the goods of A, and A had no goods in the dwelling-house,⁴ — there is no burglary. This proposition, we saw in the first volume,⁵ cannot be sustained on principle; and the authorities apparently supporting it are not sufficiently distinct or numerous to justify a departure from the true line of the law. Burglary being an attempt,⁶ the principles governing attempts as explained in that volume will indicate the true solution of all questions of this sort.⁷

§ 115. **Presumption of Intent.** — Though there are felonies which men may commit in point of law, and do sometimes commit in point of fact, without meaning so high an offence, yet the presumption is, *prima facie*, that whatever they do they intend.⁸ And if a man is indicted for breaking and entering with the intent, for example, to steal, and the proof shows that he did steal, it establishes also the intent charged; since the presumption is, that whatever was done, was intended.⁹

¹ Vol. I. § 727-730.

² Vol. I. § 736; 2 East P. C. 509; 1 Hale P. C. 561.

³ And see Vol. I. § 729, 734, 735.

⁴ *Rex v. Jenks*, 2 Leach, 4th ed. 774, 2 East P. C. 514; *Rex v. Lyons*, 2 East P. C. 497, 498, 1 Leach, 4th ed. 185.

⁵ Vol. I. § 740-754.

⁶ Vol. I. § 437.

⁷ This case is, by analogy, like that of the attempt to commit an abortion, when, contrary to the belief of the parties, there is no fetus or embryo in the womb; and the attempt to steal, by picking the pocket, when the experiment proves that there is nothing in the pocket

to be stolen. We have seen, Vol. I. § 741, that the English judges have held both ways on this question; while some American courts have held the offence of indictable attempt to be committed under these circumstances. Vol. I. § 743, 744.

⁸ Vol. I. § 734, 735; 2 East P. C. 510, 514.

⁹ *Crim. Procd. II. § 148*; *People v. Marks*, 4 Parker, 153, where it was held, that, if, on an indictment for burglary with the intent to commit larceny, and for the commission of such larceny, the larceny itself is insufficiently charged, the prisoner may still be convicted of

§ 116. **Forms of Indictment as to Intent.** — To make this plain, we must repeat what properly belongs to the volumes of Criminal Procedure,¹ that the indictment for burglary may either allege an intent to do a felonious act in the place broken and entered; or, while silent concerning the intent, may allege that a particular felony was done there, — the pleader being permitted to elect which of these forms he will adopt.² The common method is to blend the two in one, and charge both an intent to do and an actual doing; and this blending has been held to be good.³

Verdict. — The conviction may be of so much as is sustained by the proof;⁴ for example, of the felony charged, as committed in the place broken and entered, with an acquittal of the burglary.⁵ And it makes no difference that the intent alleged is to steal, for instance, the goods of one person, and the actual stealing set out is of the goods of another; or that one or both of these persons be other than one alleged as the owner of the dwelling-house broken.⁶ When the indictment sets out a breaking and entering, and an actual stealing, but no more, and the proof is simply of a breaking and entering with intent to steal, there can be no conviction; because this allegation and this evidence do not harmonize with or support each other.⁷

§ 117. **Further Illustrations — (Larceny — Other Felony).** — A larceny, however, is committed only when one intends to commit it.⁸ But suppose the indictment for burglary, instead of alleging a larceny in the place broken and entered, charges the perpetration, in such place, of a felony of a different nature; and suppose the proof sustains the breaking and entering, and also shows, that the commission of the felony in the place entered

the burglary alone, the evidence being sufficient to establish the alleged intent.

¹ *Crim. Procd. II. § 142 et seq.*

² Vol. I. § 1032; 2 East P. C. 514; *Commonwealth v. Brown*, 3 Rawle, 207; *Jones v. The State*, 11 N. H. 269. See post, § 117; *Crim. Procd. II. § 129, 142 et seq.*

³ *Commonwealth v. Tuck*, 20 Pick. 356; *The State v. Brady*, 14 Vt. 353; *Stoops v. Commonwealth*, 7 S. & R. 491; *The State v. Squires*, 11 N. H. 37; *The State v. Moore*, 12 N. H. 42; *The State v. Ayer*, 3 Fost. N. H. 301.

⁴ Vol. I. § 796-799; *Reg. v. Clarke*, 1 Car. & K. 421.

⁵ *Rex v. Furnival*, Russ. & Ry. 445; *Reg. v. Reid*, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181; *Jones v. The State*, 11 N. H. 269; *Commonwealth v. Hope*, 22 Pick. 1; *The State v. Cocker*, 3 Harring. Del. 554; *People v. Snyder*, 2 Parker, 23.

⁶ *The State v. Brady*, 14 Vt. 353; *Reg. v. Clarke*, 1 Car. & K. 421.

⁷ Vol. I. § 803; *Rex v. Furnival*, Russ. & Ry. 445; *Jones v. The State*, 11 N. H. 269; *Reg. v. Reid*, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181.

⁸ Vol. I. § 207, 820, 342, 411; post, LARCENY.

was accidental, while the offender meant only a misdemeanor, — could he be convicted of the burglary, or merely of the minor felony? According to the doctrine stated in a section further back,¹ the conviction could be only of the minor felony; yet, in point of fact, none of the cases adjudged have presented this exact question; therefore it may be deemed open for future judicial discussion. If the intent was to commit a felony other than the one committed, in pursuance of which this one resulted accidentally, it seems plain he could be found guilty of the whole indictment.² Yet, again, it may be worthy of inquiry, whether, after all, it is sound law that an indictment for burglary is good which is silent as to the intent, and only charges a felony actually perpetrated, in those cases where such felony is of a nature to be legally committed without being intended.

V. Statutory Breakings.

§ 118. **In General.** — Something of statutory breakings is considered in the volume of Statutory Crimes.³ It is sufficient to say here, in general terms, that in our States there are provisions of many forms and kinds against house and shop breakings, creating offences analogous to common-law burglary. In the interpretation of these enactments, the courts follow the analogies of the common law of burglary, giving to particular words the meanings they have therein acquired.⁴ Some cases and adjudged points are here added in a note.⁵

¹ Ante, § 113.

² 2 East P. C. 514.

³ Stat. Crimes, § 221, 233, 234, 240, 276-278, 313, 532, 533.

⁴ The State v. Newbegin, 25 Maine, 500; Dutcher v. The State, 18 Ohio, 308; Stat. Crimes, § 141, 242; Wilson v. The State, 24 Conn. 57.

⁵ 1. Tully v. Commonwealth, 4 Met. 357; Wilde v. Commonwealth, 2 Met. 408; Commonwealth v. Lindsay, 10 Mass. 153; Commonwealth v. McMonagle, 1 Mass. 517; Reg. v. Gilbert, 1 Car. & K. 84. And see post; § 119, note.

2. "Outhouse." — A statute in Connecticut provided a punishment for "every person who shall, in the night season, break and enter the store, shop, warehouse, or outhouse of an-

other, whether parcel of any mansion-house or not, wherein goods, wares, or merchandise are deposited, with an intention to commit theft within the same." And it was held by the majority of the court, two judges dissenting, that a barn, disconnected from the mansion and standing alone, several rods distant, was an "outhouse" within the terms of this statute. See Stat. Crimes, § 291. "Goods," &c. — Likewise, that grain, the produce of the owner's farm, was "goods, wares, or merchandise," within the statute. By these words, said Hosmer, C. J., "is intended any personal property, of which larceny may be committed; and not those goods and chattels only, which are offered for sale." See Stat. Crimes, § 344. The State v. Brooks, 4 Conn. 448,

VI. Remaining and Connected Questions.

§ 119. **Consent.** — The effect of a consent to let in a burglar was considered in the preceding volume.¹

449. **Intent.** — On a similar statute, the same tribunal held, that the offence is completed by the breaking and entering, with the felonious intent, the same as in common-law burglary, though the ulterior felony be not perpetrated. Wilson v. The State, 24 Conn. 57. "Store" — "Shop." — A banking-house is a store or shop within the meaning of this statute. *Ib.* See Stat. Crimes, § 295.

3. **The Breaking, &c.** — A statute in Maine provided, that, "if any person, with intent to commit a felony, shall at any time break and enter any office, bank, shop, or warehouse, he shall be punished," &c. And it was held, that, when a store is lighted up, and the doors are merely latched in the ordinary manner, without any fastening to exclude admission, and the clerks are in the store ready to attend on customers; and, before eight o'clock in the evening, one carefully lifts the latch of the door and enters, intending to commit a larceny in the store, and does commit it, secretly, and without the knowledge of the attendants, the transaction does not constitute the offence provided for by the statute. "It was doubtless the design of the legislature," said Shepley, J., "to use the words break and enter, when defining this offence, in the sense in which they are used to define the crime of burglary. To constitute that offence, there must be proof of an actual breaking, or of that which is equivalent to it. Proof of an illegal entrance merely, such as would enable the party injured to maintain trespass *quare clausum*, will not be sufficient. Nor will proof of an entrance merely, for a purpose ever so felonious and foul, accompanied by any conceivable stratagem, be sufficient, if there be no actual breaking." The State v. Newbegin, 25 Maine, 500, 502, 503. And see Stat. Crimes, § 312.

4. "Forcibly Break." — A statute of Ohio provided a punishment, "if any

person shall, in the night season, wilfully, maliciously, and *forcibly* break and enter into any dwelling-house," &c. And it was held, that, notwithstanding the use of this word "forcibly," no other breaking is required than what would be sufficient to support a common-law indictment for burglary. Therefore where the inmates of the house were, on the night mentioned in the indictment, awakened by some one knocking at the door, and, in answer to the knocking, one of the inmates said "Come in;" and the person outside pulled the latch-string, but said he could not open the door; whereupon the person in the house, being deceived as to the intention of the person outside, opened the door, and let the burglar in, — this was held to be a sufficient breaking, by such outside person, to constitute the statutory offence. "For ages," said Spalding, J., "it has been considered, that the most dangerous sort of burglars were those who would seek to gain an entrance into one's mansion, not by violence, for that might be resisted, but by art, cunning, and circumvention." One judge dissented, deeming, "that, to constitute burglary under the statute, some degree of violence must be used in effecting an entry." Ducher v. The State, 18 Ohio, 308, 317, 318. Consult, in connection with this case, The State v. Henry, 9 Ire. 463. And see Stat. Crimes, § 312, 313; Vol. I. § 260-263.

¹ Vol. I. § 262; and see ante, § 118, note. **Consent of Adulterous Wife.** — It is strongly intimated in Ohio, that one who breaks and enters another's dwelling-house in the night, to commit therein adultery with the wife of him who, with his family, occupies it, cannot set up, in excuse for this breach and entry, the wife's consent previously granted. On the facts before the court, and the general question, Wright, J., observed: "We are not called upon to say, whether one entering a house, with the actual consent

§ 119 *a*. **Attempts.**— We have seen,¹ that burglary is itself a species of attempt. Still it admits of attempts less than burglary. Thus, if one breaks a dwelling-house, intending to commit a burglary in it, but is interrupted or desists before he effects an entry, he commits the indictable attempt.² Not every act short of breaking will be sufficiently proximate to the consummated burglary to be thus indictable.³ Consequently, in Canada, it was held that, if persons go within thirteen feet of a dwelling-house in which they intend to commit a burglary, but do no more, this act is not “sufficiently proximate and directly tending to the offence” to be punishable.⁴ Still, in many other ways short of a breaking, may the attempt be committed, as the reader will see who consults the title Attempt in our first volume.

§ 120. **Felony.**— Burglary is a common-law⁵ felony;⁶ and so the doctrines discussed in our first volume concerning principals, accessories,⁷ and the like, apply to this offence. For example,—

Persons Assisting.— All who are present, concurring in what is done, being near enough to render aid, whether in fact they do any thing or not, are principal offenders;⁸ but persons present who merely appear to concur, their object being to detect the guilty, are not criminal.⁹ The doctrine, likewise, that for one to become a principal felon, his presence during the entire transaction is not necessary, provided he is near enough to assist during

of the wife of the occupant, with a view to illicit intercourse, could be punished, under the statute, for breaking and entering the house. No such case is before us. The real question is: Would Mrs. Mason's consent that the accused should visit her in the absence of her husband, or proof of his being in the habit of visiting her when her husband was absent, even for a criminal purpose, conduce to prove her permission to him to break and enter the house for such purpose when the husband was present and by her side? It is absurd to suppose so. . . . We incline to think a married woman incapable in law, by consent, to authorize a third person to break open and enter the house of her husband for an unlawful purpose. Such consent, though ever so formally given, could not justify or legalize an infraction of law, or sanctify an unlawful purpose. And will any one pretend, that the entering a

man's house, with intent to commit adultery with his wife, with any consent, save only that of the husband, is a lawful entry? Forsythe v. The State, 6 Ohio, 19, 23.

¹ Ante, § 112 et seq.

² Reg. v. Spanner, 12 Cox C. C. 155, 2 Eng. Rep. 208; Reg. v. Meal, 3 Cox C. C. 70; Reg. v. Bain, Leigh & C. 129, 9 Cox C. C. 98.

³ People v. Lawton, 56 Barb. 126.

⁴ Reg. v. McCann, 28 U. C. Q. B. 514.

⁵ Rex v. Hanson, 1 Root, 59.

⁶ 1 Hawk. P. C. Curw. ed. p. 129; 1 Hale P. C. 585.

⁷ Vol. I. § 646-654, 662-680.

⁸ Rex v. Bailey, Russ. & Ry. 341; Cornwall's Case, 2 Stra. 881; Hawkins's Case, cited 2 East P. C. 485.

⁹ Rex v. Dannelly, Russ. & Ry. 310, 2 Marshall, 471. And see Reg. v. Johnson, Car. & M. 218.

a part of it,¹ applies here; so that, if he is present, for instance, at the breaking only, he is answerable as principal for what is done afterward in pursuance of the original plan, though personally absent.²

¹ Vol. I. § 649, 650.

² Reg. v. Jordan, 7 Car. & P. 432. See Vol. I. § 676.

For BURIAL, see SEPULTURE.

BURNING BUILDINGS, see ARSON AND OTHER BURNINGS.

CARNAL ABUSE, see RAPE AND THE LIKE. Also, Stat. Crimes, § 478-494

CARRYING WEAPONS, as to both law and procedure, see Stat. Crimes

CHALLENGING, see DUELLING.

CHAPTER IX.

CHAMPERTY AND MAINTENANCE.¹

- § 121. Introduction.
 122-130. Maintenance.
 131-135. Champerty.
 136-140. Buying and Selling Pretended Titles.

§ 121. *Nature of these Offences.*—Champerty and maintenance differ little in their nature, and a discussion of them under separate heads is unnecessary. They are scarcely of practical note in the criminal law; because indictments for them are seldom found. But in civil jurisprudence they come under frequent animadversion, contracts growing out of them being void.²

How Chapter divided.—Let us consider, I. Maintenance; II. Champerty proper; III. That species of the general offence known as the Buying and Selling of Pretended Titles.

I. *Maintenance.*

§ 122. *How defined.*—We have already found Blackstone's definition to be unobjectionable; namely, that maintenance is "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."³

Why indictable.—In a modern case it was said: "Combinations against individuals are dangerous in themselves, and prejudicial

¹ For matter relating to this title, see Vol. I. § 307, 541, 942, note. See, also, this vol. BARRATRY. For the pleading, practice, and evidence, see Crim. Proc. II. § 154 et seq. See, also, Stat. Crimes, § 232, 568.

² *Brown v. Beauchamp*, 5 T. B. Monr. 413; *McCall v. Capehart*, 20 Ala. 521; *Arden v. Patterson*, 5 Johns. Ch. 44; *Webb v. Armstrong*, 5 Humph. 379; *Burt v. Place*, 6 Cow. 431; *Swett v. Poor*,

11 Mass. 549; *Grell v. Levy*, 16 C. B. n. s. 73; *Sayles v. Tibbitts*, 5 R. I. 79.

³ Vol. I. § 541. Hawkins says: "Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of, quarrels or sides to the disturbance or hindrance of common right." 1 Hawk. P. C. Curw. ed. p. 464. And see post, § 123.

to the public interest; and it is upon this principle that the doctrine of maintenance is founded. It is no wrong for an individual to prosecute his rights against another in a court of justice;¹ but it is, notwithstanding, criminal for others to maintain him in his suit; and for the reason, that such maintenance tends to oppression; and that the weak would be endangered by combinations of the powerful and wealthy."²

§ 123. *Old Doctrine.*—In the old books, this offence occupies broader ground. Thus Hawkins, substantially followed by later writers,³ defines maintenance to be "an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." And he says it is of two kinds; namely, "*ruralis*, or in the country, as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty,"⁴ &c.; and "*curialis*, or in a court of justice," which last is the only kind embraced in the definition we have taken from Blackstone.⁵

§ 124. *Modern Doctrine*—(Court of Justice).—It is difficult to say how much of what we find on this subject in the old books is law at the present day; but the true doctrine seems to be, that maintenance, properly so called, can only be in a court of justice, or in reference to matter pending, or to be brought there.

Conspiracy in Nature of Maintenance.—Still there is a kind of indictable conspiracy, sometimes treated of under the head of maintenance, having no necessary reference to a court of justice. Persons guilty of it are described in Stat. 33 Edw. 1, stat. 2, to be "such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth."⁶

§ 125. *Fluctuations of Doctrine*—(More of the Old Law).—"It is curious, and not altogether useless," said Buller, J., "to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who had

¹ *Mistake of Fact.*—Nor is it maintenance to prosecute or defend a suit in which he believes, though erroneously, he has an interest. *McCall v. Capehart*, 20 Ala. 521.

² *Stebbins*, Senator, in *Lambert v. People*, 9 Cow. 578, 600. And see observations in *Rust v. Larue*, 4 Litt. 411, 426; *Lathrop v. Amherst Bank*, 9 Met. 489, 492.

³ 1 Russ. Crimes, 3d Eng. ed. 176; 1 Gab. Crim. Law, 139.

⁴ See *Baley v. Deakins*, 5 B. Monr. 159.

⁵ 1 Hawk. P. C. Curw. ed. p. 454, § 1-3. In *Brown v. Beauchamp*, 5 T. B. Monr. 413, the court made an exposition of the law of maintenance based on Hawkins's.

⁶ See post, § 174 and note.

laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held to be guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected."¹ Hawkins, ever faithful in his search after old law, has set down, without dissent, not only what Buller, J., thus mentions as having been "soon laid aside," but much else of the like character; and some subsequent writers have followed him. Thus, as instances of maintenance, he mentions "speaking in the cause as one of the counsel with the party," "perhaps barely going along with him to inquire for a person learned in the law," "giving any public countenance to another in relation to the suit," and "soliciting a judge to give judgment according to the verdict." He admits, that a juror may exhort his companions to render the verdict which he deems right himself; and even, that a non-professional man may impart to his neighbor gratuitously, "friendly advice what action is proper for him to bring for the recovery of a certain debt," &c. "Yet it is said," he adds, "that a man of great power, not learned in the law, may be guilty of maintenance by telling another, who asks his advice, that he has a good title."²

§ 126. **Present Doctrine — Assisting with Money, &c.** — There is little risk in saying, that none of the absurdities spoken of in the last section would be supported by the courts of the present day, either in England or the United States. Perhaps, indeed, we can certainly set down as saved of the wreck of the old law, on this particular point, only what Hawkins terms "assisting another with money to carry on his cause; as by retaining one to be counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit."³ This, done under some circumstances, is indictable now. And the assistance rendered need not, evidently, be money; it may be any other thing valuable for accomplishing the object.⁴

§ 127. **When assist with Money.** — But even this general propo-

¹ *Master v. Miller*, 4 T. R. 320, 340, 2 H. Bl. 141.

² 1 Hawk. P. C. Curw. ed. p. 455, 456, § 5-11. As to the last point, see *Burt v. Place*, 6 Cow. 431.

³ 1 Hawk. P. C. Curw. ed. 455. And see *Lathrop v. Amherst Bank*, 9 Met. 489; *Campbell v. Jones*, 4 Wend. 306.

⁴ *Stanley v. Jones*, 7 Bing. 369.

sition of modern law demands qualifications. One is, "that, if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it."¹ Thus, it is not maintenance for a vendor, with warranty, to uphold his vendee in a suit about the title.² And an heir apparent may do the same for an ancestor of lands in fee.³ So, "whenever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit relating to the same."⁴

§ 128. **When with Advice, &c.** — Another exception, stated by Hawkins, is, "that whoever is in any way of kin or affinity to either of the parties, so long as the same continues, or but related to him by being his godfather, may lawfully stand by him at the bar, and counsel and assist him, and also pray another to be of counsel to him; but he cannot justify the laying out of any of his own money in the cause unless he be either father, or son, or heir apparent to the party, or the husband of such an heiress."⁵

Landlords and Tenants — Servants — Poor Men. — And under a variety of circumstances, landlords and tenants, masters and servants, and even neighbors may assist one another.⁶ So, "it seems to be agreed," says Hawkins, "that one may lawfully give money to a poor man to enable him to carry on his suit."⁷

General Conclusion. — The doctrine, in short, is, that, whenever there is a moral duty to assist another in a cause, the assistance rendered is no violation of law. And we need not wonder that there are differences of judicial opinion in the application of this doctrine.

§ 129. **How in Legal Reason.** — Let us, seeing how vague is the doctrine in the books of authority, look into the reason of the law, and, if possible, draw thence the true rule. The reader

¹ Buller, J., in *Master v. Miller*, 4 T. R. 320, 340; *Lathrop v. Amherst Bank*, 9 Met. 489; Hawk. P. C. Curw. ed. p. 456-458, § 14-17, 20-23; *Gowen v. Nowell*, 1 Greenl. 292; *Knight v. Sawin*, 6 Greenl. 381; *Wickham v. Conklin*, 8 Johns. 220; *Cummins v. Latham*, 4 T. B. Moor. 97, 105.

² *Williamson v. Sammons*, 34 Ala. 691; *Goodspeed v. Fuller*, 46 Maine, 141.

³ 1 Hawk. P. C. Curw. ed. p. 457, § 18. And see *Persse v. Persse*, 7 Cl. & F. 279.

⁴ 1 Hawk. P. C. Curw. ed. p. 458, § 24; *Frost v. Paine*, 3 Fairf. 111.

⁵ 1 Hawk. P. C. Curw. ed. p. 458, § 26; *Lathrop v. Amherst Bank*, 9 Met. 489; *Thalhimer v. Brinckerhoff*, 3 Cow. 623.

⁶ 1 Hawk. P. C. Curw. ed. p. 459, 460, § 27 et seq.; *Thalhimer v. Brinckerhoff*, 3 Cow. 623.

⁷ 1 Hawk. P. C. Curw. ed. p. 460, § 28, s. F. *Perinc v. Dunn*, 3 Johns. Ch. 508, 518; *Anonymous*, 3 Mod. 97. And see *Bristol v. Dann*, 12 Wend. 142.

observes, that, for a man to be guilty of maintenance, there must be another to be maintained; whence it follows, that the combination of forces to oppress lies at the foundation of the law of maintenance, the same as of the law of conspiracy. Therefore, in reason, if neither unlawful means nor unlawful ends are contemplated, the combination is not criminal, though it be to use the courts of the country for establishing or defending against a private claim. It is not pretended to be criminal in the person directly suing or defending; because the law permits him to carry on or defend a suit by any means not calculated to impose upon the tribunal; no other limit to his right to prosecute or defend being, in the nature of litigation, possible. And simply to give or lend aid to a man who, by lawful means, is seeking to accomplish a lawful end, can be no breach of social duty; it should be deemed no breach of legal, so long as we who live on this earth acknowledge ourselves to be bound together by the ties of brotherhood, or recognize the duty to love each his neighbor as himself. If the rich man is not shut out from the tribunals on the ground of the influence which riches bring, the poor man should not be for having found a friend.

§ 130. *Continued.*— But if one assists another, whether by advice or money, to deceive the court, or to obstruct in any other way the justice of the country, the two should be punished as criminals together. This is the doctrine of conspiracy, as will be seen on consulting our chapter on that subject. Beyond this, the courts ought not, whatever they may do in fact, to carry the law of maintenance.

II. Champerty.

§ 131. *How defined — Distinguished from Maintenance.*— Champerty differs from maintenance chiefly in this, that, in champerty, the compensation to be given for the assistance rendered is a part of the thing in suit, or some profit growing out of it;¹ whereas, in simple maintenance, the question of compensation

¹ *Holloway v. Lowe*, 7 Port. 488; *Lathrop v. Amherst Bank*, 9 Met. 489; *Stevens v. Bagwell*, 15 Ves. 139; *Barnes v. Strong*, 1 Jones Eq. 100; *Wheeler v. Pounds*, 24 Ala. 472. Hawkins defines champerty as "a species of maintenance," and says:

It "is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." 1 Hawk. P. C. Curw. ed. p. 463.

enters not much into the account.¹ Champerty, also, like the other form of maintenance, is an offence indictable at the common law.²

Suit commenced or not.— It may be committed, though there has been no suit actually commenced.³

§ 132. *Lawyer part of what he gets.*— A common instance of champerty is where an attorney at law agrees with a client to make collections, receiving for his compensation a part⁴ or percentage⁵ of the money collected. The agreement is void, and the attorney can recover of the client neither the stipulated com-

¹ According to Stat. 33 Edw. 1, stat. 2.— see post, § 174 and note,—"Champersters be they that move pleas and suits, or cause to be moved, either by their own procurement or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains."

² *Thurston v. Percival*, 1 Pick. 415; *Rust v. Larue*, 4 Litt. 411, 425; *Brown v. Beauchamp*, 5 T. B. Monr. 413, 416; *Douglass v. Wood*, 1 Swan, Tenn. 393. And see *Pechel v. Watson*, 8 M. & W. 691; *Fletcher v. Ellis*, 11 Emp. 300; 2 Inst. 208. The statute of 28 Edw. 1, c. 11— see 2 Inst. 563; 1 Hawk. P. C. Curw. ed. p. 465; *Lathrop v. Amherst Bank*, 9 Met. 489— is perhaps a part of the common law of this country. It provides, "that no officer, nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and, if any do, and he be attainted thereof, the taker shall forfeit unto the king so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this attainder, whosoever will, shall be received to sue for the king before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law, for his fee, or of his parents and next friends." And the earlier English enactment of 3 Edw. 1, c. 25, provided, that "no officer of the king, by themselves nor by other, shall

maintain pleas, suits, or matters hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth, shall be punished at the king's pleasure." However, the doctrine of maintenance and champerty stands well on the older English law, without these statutes. In Ohio, this offence is not indictable, simply because there are no common-law offences there. Key v. Vattier, 1 Ohio, 132. So in one or two of the other States. Vol. I. § 35. *Wright v. Meek*, 3 Greene, Iowa, 472; *Newkirk v. Conc*, 18 Ill. 449; *Danforth v. Streeter*, 28 Vt. 490; *Richardson v. Rowland*, 40 Conn. 565. And see note to this case in 2 Green Crim. 495. The question as to Texas was considered in *McMullen v. Guest*, 6 Texas, 275, to be doubtful. But afterward the court rejected the statutes and general doctrine as not applicable to this country, and held that an attorney may lawfully contract for a portion of the land recovered as his fee. *Bentinck v. Franklin*, 38 Texas, 458.

³ *Rust v. Larue*, 4 Litt. 411. And see *Martin v. Amos*, 13 Ire. 201.

⁴ *Byrd v. Odem*, 9 Ala. 755; *Key v. Vattier*, 1 Ohio, 132; *Dumas v. Smith*, 17 Ala. 305; *In re Masters*, 1 Har. & W. 348; *Ex parte Yeatman*, 4 Dowl. P. C. 304, 1 Har. & W. 510; *Strange v. Brennan*, 10 Jur. 649; *Scobey v. Ross*, 13 Ind. 117. And see *Smith v. Paxton*, 4 Dana, 391; *Wilhite v. Roberts*, 4 Dana, 172; *Robison v. Beall*, 26 Ga. 17; *Miles v. Collins*, 1 Met. Ky. 308.

⁵ *Elliott v. McClelland*, 17 Ala. 206; *Lathrop v. Amherst Bank*, 9 Met. 489. And see *Allen v. Hawks*, 13 Pick. 79.

And see *Allen v. Hawks*, 13 Pick. 79.

compensation nor any other. But the Kentucky court held, contrary to what is probably the general doctrine, that he may compel a payment of what his labor is worth, though not the agreed compensation.¹ The same court likewise held, that a covenant by a plaintiff, in an action of slander, to give the lawyer "a sum equal to one-tenth of the damages which might be recovered," for his services, is not champertous, "but is an obligation to pay a contingent fee made dependent on a recovery."² This very thin distinction the Alabama court did not make in a similar case, but held the contract void.³

§ 133. *Promise after Suit ended.*—After the suit is ended, however, the client may lawfully promise payment to his attorney of a part of what is collected.⁴

Assignment.—And the transfer of the subject-matter of the suit, to the attorney, by assignment, as security for his charges, is not deemed champertous, though an absolute sale might be.⁵

§ 134. *How in Principle.*—Thus the law stands in the books; but, in legal reason, the better statement of it, if not the law itself, is somewhat different. It is as follows. The repose of the community demands, that litigation be not stirred up beyond the natural and ordinary prosecution and defence of suits growing out of men's own transactions. From this truth sprang the old common-law rule, applicable in civil jurisprudence, that a *chose in action* cannot be assigned. This rule, the reader knows, was practically abolished long ago; though still the suit, after an assignment, must be brought in the name of the assignor.⁶ Consequently it is not now champerty to make such an assignment. But to allow a man to carry on a suit for another at his own charges, and receive in compensation a part of what he gets, is more prejudicial to the public repose; consequently the law takes notice of such an act, and punishes it as champerty. In this view, the doctrines of champerty rest perhaps on a good foundation of

¹ *Rust v. Larue*, 4 Litt. 411, 425; *Caldwell v. Shepherd*, 6 T. B. Monr. 389, 392.

² *Evans v. Bell*, 6 Dana, 479; s. r. *Major v. Gibson*, 1 Patton & H. 48. And see *Benedict v. Stuart*, 23 Barb. 420; *Ogden v. Des Arts*, 4 Duer, 275; *Lytle v. The State*, 17 Ark. 608; *Backus v. Byron*, 4 Mich. 535.

³ *Holloway v. Lowe*, 7 Port. 488. As to Texas, see note to the last section.

⁴ *Walker v. Cuthbert*, 10 Ala. 213; *Floyd v. Goodwin*, 8 Yerg. 484.

⁵ *Anderson v. Radcliffe, Ellis, B. & E.* 806.

⁶ See *Lewis v. Bell*, 17 How. U. S. 616; *McMicken v. Perin*, 18 How. U. S. 507; *Danforth v. Streeter*, 28 Vt. 490; *Deshler v. Dodge*, 16 How. U. S. 622; *Poe v. Davis*, 29 Ala. 676.

reason; plainly they do, as applied to attorneys at law, and to other persons engaged in similar occupations.

§ 135. *Statutes.*—In some of the States, there are statutes regulating these matters.¹

III. *The Buying and Selling of Pretended Titles.*²

§ 136. *General Doctrine.*—Says Hawkins: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate. And it seemeth not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression."³

How in our States.—The substance of this doctrine is pretty generally, not universally, accepted as common law in our States.³

Mistake of Fact.—The criminal intent being an element in all crime, the purchase and sale must be with knowledge of the impediment.⁴ Then they are the subject of indictment.⁵

§ 137. *Conveyance of Land held adversely.*—This is one of the sources of the rule, that a conveyance of land held by another adversely to the grantor is void.⁶

¹ See *Low v. Hutchinson*, 37 Maine, 196; *Sedgwick v. Stanton*, 4 Kernan, 289; *Newkirk v. Cone*, 18 Ill. 449; *Davis v. Sharron*, 15 B. Monr. 64; *Williams v. Matthews*, 3 Cow. 252; *Stoddard v. Mix*, 14 Conn. 12; *Arden v. Patterson*, 5 Johns. Ch. 44; *People v. Walbridge*, 6 Cow. 612, 8 Wend. 120.

² 1 Hawk. P. C. Curw. ed. p. 470, § 1.

³ *Sessions v. Reynolds*, 7 Sm. & M. 130; *Dexter v. Nelson*, 6 Ala. 68; *Bledsoe v. Little*, 4 How. Missis. 13, 24; *Woodworth v. Janes*, 2 Johns. Cas. 417; *Van Dyck v. Van Beuren*, 1 Johns. 345, 363; *Cummins v. Latham*, 4 T. B. Monr. 97, 105.

⁴ *Sessions v. Reynolds*, supra; *Verdier v. Simons*, 2 McCord, Ch. 385; *Alexander v. Polk*, 39 Missis. 737; *Rives v. Weaver*, 36 Missis. 374.

⁵ *Swett v. Poor*, 11 Mass. 549, 553; *Everenden v. Beaumont*, 7 Mass. 76, 78; *Wolcot v. Knight*, 6 Mass. 418, 421; *Brinley v. Whiting*, 5 Pick. 348, 359. And see, as to ignorance of the impediment, *Etheridge v. Cromwell*, 8 Wend. 629; *Preston v. Hunt*, 7 Wend. 53; *Bullard v. Copps*, 2 Humph. 409; *Gass v. Malony*, 1 Humph. 452; *Hassenfrats v. Kelly*, 13 Johns. 466; *Hendricks v. Andrews*, 7 Wend. 152.

⁶ *Co. Lit.* 214; *Gibson v. Shearer*, 1 Murph. 114; *Bledsoe v. Little*, 4 How. Missis. 13, 24; *Martin v. Pace*, 6 Blackf. 99. Another reason is, that there could be no livery of seisin by a person out of possession. *Kercheval v. Triplett*, 1 A. K. Mar. 493; *Dexter v. Nelson*, 6 Ala. 63. And see Vol. I. § 541.

Stat. 32 Hen. 8. — But the rule rests also on some early English statutes, the principal one of which is 32 Hen. 8, c. 9.¹ It directs, in § 1, the enforcement of the laws against champerty, maintenance, and other “misdemeanors” mentioned; in § 2 enacts, “that no person, &c., shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person, &c., in or to any manors, lands, tenements, or hereditaments (except such person, &c., their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain,” &c. And the remaining sections add further provisions against maintenance and the like, with further limitations of the doctrine, not necessary to be mentioned here.

Not in all our States. — In Ohio, a State in which there are no common-law crimes,² it is held, that, as this enactment is not received there, such conveyances are valid.³ So also it is in Illinois.⁴

§ 138. **Other States.** — While some courts have denied that the statute of 32 Hen. 8, c. 9, is common law in this country,⁵ the doctrine perhaps better established accepts it.⁶ In various States

¹ Co. Lit. 369 a; 1 Hawk. P. C. Curw. ed. p. 471. And see on this point, and as to what is an adverse possession: *Burhans v. Burhans*, 2 Barb. Ch. 398; *Poor v. Horton*, 15 Barb. 485; *Vrooman v. Shepherd*, 14 Barb. 441; *Klock v. Hudson*, 3 Johns. 375; *Whitaker v. Cone*, 2 Johns. Cas. 58; *Gillet v. Hill*, 5 Wend. 532; *Allen v. Smith*, 6 Blackf. 527; *Weilman v. Hickson*, 1 Ind. 581; *Michael v. Nutting*, 1 Ind. 481; *Tabb v. Baird*, 3 Call, 475; *Tomb v. Sherwood*, 13 Johns. 289; *Whitesides v. Martin*, 7 Yerg. 384; *Pickens v. Delozier*, 2 Humph. 400; *Bullard v. Copps*, 2 Humph. 409; *Mitchell v. Churchman*, 4 Humph. 218; *Wilcox v. Calloway*, 1 Wash. Va. 38; *Brinley v. Whiting*, 5 Pick. 349; *Gibson v. Shearer*, 1 Murph. 114; *Ross v. Blair*, 1 Meigs, 525; *Williams v. Hogan*, 1 Meigs, 187; *Mitchell v. Lipe*, 8 Yerg. 179; *Cawsey v. Driver*, 13 Ala. 818; *Hibbard v. Hurlburt*, 10 Vt. 173; *Lane v. Shears*, 1 Wend.

433; *Scotfield v. Collins*, 3 Cow. 89; *Van Dyck v. Van Beuren*, 1 Johns. 345; *Wood v. McGuire*, 21 Ga. 556; *Kinsolving v. Pierce*, 18 B. Monr. 782; *Williams v. Council*, 4 Jones, N. C. 206; *Pepper v. Dhaight*, 20 Barb. 429; *McCoy v. Williford*, 2 Swan, Tenn. 642; *Kincaid v. Meadows*, 3 Head, 188.

² Ante, § 181, note; Vol. I. § 85.

³ *Hall v. Ashby*, 9 Ohio, 96. Contra, in Kentucky, *Ewing v. Savary*, 4 Bibb, 424; *Kercheval v. Triplett*, 1 A. K. Mar. 493, and most other States.

⁴ *Willis v. Watson*, 4 Scam. 64; *Fetrow v. Merriwether*, 53 Ill. 275.

⁵ *Sessions v. Reynolds*, 7 Sm. & M. 130; *Hall v. Ashby*, 9 Ohio, 96; *Poyas v. Wilkins*, 12 Rich. 420; *Cain v. Monroe*, 28 Ga. 82; *Harring v. Barwick*, 24 Ga. 59; *Webb v. Camp*, 26 Ga. 354.

⁶ *Kilty Rep. Stats.* 232; *Brinley v. Whiting*, 5 Pick. 348, 353. And see Vol. I. § 541, note.

the subject has been legislated upon; in some, in confirmation of the English law, and in abrogation of it in others.¹

§ 139. **How the Statutes construed.** — Statutes of this kind are construed strictly;² and a case, to be indictable, must fall within the mischief to be remedied, as well as within their words.³

Judicial Sales — What others. — They do not apply to judicial and official sales,⁴ or to conveyances to *cestuis que trust*, or to such as are made in pursuance of a contract executed before their enactment,⁵ or made when there was no adverse possession.⁶

§ 140. **Sale after Judgment.** — And in Kentucky it is held, that a sale of land by one who has recovered judgment for it, though he has not taken possession, is not within the statute; because “the object of that act was to prevent speculations in ‘pretended’ titles, whereby purchasers were enabled to harass occupants with lawsuits.”⁷

Mortgage — Will — Surrender — Near Relatives. — The statute applies to mortgages;⁸ but not to wills, being without the mischief to be remedied;⁹ and, for the same reason, it does not, in

¹ See, among other cases, *Alexander v. Polk*, 39 Missis. 737; *Cassedy v. Jackson*, 45 Missis. 397; *Webb v. Bindon*, 21 Wend. 98; *Crary v. Goodman*, 22 N. Y. 170; *Sherwood v. Burr*, 4 Day, 244.

² Stat. Crimes, § 193. For sundry points adjudged on Stat. 32 Hen. 8, c. 9, see 1 Hawk. P. C. Curw. ed. p. 472 et seq.

³ *Leonard v. Bosworth*, 4 Conn. 421; Stat. Crimes, § 220, 232.

⁴ Stat. Crimes, § 232; *Frizzle v. Veach*, 1 Dana, 211; *Violet v. Violet*, 2 Dana, 323, 325; *Dubois v. Marshall*, 3 Dana, 335; *Tuttle v. Illis*, 6 Wend. 213; *Anderson v. Anderson*, 4 Wend. 474; *Truax v. Thorn*, 2 Barb. 156; *Hoyt v. Thompson*, 1 Seld. 320; *Williams v. Bennett*, 4 Ire. 122; *Sims v. Cross*, 10 Yerg. 460; *McGill v. McCall*, 9 Ind. 306; *Saunders v. Groves*, 2 J. J. Mar. 406; *Cook v. Travis*, 20 N. Y. 400. But see *Martin v. Pace*, 6 Blackf. 99.

⁵ *Saunders v. Groves*, 2 J. J. Mar. 407; *Moss v. Scott*, 2 Dana, 271, 274; *Cardwell v. Spriggs*, 7 Dana, 36; *Castleman v. Combs*, 7 T. B. Monr. 273, 276; *Swartwout v. Johnson*, 5 Cow. 74; *Poage v. Chinn*, 4 Dana, 50; *Chiles v. Jones*, 4 Dana, 479; *Allen v. Smith*, 1 Leigh, 231, 248; *Whitesides v. Martin*, 7 Yerg. 384;

Lipe v. Mitchell, 2 Yerg. 400, 403; *Lane v. Shears*, 1 Wend. 433. And see *Dickinson v. Burrell*, Law Rep. 1 Eq. 337.

⁶ *Norton v. Sanders*, 1 Dana, 14, 17; *Chiles v. Conley*, 9 Dana, 385. See *Parks v. Hendricks*, 11 Wend. 442.

⁷ *Jones v. Chiles*, 2 Dana, 25, 35. Otherwise of a sale while the suit is pending. *Bryant v. Ketchum*, 8 Johns. 479; *Hendricks v. Andrews*, 7 Wend. 152; *Murray v. Ballou*, 1 Johns. Ch. 566, 570; *Murray v. Lyburn*, 2 Johns. Ch. 441. And see *Parks v. Hendricks*, 11 Wend. 442; *Swett v. Poor*, 11 Mass. 549; *Webb v. Bindon*, 21 Wend. 98. But the Alabama court has held, that a sale of lands *pendente lite*, by one in possession, is not void at the common law. *Camp v. Forrest*, 13 Ala. 114. See also *Harrell v. Bunting*, 3 Hawks, 86; *Cockell v. Taylor*, 15 Eng. L. & Eq. 101, 15 Beav. 105; *Lewis v. Bell*, 17 How. U. S. 616.

⁸ *Redman v. Sanders*, 2 Dana, 68, 69; *Wash v. McBrayer*, 1 Dana, 565, 566. Otherwise in Connecticut. *Leonard v. Bosworth*, 4 Conn. 421.

⁹ *Clay v. Wyatt*, 6 J. J. Mar. 583; *May v. Slaughter*, 8 A. K. Mar. 505, 509.

Vermont, apply to an assignment of a mortgage.¹ Neither does it prevent a surrender of land to the person in possession,² or, perhaps, a conveyance between near relations.³

¹ *Converse v. Searls*, 10 Vt. 578.

² *Williams v. Council*, 4 Jones, N. C. 206. For further points decided under the *Kentucky* statutes, see *Clay v. Wyatt*, 6 J. J. Mar. 583; *Young v. McCampbell*, 6 J. J. Mar. 490; *Violet v. Violet*, 2 Dana, 323, 326; *Redman v. Sanders*, 2 Dana, 68, 70; *Aldridge v. Kincaid*, 2 Litt. 890; *Young v. Kimberland*, 2 Litt. 223, 225; *Castleman v. Combs*, 7 T. B. Monr. 273; *Willite v. Roberts*, 4 Dana, 172; *Conn v. Manifee*, 2 A. K. Mar. 396; *Baley v. Deakins*, 5 B. Monr. 159; *Adams v.*

Buford, 6 Dana, 406; *Griffith v. Dickin*, 4 Dana, 561; *Smith v. Paxton*, 4 Dana, 391; *Hopkins v. Paxton*, 4 Dana, 36; *Dubois v. Marshall*, 3 Dana, 336; *Lillard v. McGee*, 3 J. J. Mar. 549. As to *partial eviction* from the land, see *Mitchell v. Churchman*, 4 Humph. 218; *Pickens v. Delozier*, 2 Humph. 400; *Hyde v. Morgan*, 14 Conn. 104; *Van Dyck v. Van Beuren*, 1 Johns. 345.

³ *Morris v. Henderson*, 37 Missis. 492. See ante, § 128.

CHAPTER X.

CHEATS AT COMMON LAW.¹

§ 141, 142. Introduction.

143, 144. General Doctrine.

145-158. Nature of the Symbol or Token.

159, 160. Nature of the Fraud involved.

161-164. Public Cheats.

165-168. Remaining and Connected Questions.

§ 141. **What for this Chapter.** — It is proposed, in this chapter, to discuss cheats at the common law, and under Stat. 33 Hen. 8, c. 1, § 1, 2, which is common law with us; leaving cheats under the statutes of false pretences for a separate chapter.

§ 142. **Order of this Chapter.** — We shall consider I. The General Doctrine; II. The Nature of the Symbol or Token; III. The Nature of the Fraud involved, — as to private cheats respectively; IV. Public Cheats; V. Remaining and Connected Questions.

I. *The General Doctrine.*

§ 143. **How defined.** — A cheat at the common law is a fraud accomplished through the instrumentality of some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in some pecuniary interest.²

¹ See, for matter relating to this title, Vol. I. § 571, 581, 582, 584, 585. See also this volume, FALSE PRETENCES. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 157 et seq. And see *Stat. Crimes*, § 450-452.

² Vol. I. § 571. The books are nearly bare of definitions of cheat; *Hawkins* has the following: "It seemeth that those cheats which are punishable at common law may, in general, be described to be deceitful practices in defrauding, or endeavoring to defraud, another of his known right by means of some artful device, contrary to the plain

rules of common honesty: as, by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c.; or by suppressing a will; or by levying a fine in another's name, or suing out an execution upon a judgment for him, or acknowledging an action in his name, without his priv-

Stat. 33 Hen. 8.— We saw, while announcing this definition in the first volume, that the statute of 33 Hen. 8, c. 1, § 1 and 2, merely affirmed the common-law doctrine, also that it is a part of the common law of this country.¹

ity, and against his will; in which cases, by some good opinions, the record may be vacated." 1 Hawk. P. C. Curw. ed. p. 318, § 1. The accuracy of this definition has been questioned. See Hawk. ut sup., note; Burn Just. 28th ed. by Clit. tit. Cheat. Blackstone says: "Cheating is an offence more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize of bread*, or the rules laid down by the law, and particularly by the statutes 31 Geo. 2, c. 29, 3 Geo. 3, c. 11, and 13 Geo. 3, c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise, in a peculiar manner, the offence of selling by *false weights and measures*. The punishment of bakers breaking the assize was anciently to stand in the pillory, by statute 51 Hen. 8, stat. 6; and, for brewers (by the same act), to stand in the tumbrel or dungcart; which, as we learn from Doomsday Book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the Confessor. But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment; though the easier and more usual way is by levying, on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of Parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory." 4 Bl. Com. 157, 158. It is not my purpose, in this note, to discuss the definition of Haw-

kins, or inquire why Blackstone did not attempt definition here, as he did in treating of almost every thing else. Obviously the early existence, in England, of statutes covering this ground of cheat tended to prevent that accurate examination of the common law out of which definitions grow. Whether my own definition is accurate the reader must judge for himself.

¹ It recites, § 1, that "many light and evil-disposed persons, not minding to get their living by truth, &c., but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels, and jewels of other persons, for the maintenance of their unthrifty living; and also knowing, that, if they came to any of the same goods, chattels, and jewels by *stealth*, then they, being thereof lawfully convicted according to the laws of this realm, shall die therefore; have now of late falsely and deceitfully contrived, devised, and imagined *privy tokens* and *counterfeit letters* in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances, by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience." and for the remedy of these evils enacts, § 2: "That, if any person or persons, &c., falsely and deceitfully obtain, or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by color and means of any *such false token or counterfeit letter* made in another man's name, as is aforesaid, that then every person and persons so offending," &c.,—adding provisions the effect of which is to make the offence an indictable misdemeanor. See 1 Hawk. P. C. Curw. ed. p. 319, § 4; the author, how-

§ 144. **Distinction.**— The reader should bear in mind, that, though under our statutes against obtaining goods by false pretences, to be discussed in another chapter, the cheat is sometimes indictable when brought about by a mere lie, it is otherwise of the common-law cheat, to be considered in this chapter.

Symbol or Token.— Under the ancient common law, and under this statute of Hen. 8, there must be some symbol or token (such, for example, as the "counterfeit letters" mentioned in the statute) to give effect, character, and credibility to the verbal falsehood. For we have seen,¹ that a fraud accomplished by a mere spoken² lie is not at the common law indictable.

II. *The Nature of the Symbol or Token.*

§ 145. **Not mere Words—Illustrations.**— A man's mere words are neither symbols nor tokens. Therefore a naked lie is not alone such a false symbol or token as comes within the law.³ Thus, if one obtains a credit of goods, by falsely representing himself to be in trade, and to keep a grocery shop;⁴ or by misstating his pecuniary condition and circumstances;⁵ or, if he gets into his possession his own note, by pretending to the holder he wishes to look at it, and then refuses to deliver it back;⁶ or,

ever, taking too much freedom with the words of the statute in transferring it to his page.

¹ Vol. I. § 582; post, § 145.

² It does not under all circumstances make any difference that the lie is written. See post, § 147.

³ *Rex v. Bryan*, 2 Stra. 866; *Hartmann v. Commonwealth*, 5 Barr, 60. In the former of these cases, the indictment charged, as the report states, "that the defendant came to the shop of Langley, a mercer, and affirmed she was a servant of the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the queen, endeavoring thereby to defraud the said Langley; whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the queen's account." After conviction, on a motion in arrest of judgment, it was suggested to the court, by way of sustaining the indictment, that the case was one of "fraud concerning the public

traffic; and, though no harm was done, yet an indictment would lie, as in the case in 1 Vent. 304 [*Rex v. Armstrong*], of an indictment for a conspiracy to charge a man with a bastard child, when there really was no child, so that the party could not suffer. *See per Curiam*, There the conspiracy was the crime, and an indictment will lie for that, though it be to do a lawful act; this is no more than telling a lie, and, no instance being shown to maintain it, the judgment must be arrested."

⁴ *Commonwealth v. Warren*, 6 Mass. 72.

⁵ *The State v. Sumner*, 10 Vt. 587, decided, however, under a statute.

⁶ *People v. Miller*, 14 Johns. 371. **Larceny.**— Query, whether this would not be larceny of the note under statutes making promissory notes the subject of larceny. See also *Commonwealth v. Hearsay*, 1 Mass. 187.

if feigning to have money ready to pay a debt which has been sued before a justice of the peace, he obtains from the plaintiff a receipt, and an order on the justice to discharge the judgment on his paying the costs;¹ or, if he falsely tells another he has been sent to him by a third person for money, and so gets it;² or, if, in selling an inferior kind of gum, he says it is gum Seneca, when he knows it is not;³ or, in selling a horse he knows to be blind, wilfully says it is a sound one;⁴ or thus sells bull beef for steer beef;⁵ or, if he knowingly disposes of wrought gold, under the sterling alloy, for gold of the true standard weight;⁶ or, if he pretends an article of goods, he is delivering, weighs more, or measures more, than he knows it really does;⁷—in these and the like cases, he but utters a naked falsehood, unconfirmed by symbol or token, and so he is not indictable at the common law, or under the statute of 33 Hen. 8, c. 1. What he says is a mere false affirmation.

§ 146. **False Measure.**—While, therefore, if a person selling an article by measure falsely says, “Here are so many bushels,” he merely tells an untruth, and is not indictable at the common law, though the purchaser takes it on this representation,—still, if he measures it out to the buyer, the measure is a token, and, if being false, he commits a criminal cheat.⁸ “The reason” of the distinction, said Wilmot, J., is, that in the former case “it is in everybody’s power to prevent this sort of imposition; whereas a *false measure* is a general imposition upon the public which cannot be well discovered.”⁹

§ 147. **Bank Check.**—Again, if a man fraudulently effects a purchase, by drawing and delivering in payment his check on a bank in which he keeps no account, he thus merely puts his

false representation in writing, the check is no token, and he is not indictable at the common law.¹

False Marks of Weight.—But, if a baker of bread for the army puts on his barrels of bread false marks of weight, whereby the public is defrauded, he commits the crime.² Says Mr. East: “Wilders,³ a brewer, was indicted for a cheat in sending to one Hicks, a publican, so many vessels of ale, *marked* as containing such a measure, and writing a letter to Hicks assuring him that they did contain that measure, when in fact they did not contain such measure, but so much less, &c. The indictment was quashed upon motion, as containing no criminal charge. Yet this was thought by the court, in *Rex v. Wheatly*,⁴ a strong case; and Mr. Justice Foster doubted it, because he considered that the vessels, being marked as containing a greater quantity than they really did, were *false tokens*. Possibly, however, the court in deciding the case of Wilders thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did in effect resolve themselves into no more than the dealer’s own affirmation that the vessels contained the quantity for which they were marked.”⁵ There

¹ *Rex v. Jackson*, 3 Camp. 370; *Rex v. Lara*, 2 Leach, 4th ed. 647, 2 East P. C. 819, 827, 6 T. R. 565; *Rex v. Wavell*, 1 Moody, 224.

² *Republica v. Powell*, 1 Dall. 47. See also *The State v. Wilson*, 2 Mill, 185, 139.

³ *Rex v. Wilders*, cited by Lord Mansfield in 2 Bur. 1128.

⁴ *Rex v. Wheatley*, 1 W. Bl. 273; s. c. nom. *Rex v. Wheatly*, Bur. 1125, 1 Bennett & Heard Lead. Cas. 1.

⁵ 2 East P. C. 819, 820. *Rex v. Wheatly*, mentioned in the text, has been regarded as a leading case, settling previous conflicts in the law of indictable cheat. See *Wright v. People*, Bruce, 66. The head-note of the case, as it stands in the reports of Burrow and of Blackstone, is “Delivering less beer than contracted for as the due quantity is not indictable.” The case is also published as a leading case in 1 Ben. & Ll. Lead. Cas. 1; and there Mr. Bennett has given the following head-note: “An offence, to be indictable,

must be one that tends to injure the public. Defrauding one person only, without the use of false weights, measure, or tokens, and without any conspiracy, is, at common law, only a civil injury, and not indictable.” This case, being found in the three several reports mentioned, is presumed to be accessible to every reader, and I shall not, therefore, discuss it further. **Separating Condition of Bond from Penalty.**—In *Wright v. People*, supra, the Illinois court, taking the doctrines of this case for its guide, held it not to be an indictable fraud at the common law for the holder of a bond to separate the condition from the penalty. Said Smith, J.: “The act of separating the condition, written underneath the obligation, which was to determine the time of payment, and liability of the parties to it, cannot be considered as an act which common prudence might not have guarded against. It might have been avoided in various ways,—by taking from Wright [the defendant] an instrument expressive of

¹ *People v. Babcock*, 7 Johns. 201.

² *Rex v. Grantham*, 11 Mod. 222. Anonymous, 6 Mod. 105; *Reg. v. Jones*, 2 Ld. Raym. 1013, 1 Salk. 379; *Reg. v. Hannon*, 6 Mod. 311.

³ *Rex v. Lewis*, Say. 205. See *Rex v. Haynes*, 4 M. & S. 214.

⁴ *The State v. Delyon*, 1 Bay, 353.

⁵ *Rex v. Botwright*, Say. 147.

⁶ *Rex v. Bower*, Cowp. 323.

⁷ *Rex v. Wheatley*, 1 W. Bl. 273; s. c. nom. *Rex v. Wheatly*, 2 Bur. 1125, 1129; *Rex v. Driffeld*, Say. 146; *Rex v. Os-*

born, 3 Bur. 1697; *Rex v. Channell*, 2 Stra. 793; *Rex v. Dunnage*, 2 Bur. 1130; *Pinkney’s Case*, 2 East P. C. 818.

⁸ 2 East P. C. 820; *People v. Gates*, 13 Wend. 311, 319; *Pinkney’s Case*, 2 East P. C. 818, 820; *Rex v. Burgaine*, 1 Sid. 409; *Commonwealth v. Warren*, 6 Mass. 72, 73.

⁹ *Rex v. Osborn*, 3 Bur. 1697. Receiving grain on storage for hire, or buying grain, by false weights, is a common-law cheat, indictable. *People v. Fish*, 4 Parker, 206.

is abundant principle, in the criminal law, for distinguishing between a mark put on a particular package, intended for a particular individual, and a brand or mark on a package to be cast into the open market, to mislead the public generally.¹

§ 148. **Commercial Paper.**— While, if, on the one hand, a man draws his own check on a bank where he has no deposit, he merely writes a falsehood, as just explained; ² yet, if, on the other hand, he pays for an article he is purchasing in the paper of another man, representing it to be good, but knowing it to be worthless, this paper is a false token, and he is indictable for the cheat. Accordingly we saw, in the previous volume,³ that forgery itself, at the common law, is but a common-law cheat, or attempt to cheat; this form of the offence having been distinguished from the other, under the separate name of forgery. And so when one obtains money or goods from another, paying him therefor in a piece of paper purporting to be a bank-note, but knowing there is no such bank; ⁴ or, there being such a bank, knowing the bill to be counterfeit, as having the name of a fictitious cashier countersigned to it; ⁵ or worthless, as not having the signatures of the bank officers attached to it, and the defect not obvious on account of the bill being worn; ⁶ or the bill being,

the condition upon which the obligation was given, instead of having it underwritten; or by having the condition inserted in the body of the obligation, according to the most common and usual method in practice." p. 67. Moreover, the learned judge considered that cases like this had already been provided for by the statutes; therefore there was less reason for holding them indictable at the common law. The line, let me observe, between the indictable and unindictable wrong, is, in the facts of cases, indistinct and uncertain at several places in our unwritten criminal law; but it is going very far to say, that it is not a thing forbidden by the principles of this law to mutilate a written instrument which may be the foundation of a lawsuit, even though the instrument might have been so framed as not to be so easily mutilated.

¹ See Vol. I. § 232, 235, 243-245, 250-252.

² Ante, § 147.

³ Vol. I. § 572.

⁴ Commonwealth v. Speer, 2 Va. Cas. 65; The State v. Patillo, 4 Hawks, 348.

⁵ Commonwealth v. Boynton, 2 Mass. 77. And see Reg. v. Philpotts, 1 Car. & K. 112.

⁶ The State v. Grooms, 5 Strob. 158, decided on the South Carolina act, of 1791, against cheating and swindling, construed to be in affirmance of the common law. The words of it are: "Any person who shall overreach, cheat, or defraud, by any cunning, swindling acts and devices, so that the ignorant or unwary who are deluded thereby lose their money and other property, shall forfeit," &c. Threats.— And the court held, that it is swindling within this enactment, to obtain horses from an ignorant man, by threats of a criminal prosecution, and also by threats of his life. The State v. Vaughan, 1 Bay, 282; but not swindling to sell a blind horse as a sound one. The State v. Delyon, 1 Bay, 353.

within his knowledge, otherwise false; ¹ he commits a common-law cheat. And probably he does so, if he knowingly passes for value a genuine note of a broken bank, the note being therefore worthless, though this point appears not to be absolutely decided.² Such a case, however, is within the statutes against getting money or goods by false pretences.³

§ 149. **False Order.**— So while one who, as we have seen,⁴ procures money or goods of another, on the false oral representation that he has been sent for them, is not indictable at the common law, on account of there being no token; yet, if he presents a piece of paper, which purports falsely to be an order from such other, this paper is a token, and he is answerable criminally for the cheat.⁵

Counterfeit Discharge.— And, when a man committed to jail on an attachment for contempt in a civil cause, counterfeited a pretended discharge, as from his creditor to the sheriff and jailer, and an affidavit annexed; whereby he procured his release; the English judges held him guilty of a common-law misdemeanor, even though, under the circumstances, if the order had been genuine it would have been a nullity, not authorizing the sheriff or his officer to set him at liberty.⁶

§ 150. **Putting on Market Goods with False Stamps.**— Moreover, whatever be the doctrine in regard to a man himself marking the weight or measure of an article on the package of it which he sells to a particular purchaser; ⁷ yet, generally, if he cheats in trade by knowingly vending or thrusting into the market goods with false stamps upon them, he violates this branch of our law, the packages, with their marks, being deemed false tokens: "as in Edwards' Case,"⁸ says Mr. East,⁹ "where cloth was sold with Aineager's seal counterfeited thereon; or, as in Worrell's case,¹⁰ where there was a general seal or mark of the trade on cloth of a certain description or quality, which was deceitfully counterfeited." An examination, in Tremaine, of the

¹ The State v. Stroll, 1 Rich. 244; The State v. Patillo, 4 Hawks, 348; Lewis v. Commonwealth, 2 S. & R. 551.

² Rex v. Flint, Russ. & Ry. 460.

³ Commonwealth v. Stone, 4 Met. 43; Rex v. Spencer, 3 Car. & P. 420; post, FALSE PRETENCES.

⁴ Ante, § 145.

⁵ Reg. v. Thorn, Car. & M. 206.

⁶ Rex v. Fawcett, 2 East P. C. 862.

⁷ Ante, § 147.

⁸ Rex v. Edwards, Trem. P. C. 108.

⁹ 2 East P. C. 820. And see People v. Gates, 18 Wend. 311, 319.

¹⁰ Rex v. Worrell, Trem. P. C. 106.

indictments in the two cases here referred to, shows, that, in both, the defendants themselves counterfeited and put on the marks, which were of a somewhat public nature, and then sold the articles to the public generally.¹

§ 151. *Lie and False Token further distinguished.*— There is another class of cases, in which only the breadth of a hair lies between the indictable and the unindictable. Thus, —

Acting for Another — Misrepresenting Self. — It is, we repeat, not a common-law cheat to get money of a man by the false assertion of having been sent for it by another,² or otherwise acting for another;³ although such false assumption may furnish, in proper circumstances, ground for an indictable conspiracy.⁴ Yet where an indentured apprentice got himself enlisted as a soldier, and thus obtained a bounty, representing that there was no impediment, no doubt was entertained of the act being a crime, though the conviction was quashed for want of proof of the indentures.⁵ The proposition is a nice one, that the boy himself was a token; and, appearing without his indentures, a false token; yet probably this case has sufficient foundation of principle. When one tells a bare lie, the person is put on his inquiry; when he presents a token or symbol, the person looks at that. The boy showed himself; and, by appearing without master or indentures, apparently free, forestalled inquiry. And there is an old case, in which an indictment against one for falsely representing himself to be a merchant, and producing a commission as such, whereby he obtained another's goods, was sustained.⁶

§ 152. *False Personation:*—

In General.— And this leads to the inquiry, how far the common law makes it criminal to cheat by falsely personating another. In England there are at present statutes regulating this subject;⁷ so there are in some of our States. Likewise a false

representation of one's personality, or using a fictitious name, may be a statutory false pretence.¹

Wife pretending Single.— In an old case, the court refused to quash an indictment against a woman, for getting board and lodging by falsely affirming herself to be single, and of the name of Fuller, when she was married, and of the name of Hanson. And Ryder, C. J., said: "We are inclined to the opinion, that the indictment is good."²

§ 153. *Infant pretending of Age.*— Gabbett observes: "If a minor go about the town, and, pretending to be of age, defraud many persons by taking credit for quantities of goods, and then insist on his nonage, the person injured may prosecute him as a common cheat."³ But this is put somewhat upon the repetitions of the act, and the numbers injured.⁴

§ 154. *Generally.*— Mr. East appears to deem false personating indictable at the common law, though in most of the cases there was a conspiracy.⁵ But of cases other than of conspiracy he cites only *Dupee's*,⁶ where the court refused to quash an indictment charging, that *Dupee* personated the clerk of a justice of the peace, to extort money from several persons, in order to procure their discharge from misdemeanors for which they stood committed. He observes: "It might probably have occurred to the court, that this was something more than a bare endeavor to commit a fraud by means of falsely personating another: it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices."⁷

§ 155. *How in Principle.*— Perhaps the true view may be, that, if a man merely says he is Mr. So-and-so, another person, he cannot be deemed a false token or symbol of such person; but, otherwise, if he puts on apparel representing him, or changes his

¹ And see ante, § 147.

² Ante, § 145.

³ See *Reg. v. White*, 2 Car. & K. 404, 1 Den. C. C. 208.

⁴ *Rex v. Hevey*, 1 Leach, 4th ed. 220, Russ. & Ry. 407, note, 2 East P. C. 856.

⁵ *Rex v. Jones*, 1 Leach, 4th ed. 174, 2 East P. C. 822. The punishment, in this case, seems to have been provided for by statute; but, as stated in the text, the

indictment was at common law. This is the true procedure in such cases. Stat. Crimes, § 186. See also, as illustrative, *Rex v. Hanson*, Say. 229.

⁶ *Rex v. Govers*, Say. 206.

⁷ 2 East P. C. 1004; 2 Russ. Crimes, 3d Eng. ed. 540; Vol. I. § 758; *Rex v. Cramp*, Russ. & Ry. 327; *Rex v. Parr*, 1 Leach, 4th ed. 434, 2 East P. C. 1005; *Rex v. Brown*, 2 East P. C. 1007.

¹ *Commonwealth v. Drew*, 19 Pick. 179.

Rex v. Hanson, Say. 229. "There is a precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bailbond to the sheriff for one arrested on a bailable writ. This perhaps was considered as a fraud upon a public officer in the course of justice." 2 East P. C.

821. The precedent is *Rex v. Blackburne*, Trem. P. C. 101.

² 1 Gab. Crim. Law, 204, 205, referring to Barl. 100.

³ See ante, § 147.

⁴ 2 East P. C. 1010. And see Vol. I. § 468.

⁵ *Rex v. Dupee*, 2 Scss. Cas. 11.

⁶ 2 East P. C. 1010, 1011. And see 2 Russ. Crimes, 3d Eng. ed. 589, 540.

appearance, or does any thing which amounts to what is figuratively called holding out false colors.

§ 156. *Misreading a Writing.*

Cheat — Forgery. — Very near the line also, dividing the indictable and unindictable, is the misreading of a writing to an illiterate person, and thereby obtaining his signature to it.¹ Ordinarily, in such a case, the offender is not indictable for a cheat,² and according to what is probably the better doctrine, he never is for a forgery;³ though the reading was corruptly wrong, made so with a view to defraud. But the proposition has been strongly insisted on, that, where the person executing the writing is unable to read it himself, and trusts to the other, this circumstance completes the act as a common-law cheat.⁴

§ 157. *The Token as Public or not:—*

In what Sense Public — Private. — Another principle was mentioned in the preceding volume. The token must be of such a nature, that, according to the customs and order of society, every man is supposed to place confidence in it; while, on the other hand, it need not be, as some of the cases seem to imply, of a public character.⁵ The statute of 33 Hen. 8, c. 1, § 2,⁶ has the words “*such false token;*” which, taken in connection with § 1, mean, “*privy false token;*” so that, whatever doubt on this point may have existed before its enactment, there should be none now.⁷ A “*privy false token*” is indictable, the same as one not privy.

False Dice. — But even the more ancient common law was plainly enough so. For, besides the various tokens mentioned in the foregoing sections, whereof most are private, we have the playing with false dice, always held to be an indictable cheat.⁸ To say that dice are public tokens is absurd.

Forgery — Conspiracy. — Again, in the common-law cheat of forgery,⁹ it is expressly decided that the instrument need not be public;¹⁰ and in conspiracies the like principle prevails.¹¹

¹ See ante, § 143, note.

² *The State v. Justice*, 2 Dev. 199.

³ Vol. I. § 584.

⁴ Vol. I. § 584; *Hill v. The State*, 1 Yerg. 76; 1 Hawk. P. C. Curw. ed. p. 213, § 1; post, § 160.

⁵ Vol. I. § 585.

⁶ Ante, § 143.

⁷ See 1 Hawk. P. C. Curw. ed. p. 320, 321; Anonymous, 6 Mod. 105, note.

⁸ Anonymous, 6 Mod. 105; Anonymous, 7 Mod. 40; McKean, C. J., in *Respublica v. Teischer*, 1 Dall. 335, 338; Savage, C. J., in *People v. Gates*, 13 Wend. 311, 319.

⁹ See ante, § 143.

¹⁰ Vol. I. § 585.

¹¹ Post, CONSPIRACY.

Promissory Notes. — Therefore it is impossible to recognize, as sound general doctrine, a proposition laid down in one or two States, that the promissory notes of individuals, differing from those of banks,¹ are not tokens of a kind to render indictable the act of cheating by them, when the party represents them to be genuine and valuable, knowing them to be otherwise.²

§ 158. *Legal Validity:—*

Not as in Forgery. — When the false token is a written instrument, it need not be such as, if genuine, would be of legal validity.³ The rule is otherwise in forgery;⁴ or, rather, when the law elevated, as before explained,⁵ certain cheats to the special crime of forgery, it did not include this one.

III. *The Nature of the Fraud involved.*

§ 159. **Acted on Confidence in Token.** — To constitute the complete cheat, in distinction from a mere indictable attempt to cheat, the person defrauded must have acted on his confidence in the token or symbol employed. Though the false device was used, if the individual operated upon withheld belief in it, yielding to what was asked from other considerations, there was no cheat by means of the device, but merely an attempt to cheat.⁶ What authorities we have on this point are cases decided under the statutes against false pretences; to which title the reader is referred for many other points applicable equally under the present title.⁷

§ 160. **Thing obtained — (With General Views.)** — The statute of 33 Hen. 8, c. 1, § 1 & 2,⁸ has the words, “*obtain, &c., any money, goods, chattels, jewels, or other things.*”⁹ Though this provision is broad, obviously the common law, which it did not supersede, is broader, — how much broader, and where the boundary line here runs between the indictable and unindictable,

¹ Ante, § 143.

² *The State v. Patillo*, 4 Hawks, 348; *The State v. Stroll*, 1 Rich. 244; *Middleton v. The State*, Dudley, S. C. 275. For the general doctrine, see ante, § 143.

³ *Rex v. Fowle*, 4 Car. & P. 592; *Rex v. Fawcett*, 2 East P. C. 862. And see post, CONSPIRACY.

⁴ Vol. I. § 572; post, FORGERY.

⁵ Ante, § 143.

⁶ See *Commonwealth v. Davidson*, 1 Cush. 33; *Rex v. Dale*, 7 Car. & P. 352; *People v. Stetson*, 4 Barb. 151; *People v. Haynes*, 14 Wend. 546.

⁷ Post, FALSE PRETENCES.

⁸ Ante, § 143.

⁹ As to the interpretation of the words “*other things*,” see Stat. Crimes, § 245, 246.

are questions on which we have little light. Hawkins says: "It seemeth, that those [cheats] which are punishable at common law may, in general, be described to be deceitful practices, in defrauding or endeavoring to defraud another of his known right, by means of some artificial device, contrary to the plain rules of common honesty: as, by playing with false dice;¹ or by causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written;² or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c.; or by suppressing a will; or by levying a fine in another's name, or suing out an execution upon a judgment for him, or acknowledging an action in his name, without his privity, and against his will."³ Doubtless we may obtain some light on this point by consulting the title "Conspiracy;" because any injury to another for which conspirators are indictable would seem in reason sufficient to constitute a criminal cheat, when effected by a false symbol or token.⁴

IV. *Public Cheats.*

§ 161. *General Doctrine.*— Obviously the before-described cheats are no less indictable when their victims are numerous, than when they fall only on one person. On the other hand, it is general doctrine in the criminal law, that, where many are injured, the injurious act merits heavier reprobation than when it extends to but a single victim.⁵

§ 162. *Analogous Wrongs not properly Cheats.*— Aside from this, Russell,⁶ East,⁷ and some other writers⁸ include, under the title of cheat, various offences in the nature of frauds against the public justice,⁹ such misconduct as the rendering of false accounts by persons in office,¹⁰ such nuisances as the thrusting into market

¹ Ante, § 157.

² Ante, § 156.

³ 1 Hawk. P. C. Curw. ed. p. 318, § 1. See, as to this passage, ante, § 143, note.

⁴ And see *Rex v. Pettit*, Jebb, 151; *Reg. v. Blacket*, 7 Mod. 39; *Anonymous*, Comb. 16.

⁵ See ante, § 147, and the reference at the end of the section.

⁶ 2 Russ. Crimes, 3d Eng. ed. 275.

⁷ 2 East P. C. 321.

⁸ See 1 Gab. Crim. Law, 201; 1 Hawk. P. C. Curw. ed. p. 322.

⁹ 2 Russ. Crimes, 3d Eng. ed. 275; 2 East P. C. 321.

¹⁰ 2 Russ. Crimes, 3d Eng. ed. 275.

of unwholesome provisions or supplying them to prisoners of war,¹ and such private indictable injuries as malpractice by a physician.² Russell even places under this title the indictable misdemeanor of spreading false news.³ But while there is nothing gained by undertaking to be too nicely philosophical in our division of subjects in the criminal law, still it is a little loose to contemplate all these varying wrongs as cheats.

§ 163. *Public Cheats proper* — (*Personating Officer — Using Public Trust to defraud, &c.*). — Yet, as belonging to cheats proper, we have the doctrine that one may make himself criminal by a fraud committed in personating an officer,⁴ or by taking advantage of a public trust or confidence,⁵ when he would not be so if he had accomplished the same wrong by some other means. "Thus, where Bembridge and Powell were indicted for enabling persons to pass their accounts with the pay officer in such a way as to enable them to defraud the government, it was objected that it was only a private matter of account, and not indictable; but the court held otherwise, as it related to the public revenue."⁶

§ 164. *Statutes regulating Trade and Manufacture.* — There are statutes, ancient and modern, English and American, regulating trade and manufacture, a violation whereof may be deemed a public cheat. Such, for illustration, is the statute of 28 Edw. 1, stat. 3, c. 20, the material part of which is "that no goldsmith . . . shall from henceforth make . . . any manner of vessel, jewel, or any other thing, of gold or silver, except it be of good and true alloy, that is to say, gold of a certain touch and silver of the sterling alloy, or of better, at the pleasure of him to whom the work belongeth; and that none work worse silver than money. And that no manner of vessel of silver depart out of the hands of the workers, until it be essayed by the wardens of the craft; and, further, that it be marked with the leopard's head. And that they work no worse gold than of the touch of Paris."

¹ 2 East P. C. 321; 2 Russ. Crimes, 3d Eng. ed. 276; 1 Hawk. P. C. Curw. ed. p. 322.

² 2 Russ. Crimes, 3d Eng. ed. 277; 1 Crim. Law, 203, 204.

³ 2 Russ. Crimes, 3d Eng. ed. 278.

⁴ Vol. I. § 587.

⁵ *Rex v. Bower*, Cowp. 323; 2 East P. C. 321.

⁶ 1 Gab. Crim. Law, 204, referring to *Rex v. Bembridge*, cited 6 East, 136. s. o. reported 3 Doug. 327.

V. *Remaining and Connected Questions.*

§ 165. **Aggravations — Merger — Misdemeanor or Felony.** — In the preceding volume, was considered the general rule, with its limitations, “that a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of his act. He is not to elect, but the prosecutor is.”¹ According to this rule, if a man commits a cheat, yet if what he does amounts also to an offence of another name, he may still be indicted for the cheat, should the prosecuting power choose. The limit is, that generally the same precise act cannot be both a felony and a misdemeanor.² Now, a cheat is a misdemeanor;³ therefore, if a particular act, coming fully within the definition of cheat, is such as the law makes also a felony, the indictment must be for the felony.⁴

§ 166. **Larceny and Cheat compared and distinguished.** — With this view, let us advert to a distinction between larceny and cheat. When a man beguiles another by false tokens into delivering to him goods which he means to appropriate to his own use, he commits larceny, if, by the understanding, only the possession, not the property, in the goods, is to pass; consequently, as larceny is felony, he cannot be indicted for the misdemeanor

¹ Vol. I. § 791.

² Vol. I. § 787, 815.

³ 2 East P. C. 838.

⁴ See this illustrated Vol. I. § 787, 788, 815. And see *Rex v. O'Brian*, 7 Mod. 378. In a case before the Superior Court of Buffalo, N. Y., on demurrer to an indictment for trading by false weights, the offence being charged as a misdemeanor, the court held that it should have been charged as a felony, and sustained the demurrer. Said Clinton, J.: “If this misdemeanor at common law is now a statutory felony, the misdemeanor is merged. False weights are false tokens. They were held to be so long before the statute of cheats. The revision of 1813 (1 B. L. 410, § 1) provided for cheats by false pretences only; but the Revised Statutes broadened the definition so as to include the common-law offences, and declared them all felonies. Those statutes now provide, that

‘every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretence,’ obtain from any person any money, personal property, or valuable thing, shall be guilty of a felony. This statute increases the number of indictable cheats, and makes them felonies. I do not see how any cheat can now be regarded as a mere misdemeanor.” *People v. Fish*, 4 Parker, 206, 212. The intimation by the judge, that the Revised Statutes, as quoted by him, covered the whole ground of common-law cheat, was obviously an oversight. They covered perhaps the greater part of it; but plainly, not all. It is not clear that all courts would hold to the doctrine of merger, precisely as laid down in this case. The question is a nice one, on which judicial opinion is not quite uniform or distinct. And see Vol. I. § 812-816; post § 166.

of a cheat. But if the understanding is, that the property in the goods is to pass to him, he may be indicted for the act as a cheat, because the transaction does not then constitute larceny. And it is the same if goods are obtained thus by a statutory false pretence;¹ except where the difficulty is removed by the statute itself, as it is in England since Stat. 7 & 8 Geo. 4, c. 29, § 53; now 24 & 25 Vict. c. 96, § 88.

§ 167. **Punishment.** — A common-law cheat, being a misdemeanor, is punishable as explained in the preceding volume.²

§ 168. **Attempts.** — We have, in the books, little concerning attempts to cheat, where the fraud is not actually effected. But certain kinds of these attempts are included in the separate offence of forgery;³ and there can be no doubt, that, generally, there may be indictable attempts to commit this crime, as well as any other.⁴ Indeed, the courts have sustained indictments for the attempt to commit the statutory offence of obtaining goods by false pretences;⁵ and plainly the same doctrine applies to common-law cheats.

¹ Vol. I. § 538, 586; 2 East P. C. 816; 1 Hale P. C. 606, 507. And see the note to the last section.

² Vol. I. § 933, 940-947; 2 East P. C. 838.

³ Vol. I. § 572.

⁴ And see *Reg. v. Marsh*, 1 Den. C. C. 605, Temp. & M. 192, 3 New Sess. Cas. 699, 13 Jur. 1010; *Rex v. Bryan*, 2 Stra.

866.

⁵ Post, § 488.

For CHILD MURDER, see Stat. Crimes.

CONCEALMENT OF BIRTH, see Stat. Crimes.

COIN, see COUNTERFEITING.

COMBUSTIBLE ARTICLES, see Vol. I. § 1097 et seq.

COMMON BARRATRY, see BARRATRY.

COMMON DRUNKARD, see Stat. Crimes.

COMMON GAMING-HOUSE, see GAMING-HOUSE, Vol. I. § 1135 et seq. And see GAMING and GAMING-HOUSE in Stat. Crimes.

COMMON NUISANCE, see NUISANCE, Vol. I. § 1071 et seq.

COMMON SCOLD, see Vol. I. § 1101 et seq.

COMPOUNDING CRIME, see Vol. I. § 709 et seq.

CONFISCATIONS, see Vol. I. § 816 et seq.

CHAPTER XI.

CONSPIRACY.¹

- § 169, 170. Introduction.
 171-179. General Doctrine.
 180-190. Element of the Law of Corrupt Combinations.
 191-195. Element of the Law of Attempt.
 196-235. Applied to Particular Relations and Things; as—
 198-214. Defrauding Individuals.
 215-218. Injuring them otherwise.
 219-225. Disturbing Government and Justice.
 226. Creating Breaches of the Peace.
 227-229. Creating Public Nuisances, &c.
 230-233. Concerning Wages and the like.
 234, 235. Otherwise injuring both Public and Individuals.
 236-238. Statutory Conspiracies.
 239, 240. Remaining and Connected Questions.

§ 169. *Scope of the Chapter.* — Conspiracy, we shall see, is, in one of its branches, a species of Attempt; and, in a philosophical division of the law, this branch would be placed under the title Attempt. Another branch has no more relation to attempt than to any other title in the law. But it is not deemed to be within the province of an author to change the names of crimes; therefore, though the arrangement thus suggested would be intrinsically best, we shall consider, in this chapter, whatever is ordinarily set down in our books as pertaining to the offence of conspiracy.

§ 170. *How the Chapter divided.* — The order will be, I. The General Doctrine; II. The Element of the Law of Corrupt Combinations; III. The Element of the Law of Attempt; IV. Applications of the Elementary Doctrines to Particular Relations and Things; V. Statutory Conspiracies; VI. Remaining and Connected Questions.

¹ For matter relating to this title, see evidence, see *Crim. Procd.* II. § 202 Vol. I. § 432, 592, 593, 767, 768, 792, 801, et seq. And see *Stat. Crimes*, § 260 814, 974. For the pleading, practice, and 598, 625, 688.

I. *The General Doctrine.*

§ 171. *How defined.* — Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

§ 172. *Definition Explained.* — By “corrupt,” in this definition, is meant an evil purpose, but not necessarily an intent to do what, if accomplished by one alone, would be indictable. A like signification is here attached to “unlawful;” many things are unlawful which are not indictable, and a combination of wills to do what would not be indictable if actually executed by one, constitutes in many circumstances an indictable conspiracy. Again, a conspiracy is a mere “agreeing together,” — not necessarily otherwise an act.

§ 173. *Two Elements.* — If we examine these propositions more closely, we shall see that the law of conspiracy has two elements; one of *combination*, and the other of *attempt*.

Combination. — In many circumstances, if two or more combine to do a wrong, — whether the wrong be a means to something else, or the contemplated end, — the act of combining more endangers or disturbs the repose of the community than would the executed wrong performed by a single will. This is the central idea in the law of conspiracy.

Attempt. — In other circumstances, there is no such special evil in the combination, and its indictable quality does not consist in this linking together of wills for wrong. The thing contemplated to be done must, in these circumstances, be such as would be indictable if performed by one, and then the conspiracy is punishable simply because it is an attempt.

§ 174. *Old Statutory Definition.* — An old English statute, 33 Edw. 1, stat. 2, sometimes cited as 21 Edw. 1, undertook a definition as follows: “Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious

enterprises [and to drown the truth¹]; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seigniorship, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the king and his counsel in his Parliament, the thirty-third year of his reign." Here are no negative words; consequently, on principles elsewhere developed,² this statute does not abrogate any thing of the prior common law; but, since it professes merely to add a new provision, or to affirm an old one, it leaves whatever was before indictable as conspiracy, indictable still.³ It is unequivocally of a date sufficiently early to be common law in this country,⁴ though it has little or no practical effect anywhere.

§ 175. **Other Definitions.** — Conspiracy, in the modern law, is generally defined as a confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means.⁵ The English commissioners, in their report of

¹ These five words, set here in brackets, are not in Hawkins; neither are they in the collections of the statutes by Pulton, by Ruffhead, and by Pickering, the latter two of whom followed Pulton; but they appear in the translation as revised by the commissioners of Geo. III., and published by authority. They appear also in Tomlins & Raithby's edition of the Statutes at Large, and 1 Williams Dig. p. 100.

² Stat. Crimes, § 151-153 et seq., 173.

³ The State v. Buchanan, 5 Har. & J. 317; The State v. Norton, 3 Zab. 33, 40, 42. And see, as illustrative, Sydenham v. Keilaway, Cro. Jac. 7, pl. 9.

⁴ Kilty mentions it among the statutes not found applicable in Maryland. Kilty Report of Statutes, 26. But the Pennsylvania judges say: "That part only of this statute is in force which relates to 'conspirators,' and from that part is to be excepted what relates to 'stewards and bailiffs and great lords.'" Report of Judges, 3 Binn. 695, 808.

⁵ 1. Commonwealth v. Hunt, 4 Met. 111; The State v. Burnham, 15 N. H.

396; Commonwealth v. Judd, 2 Mass. 329, 337; Commonwealth v. Tibbetts, 2 Mass. 536, 538; People v. Mather, 4 Wend. 229; The State v. Cawood, 2 Stew. 360; Collins v. Commonwealth, 3 S. & R. 220; Morgan v. Bliss, 2 Mass. 111, 112; The State v. Rowley, 12 Conn. 101; O'Connell v. Reg., 11 Cl. & F. 155 9 Jur. 25; 1 Gab. Crim. Law, 243; 2 Russ. Crimes, 3d Eng. ed. 674; Alderman v. People, 4 Mich. 414; The State v. Mayberry, 48 Maine, 218; Reg. v. Bunn, 12 Cox C. C. 316, 338, 339, 4 Eng. Rep. 564.

² Definition expanded. — In The State v. Buchanan, 5 Har. & J. 317, this subject of conspiracy was largely discussed; and the results to which the court arrived have been condensed by the New York criminal code commissioners as follows: In this case it is said, "that, by a course of decisions running through a space of more than four hundred years, from the reign of Edward III. to the 59 Geo. III., without a single conflicting adjudication, these points are clearly settled, — That a con-

1843, proposed the following: "The crime of conspiracy consists in an agreement of two persons (not being husband and wife), or more than two persons, to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person."¹ And in 1848 they proposed an abridged form of the definition; thus, "The crime [&c. as before] to defraud or injure the public or any individual person."² The definition given by the writer of these volumes, in the opening section of this sub-

spiracy to do any act that is criminal *per se* is an indictable offence at common law. That an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public; for example, a combination by workmen to raise their wages. 3. For a conspiracy to extort money from another, or to injure his reputation, by means not indictable if practised by an individual; as, by verbal defamation, and that whether it be to charge him with an indictable offence or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat if effected by an individual. 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6. For a conspiracy to defraud a third person by means of an act *not per se* unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it could not be determined on at the time." Draft of Penal Code, 76, 77.

³ Another Exposition. — In a much considered Massachusetts case, Shaw, C.J., in delivering the opinion of the court, observed: "Although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confed-

erate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it may depend upon 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. . . . This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here. *Rex v. Journeyman Tailors*, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction, of journeymen mechanics of a conspiracy to raise their wages. It was there held that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful, if not criminal." Commonwealth v. Hunt, supra, p. 121, 122.

¹ 7th Rep. Crim. Law Com. 1843, p. 275; Act of Crimes and Punishments, pub. 1844, p. 209.

² 4th Rep. of Com. of 1845, A. D. 1848, p. 65.

title, does not differ materially from these several definitions, but it is believed to be more clear and exact.

§ 176. **Offence at Common Law.** — That conspiracy is an offence at the common law, quite independently of Stat. Edw. 1, is a doctrine sufficiently established.¹

Developed by Degrees. — But it is of a nature to be only gradually elucidated by adjudication; therefore, though the facts of some cases, and their subordinate principles, may seem new, yet truly they present but new manifestations of the old law, the expansion whereof is apparent, not real.² Lord Coke mentions in his Institutes only one kind of conspiracy; namely, “to appeal or indict an innocent, falsely and maliciously, of felony;”³ but we should greatly err if we supposed no other conspiracy cognizable by the criminal law at the time he wrote.⁴

§ 177. **In United States.** — The common law on this subject came with our forefathers to this country;⁵ yet, again, in its application to our different institutions and relations, it sometimes sustains an indictment here which it would not in England, or refuses its support to one here which it would uphold there. In other words, the common law of conspiracy is the same in the two countries, but its applications vary with their circumstances, statutes, and general jurisprudence.⁶

§ 178. **Distinction whether Means or Object unlawful.** — There is a distinction sometimes made between a conspiracy to accomplish an unlawful object by lawful means, and one to accomplish a lawful object by means unlawful.⁷ This distinction is possibly, in some circumstances, important as respects the mere form of the indictment;⁸ but, as to the offence itself, there is no differ-

¹ Tindal, C. J., in *O’Connell v. Reg.*, 11 Cl. & F. 155, 233; *The State v. Buchanan*, 5 Har. & J. 317, 338, 361.

² See Vol. I. § 18–20.

³ 3 Inst. 143.

⁴ Therefore the first sentence in the following from a learned judge, in *The State v. Younger*, 1 Dev. 857, is hardly correct in form, though the whole passage is substantially right: “Conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person by perjury and a perversion of the law. But it is certain, that modern cases have extended the doctrine far be-

yond the old rule of law; and it has long been established, that every conspiracy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy, and indictable.” And see *Miffin v. Commonwealth*, 5 Watts & S. 461.

⁵ *The State v. Burnham*, 15 N. H. 396.

⁶ And see the observations of Shaw, C. J., in *Commonwealth v. Hunt*, 4 Met. 111, 121; ante, § 175, note, par. 3.

⁷ See cases cited ante, § 175.

⁸ *Commonwealth v. Shedd*, 7 Cush. 514; *Commonwealth v. Eastman*, 1 Cush. 189, 224; *The State v. Burnham*, 15 N. H.

ence to be noted whether the unlawful thing be means or end. If both means and end are unlawful, *a fortiori*, the offence is constituted. If neither is unlawful, there is no offence.

Meaning of “Unlawful.” — The reader should bear in mind, that “unlawful” signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution. Therefore, in the language of Cockburn, C. J., “it is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful; that is, amount to a civil wrong.”¹ This doctrine is mentioned in other connections in this chapter;² but, though nothing contrary to it is actually held by our courts, it is so often overlooked by American judges, and such confusion comes in consequence, that a little repetition of the proposition is necessary.

§ 179. **Two Elements** — (**Unlawful Combination — Attempt**). — Hence we have the doctrine of two elements in the law of conspiracy, already stated.³ Out of these, and their combination with the general principles of criminal jurisprudence presented in the first volume, whatever pertains to this subject of conspiracy proceeds. Continuing, then, in the order already indicated, let us now look more minutely into the two elements.

II. *The Element of the Law of Corrupt Combinations.*

§ 180. **General Doctrine.** — There are many circumstances in which combinations of persons, for the promotion of evil, portend a danger, and call for legal interposition, when the single efforts of individuals might pass unnoticed by the law, which does not take cognizance of all wrongs.⁴ Therefore, in the language of the English criminal-law commissioners, “the general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary

396; *People v. Richards*, 1 Mich. 216;

March v. People, 7 Barb. 391; *The State v. Bartlett*, 30 Maine, 132.

¹ *Reg. v. Warburton*, Law Rep. 1 C. C.

274, 276.

² Ante, § 172, 175, note; post, § 181 et seq., 198, 215 et seq., 235, note.

³ Ante, § 173.

⁴ Vol. I. § 10, 11, 16, 592.

were the same thing proposed, or even attempted to be done, by any person singly."¹

Illustrations — (Maintenance — Riots — Indictable Trespass to Property, &c.). — The offences of maintenance,² of unlawful assemblies,³ of riots, routs, and some others partake more or less of this element. In like manner, congregated numbers sometimes supply in law the place of actual violence; as, where three persons, committing a trespass upon property in the presence of its possessor, without force, were held indictable therefor, while one alone would not have been so unless he had used force.⁴

§ 181. **Wrong Contemplated need not be Indictable.** — Hence it follows, as already said,⁵ that, in conspiracy, the unlawful thing proposed, whether as a means or an end, need not be such as would be indictable if proposed or even done by a single individual.⁶

Limits of the Rule. — But this rule, like all others in the law, cannot be extended beyond the reason on which it rests. Therefore, where the thing to be done by the conspirators is such as is not indictable when performed by one, it must, to constitute the basis of an indictable conspiracy, be of a nature to be particularly harmful by reason of the combination, or else the case must be one in which there is a particular power in combining. Not all wrongful things are of such a nature.

§ 182. **Illustrations — (Defraud — Trespass on Real Estate).** — Thus there are many ways in which several persons, acting together, may defraud a third person of his property; while the individual attempt of each, with the fraudulent purpose, would have failed. Severally, they stand on equal footing with him; collectively, they occupy toward him unfair ground.⁷ On this principle, a conspiracy to cheat, though unexecuted, is indictable, even where the unassociated attempt of the several conspirators

¹ 7th Rep. Crim. Law Com. 1848, p. 90; Act of Crimes and Punishments, pub. 1844, p. 209. See observations of Parsons, C. J., in *Commonwealth v. Judd*, 2 Mass. 329, 337. And see observations in *Twitchell v. Commonwealth*, 9 Barr, 211, 212, and *The State v. Burnham*, 15 N. H. 396.

² Ante, § 129, 130.

³ *Stebbins, Senator, in Lambert v. People*, 9 Cow. 578, 600.

⁴ *The State v. Simpson*, 1 Dev. 504.

⁵ Ante, § 172, 175, note, 178.

⁶ Vol. I. § 592; *The State v. Rowley*, 12 Conn. 101; *The State v. Burnham*, 15 N. H. 396; *People v. Richards*, 1 Mich. 216; *Reg. v. Carlisle, Dears.* 337; 25 Eng. L. & Eq. 577, 23 Law J. N. S. M. C. 109, 18 Jur. 386; *Reg. v. Warburton*, Law Rep. 1 C. C. 274.

⁷ Vol. I. § 232, 250-252; ante, § 171.

would not be so, though successfully executed.¹ But if the object of the conspiracy is to commit a mere civil trespass on real estate, it is not criminal, because such an act by one person is not criminal, and many united have in this instance, differing in nature from the other, no more power for harm, and do no more harm, than if each proceeded with his part of the mischief alone.²

§ 183. **Trespass on Real Estate, continued.** — The leading case sustaining the point last mentioned is *Rex v. Turner*,³ now generally understood to have been decided incorrectly, but on other points. The object of the conspirators, as stated in the indictment, was to kill and take hares from a preserve, which, by Stat. 13 Geo. 3, c. 80, § 1, was an offence subject to a penalty of not more than £20, nor less than £10; and, in doing this, to go armed with weapons for resisting all attempts to obstruct or apprehend them. The minds of the judges did not advert to these points in the case, either one of which, it is by lawyers believed, would have led to the sustaining of the prosecution; because a conspiracy to commit a crime is, as a general proposition, indictable; and because a combination to use physical force, by persons acting therein jointly, is of a nature to give the conspirators a power for evil which they would not singly possess.⁴

Combinations of Physical Force. — Yet in respect to the latter of these two reasons, we have seen, that the law always deems the employment of physical force toward an individual to be an assumption of unfair ground;⁵ and so the inference appears inevitable, that no combination of physical force can be indictable, under circumstances in which its use by one would not be so, if its tendency is simply to injure a private person. If it leads to a

¹ Vol. I. § 592; post, § 198.

² *Rex v. Turner*, 13 East, 228. The judge did not mention, in this case, the same reason which is stated in our text, — an omission not very material to notice. In our next section will be seen another reason for the conclusion of the court, which reason is probably equally sound with the one in this section. See, also, *The State v. Straw*, 42 N. H. 393, 397.

³ *Rex v. Turner*, 13 East, 228.

⁴ *Reg. v. Rowlands*, 2 Den. C. C. 304.

888, 9 Eng. L. & Eq. 287, 292, 17 Q. B. 671; 3 Greenl. Ev. 3d ed. 90 a, note; 1 Gab. Crim. Law, 251 and note; 1 Deac. Crim. Law, 278; Report of the Penal Code of Mass. 1844, tit. Conspiracy, p. 5, note; 7th Report Eng. Crim. Law Com. 1848, p. 90; Act of Crimes and Punishments, 1844, p. 209. Gibson, C. J., says, the case of *Rex v. Turner* is, "to say the least of it, an odd case." *Miffin v. Commonwealth*, 5 Watts & S. 461.

⁵ Vol. I. § 548, 556-558, 574 et seq.

public disturbance, as to a riot, it then falls under a different consideration.

§ 184. **Where Combination is itself a Part of the Wrong.**—Another illustration of the proposition, that there are wrongs not of a nature to be aggravated by combination, therefore that conspiracies to commit them are not indictable where the doing of them by one is not, may be seen in cases wherein the combination is a necessary part of the wrong itself. Thus,—

Adultery.—An act of adultery implies the consent of the two persons; and, if a man and woman should agree to commit it with each other, the conspiracy clearly would not be indictable, in those localities where the act itself would not be. We have seen,¹ that doubtless such a corrupt combination would be a criminal attempt,—one of the elements of conspiracy,—in localities where adultery is a very heavy crime; but, in Pennsylvania, where it is a light one, a conspiring by two to commit it with each other was held not to be punishable.²

§ 185. **Executed by Combination.**—Perhaps the proposition may be maintained on authority, certainly it may on principle, that, for a conspiracy to be indictable by reason of the evil which lies in the combining,—not speaking now of conspiracies in the nature of attempts,—the confederation must embrace, in its purpose, the exercise of the combined powers of the conspirators, or of more than one of them, for the accomplishment of the contemplated wrong. If two should agree that one alone should, by unindictable means, do an unindictable wrong to a third person, this would present only the common case of one man undertaking the wrong and another rendering to it the concurrence of his will; here, since neither the act is indictable, nor the intent, the combining cannot be. The combination has in it no element of power, other than would lie in the intent, or attempt, of the one unaided. But if the two were proposing to proceed together, in a case where there is force in the mere combination; or to proceed singly, each doing his particular part, where there

¹ Vol. I. § 768.

² *Shannon v. Commonwealth*, 2 Harris, Pa. 226. The proposition in this case, that a conspiracy to commit a criminal act whereof consent is an element cannot be indictable, is not good; because it

would overturn the whole doctrine of attempt. An attempt is almost always a step in a substantive crime. See Vol. I. § 723 et seq. Still such a conspiracy was adjudged not punishable in *Alabama Miles v. The State*, 58 Ala. 390.

is force in their severally acting to one end; there, the necessary other circumstances concurring, the conspiracy would be indictable; though no one thing proposed to be done would be so, if even it were actually accomplished by one of the conspirators alone.

Cheats.—This proposition does not conflict with what is held by the courts;¹ namely, that the mere combining by individuals to defraud another, without any concert respecting the means, is punishable as conspiracy; because, in such a case, the combination itself implies a union of corrupt power adapted alone to accomplish the object.

§ 186. **Too Small to Notice, &c.**—It clearly follows from established principles, that there may be circumstances in which the combination will have a special power for harm, when, still, the conspiracy will not be punishable because of its being too small a thing,² viewed in the light of its general consequences, for the law to notice;³ or because of other opposing rules of the law such as were brought to view in the first volume.

§ 187. **How many Conspirators.**—From this view it results, that a conspiracy cannot be committed by one person alone.⁴

Husband and Wife.—Neither can it be by a husband and his wife alone, they being regarded legally as one.⁵ But a wife may be joined with her husband in an indictment for this offence, if there is also another conspirator.⁶ In like manner, the husband and his wife may be prosecuted together, alone, for a conspiracy entered into before their marriage.⁷

§ 188. **How many, as to the Procedure.**—When two conspirators are charged jointly, no third person being mentioned in the indictment as a co-conspirator, known or unknown, and one of them is acquitted, his acquittal operates as an acquittal of the other.⁸ Yet one may be convicted after the other is dead;⁹ and,

¹ Post, § 188 et seq.

² See observations of Lord Denman, C. J., in *Reg. v. Kenrick*, 5 Q. B. 49, 62, Dav. & M. 208.

³ Vol. I. § 212 et seq.

⁴ *Commonwealth v. Manson*, 2 Ashm. 31; *Rex v. Hilbers*, 2 Chit. 163; *United States v. Cole*, 5 McLean, 513.

⁵ 1 Hawk. P. C. Curw. ed. p. 448, § 8.

⁶ *Rex v. Hodgson*, A. D. 1831, before Lord Tenterden, see Gurney's report of this case; *Commonwealth v. Woods*, 7

Law Reporter, 58; *Rex v. Locker*, 5 Esp. 107; Archb. New Crim. Proceed. 7. And see *Reg. v. Gompertz*, 9 Q. B. 824; *The State v. Covington*, 4 Ala. 603.

⁷ *Rex v. Robinson*, 1 Leach, 4th ed. 37.

⁸ *The State v. Tom*, 2 Dev. 569; 9 Chit. Crim. Law, 1141. The same of a *not pros.*, which operates as an acquittal. *The State v. Jackson*, 7 S. C. 283.

⁹ *Rex v. Nicolls*, 2 Stra. 1227; *Reg. v. Kenrick*, 5 Q. B. 49, Dav. & M. 208.

where there were three, and one died before the trial, and another was acquitted, the third was held liable still.¹ And there is no necessity for all to be either indicted or tried together; but, if, after the conviction of one, whether he was proceeded against alone or with others, there appears on the whole record a sufficient allegation against him and another who has not been actually acquitted, his conviction is good.²

§ 189. **Two — More — (Riot — Labor Combinations).** — Therefore the law requires two, and is indifferent whether there be more, in every conspiracy.³ But obviously there are circumstances in which an evil combination, to be efficacious, must consist of more than two. Thus, it is legally necessary for three, at least, to combine, to commit a riot.⁴ In conspiracy, however, no rule of law requires more than two; the law has not descended to so nice a refinement; yet there are evidently circumstances in which two persons alone would hardly be held as conspirators, while many together would be. For example, combinations of laborers to raise the price of wages,⁵ and other like combinations, derive their force from numbers; and we cannot presume the courts would decide that two alone can commit such an offence under every variety of circumstances in which it may be committed by many.

§ 190. **What Union of Wills.** — Another proposition, hardly requiring specific mention, is, that there must be, between the conspirators, concert of will and endeavor, as distinguished from a mere several attempt, without such concert, to accomplish the particular wrong.⁶ Yet there is no need, in conspiracy more than in other crimes, that the defendant should have been an original contriver of the mischief; for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is requisite of an agreement to concur.⁷ And if

¹ *People v. Olcott*, 2 Johns. Cas. 301.

² *Rex v. Cooke*, 7 D. & R. 673, 5 B. & C. 538; 3 Chit. Crim. Law, 1141. And see *Reg. v. Ahearne*, 6 Cox C. C. 6.

³ *Commonwealth v. Irwin*, 3 Philad. 380.

⁴ Vol. I. § 534.

⁵ See observations of Shaw, C. J., in *Commonwealth v. Hunt*, 4 Met. 111, 131, ante, § 175, note, par. 3; and of Savage, C. J., in *People v. Fisher*, 14 Wend. 9, 19. And see post, § 230 et seq.

⁶ *Rex v. Pywell*, 1 Stark. 402; *Reg. v. Kenrick*, 5 Q. B. 49, 62, Dav. & M. 208; *Rex v. Hilbers*, 2 Chit. 163; *Commonwealth v. Ridgway*, 2 Ashm. 247.

⁷ *People v. Mather*, 4 Wend. 229, 259; *Reg. v. Murphy*, 8 Car. & P. 297; *Stewart v. Johnson*, 3 Harrison, 87; Vol. I. § 642, 649, 650. *A fortiori*, there is no need the conspirators should have had any previous acquaintance with each other. Lord Mansfield, in the case of the prisoners in the King's Bench, Hilary T. 25 Geo.

persons meet for a lawful purpose, then proceed to act together unlawfully, the transaction thus becomes an unlawful conspiracy.¹ As soon as the union of wills for the unlawful purpose is perfected, the offence of conspiracy is complete, — no act beyond this is required.²

Evidence. — The joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence.³

III. *The Element of the Law of Attempt.*

§ 191. **In General.** — We have already seen, in a general way, that conspiracy is, to a certain extent, a species of attempt.⁴

§ 192. **Overt Act.** — Therefore in conspiracy the thing intended need not be accomplished; but the bare combination constitutes the crime.⁵ No overt acts need be alleged or proved.⁶ In New York,⁷ New Jersey,⁸ and perhaps some other of the States, statutes have made it necessary, in most cases, for some overt act to be performed, in pursuance of the combination; yet, even in these States, the object of the conspiracy need not be fully accomplished.⁹ So, in these States, if one alone of the conspirators performs the required overt act, in pursuance of the conspiracy, it is sufficient against all.¹⁰

§ 193. — **Overt Act as to Procedure.** — At the common law, the same as under this statute, the indictment frequently mentions things done in carrying out the conspiracy;¹¹ but, at the common

3, 1 Hawk. P. C. 6th ed. c. 72, § 2, note 2.

¹ *Lowery v. The State*, 30 Texas, 402.

² *Heymann v. Reg.*, Law Rep. 8 Q. B. 102, 195. 12 Cox C. C. 383; post, § 192.

³ 3 Chit. Crim. Law, 1141, 1143; 3 Greenl. Ev. § 98; *Reg. v. Murphy*, 8 Car. & P. 297; *Rex v. Parsons*, 1 W. Bl. 392; *Rex v. Cope*, 1 Stra. 144; *The State v. Sterling*, 31 Iowa, 443.

⁴ Vol. I. § 767; ante, § 173, 179.

⁵ Vol. I. § 432; ante, § 190; *Poulterer's Case*, 9 Co. 55 b, 56 b, 57 a; *Reg. v. Best*, 1 Salk. 174, 2 Ld. Raym. 1167, 6 Mod. 137, 185, 186; *Rex v. Kinnersley*, 1 Stra. 196; *Rex v. Rispal*, 3 Bur. 1320, 1321; *Landringham v. The State*, 49 Ind. 186; *Isaacs v. The State*, 48 Missis.

284; *Commonwealth v. Judd*, 2 Mass. 329, 337; *The State v. Buchanan*, 5 Har. & J. 317, 349, 352; *Hazen v. Commonwealth*, 11 Harris, Pa. 355. See *Rex v. Spragg*, 2 Bur. 993, 999.

⁶ *The State v. Straw*, 42 N. H. 393; *The State v. Pulte*, 12 Minn. 164.

⁷ Vol. I. § 432.

⁸ *The State v. Norton*, 3 Zab. 33.

⁹ *People v. Chase*, 16 Barb. 495; *The State v. Norton*, 3 Zab. 33.

¹⁰ *Collins v. Commonwealth*, 3 S. & N. 220; *United States v. Donau*, 11 Blatch. 168; Vol. I. § 628 et seq., 685.

¹¹ See 1 Stark. Crim. Pl. 2d ed. 156, Am. ed. of 1824, p. 170; 1 Ben. & H. Lead. Cas. 296.

law, they need not be proved;¹ or if, on this point, the proof varies from the allegation, it will do;² and indeed the allegation of overt acts, in respect of the common-law conspiracy, is quite unnecessary.³ If such allegation is informal or uncertain, no harm comes from the defect.⁴

§ 194. **Principle of Attempt, explained.**—But the foregoing view shows us only how the doctrine of attempt pervades the law of conspiracy in common with other departments of the criminal law. When, however, we seek for the special manifestation of the doctrine of attempt in conspiracy, we find it to be, that the combining of two or more wills to do a particular criminal thing is an attempt to do this thing, on which ground it is indictable.⁵ And most unphilosophically, as already mentioned,⁶ have our books of the law treated of this species of attempt under the title of conspiracy.

§ 195. **Continued.**—And the reader should bear in mind, that the cases in which something of evil, or of power to do evil, comes from the combination of wills, as already considered,⁷ are the only ones illustrating the distinctive doctrine of conspiracy; while, where the combination gives no additional power, it is still an attempt, punishable in proper circumstances under the name of conspiracy. In these latter circumstances, the wrong intended must be such as would be indictable if actually performed by a single individual; and, when it is such, the conspiracy is generally punishable.⁸

Small in Magnitude.—The exception is, that, as the doctrine of attempt discussed in the preceding volume teaches, if the thing intended is but just sufficient in magnitude of evil for the criminal law to notice it, the attempt to perpetrate it by a conspiracy is therefore too small a dereliction from duty to be regarded.⁹ Thus, —

¹ Commonwealth v. Eastman, 1 Cush. 189; The State v. Noyes, 25 Vt. 415; Commonwealth v. Davis, 9 Mass. 415.

² Contra, 3 Greenl. Ev. § 95.

³ Reg. v. Turvey, Holt, 364; The State v. Bartlett, 30 Maine, 132; Commonwealth v. Eastman, 1 Cush. 189; The State v. Noyes, 25 Vt. 415; Sydeserff v. Reg., 11 Q. B. 245, 12 Jur. 418; Reg. v. Gompertz, 9 Q. B. 824; Reg. v. Kenrick, 5 Q. B. 49, Dav. & M. 208.

⁴ Commonwealth v. Davis, 9 Mass. 415; Commonwealth v. Tibbetts, 2 Mass. 536.

⁵ Vol. I. § 767.

⁶ Ante, § 189, 173.

⁷ Ante, § 180 et seq.

⁸ The State v. Buchanan, 5 Har. & J. 317, 335, 351; 3 Greenl. Ev. § 90.

⁹ Vol. I. § 760, 767, 768; Reg. v. Kenrick, 5 Q. B. 49, 62, Dav. & M. 208.

Usury.—In an old case, a corrupt agreement concerning the taking of usury was held not to be indictable, though the act would have been so if the agreement had been carried into effect.¹

IV. Application of the Elementary Doctrines to Particular Relations and Things.

§ 196. **Variable.**—In some respects, the foregoing doctrines are of easy and exact application. But, in other respects, and in some classes of cases, their application is difficult, or they leave in the court a wide discretion, to hold a particular conspiracy indictable or not. It is the purpose of the present sub-title, not to seek much for further principles, but to see how these have been applied by the courts.

§ 197. **How the Sub-title divided.**—Some classification will be convenient; therefore, without aiming at any scientific arrangement, we shall examine the cases under the following heads: First, Conspiracies to defraud individuals; Secondly, To injure individuals otherwise than by fraud; Thirdly, To disturb the course of government and of justice; Fourthly, To create public breaches of the peace; Fifthly, To create public nuisances, and do other like injuries; Sixthly, Conspiracies concerning wages and the like; Seventhly, Conspiracies against both individuals and the community. These heads are not intended to include all possible cases to which the law of conspiracy may hereafter be applied, though doubtless they do most. And perhaps some of the cases adjudged in the past are not strictly within any of these heads; the classification, indeed, is merely for convenience, where the subject does not admit of distinct lines. Many of the decisions might claim consideration under more than one head, as presenting various aspects of combined wrong.

§ 198. **First. Conspiracies to defraud Individuals:—**

Indictable Frauds.—When the fraud intended by the conspirators is such, that, if actually done by one, he would be answerable criminally therefor, the conspiracy is likewise, for the reasons before mentioned,² indictable as an attempt.³ What is such a

¹ Rex v. Upton, 2 Stra. 816.

² Ante, § 195.

³ The State v. Norton, 3 Zab. 33; The

State v. Buchanan, 5 Har. & J. 317, 351; Clary v. Commonwealth, 4 Barr, 210;

Collins v. Commonwealth, 3 S. & R. 220;

conspiracy, we need not here inquire; because we have already seen what cheats by one are crimes at the common law, and the law of false pretences under statutes will be examined further on.¹

Frauds not indictable.—But the doctrine is also established, that, for many other cheats and frauds when attempted or done by means of conspiracies, there may be prosecutions by indictment, wherein the parties are to be punished for agreeing together to do what would have rendered no one of them liable, if singly he had done, by the same means, the thing agreed.² There is a New Jersey case,³ in which this last proposition was controverted by a strong *dictum*, but it did not settle the law, even for that State;⁴ and throughout the Union elsewhere, and in England, the law is as just expressed; or, at least, the proposition is seldom or never denied. At the same time, the discussions in the author's work on Criminal Procedure, concerning the form of the indictment for conspiracies to defraud individuals, show, that, in point of fact, still other judges have appeared to assume, without reflection, the law to be as maintained by the one New Jersey judge.⁵

§ 199. **As to Allegation of Means.**—But a diversity of opinion seems to have arisen upon the question, whether, if two or more persons agree to cheat or defraud another of lands or goods,

Hartmann v. Commonwealth, 5 Barr, 60; Reg. v. Parker, 3 Q. B. 292, 2 Gale & D. 709; Wright v. Reg., 14 Q. B. 148; Reg. v. Whitthouse, 6 Cox C. C. 38; Reg. v. Hudson, Bell C. C. 263, 8 Cox C. C. 305; Reg. v. Timothy, 1 Fost. & F. 39; Heymann v. Reg., 8 Q. B. 102, 12 Cox C. C. 383. See, and query, Reg. v. Levine, 10 Cox C. C. 374.

¹ Ante, CHEATS; post, FALSE PRETENCES.

² The State v. Buchanan, 5 Har. & J. 317; Sydserriff v. Reg., 11 Q. B. 245, 12 Jur. 418; People v. Richards, 1 Mich. 216; Commonwealth v. Ridgway, 2 Ashm. 247; Reg. v. Gompertz, 9 Q. B. 824, 16 Law J. n. s. Q. B. 121; Twitchell v. Commonwealth, 9 Barr, 211; Reg. v. Kenrick, 5 Q. B. 49, Dav. & M. 208; The State v. Shooter, 8 Rich. 72; The State v. Burnham, 15 N. H. 396; Commonwealth v. Warren, 6 Mass. 74; Commonwealth v. Ward, 1 Mass. 473; Fatten v.

Gurney, 17 Mass. 182, 184; Bean v. Bean, 12 Mass. 20, 21; Rhoads v. Commonwealth, 3 Harris, Pa. 272; Rex v. Mackarty, 2 East P. C. 823, 824, 6 Mod. 301; s. c. nom. Rex v. Mackarty, 2 Ld. Raym. 1179; Reg. v. Orbell, 6 Mod. 42; Reg. v. Button, 11 Q. B. 929; The State v. Simons, 4 Strob. 266; The State v. De Witt, 2 Hill, S. C. 283; The State v. Younger, 1 Dev. 357; Lambert v. People, 7 Cow. 166, 9 Cow. 578; Levi v. Levi, 6 Car. & P. 239; Reg. v. Wilson, 8 Car. & P. 111; Morris Run Coal Co. v. Barclay Coal Co., 18 Smith, Pa. 173.

³ The State v. Rickey, 4 Halst. 293, 300.

⁴ The State v. Norton, 3 Zab. 33, 44.

⁵ Crim. Proce. II. § 214 et seq. In People v. Brady, 56 N. Y. 182, 189, 190, there is a *dictum* which seems to be in a measure contrary to my text; but, if so, I still think the learned judge mistaken.

without agreeing upon the particular means to be employed, the conspiracy is then indictable; or whether they must go further, and determine the means, when it will be indictable or not, according to the nature of the means. The question, indeed, as usually presented in the reports, wears the aspect of one concerning the mere form of the allegation in the indictment; but an accurate examination shows the difference to extend further.

§ 200. **English Form of Allegation.**—And the doctrine is now fully settled in England, not without some doubts having been entertained in the earlier stages of the inquiry, that the words, “unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud” one “of his goods and chattels,” contain a sufficient allegation of conspiracy, without mention of any means intended.¹

§ 201. **American.**—The same has been held in Michigan;² rather indistinctly, also, in North Carolina.³ And in New York the Supreme Court came to the same result, before the statutes which now regulate the question were there enacted;⁴ but the case was overruled in the Court of Errors by the casting vote of its presiding officer, yet whether on this point or not there is an ambiguity.⁵ In some of the other States, the question is perhaps not settled.⁶ On the other hand, the courts of Massachusetts⁷ and Maine⁸ have held, that the means intended to be used must be set out. This question, however, is more exactly discussed,

¹ Sydserriff v. Reg., 11 Q. B. 245, 12 Jur. 418; Reg. v. Gompertz, 9 Q. B. 824; Reg. v. King, Dav. & M. 741; Rex v. Gill, 2 B. & Ald. 204.

² People v. Richards, 1 Mich. 216.

³ The State v. Younger, 1 Dev. 357. In this case, the allegation was, “did combine, conspire, confederate, and agree to and with each other, to cheat and defraud one P. D. out of his goods and chattels,” and it was held sufficient. But, in fact, overt acts were also set out; and though (see ante, § 193) this could not help the other part of the indictment, if it were insufficient, yet the attention of the court was not directed to this point.

⁴ See March v. People, 7 Barb. 391.

⁵ Lambert v. People, 7 Cow. 166, 9

Cow. 578. In Scholtz's Case, 5 City Hall Recorder, 112, this form was held to be sufficient. And see People v. Olcott, 2 Day, 507, note 1, 2 Johns. Cas. 301.

⁶ See, as perhaps indicating how the question stands in Pennsylvania, Clary v. Commonwealth, 4 Barr, 210; Hartmann v. Commonwealth, 5 Barr, 60; Collins v. Commonwealth, 3 S. & R. 220; Commonwealth v. McKisson, 8 S. & R. 420; Rhoads v. Commonwealth, 3 Harris, Pa. 272, 277; Commonwealth v. Ridgway, 2 Ashm. 247; Twitchell v. Commonwealth, 9 Barr, 211.

⁷ Commonwealth v. Eastman, 1 Cush. 189; Commonwealth v. Wallace, 16 Gray, 221.

⁸ The State v. Roberts, 34 Maine, 820.

and on the later authorities, in the work on Criminal Procedure; to which the reader is referred.¹

§ 202. **How the Allegation in Principle.** — It may seem strange, as a question of pleading, to hold parties for a great crime on so short an allegation as that, on a day named, they unlawfully confederated to cheat a person mentioned of his lands and goods. But though cheating, by one, is not always indictable, it is always unlawful;² and a conspiracy, say the books, to do an unlawful thing, even by lawful means, is a crime. If, therefore, there is deemed to be a defect in this short allegation, one cannot easily see how a mention of lawful means is to mend it. If the defect consists in not stating the end of the conspiracy, the conspiracy has no end but cheating, and this end is stated. Moreover, if the means proposed to be employed must be set out, it logically follows, that, when they do not consist of acts which would be indictable performed by one, they must be of a nature to derive their power for mischief from the combination of numbers; things which can be done as effectually by persons proceeding severally as in concert not being sufficient.³ But if the reader will consult the cases referred to in our last section, he will see, that such a distinction has never been drawn by the judges. Even in the leading case,⁴ in which the means were held to be a necessary part of the allegation, the court admitted, “that the purchase of goods by an insolvent person, knowing himself to be such, without any expectation of paying for the goods, would be an unlawful act, which might be the subject of a conspiracy,” — an act, nevertheless, to be just as effectually performed by one person as by many, but not indictable unless done in combination. The true view probably is, that, referring to distinctions laid down in our first volume,⁵ which the reader will consult, a combination of the mental forces of numbers, in a conspiracy, is, like the physical force of a single individual, indictable when directed against the property rights of others; this general proposition, like that concerning physical force, being subject to such limitations and qualifications as the other principles of the criminal law require.

§ 203. **Aggravations.** — Under the title Assault, we saw how

¹ Crim. Proc. II. § 204-222.

² See ante, § 178.

³ See ante, § 185.

⁴ Commonwealth v. Eastman, 1 Cush 189, 220, 221.

⁵ Vol. I. § 546, 574, 575, 581.

that offence — as simple as conspiracy, and admitting of as brief a description in the indictment — may be aggravated by innumerable circumstances, and how it is customary to set forth in the indictment the aggravations of the particular case.¹ In like manner, a conspiracy to cheat is aggravated by the parties proceeding to devise the plans; and this aggravation is greater or less according to the nature of the plans. It may be further aggravated by their carrying or beginning to carry the contemplated wrong into execution; and here, again, the amount of the aggravation depends upon the amount and nature of what is done. And as in assault, so in conspiracy, the indictment usually sets out the matter aggravating the offence; yet the offence exists without this matter, and strictly it need not, as we have seen,² be stated in the indictment, though some authorities hold otherwise.

§ 204. **Illustrations.** — Some illustrations of aggravated conspiracies to defraud individuals are the following: —

Deceitful Wager — Why. — A comparatively old case holds it to be indictable when one, to defraud another, procures him to lay money on a foot-race, and then prevails on the party to run booty.³ This result was evidently derived from the doctrine of conspiracy, though only one of the conspirators was proceeded against;⁴ and it is a conspiracy in which the entire power for evil lies in the combination.⁵ Indeed, the corrupt agreeing together, which is the gist of this offence, is placed, by the judges in some of the cases, on the same ground as the employment of a false token; “for,” says Lord Mansfield, “ordinary care and caution are no guard against this.”⁶

§ 205. **Bartering bad Liquor.** — In another of these older cases, the undertaking, which, indeed, was executed, was to barter for hats a quantity of unwholesome liquor, not fit to be drunk, as “good and true new Portugal wine;” and, the better to effect this cheat, one of the conspirators pretended to be a broker and

¹ Ante, § 43.

² Ante, § 198.

³ Reg. v. Orbell, 6 Mod. 42.

⁴ See ante, § 187.

⁵ See ante, § 180, 181.

⁶ Rex v. Wheatly, 2 Bur. 1125, 1127, 1 Bennett & Heard Lead. Cas. 1, 8; The State v. Buchanan, 5 Har. & J. 317, 345;

People v. Babcock, 7 Johns. 201; Cross v. Peters, 1 Greenl. 376; Commonwealth v. Warren, 6 Mass. 72; People v. Stone, 9 Wend. 182; People v. Miller, 14 Johns. 371; Rex v. Lara, 2 Leach, 4th ed. 647, 6 T. R. 565; The State v. Justice, 2 Dev 199.

the other a wine merchant. This case also, in which the parties were convicted, has been sometimes viewed as one of a mere ordinary cheat at the common law; but it really proceeded on the ground of conspiracy.¹

§ 206. **Further Illustrations** — (Drunk — Cards — False Bank-notes — False Representations at Sale — Mock Auction — Destroying Will — Getting Goods by Deceit — Secreting Property from Creditors — Fabricating Shares of Stock, &c.). — So, to combine to cheat by making one drunk and playing at cards with him falsely;² or, by selling forged foreign bank-notes of a denomination prohibited by statute, even though the actual sale of them, by one, should not be within the laws against counterfeiting;³ or, by falsely representing to a purchaser that a horse, offered for sale, is the property of a lady deceased, and not of a dealer in horses, and is quiet and tractable;⁴ or, by making false statements to one of whom a horse has been bought on credit, concerning its soundness and the price for which the purchaser resold it, so as to get a remission of a part of the sum due for it;⁵ or, by a mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth;⁶ or, by destroying a will under which persons have rights;⁷ or, by obtaining, on credit, goods to come into the hands of one conspirator, and be attached by another for a fictitious claim;⁸ or, by removing, secreted, or making conveyance of property for the purpose of keeping it from creditors, to defraud them of their dues;⁹ or, by fabricating shares, in addition to the number limited, in a joint-stock company, even though there was an imperfection in the original formation of the company;¹⁰ is, like many other

¹ *Rex v. Macarty*, 6 Mod. 301; s. c. nom. *Rex v. Mackarty*, 2 Ld. Raym. 1179, and particularly for a full and exact statement of it, 2 East P. C. 823.

² *The State v. Younger*, 1 Dev. 357.

³ *Twitchell v. Commonwealth*, 9 Barr, 211.

⁴ *Reg. v. Kenrick*, 5 Q. B. 49 Dav. & M. 208.

⁵ *Reg. v. Carlisle*, Dears. 337, 25 Eng. L. & Eq. 577, 23 Law J. n. s. M. C. 109, 18 Jur. 336.

⁶ *Reg. v. Lewis*, 11 Cox C. C. 404.

⁷ *The State v. De Witt*, 2 Hill, S. C. 282.

⁸ *Reg. v. King*, Dav. & M. 741. See, as to the purchase of goods by two, without the expectation of paying for them, *Commonwealth v. Eastman*, 1 Cush. 189.

⁹ *The State v. Simons*, 4 Stroob. 266; *Bean v. Bean*, 12 Mass. 20, 21; *Reg. v. Peck*, 9 A. & E. 686; s. c. nom. *Peck v. Reg.*, 1 Per. & D. 508. *Hartmann v. Commonwealth*, 5 Barr, 60, was decided under a statute. See also *Johnson v. Davis*, 7 Texas, 173; *Whitman v. Spencer*, 2 R. I. 124; *Hall v. Eaton*, 25 Vt. 458; *Reg. v. Creese*, Law Rep. 2 C. C. 105.

¹⁰ *Rex v. Mott*, 2 Car. & P. 521.

similar conspiracies to cheat individuals,¹ indictable at the common law.

§ 207. **Cheating a Partner.** — It was recently held in England, that, if a partner and third person conspire to deprive the other partner, by false entries and documents, of his interest in some of the property when the accounts are taken to make a division on dissolving the partnership, the conspiracy is indictable; though, if the fraud had been actually accomplished without the conspiracy, it would not be cognizable by the criminal law. "No one," said Cockburn, C. J., "would wish to restrict the law so that it should not include a case like the present."²

§ 208. **Fraud in electing Directors.** — An apt illustration of conspiracy to accomplish a lawful object by unlawful means, is a combination to procure certain persons to be elected directors of a mutual insurance company, and thereby get employment for the conspirators in the company's service. Here the end is lawful; but, if to accomplish it the conspirators are to issue fraudulent policies of insurance to persons who shall merely vote on them for directors, the fraudulent means render the combination indictable. And though, in the case where these facts appeared, the understanding was, that the policies were to be approved in due form and on regular application, by the requisite number of directors not cognizant of the fraud; and though, in point of law, the policies might be binding on all the parties; still the court held the result to be the same.³

§ 209. **Many to be defrauded.** — It can be no objection that the object of the conspiracy is to defraud many persons, or the public generally, instead of a single individual. Indeed, there are principles of the criminal law rendering the combination the more obnoxious in proportion to the numbers against whom it is directed; just as public nuisances and numerous other things are crimes, merely because they operate against many, rather than one.⁴ Thus, —

Bank of Issue. — In New Jersey, the court — being, in consequence of a previous decision, doubtful whether a conspiracy can be a crime where its object is a civil injury to one person by

¹ See the cases cited ante, § 198.

² *Reg. v. Warburton*, Law Rep. 1 C. C. 274, 276. The principle of this case followed in *The State v. Cole*, 10 Vroom, 324.

³ *The State v. Burnham*, 15 N. H. 396.

⁴ Vol. I. § 232, 235, 236, 243-246, 264; *Rex v. De Berenger*, 3 M. & S. 67, 2 Russ. Crimes, 3d Ed. 679, 680.

unindictable means — decided, that a confederacy to defraud an incorporated bank of issue, whereby its bills in circulation among the public become liable to depreciation or to be made worthless, is of so public a nature as to be criminally cognizable on this principle.¹

Stocks. — On a like principle, a conspiracy to raise unduly the price of a particular kind of stock in the market, by circulating falsehoods, and thus defrauding the public, is punishable.²

Municipality — Other Corporations. — A conspiracy to defraud a city is, therefore, indictable, even though it should not be deemed so to conspire in like manner against an individual.³ And always, where the fraud is aimed at numbers or a corporation,⁴ it is deemed at least as reprehensible in the law as where a single individual is meant to be the victim.

§ 210. **No particular Person — (Spurious Goods on Market).** — Therefore conspirators need not have in mind any particular individual to be defrauded. And the corrupt combination was held sufficient where its object was the manufacture of spurious indigo, to be sold at auction for good; the court observing, “We think the offence to be greatly aggravated by the undistinguishing mischief that was designed.”⁵

§ 211. **Thing to be obtained — (Chose in Action — Real Estate — Contract — Debt remitted).** — It is no objection to a conspiracy being indictable that its end is to obtain *choses in action*,⁶ instead of coin; or to get the ownership⁷ or the possession⁸ of real estate, instead of personal; or to work out its results through the means of a contract, which might form the basis of a civil suit;⁹ or to

¹ The State v. Norton, 3 Zab. 33. See ante, § 198, 207.

² Rex v. De Berenger, supra; Reg. v. Gurney, 11 Cox C. C. 414; Reg. v. Brown, 7 Cox C. C. 442; Reg. v. Esdaille, 1 Fost. & F. 213.

³ The State v. Young, 8 Vroom, 184.

⁴ Lambert v. People, 7 Cow. 166, 9 Cow. 578; Clary v. Commonwealth, 4 Barr, 210; Rex v. Edwards, 8 Mod. 320; Rex v. Herbert, 2 Keny. 466; Rex v. Watson, 1 Wils. 41; Reg. v. Absolon, 1 Fost. & F. 498; Commonwealth v. Foering, 4 Pa. Law Jour. Rep. 29.

⁵ Commonwealth v. Judd, 2 Mass. 323. And see Reg. v. King, Dav. & M. 741, 7 Q. B. 782, 13 Law J. n. s. M. C. 118, 8

Jur. 662, s. c. in error, 14 Law J. n. s. M. C. 172, 9 Jur. 833.

⁶ Stebbins, Senator, in Lambert v. People, 9 Cow. 578, 598.

⁷ People v. Richards, 1 Mich. 216.

⁸ The State v. Shooter, 8 Rich. 72.

⁹ Reg. v. Gompertz, 9 Q. B. 824; Reg. v. Kenrick, 5 Q. B. 49, 62, Dav. & M. 208, wherein Lord Denman, C. J., says of Rex v. Pywell, 1 Stark. 402, which has been sometimes understood to maintain a contrary doctrine: “The acquittal was directed, not because an action might have been brought on a warrant, but because one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised.”

get a part of a debt remitted by the person to whom it is payable, instead of directly procuring things valuable from him.¹

§ 212. **Payment of Just Debt.** — We shall see, in the law of false pretences, that one is not indictable who, by such a pretence, induces another to pay a sum he owes, already due.² And a like rule has been held, doubtless correctly, in conspiracy.³

Personating Officer. — But, if the conspirators pretend to be officers armed with legal process, and threaten arrest, and thus extort for the debt a security which the creditor has no right to demand, the case is otherwise, and they become liable by reason of the illegal means.⁴

§ 213. **Limits of foregoing Doctrine.** — It may not be possible to state all the limits, known to the law, to the foregoing doctrines respecting conspiracy to defraud individuals; but every general doctrine, throughout our jurisprudence, is more or less qualified and restrained by other doctrines. On the present topic, we have few decisions disclosing limitations; because, in nearly every reported case, the court has sustained the prosecution, unless some defect of form has appeared in the indictment. Plainly, if the thing contemplated by the conspirators to be done, whether as means or end, was neither in civil jurisprudence nor criminal a cheat, the prosecution could not be sustained.

§ 214. — **Illustrations — (Bank-checks and no Deposits — Married Woman — Office in Illegal Company).** — On this ground, perhaps, the New Jersey case of *The State v. Rickey*⁵ should have proceeded. It was there held, that a conspiracy to obtain money from a bank, by the conspirators severally drawing their checks for it, when they had no funds in the bank, was not indictable; and we may well doubt, whether any one man can be said to defraud such an institution when he simply asks, and it allows, an overdraft of his account.⁶ In like manner, where the

And see Act of Crimes and Punishments, A. D. 1844, p. 210; 7th Report of Eng. Crim. Law Com. A. D. 1843, p. 90. See also *Bloomfield v. Blake*, 6 Car. & P. 75; Reg. v. Carlisle, Dears. 337, 25 Eng. L. & Eq. 577.

¹ Reg. v. Carlisle, Dears. 337, 25 Eng. L. & Eq. 577, 23 Law J. n. s. M. C. 109, 18 Jur. 386.

² Post, § 466.

³ *People v. Bradford*, 1 Wheeler Crim. Cas. 219.

⁴ *Bloomfield v. Blake*, 6 Car. & P. 75. And see *The State v. Shooter*, 8 Rich. 72.

⁵ *The State v. Rickey*, 4 Halst. 293.

⁶ The prosecution likewise did not succeed in *Commonwealth v. Eastman*, 1 Cush. 189.

common-law rules of property between husband and wife prevail, an indictment cannot be maintained for a conspiracy to cheat a *feme covert* of a promissory note, given her for her share in the estate of a deceased person; because, in law, the note is the husband's, who, instead of the wife, is legally the victim of the conspiracy.¹ Again, there is nothing unlawful in conspiring to deprive a man of the office of secretary to an illegal company.² In short, where there is no evil intent and nothing unlawful appears, an indictment will not lie.³

§ 215. *Secondly. Conspiracies to injure Individuals otherwise than by Fraud:—*

Any Injury.—The same reason which renders a conspiracy to defraud individuals indictable, applies equally to one whose object is any other kind of injury, either to their property or person.⁴ Here also the act contemplated by the conspirators need not be such as is criminal when undertaken or accomplished by one alone; though, if it is such an act, the conspiracy will generally be indictable even as an attempt, on the ground before stated.⁵

Extort Money.—A conspiracy to extort money⁶ is an illustration of a criminal attempt; while, if extortion were not a crime, still the combination would doubtless be indictable for the other reason.

§ 216. **Other Illustrations—(Injure Man's Trade—Title to Real Estate—Marriage—False Accusation—Auction—Theatre—Hiss Actor).**—Some examples, in which the act would not be punishable in one, are the following: a conspiracy to injure a man's trade of card-maker, by giving his apprentice money to put grease into the paste used in manufacturing the cards;⁷ to create

¹ Commonwealth v. Manley, 12 Pick. 173. And see Vol. I. § 738-748.

² 2 Russ. Crimes, 3d Eng. ed. 688; Rex v. Stratton, 1 Camp. 549, note. And see Reg. v. Hunt, 8 Car. & P. 642.

³ And see The State v. Flynn, 28 Iowa, 26.

⁴ "There can be no doubt," says Hawkins, "that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being

the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false." 1 Hawk. P. C. Curw. ed. p. 446. **Assault and Battery.**—A conspiracy to commit an assault and battery has been held, in Pennsylvania, to be indictable. Commonwealth v. Putnam, 5 Casey, 296. And see ante, § 62.

⁵ Ante, § 195.

⁶ Rex v. Hollingberry, 6 D. & R. 345, 4 B. & C. 329; Reg. v. Tracy, 6 Mod. 178; Robertson's Case, 1 Broun, 295.

⁷ Rex v. Cope, 1 Stra. 144.

a specious title to an estate, by one of the conspirators, who is a man, marrying, under the assumed name of its owner, the other conspirator, a woman;¹ and to get money out of a person by bringing against him a false charge, whether of a thing criminal or not,² or to procure him to be arrested.³ Likewise an indictable conspiracy occurs where a knot of men go to a public auction, on the mutual understanding that one only shall bid for any particular article, and after the auction is over they shall resell among themselves alone, at fair prices, the articles bought, sharing the difference between the buying and selling prices; because owners, offering goods at auction, justly expect an open competition from the public.⁴ In like manner, though an audience at a theatre may lawfully express, by applause or hisses, the emotions which naturally arise at the moment, yet a conspiracy to hiss an actor, or damage a piece, is indictable.⁵

§ 217. **Charge falsely with Crime—Less than Crime.**—We shall have occasion presently to consider conspiracies to divert corruptly the course of justice in the courts;⁶ but, aside from this, it is indictable to conspire to charge one falsely with a crime, even though the purpose is not to go so far as to get legal process against him.⁷ Indeed, the accusation need not necessarily be even of what amounts to a crime; for, in England, where fornication is only an ecclesiastical offence, a conspiracy to charge one wrongfully with being the father of a bastard child is indictable, apparently without reference to compelling him to pay money for its support, but simply on the ground of defamation of character, as bringing him into public disgrace.⁸ Therefore we shall prob-

¹ Rex v. Robinson, 1 Leach, 4th ed. 87, 2 East P. C. 1010.

² Rex v. Rispal, 1 W. Bl. 368, 3 Bur. 1320.

³ Elkin v. People, 28 N. Y. 177.

⁴ Levi v. Levi, 6 Car. & P. 239.

⁵ Clifford v. Brandon, 2 Camp. 358; Anonymous, cited 6 T. R. 629 post, § 308, note.

⁶ Post, § 219 et seq.

⁷ Commonwealth v. Tibbets, 2 Mass. 536. And see Johnson v. The State, 2 Dutcher, 313. So in Scotland also. 1 Alison Crim. Law, 369. But in Scotland the doctrines of conspiracy have not been as much developed as in England and this country.

⁸ Reg. v. Best, 2 Ld. Raym. 1167, 1 Salk. 174, 6 Mod. 137, 185, Holt, 151; Timberley v. Child, 1 Sid. 68; Rex v. Armstrong, 1 Vent. 304. And see Vol. I. § 591 and note; 2 Russ. Crimes, 3d Eng. ed. 676, 678, 683; Rex v. Rispal, 1 W. Bl. 368, 3 Bur. 1320; The State v. Buchanan, 5 Har. & J. 317, 351, 352; Johnson v. The State, 2 Dutcher, 313; 1 Trem. P. C. 82, 83. In a civil case it has been held, that a conspiracy to vex and harass a person, by having him subjected to an inquisition of lunacy without any probable cause, is actionable. Davenport v. Lynch, 6 Jones, N. C. 545.

ably find, that Gabbett limits the doctrine within too narrow bounds when he says: "The fair result of the cases appears to be, that the mere conspiracy to slander a man will not be sufficient; but that there must be combined with it the imputation of a crime cognizable either by the temporal or ecclesiastical courts; or else an intent, by means of such false charge, to extort money from the party."¹

§ 218. **Burden Parish with Pauper.** — The English books furnish numerous instances of criminal proceedings against overseers of the poor and others, for conspiring to charge a particular parish with the support of a pauper, to the relief of another parish. Thus, —

Letting Pauper Land, &c. — A conspiracy to let land to such a person with the intent thereby to shift the burden of his maintenance, appears to have been deemed indictable;² and there are other circumstances in which the like principle is recognized.³

Procuring Pauper's Marriage. — But the common corrupt method of effecting the change of settlement is to procure one pauper to marry another; and here, if, with no artifice or wrongful practice, men combine to give paupers money to carry out their own voluntary wish of intermarrying, which would not otherwise be gratified, the conspiracy is not criminal, whatever be its secret motive. On the other hand, if the marriage is to be brought about through any artifice or constraint of the will, as by violence or threats or other undue means, the conspiracy is indictable. Matrimony is a thing of public interest; it should be free to all, yet imposed by force or fraud on none: and these considerations enter into the decision of this class of questions.⁴

§ 219. Thirdly. *Conspiracies to disturb the Course of Government and of Justice:* —

Generally Punishable. — We saw, in the preceding volume,⁵ what efforts to injure or destroy the government, or to impair its several functions, are punishable when put forth by a single indi-

¹ 1 Gab. Crim. Law, 252. See also Vol. I. § 591 and note.

² Rex v. Edwards, 8 Mod. 320.

³ Rex v. Warne, 1 Stra. 644; Rex v. Flint, Cas. temp. Hardw. 370; Rex v. Rusby, 1 Bott P. L. 335; Reg. v. Storrow, 9 Jur. 448; Reg. v. Jennings, 1 New Sess. Cas. 488; Rex v. Edwards, 8 Mod. 320.

⁴ 2 Russ. Crimes, 3d Eng. ed. 681, 862; Rex v. Fowler, 1 East P. C. 461; Rex v. Edwards, 8 Mod. 320, 11 Mod. 386, 2 Stra. 707; Rex v. Compton, Cald. 246; Rex v. Tarrant, 4 Bur. 2106; Rex v. Watson, 1 Wils. 41; Rex v. Herbert, 2 Keny. 436; Rex v. Seward, 3 Nev. & M. 557, 1 A. & E. 706.

⁵ Vol. I. § 456-485.

vidual. And there is scarcely need to add, that conspiracies to do any of those acts are generally crimes, on the ground of attempt, as before explained.¹ Thus, —

Indict falsely — Process of Court — Fabricate Testimony, &c. — A conspiracy to indict one falsely,² or to procure any process against one for purposes of oppression or private ends,³ or in any way to fabricate or suppress testimony in a court of justice,⁴ or to prevent a prosecution,⁵ is an indictable offence.

§ 220. **Not Criminal performed by one.** — But the doctrine of combinations enhancing the public danger,⁶ applies also under our present head; and, therefore, a conspiracy against the government or its justice need not be to do a thing which would be criminal performed by one.⁷

Criminal Proceedings for Private Ends. — A good illustration of this is Sir Anthony Ashley's case,⁸ reported by Coke. The conspirators were to proceed criminally against him for murder, and to divide among themselves his estate after his attainder; and it was resolved, that, "be Sir Anthony guilty or not guilty of the said murder, yet the defendants are punishable for the great and heinous misdemeanor and conspiracy, *scil.*, for promising of the said bribes and rewards to suborn the said Henry Smith to accuse the plaintiff of the said murder eighteen years passed, and the articles in writing to share and divide the estate of Sir Anthony after the attainder; for this corrupt conspiracy, and great and perilous practice and misdemeanor, the defendants shall be punished, let Sir Anthony be guilty or not in the said crime. And it is a great indignity offered to the king, for any subject to presume to covenant or assume that the king shall grant probation or pardon, or that the estate of any man shall be shared and divided before his attainder." Here was a combined oppression attempted against a subject, who, if guilty,

¹ Ante, § 195.

² Rex v. Spragg, 2 Bur. 993; Rex v. Macdaniel, 1 Leach, 4th ed. 44; Sydenham v. Keilaway, Cro. Jac. 7, pl. 9; Reg. v. Best, 1 Salk. 174, 2 Ld. Raym. 1167, 8 Mod. 321; 1 Hawk. P. C. Curw. ed. p. 444, § 2.

³ Slomer v. People, 25 Ill. 70.

⁴ The State v. De Witt, 2 Hill, S. C. 282; Rex v. Mawbey, 6 T. R. 619, 2

Russ. Crimes, 3d Eng. ed. 677-680; Rex v. Stevinton, 2 East, 362; Rex v. Johnson, 2 Show. 1.

⁵ Claridge v. Hoare, 14 Ves. 59, 65.

⁶ Ante, § 180 et seq.

⁷ Rex v. Mawbey, 6 T. R. 619, 2 Russ. Crimes, 3d Eng. ed. 677.

⁸ Ashley's Case, 12 Co. 90. See Parker v. Huntington, 2 Gray, 124; Newall v. Jenkins, 2 Casey, 159.

had still the right to expect all things against him to be done in the ordinary course: together with the perversion of public justice to private ends.¹

Associations against Crime. — But associations to bring criminals to punishment for the public good are not illegal.²

§ 221. **Malicious Prosecution.** — “Neither,” says Hawkins, “doth it seem to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal which was preferred, or intended to be preferred, in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on, or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was in truth in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law.”³

§ 222. **Procure Office.** — “A conspiracy,” observes Russell,⁴ “to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. The counsel for the defendant proposed to argue, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by act of Parliament. But Lord Ellenborough, C. J., said, ‘if that be a question, it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex v. Vaughan*,⁵ it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.’ And Grose, J., in passing sentence, likewise observed, that there could be no

¹ And see 1 Hawk. P. C. Curw. ed. p. 447, § 4; 6th ed. c. 72, § 4; *The State v. Enloe*, 4 Dev. & Bat. 373; *Rex v. Hollingberry*, 4 B. & C. 329, 6 D. & R. 345.

² 2 Russ. Crimes, 3d Eng. ed. 677; *Floyd v. Barker*, 12 Co. 23. See Com-

monwealth v. Leeds, 9 Philad. 569; *People v. Saunders*, 25 Mich. 119.

³ 1 Hawk. P. C. Curw. ed. p. 446, § 3. And see 2 Russ. Crimes, 3d Eng. ed. 676; *Bloomfield v. Blake*, 6 Car. & P. 75.

⁴ 2 Russ. Crimes, 3d Eng. ed. 680.

⁵ *Rex v. Vaughan*, 4 Bur. 2494.

doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law.”¹

§ 223. **Corrupt Appointment.** — The doctrine of the last section seems to be sustainable, even in England, on the simple ground of attempt,² without resorting to that of corrupt combination, peculiar to conspiracy.³ *A fortiori*, the common-law rule must be the same in this country, where no bargaining for office is allowable. In Virginia, a corrupt agreement between two justices of the peace, in whom was the power of appointment, that the first should vote for a certain third person as commissioner, in consideration of the second voting for a certain other person as clerk, and *vice versa*, was held to be, when executed, indictable at the common law, though not within the statute against buying and selling offices.⁴ And nothing appears in the case showing, that it would not have been equally indictable, if not executed.

§ 224. **Hatred to Government — Changes of Laws — Petition — Debate.** — In England, moreover, a conspiracy to excite hatred in the inhabitants of one part of the United Kingdom against those of another part; or to create disaffection or hostility toward the government; or to compel it, by force, to change the laws, — is indictable; but the doctrine is not carried so far as to abridge the just liberty of popular debate, or of petition.⁵ In this country, we protect, with even nicer care, the right of the masses to discuss public affairs, and to ask redress for real and imaginary grievances; yet no reason appears why the general doctrine does not prevail here the same as in England. The reader, however, in examining this and other like questions, should not forget, that we do not have common-law offences against the United States, but only against the States.⁶

§ 225. **Revenue.** — Of course, a conspiracy tending to lessen the governmental revenue is indictable.⁷ And it is so under the United States statutes.⁸

¹ *Rex v. Pollman*, 2 Camp. 229.

² 1 Russ. Crimes, 3d Eng. ed. 147; ante, § 195.

³ Ante, § 180 et seq.

⁴ *Commonwealth v. Callaghan*, 2 Va. Cas. 460.

⁵ *Reg. v. Vincent*, 9 Car. & P. 91; *O’Connell v. Reg.* 11 Cl. & F. 155, 234; 259; *United States v. Graff*, 14 Blatch. s. c. in earlier stages, 2 Townsend, St. Tr. 392; *Reg. v. Shellard*, 9 Car. & P. 277.

⁶ Vol. I. § 198–202.

⁷ *Rex v. Starling*, 1 Sid. 174; 1 Gab. Crim. Law, 246; *Reg. v. Blake*, 6 Q. B. 126.

⁸ *United States v. Dennee*, 3 Woods, 47; *United States v. Miller*, 3 Hughes, 553; *United States v. Rindskopf*, 6 Bis. 259; *United States v. Graff*, 14 Blatch. s. c. in earlier stages, 2 Townsend, St. Tr. 381; *United States v. Walsh*, 5 Dil. 58.

§ 226. Fourthly. *Conspiracies to create Public Breaches of the Peace* :—

General Doctrine — Riots, &c. — All breaches of the peace, even by one, all employment of physical force, even to the injury of individuals only, being indictable,¹ there is little scope for conspiracies of this kind, except when they are criminal as attempts, on principles before laid down.² Riots and the like are partly executed conspiracies to break the peace; and there may be combinations to commit them, indictable as conspiracies before they ripen into the substantive offences.³ Under our present head, however, we have few judicial decisions to guide us.⁴

§ 227. Fifthly. *Conspiracies to create Public Nuisances, and do other like Injuries* :—

General Doctrine. — Under this obvious head, we find ourselves almost as destitute of authorities as under the last, and for like reasons. Still there is no question, that conspiracies to commit offences of this kind may be indictable when the thing to be done would not be so if actually performed, much less if merely attempted, by a single individual.

§ 228. **Religion — Sepulture, &c.** — “The same principle,” says Gabbet,⁵ “which restrains any combination to defeat the public justice of the country must also apply to conspiracies to subvert religion;”⁶ and even a confederacy to do an act which offends against public decency and good-manners will be sufficient to maintain an indictment for a conspiracy; as in Young’s case, where the master of a workhouse, a surgeon, and another person, had conspired to prevent the burial of a person who died in the workhouse; the taking of a dead body, whether for the purpose of dissection, or for any indecent exhibitions, being *contra bonos mores*, and therefore indictable.”⁷

§ 229. **Defeat Operation of Statute.** — And this doctrine may be extended wide, to cover any public interest which the law has established. For example, a conspiracy to defeat the operation

¹ Vol. I. § 548; ante, ASSAULT.

² Ante, § 195.

³ 2 Chit. Crim. Law, 506, note; 1 Gab. Crim. Law, 246.

⁴ See Hunter’s Case, 1 Swinton, 550;

Anderson v. Commonwealth, 5 Band, 627.

⁵ 1 Gab. Crim. Law, 245, 246.

⁶ Fitzg. 64.

⁷ Young’s Case, cited 2 T. R. 784.

of a statute of a public nature is indictable.¹ But if the statute is repealed before trial, no conviction can be had.²

§ 230. Sixthly. *Conspiracies concerning Wages and the like* :—

English Doctrine. — The subject of this class of conspiracies has been frequently before the English courts, and it is in England in some measure affected by acts of Parliament.³ Precisely what is pure common-law doctrine there, it is not easy to state. But, in general terms, combinations among workmen to raise the price of wages, and other combinations of the like sort, are indictable under the English common law.⁴ “Each may,” said Grose, J., “insist on raising his wages, if he can; but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.”⁵ And Lord Mansfield observed in another case: “Persons in possession of any articles of trade may sell them at such prices as they individually may please; but, if they confederate and agree not to sell them under certain prices, it is conspiracy. So every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence.” In the case in which these observations occurred, it was held that an indictment may be maintained for a conspiracy to impoverish a man by preventing him from working at his trade.⁶ The point of this case is a sound determination; but, as to the points presented in the *dicta* just quoted, they do not quite accord with what was laid down by Erle, J., in a later case. “Nothing can be more clearly established in point of law,” he said, “than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not, to agree among themselves to say, ‘We will not go into any employ unless we can get a certain rate of wages.’” It should be observed, however, that this is only restating what is enacted by Stat. 6 Geo. 4, c. 129, § 4. But he considered this to be the utmost extent of the right. If, for example, persons conspire to persuade the workmen whom a man may have in his employment to leave him unless he will raise their wages, or

¹ Hazen v. Commonwealth, 11 Harris, Pa. 355; Reg. v. Bunn, 12 Cox C. C. 316, 300.

² Eng. Rep. 564.

³ Powell v. People, 5 Hun, 169.

⁴ 2 Russ. Crimes, 3d Eng. ed. 688.

And see ante, § 175, note, par. 3.

⁵ See ante, § 200; Rex v. Bykerdike,

1 Moody & R. 179; Rex v. Norris, 2 Keny.

⁶ In Rex v. Mawbey, 6 T. R. 619, 636.

⁷ Rex v. Eccles, 1 Leach, 4th ed. 274.

276. And see Reg. v. Hewitt, 5 Cox

C. C. 162; Reg. v. Shepherd, 11 Cox C.

C. 325.

otherwise change the manner of conducting his business, — or conspire to force persons, by intimidation, to leave their employment, — the conspiracy is indictable.¹ Yet here we come upon another provision of the statute.² Indeed, the whole subject is in modern times so far regulated by statutes, that it is nearly useless to look into any recent English reports for help concerning the doctrines of the common law.

§ 231. *American Doctrine.* — The general doctrine of the older English books on this subject is received as belonging to the common law of this country.³ Yet it is subject to restrictions here, and we have not sufficient adjudications to teach us exactly what these restrictions are. Under the statute of New York, whereby conspiracies are indictable whose object is “to commit any act injurious to . . . trade or commerce,” the court held, that a combination of journeymen workmen, of any trade or handicraft, to compel master-workmen or other journeymen to obey prices established by the conspirators for the regulation of the price of labor, is within the prohibition. And Savage, C. J., observed: “It is important to the best interests of society, that the price of labor be left to regulate itself, or, rather, be limited by the demand for it. Combinations and confederacies to *enhance* or *reduce* the prices of labor, or of any article of trade or commerce, are injurious. They may be oppressive, by compelling the public to give more for an article of necessity or of convenience than it is worth; or, on the other hand, by compelling the labor of the mechanic for less than its value. Without any officious or improper interference on the subject, the price of labor or the wages of mechanics will be regulated by the demand for the manufactured article, and the value of that which is paid for it; but the right does not exist either to enhance the price of the article or the wages of the mechanic by any forced or artificial means. The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say, that he will not make coarse boots for less than one dollar per

¹ Reg. v. Duffield, 5 Cox C. C. 404, 427, 431, &c. Rep. 564; Reg. v. Druitt, 10 Cox C. C. 592; Reg. v. Hibbert, 13 Cox C. C. 82.

² And see Reg. v. Rowlands, 17 Q. B. 671, 2 Den. C. C. 364, 5 Cox C. C. 456; Reg. v. Bunn, 12 Cox C. C. 316, 4 Eng. Rep. 433 and Moak's notes. ³ Commonwealth v. Hunt, 4 Met. 111; People v. Fisher, 14 Wend. 9. And see Reg. v. Hibbert, 13 Cox C. C. 82, 13 Eng. Rep. 433 and Moak's notes.

pair; but *he has no right to say, that no other mechanic shall make them for less.* The cloth merchant may say, that he will not sell his goods for less than so much per yard; but has no right to say, that any other merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious, not only to the individuals particularly oppressed, but to the public at large.”¹ Probably a close examination will show, that all these combinations are, in the end, even more injurious to those who enter into them than to any third persons; and especially more injurious to the parties when they succeed, than when they fail to accomplish their object.²

¹ People v. Fisher, 14 Wend. 9, 18. And see Master Stevedores' Association v. Walsh, 2 Daly, 1; Morris Run Coal Co. v. Barclay Coal Co., 18 Smith, Pa. 173.

² 1. Combinations of workmen to increase their wages, and of employers to diminish them, are both in a very high degree detrimental to the public interests; and ultimately, in an especial manner, to the interests of those engaged in them. This proposition results from a consideration of the familiar principles which regulate the economy of labor and of trade. It is not proposed to elucidate this topic at length here; but it will be plain to every one, that demand and supply, whether of labor, or of commodities which are the result of it, will be commensurate with each other, and regulate themselves as the drops of water find their respective positions in the ocean, by means which will create no violent upheaval of things, if left free from the disturbing force of extraneous influences. But if there is a combination to raise, by artificial means, the price of wages, and the combination succeeds, there follows an unnatural influx of labor into the particular business, and soon a part of the workmen cease to have employment, or else the price of their wages is unduly depressed. So where there is a combination to depress the wages, if it is successful it diminishes the number of laborers in the particular employment, then labor becomes scarce, then the price is unduly elevated.

And the true prosperity of the country, and especially of the particular class of the community who are engaged in a given employment, whether as employers or employed, demands that all such combinations be, in some way, suppressed. But this may be true, while yet the combination is not indictable; and whether it is or not will depend upon the nature of it, and the means it uses to effect its objects, and some other things of this sort, as, also, the decision will be influenced much by the peculiar views of the judges before whom the question comes.

2. In England, indictments of this kind have almost always been more or less aided by statutes. We have seen, Vol. I. § 453, that there were there, at one time, statutes regulating the price of wages. And, as remarks Mr Longe, an English barrister, whose observations appear in the Report on Trades' Societies and Strikes, published by the National Association for the Promotion of Social Science, A. D. 1860, p. 339, since “the rate of wages, fixed by statute, was in every case the maximum rate which either the masters might give or workmen receive, so long as such legal rate existed a demand by either one or more workmen of wages above the legal rate was a contempt of the statute law.” And see Mr Longe's article for much interesting matter on the subject, including various statutory provisions. The result is, that perhaps at no time has the statutory law of England been such as to

§ 232. *Scotch Doctrine.*—This subject seems to be now regulated in Scotland by statute, the same as it is in England. We are, therefore, destitute of direct common-law authority, of a modern date, from either country. Hume, a writer of great eminence on the Scotch criminal law, introduces some old cases, decided before the modern statutes were enacted, as follows: "To the list of offences concerning trade, we have to add that of the unlawful combination of workmen to raise their wages. When such a project is attended, as has often been the case, with a tumultuous convocation of the lieges, or violence to the persons or property of individuals, or the writing of incendiary letters, or threats of mischief to masters or employers, it never has been doubted that there is here sufficient matter for a criminal indictment. The violence done, the tumult raised, the threats used, are here themselves the substantive grounds of charge; and that these things happened in pursuance of a combination of workmen to raise their wages, is an ingredient or qualification only of the main accusation. But some thought it not so clear, whether the same were true of a combination to raise wages, *not* accompanied with any act of violence or disorder, and prosecuted only in the course of the sudden *striking of work* by numbers at one time,—the raising of funds to support the adherents of the cause,—the refusal to work or hold intercourse with those who dissent, and other like measures, tending to distress their employers, and thus to force them into their terms."¹

§ 233. *Special Nature of the Conspiracy—Other Workmen.*—Undoubtedly there may be, connected with even lawful attempts to raise wages, acts which every lawyer would hold to be indictable; while, on the other hand, no lawyer in our country would consider a mere combination, by any class of persons, to promote the interests of their particular trade, liable to be visited as crime. When, therefore, we are considering a conspiracy of this general sort, we must look into its special nature, and the particular means contemplated or employed; and decide the question of its indictability on principles relating to these, and

leave there the question of the conspiracies we are considering precisely as it stands in this country. I do not propose to attempt to forestall decision in our courts by further elucidations of the principles which govern this subject.

It will probably be found, that this is a matter in which sound reason can do more to correct an evil than even sound law.

¹ 1 Hume Crim. Law, 2d ed. 488, 489

not on such larger doctrines as would cover all forms of combination to promote common pecuniary interests. In this view it cannot be doubted, that, as held in New Jersey, a conspiracy by workmen agreeing to quit their employer in a body, unless certain other workmen are dismissed, and to notify their employer of such agreement, is indictable.¹ Here is an attempt by combination, not only to injure the employer, and interfere with the conduct of his business, but to injure other workmen of the same craft with the conspirators. Added to this, but perhaps not as being sufficient in itself, it is an attempt to interrupt the natural course of business in the community.

§ 234. *Seventhly. Conspiracies against both Individuals and the Community:*—

General Views.—The conspiracies last treated of are of a compound sort, embracing the two elements of injury to the individual and injury to the community. Indeed, there are few acts, belonging to any head in the criminal law, which do not have a somewhat twofold aspect,—as they affect the public, and particular persons. And perhaps some other of the unlawful combinations, already mentioned, might nearly as well be contemplated under this double head, as those last treated of and those which follow.

§ 235. *Public Purity—Private Virtue—Fornication—Marriage.*—Under this double head come conspiracies against chastity, the marriage laws, and the like. Thus, a conspiracy to procure a young woman to have carnal intercourse with a man is indictable, especially if force or false pretences are to be used with her, and probably if they are not, even in localities where fornication and adultery are not crimes.² *A fortiori*, the conspiracy is so if there is to be a marriage ceremony performed, invalid in law, but believed by her to be good.³ So also a confederacy to

¹ The State v. Donaldson, 3 Vroom, 151.

² Reg. v. Mears, 2 Den. C. C. 79, Temp. & M. 414, 15 Jur. 66, 1 Eng. L. & Eq. 581; Rex v. Delaval, 3 Bur. 1434; Anderson v. Commonwealth, 5 Rand. 627. In a late Illinois case, the doctrine was laid down broadly, that it is indictable to conspire to seduce a female, whether the means proposed be lawful or unlawful. "Unlawful."—And Caton, C. J., said: "If the term unlawful [in the

definition of a common-law conspiracy] means criminal, or an offence against the criminal law, and as such punishable then the objection taken to this indictment is good; for seduction, by our law, is not indictable and punishable as a crime. But by the common law governing conspiracies the term is not so limited." Smith v. People, 25 Ill. 17, 28. See ante, § 178.

³ The State v. Murphy, 6 Ala. 765; Republica v. Hevice, 2 Yeates, 114.

assist a female infant to escape from her father's control, with a view to marry her against his will;¹ or to commit fornication with her, of course against his will,²—is indictable at the common law. And the same is true, if the object of the confederacy is to entrap a girl by fraud, or coerce her by force, into a marriage.³ Likewise it is indictable to conspire to persuade a young girl, even though she is not alleged to be chaste, to become a common prostitute.⁴ All such combinations are gross violations of the public interests, on the one hand; and of private rights, private virtue, and private happiness, on the other.

V. Statutory Conspiracies.

§ 236. **How, in General.**—In some of the States, as Maine,⁵ New York, New Jersey, Pennsylvania,⁶ Georgia, Indiana,⁷ Iowa,⁸ and perhaps some of the others, there are statutes regulating, more or less, the general subject of conspiracy.

§ 237. **New York.**—In New York, "If two or more persons shall conspire, either, 1. To commit any offence; or, 2. Falsely and maliciously to indict another for any offence, or to procure another to be charged or arrested for any such offence; or, 3. Falsely to move or maintain any suit; or, 4. To cheat and defraud any person of any property by any means which are in themselves criminal; or, 5. To cheat and defraud any person of

¹ *Miffin v. Commonwealth*, 5 Watts & S. 461. And see *Reg. v. Blacket*, 7 Mod. 39; *Rex v. Thorp*, 5 Mod. 221; *Rex v. Surjeant, Ryan & Moody* N. P. 352. Yet in a civil case in Massachusetts it was held, that a parent cannot maintain an action for cutting away a daughter between the ages of twelve and eighteen from his service, and procuring her marriage, without his consent, to a man of bad character, by fraudulent representations to the city clerk and to the magistrate. And Dewey, J., observed: "If the marriage of the daughter was a legal act [that is, if the marriage was valid], from the time of its consummation the daughter was legally discharged from all further duties to perform service for her parent, having assumed new relations inconsistent therewith. The only question, therefore, is,

whether the marriage of the daughter was a legal one." *Hervy v. Moseley*, 7 Gray, 479, 488.

² *Rex v. Grey*, 9 Howell St. Tr. 127, 1 East P. C. 460, 1 Gab. Crim. Law, 247; s. c. nom. *Gray's Case*, Skin. 81.

³ *Rex v. Wakefield*, 2 Townsend St. Tr. 112, 1 Bishop Mar. & Div. § 196, 2 Lewin, 279, 2 Russ. Crimes, 3d Eng. cd. 686.

⁴ *Reg. v. Howell*, 4 Fost. & F. 160.

⁵ See *The State v. Ripley*, 31 Maine, 386; *The State v. Hewett*, 31 Maine, 396.

⁶ *Clary v. Commonwealth*, 4 Barr, 210. In this State there are some relevant old English enactments in force. See *Lewis Crim. Law*, 206.

⁷ *Laudringham v. The State*, 49 Ind. 186.

⁸ *The State v. Stevens*, 30 Iowa, 391.

any property by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences; or, 6. To commit any act injurious to the public health, to public morals, or to trade or commerce; or for the perversion or obstruction of justice or the due administration of the laws,—they shall be deemed guilty of a misdemeanor." And then it is provided, that no conspiracies but these shall be punishable criminally.¹ The provisions in New Jersey are the same, only they do not abrogate the common law; consequently, in the latter State, there are indictable conspiracies not within the statute.² Probably there is no State except New York in which the common-law doctrines on this subject are narrowed by legislation. Even in New York the enactment was intended, by the revisers who drew it, to be merely an embodiment of the common law.³

§ 238. **United States.**—We have also some particular statutory conspiracies created by the laws of the United States, there being no common-law offences against the United States government.⁴

VI. Remaining and Connected Questions.

§ 239. **Merger.**—The question, whether a conspiracy to commit an offence is, when executed, merged in the offence committed; and, if so, under what circumstances,—was sufficiently discussed in the preceding volume.⁵

§ 240. **Misdemeanor—How Punished.**—Conspiracy is misdemeanor, even in those cases where its object is the commission of a felony.⁶ What the punishment of misdemeanor is at the common law, we saw in the former volume.⁷ In Pennsylvania, it is laid down, that a conspiracy to commit an indictable offence cannot be punished more severely than the offence itself.⁸ This

¹ *People v. Fisher*, 14 Wend. 9, 14. We have already seen, that, by other provisions in this statute, there must be an overt act in all conspiracies, except when their object is the commission of felony upon the person of another, or arson, or burglary. Vol. I. § 432; ante, § 180.

² *The State v. Norton*, 3 Zab. 33.

³ *People v. Fisher*, 14 Wend. 9, 17.

⁴ *United States v. Cole*, 5 McLean, 513; *United States v. Hand*, 6 McLean, 274; ante, § 225.

⁵ Vol. I. § 787, 792, 814; *The State v. Murphy*, 6 Ala. 765; *The State v. Noyes*, 25 Vt. 415; *Reg. v. Button*, 11 Q. B. 929; *People v. Richards*, 1 Mich. 216; *People v. Mather*, 4 Wend. 229, 265; *Commonwealth v. Kingsbury*, 5 Mass. 106.

⁶ *People v. Mather*, 4 Wend. 229, 265; *Reg. v. Button*, 11 Q. B. 929.

⁷ Vol. I. § 940-945.

⁸ *Hartmann v. Commonwealth*, 5 Barr, 60; *Williams v. Commonwealth*, 10 Casey, 178.

conclusion may have been derived somewhat from the particular terms of the statute, or from some peculiarity of Pennsylvania jurisprudence; while, on general principles, it is correct as applied to all that class of conspiracies which are mere attempts.¹ But where there is also the element of enhanced guilt growing out of combination,² and no statute directs how it shall be, the rule of law cannot, in reason, be such as is thus laid down. And in conspiracies to do what is not even indictable in one person, there is clearly no room for the application of this Pennsylvania doctrine.³

¹ Ante, § 195.

² Ante, § 180 et seq.

³ See further, as to the punishment of

conspiracy in Pennsylvania, *Clary v. Commonwealth*, 4 Barr, 210. And see *The State v. Jackson*, 82 N. C. 565.

CHAPTER XII.

CONTEMPT OF COURT AND THE LIKE.¹

§ 241, 242. Introduction.

243-249. Against what Tribunal or Assemblage.

250-267. By what Act — subdivided thus:—

250, 251. General Doctrine.

252, 253. In Presence of Court.

254, 255. By Officers, &c., not in Presence.

256. Parties, &c., not in Presence.

257-262. Third Persons not in Presence.

263. Against Justices of Peace.

264-267. As Indictable Offence.

268-273. Consequences of the Contempt.

§ 241. **Nature of the Subject.** — The subject of this chapter is analogous to that of the chapter in the preceding volume entitled "Quasi Crime in Rem." There it was shown, how property in things is lost by so using them that the law ceases to recognize the claim of the owner to them; in this chapter we shall see how men, placing themselves in opposition to the machinery of the law, are necessarily borne down by it, because the machinery will move on. In both instances, the act done may or may not be a crime indictable, and may or may not furnish ground for a civil suit by a party injured; but the consequence we are discussing, as flowing from the act, is, properly viewed, neither a punishment nor a civil redress. Yet sometimes the process of contempt has the practical effect of enforcing a civil right; sometimes it serves, in its measure, practically instead of punishment.

§ 242. **Scope of the Discussion.** — It is the purpose of this chapter to bring to view so much only of the law of contempt of court as will enable the reader to see its relation to that of crime proper.

How divided. — We shall consider, I. Against what Tribunal or Assemblage the Contempt may be committed; II. By what Act; III. The Consequences of the Contempt.

¹ For matter relating to this title, see *Crim. Proced. I.* § 868, 869; and *Stat. Vol. I.* § 461-463, 913, 1067. And see *Crimes*, § 137, 568.

I. *Against what Tribunal or Assemblage.*

§ 243. **Court of Record—Not of Record.**—No court of justice could accomplish the objects of its existence unless it could in some way preserve order, and enforce its mandates and decrees. The common method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid. The doctrine, in these broad terms, is generally asserted, and is believed to be sound; the narrower doctrine, about which there is no dispute, is, that this power is inherent in all courts of record.¹

§ 244. *Contempts to Justices of the Peace:—*

How, in Absence of Statute.—A question has indeed been raised, whether the power belongs to justices of the peace, whose courts are both inferior ones and not of record. The Pennsylvania doctrine appears to be, that it does not, being unnecessary. The reason of this lack of necessity is stated to be, that the contempt is (what is true) an indictable offence, for which the magistrate may immediately bind over the offender, and compel him to find sureties for his good behavior, or imprison him on his failure to comply with this order;² while the process of committal for contempt, it is said, is one too liable to be abused to be intrusted to an inferior magistrate.³ But the English⁴ and better

¹ Stat. Crimes, § 137; *Mariner v. Dyer*, 2 Greenl. 165; *The State v. White*, T. U. P. Charl. 123, 136; *Yates v. Lansing*, 9 Johns. 395, 6 Johns. 337, 4 Johns. 317; *The State v. Tipton*, 1 Blackf. 166; *Clark v. People*, 1 Breese, 268; *United States v. Hudson*, 7 Cranch, 32, 34; *Rex v. Cotton*, W. Kel. 133; *People v. Turner*, 1 Cal. 152; *Ex parte Adams*, 25 Missis. 883; *Morrison v. McDonald*, 21 Maine, 550; *The State v. Woodfin*, 5 Ire. 199; *Gates v. McDaniel*, 3 Port. 356; *Stuart v. People*, 3 Scam. 395; *Gorham v. Lockett*, 6 B. Monr. 638; *The State v. Matthews*, 87 N. H. 450; *Watson v. Wil-*

Hams, 36 Missis. 331; *Ex parte Smith*, 28 Ind. 47; *In re Moore*, 63 N. C. 397; *Ex parte Robinson*, 19 Wat. 505; *First Congregational Church v. Muscatine*, 2 Iowa, 69; *People v. Wilson*, 64 Ill. 195; *The State v. Morrill*, 16 Ark. 384. See, as illustrative, *Janitor of Supreme Court*, 35 Wis. 410.

² And see *Richmond v. Dayton*, 10 Johns. 393.

³ *Brooker v. Commonwealth*, 12 S. & R. 175; *Fittler v. Probasco*, 2 Browne, 137. In *Brooker v. Commonwealth*, *supra*, *Gibson, J.*, observed: "Were it necessary to the due administration of

⁴ *Rex v. Revel*, 1 Stra. 420; *Reg. v. Rogers*, 7 Mod. 28, 1 Gab. Crim. Law, 287, 1 Chit. Crim. Law, 88, 112, 631. And see *Rex v. Cotton*, W. Kel. 133 *Harwood's Case*, 1 Mod. 79

American¹ doctrine extends the authority to justices of the peace acting judicially, the same as to courts of record; though, as we shall by and by see,² not probably to quite the same degree. Indeed, we could hardly find any one substantial reason why a justice of the peace might, in every emergency, preserve order in his tribunal merely by binding over offenders to answer to an indictment before a higher tribunal, and be of good behavior, not applying equally to a judge holding a court of record.³

the laws, that justices of the peace should have the power of commitment for contempt, I would not hesitate to declare that the grant of the office carried with it, as an incident, all ancillary power which should be necessary to its complete execution. But as punishment of contempts by indictment is commensurate with this object, I am content that the law, in this respect, be held here as it is in England." This learned and usually accurate judge certainly mistook the English law, in supposing that it does not allow to justices of the peace the summary process for contempts in their presence. In a New York case, before a single judge at chambers, it was held, on a consideration of the statutes, that in this State justices of the peace have no power to commit persons refusing to be sworn as witnesses, in examinations before them on complaints in criminal causes. *People v. Webster*, 3 Parker, 503; *s. r. Rutherford v. Holmes*, 5 Hun, 817. *Contra*, *Bowen v. Hunter*, 45 How. Pr. 193.

¹ *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385, 1 Brev. 155; *Clark v. People*, 1 Breese, 266; *The State v. Copp*, 15 N. H. 212; 1 Chit. Crim. Law, Am. ed. 88, note; *The State v. Applegate*, 2 McCord, 110; *Hollingsworth v. Duane*, Wal. C. C. 77; *In re Cooper*, 32 Vt. 253, *Aldis, J.*, observing: "In England, this power is not confined to the superior courts. It is exercised by the courts of quarter-sessions, a tribunal composed of two justices of the peace, and charged with the trial of inferior offences. *Rex v. Clement*, 4 B. & Ald. 218, 229. So the court-lect, a tribunal of still inferior jurisdiction, had the same power; 8 Co. 38 b." p. 257. **Court Commissioner.**—But a court

commissioner, an officer known in some of our States, has not, it has been held in Wisconsin, this power unless conferred by statute. *Haight v. Lucia*, 36 Wis. 355.

² *Post*, § 263.

³ In *United States v. Hudson*, 7 Cranch, 32, 34, it was observed: "To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others." So, in New Hampshire, it being held that a justice of the peace may order to be expelled from his presence one whom he deems to be interrupting a trial, *Gilchrist, J.*, delivering the opinion, observed: "The power of keeping order, and of requiring a decorous and proper demeanor in a court-room during the progress of a trial, lies at the very foundation of the administration of justice. Without it, there can be no law and no justice; for, if the law will not authorize the means necessary to insure its observance and proper administration, it must remain a dead letter. But the law never intended that the prisoner should have the power of stationing himself in any position he might desire during the trial. If it rested with him to select the location he might find most convenient, he might see fit to place himself upon the bench, or in the jury-box. He was present at this trial neither as a party nor as a witness. He went there to gratify his curiosity; and it behooved him so to conduct as not to disturb the proceedings of those who had duties to perform. These duties cannot be discharged unless the justice possesses the power, upon an emergency, to direct the removal of any individual

§ 245. *Justice acting ministerially.* — But where a magistrate acts ministerially and not judicially, he appears to stand on a different ground; and we may well receive the doctrine which has been laid down,¹ that then he cannot commit for contempt.

§ 246. *Statutory Regulations.* — Questions concerning contempts against the authority of justices of the peace are, in many of the States, regulated by statutes.

§ 247. *Contempts to Legislative Bodies, Officers, and Public Meetings:* —

Legislative Assemblies. — This power, of committal for contempt, extends also, in England, to the two Houses of Parliament severally;² and, in this country, to the Senate and House of Representatives of the United States;³ and to the corresponding legislative bodies of the respective States.⁴ These are all deemed courts of record for some purposes.⁵

§ 248. *Sheriffs, Constables, &c.* — But the power of such commitment does not belong properly to any officer who has no judicial or *quasi* judicial functions; though something analogous does, to some officers. Thus, a sheriff is a conservator of the

whose presence he may think prejudicial to the interests of justice. The law does not indeed authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the public, and not of the individual. If every person for whom there is sufficient space has the right to be in court, he has a right to be in any part of it where there is sufficient space, and the inconvenience resulting from the exercise of such a right is a strong argument against its existence." *The State v. Copp*, 15 N. H. 212, 214, 215. *Judge of Probate.* — Relative to the power of commitment for contempt, possessed by a judge of probate, see *In re Bingham*, 32 Vt. 329; a case, however, depending mainly upon statutes.

¹ *Fidler v. Probasco*, 2 Browne, 137. And see *Commonwealth v. Stuart*, 2 Va. Cas. 320.

² *May Parl. Law*, 62, 69; *Shaftsbury's Case*, 1 Mod. 144, 6 Howell St. Tr. 1270, 1297; *Murray's Case*, 1 Wils. 209, 8 Howell St. Tr. 30; *Rex v. Flower*, 27 Howell St. Tr. 986, 8 T. R. 314; *Crosby's Case*, 3 Wils. 188, 19 Howell St. Tr. 1138,

1146, 1147, in which De Grey, C. J., observed: "This power of committing must be inherent in the House of Commons from the very nature of its institution; and, therefore, is a part of the law of the land. They certainly always could commit in many cases. In matters of elections, they can commit sheriffs, mayors, officers, witnesses, &c.; and it is now agreed that they can commit generally for all contempts." And see the text and notes, generally, in *Thompson's Case*, 8 Howell St. Tr. 1.

³ *Anderson v. Dunn*, 6 Wheat. 204; *Stewart v. Blaine*, 1 MacAr. 453; *Ex parte Nugent*, 4 Pa. Law Jour. Rep. 220.

⁴ *Cushing's Law and Practice of Legislative Assemblies*, pl. 533, 534, 608, 625-627, 655; *Burnham v. Morrissey*, 14 Gray, 226; *The State v. Matthews*, 37 N. H. 450. And see *Falvey v. Massing*, 7 Wis. 630.

⁵ I state this as it is generally done in the books; but I doubt whether the right of a legislative body to punish for contempt is properly traceable to any power it may have as a court of record. And see the note at the end of § 249.

peace, who may, and should, "arrest all persons, with their abettors, who oppose the execution of process."¹ And if a constable is preventing a breach of the peace, he may take into custody any one who resists him.²

§ 249. *Public Meetings.* — As to mere voluntary assemblages of people, though the law protects them, even in many circumstances rendering indictable those who disturb them,³ and their officers may eject one who interrupts their deliberations, the same as any private person may put from his dwelling-house or other premises another who violates the conditions on which he was permitted to enter,⁴ they cannot exercise the judicial function of punishing for contempt.⁵

¹ *Kent, C. J.*, in *Coyles v. Hurin*, 10 Johns. 85.

² *Levy v. Edwards*, 1 Car. & P. 40.

³ Vol. I. § 542; post, *DISTURBING MEETINGS.*

⁴ *Doyle v. Falconer*, Law Rep. 1 P. C. 328, 340.

⁵ 1. *Some Questions discussed.* — There are, lying within the general scope of these three sections, some questions upon which opinions may in a degree differ, or upon which they are not distinct. *Colonial Legislatures.* — Thus, not many years ago, a case went up to the Privy Council, in England, from the province of Newfoundland, presenting, in the language of Mr. Baron Parke, who delivered the opinion of this high English tribunal, the question "whether the House of Assembly [of the province] had the power to arrest and bring before them, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly, — in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a case of contempt, or breach of privilege." And the learned judge proceeded to show, that, in the royal commission for the establishment of the colonial legislature, there was no express language conveying the power; and the question was simply, whether, by force of the common law, and of the legal

necessities of the case, the power attached to the legislative body. Upon this point he observed: "Their Lordships see no reason to think, that, in the principles of the common law, any other powers are given them [the Assembly] than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." "We feel," he added, "no doubt, that such an assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principles of the common law. But the power of punishing any one for past misconduct, as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment, as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions as a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions. These powers certainly do not exist in corporate or other bodies assembled, with authority, to make by-laws for the government of particular trades, or united numbers of

II. *By what Act.*

§ 250. *Limit of the Discussion — Leading Doctrine.* — We should travel too far from the plan of these volumes if we were to treat of the question presented under this sub-title in its application

individuals. The functions of a colonial legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question. It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs, as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is, not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription, the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption, by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly, — a claim for which there is not any color of foundation. It is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority in this respect rests upon ancient usage." From these views the tribunal proceeded to the result, that the lower house of the colonial legislature could not, as the House of Commons in England could, cause the arrest of a man, not a member, for insolent language spoken out of the house by him to the member, in a matter per-

taining to the legislative conduct of the latter. *Keilley v. Carson*, 4 Moore P. C. 63, 83, 84, 88-90, followed in *Fenton v. Hampton*, 11 Moore P. C. 347. And see 4 Upper Canada Law Journal, 99. In a later case, on appeal from another of the colonies, the Privy Council held that a colonial legislature cannot even punish one of its members for a contempt committed in its presence. *Doyle v. Falconer*, Law Rep. 1 P. C. 328.

2. *The Reasoning.* — This reasoning and these principles seem to place the subject on a different foundation from what it occupies in my text; and, in fact, to permit the legislative body to go but little, if any, beyond the mere expelling from its halls of a person who interrupts its proceedings, and perhaps confining him if he cannot be otherwise kept from returning. Still, it may be doubtful whether the intent was not to accord greater power than this. But I submit, that the reasoning itself is essentially unsound. Though it is true that the English House of Commons derives its power to commit for contempt from immemorial usage, it is equally true that the judicial tribunals of the kingdom derive their power of the same sort from the same source. As a matter of natural reason, we know that a court of justice and a legislative body must alike be intrusted with the means to preserve order, else neither the one nor the other can do its business. But what means? This is a question on which men will differ; therefore the law steps in and points to "immemorial usage," and says, that the power which has been immemorially exercised shall be taken as the measure of the necessity. In other words, and to apply the proposition to the case in hand, the law says, that the power which the House of Commons has exercised in cases of contempts of its authority and the privi-

to legislative bodies; and, indeed, we cannot examine it in all its details as respects judicial tribunals. One leading idea¹ controls the whole subject; namely, that, the power to punish thus sum-

leges of its members, — conceded to be just on all hands, — from the beginning of things, is the law's measure of what is necessary and proper to be possessed by a legislative body similarly situated. The same reason, precisely, which makes the power of punishing for contempt, as immemorially exercised by the English judicial bodies sitting in their halls of justice, the measure of the like power which a colonial judicial tribunal may exercise, demands that the power thus exercised by the English legislative body, sitting in its legislative halls, shall be taken as the measure of the colonial legislature's power.

3. *Applied to our Legislatures.* — It does not, however, follow from this doctrine of the Privy Council, assuming it to be correct, that, when a colony separates herself from the mother country, and becomes independent, the principles of the common law do not then accord to the independent legislature the full rights of punishing for contempt exercised by the equally independent legislature of England. And surely it cannot be said, that, when a member of a legislative body, being obliged to be at times outside the legislative halls, is approached in any undue manner with respect to his doings within, there is not a high propriety requiring the body to protect him, and preserve the purity of legislative action by preserving unimpaired the immunities and freedom of the individual legislator.

4. *Separate Punishment by Court.* — It may be, that, in such a case, the courts will punish the offender; but mere punishment is not always what the emergency requires. Moreover, a legislative body should not be dependent upon the courts for its protection. Especially in our own country, where the executive, legislative, and judicial branches of our State and National governments are distinct and independent of one another, would it be a violation of correct legal principles — a violation, indeed, of law — for a court of justice

to interfere to prevent a legislative body from protecting itself and its members, by its own power, against whatever disturbs its proceedings, or interferes with the freedom of a member in things pertaining to his legislative duties.

¹ Mr. Erskine once stated the doctrine thus: "Every court must have power to enforce its own process, and to vindicate contempts of its authority; otherwise the laws would be despised; and this obvious necessity at once produces and limits the process of attachment. Wherever any act is done by a court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding. Upon this principle, attachments issued against officers for contempt in not obeying the process of courts directed to them as ministerial servants of the law; and the parties on whom such process is served may, in like manner, be attached for disobedience. Many other cases might be put in which it is a legal proceeding, since every act which tends directly to frustrate the mandates of a court of justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, namely, that it can only issue in cases where the court which issues it has awarded some process, given some judgment, made some legal order, or done some act which the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect [the last being] in the face of the court, or of its minister charged with the execution of its acts. [The limitation beginning with the words, "in the face of the court," must be understood to apply only to the next preceding clause, namely, "treated with terms of contumely," &c.; otherwise it directly conflicts with what the writer has said before, as well as with other established

marily being derived from necessity, the law of necessity fixes its bounds.

§ 251. **How Divided.** — Therefore let us take a cursory look at judicial contempts in the following order: As committed, First, In the presence of the court; Secondly, In its absence, by persons attached to it as officers; Thirdly, In its absence, by persons attached to it as being parties or having had process served upon them; Fourthly, In its absence, by other persons; Fifthly, In these several ways, as against justices of the peace; Sixthly, In these several ways, as concerns the indictable quality of the act.

§ 252. **First. Contempts committed in the Presence of the Court:**—

General Doctrine.— There is no exact rule to define these contempts; but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judge presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or, *a fortiori*, any assault made in view of the court,—is punishable in this summary way.¹

Arrest of Exempt Person.— So is the arrest, in its presence, actual or constructive, of a party or witness, who, by reason of his attendance on the tribunal, is exempt from arrest.²

law.] But no crime, however enormous, even open treason and rebellion, which carry with them a contempt of all law, and of the authority of all courts, can possibly be considered as a contempt of any particular court, so as to be punishable by attachment, unless the act which is the object of that punishment be in direct violation or obstruction of something previously done by the court which issues it, and which the party attached was bound, by some antecedent proceedings, to make the rule of his conduct. A constructive extension of contempt, beyond the limits of this plain principle, would evidently involve every misdemeanor, and deprive the subject of the trial by jury in all cases where the punishment does not extend to touch his life." Letter to a member of the Irish Bar, A.D. 1785, 27 Howell St. Tr. 1019.

¹ 1 Gab. Crim. Law, 286; Reg. v. Rogers, 7 Mod. 28, 29; People v. Turner, 1 Cal. 152; Ex parte Summers, 5 Ire. 149; The State v. Yancy, 1 Car.

Law Repos. 519; St. Clair v. Piatt, Wright, 532; Lowe v. The State, 9 Ohio, State, 337; 2 Hawk. P. C. Curw. ed. p. 221, § 35. **Insult to Judge.**— In Rex v. Davison, 4 B. & Ald. 329, 339, Holroyd, J., observed: "In the case of an insult to [the judge] himself, it is not on his own account that he commits; for that is a consideration which should never enter into his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed."

² Blight v. Fisher, Peters C. C. 41. See Rex v. Hall, 2 W. Bl. 1110. And this doctrine extends to the arrest of a witness *eundo, morando, et redeundo*. Kimpton v. London and Northwestern Railway, 25 Eng. L. & Eq. 657.

Mustering Soldiers.— And it is a contempt to muster a body of soldiers so near as to disturb the proceedings.¹

What one has Right to do.— But no person is to be molested by the judge for doing respectfully, in the presence of the tribunal, any thing which he has the right to do.²

§ 253. **Other Illustrations**— (**Witness — Insufficient Return — Suit without Consent — Fictitious Suit — Papers from Court Files**).— If a witness refuses to be sworn,³ or to answer a proper question;⁴ or, if a person served with a *habeas corpus* declines to make a sufficient return thereon;⁵ or, if one brings a suit in the name of another without his privity or consent;⁶ or brings a mere fictitious suit, to obtain the opinion of the court on some point;⁷ or, if any one takes papers from the files of the court and will not bring them back;⁸—in these and analogous instances, the offender is answerable for a contempt.

§ 254. **Secondly. Contempts by Officers of the Court, not in its Presence:**—

General Doctrine.— Officers of the court, in respect of their official conduct, are under its control, as well when absent as present.⁹

§ 255. **Attorney.**— Therefore an attorney or counsellor at law, guilty of any malpractice,¹⁰—as in refusing to give back to a client papers,¹¹ or pay over to him money collected,¹² or in wilfully mismanaging his business,—is liable, after proper proceedings had, to attachment for contempt. Of course, therefore, it is a contempt for an attorney to publish a libel on the court.¹³ The

¹ The State v. Coulter, Wright, 421; The State v. Goff, Wright, 78. See Commonwealth v. Stuart, 2 Va. Cas. 320.

² Stokely v. Commonwealth, 1 Va. Cas. 330; Blight v. Fisher, Peters, C. C. 41. And see Martin v. Bold, 7 Taunt. 182.

³ Stansbury v. Marks, 2 Dall. 213.

⁴ Loit v. Burrel, 2 Mill, 167.

⁵ The State v. Philpot, Dudley, Ga. 46. See Stockdale v. Hansard, 8 Dowl. P. C. 474.

⁶ Butterworth v. Stagg, 2 Johns. Cas. 291.

⁷ Smith v. Brown, 3 Texas, 360; Smith v. Junction Railway, 29 Ind. 646.

⁸ Barker v. Wilford, Kirby, 232, 235. And see Keppele v. Williams, 1 Dall. 29.

⁹ Sanders v. Metcalf, 1 Tenn. Ch. 419; Rex v. Wakefield, 1 Stra. 69. As to the constitutional question, see Harrison v. Chiles, 8 Litt. 194; Hollingsworth v. Duane, Wal. C. C. 77, 106; Floyd v. The State, 7 Texas, 215.

¹⁰ Anonymus, 6 Mod. 137; 2 Hawk. P. C. Curw. ed. p. 210, § 6 et seq., p. 219, § 30.

¹¹ Ex parte Willand, 11 C. B. 544, 20 Eng. L. & Eq. 293.

¹² People v. Nevins, 1 Hill, N. Y. 154, 2 Hawk. P. C. Curw. ed. p. 211, § 10; Stevenson v. Power, 9 Price, 384; In re Newberry, 4 A. & E. 100; s. c. nom. In re Newbury, 5 Nev. & M. 419.

¹³ In re Moore, 63 N. C. 397.

punishment, in a proper case and after due proceedings, may extend to disbaring him.¹

Sheriff. — The same rule applies to sheriffs and other like officers: ² and a refusal by them to serve or return process,³ or to pay money collected; ⁴ or an abuse in serving a precept,⁵ or the making of a false return; ⁶ renders them liable.

Clerk — Master. — So is a clerk of the court⁷ or a master in

¹ Post, § 270. Ex parte Robinson, 19 Wal. 505. **Disbaring.** — In this case, Field, J., delivering the opinion of the court, said: "This power is possessed by all courts which have authority to admit attorneys to practise. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court." p. 512. I do not understand it to be absolutely settled, or this dictum of the learned judge to assert, that, in all cases, the power of the court to admit an attorney is essential to its power to disbar him. In reason, it would seem not to be. A legislative assembly that cannot elect a member may expel one. And if an officer of court is appointed otherwise than by its mandate, that does not preclude the court from controlling him; and it ought not, in extreme cases, from expelling him. In the Tennessee case of Smith v. The State, 1 Yerg. 228, it was held that the courts have power, without the intervention of a jury, to strike an attorney from the roll for improper conduct; and it is good cause that be accepted a challenge to fight a duel or fought one beyond the bounds of the State and killed his antagonist. As to the power, Catron, J., said: "Much inquiry has been made into the powers of the courts to remove attorneys. If the old statute of Hen. 4 had been examined, that which

has been searched for, and found obscurely hinted at in so many authors, could have been found in a short paragraph; the statute first provides that all who are of good fame shall be put upon the roll, after examination of the justices, at their discretion, and after being sworn well and truly to serve in their offices: 'And if any such attorney be hereafter notoriously found in any default, of record or otherwise, he shall forswear the court, and never after be received to make any suit, in any court of the king. They that be good and virtuous, and of good fame, shall be received and sworn, at the discretion of the justices; and, if they are notoriously in default, at discretion may be removed upon evidence either of record or not of record.'" p. 229.

² See The State v. Williams, 2 Speers, 26.

³ Chittenden v. Brady, Ga. Decis. 219; Ex parte Summers, 5 Ire. 149; People v. Marsh, 2 Cow. 493; People v. Adgate, 2 Cow. 504; Anonymous, 23 Wend. 102 (there is a statute in New York); Connor v. Archer, 1 Speers, 89; Pitman v. Clarke, 1 McMullan, 316; Rice v. McClintock, Dudley, S. C. 354; 2 Hawk. P. C. Curw. ed. p. 208, § 2; Howitt v. Rickaby, 9 M. & W. 52. See also Clark v. Foxcroft, 6 Greenl. 296, 301.

⁴ Matter of Stephens, 1 Kelly, 584; Connor v. Archer, 1 Speers, 89; Thomas v. Aitken, Dudley, S. C. 292; 2 Hawk. P. C. Curw. ed. p. 209, § 4.

⁵ The State v. Tipton, 1 Blackf. 166; Anonymous, 2 Keny. 372; Gregory v. Onslow, Lofft, 35; Rex v. Hall, 2 W. Bl. 1110; Hewitson v. Hunt, 8 Rich. 106; 2 Hawk. P. C. Curw. ed. p. 208, § 3.

⁶ 2 Hawk. P. C. Curw. ed. p. 209, § 5.

⁷ The State v. Simmons, 1 Pike, 265;

chancery¹ answerable in this way, for any wilful misfeasance or non-feasance.

Juror. — And if a juror, charged with a cause, leaves his associates and mingles with the community, or holds communication with persons outside,² he commits a contempt of court.³

§ 256. Thirdly. *Contempts in the Absence of the Court by Parties and Persons served with Process:* —

General Doctrine. — The relation of these persons to the tribunal is such, that any wilful disregard by them of its proper command is a contempt.

Illustrations — (Disobeying Injunction — Decree or Order — Award of Referees — Subpœna — Mandamus, &c.). — When, therefore, one disobeys an injunction,⁴ or a decree to make a conveyance,⁵ or an order to perform the award of referees,⁶ or other similar command;⁷ or a subpœna to appear as a witness,⁸ or the like;⁹ or when referees under a rule will not report;¹⁰ or when the judge of an inferior tribunal refuses obedience to a process from a superior one;¹¹ or a private party declines to comply with

Moore v. Clerk of Jessamine, Litt. Sel. Cas. 104; Reg. v. Harland, 8 Dowl. P. C. 328.

¹ Yates v. Lansing, 9 Johns. 395, 4 Johns. 317, 6 Johns. 337.

² The State v. Helvenston, R. M. Charl. 48.

³ See 2 Hawk. P. C. Curw. ed. p. 212, § 14 et seq.

⁴ Gates v. McDaniel, 3 Port. 856; Woodworth v. Rogers, 3 Woodb. & M. 185; Finley v. Ankeny, Breese, 191; People v. Compton, 1 Duer, 512; Davis v. New York, 1 Duer, 451; Mead v. Norris, 21 Wis. 310; Howe v. Searing, 6 Bosw. 684; McCredie v. Senior, 4 Paige, 378; Hull v. Thomas, 3 Edw. Ch. 236.

⁵ Buffum's Case, 13 N. H. 14; Hilliker v. Hathorne, 5 Bosw. 710.

⁶ McClure v. Gulick, 2 Harrison, 340; Shriver v. The State, 9 Gill & J. 1; Yates v. Russell, 17 Johns. 481; Anonymous, Lofft, 451; Anonymous, Lofft, 321; Rex v. Myers, 1 T. R. 265; Mendell v. Tyrell, 9 M. & W. 217; McArthur v. Campbell, 4 Nev. & M. 208, 2 A. & E. 52; Bath v. Pinch, 4 Scott, 299.

⁷ Hendrickson v. Hendrickson, 8 Harrison, 366; The State v. Noel, T. U. P.

Charl. 43; Philips v. Harriss, 3 J. J. Mar. 122; Gates v. McDaniel, 3 Port. 356; Ex parte Walker, 25 Ala. 81; Ex parte Langdon, 25 Vt. 680; Fisher v. Fisher, 4 Hen. & Munf. 484; Livingston v. Fitzgerald, 2 Barb. 396; Sherman v. Cohen, 2 Strob. 553; Kunckle v. Kunckle, 1 Dall. 364; Thicknesse v. Acton, 8 Eng. L. & Eq. 47, 15 Jur. 1052, 21 Law J. n. s. Ch. 215. The State v. Hungerford, 8 Wis. 345; People v. Church, 2 Wend. 262; Fulton v. Brunk, 18 Wend. 509.

⁸ The State v. Trumbull, 1 Southard, 139; Delaney v. Regulators, 1 Yeates, 403; Commonwealth v. Deskins, 4 Leigh, 685.

⁹ Jackson v. Justices, 1 Va. Cas. 314.

¹⁰ Thompson v. Parker, 3 Johns. 260; Cumberland v. North Yarmouth, 4 Greenl. 459; Stafford v. Hesketh, 1 Wend. 71. See Frets v. Frets, 1 Cow. 335.

¹¹ People v. Judges of Washington, 2 Caines, 97; People v. Westchester Judges, 2 Johns. Cas. 118; The State v. Noel, T. U. P. Charl. 43; The State v. Hunt, Coxe, 287; Mungeam v. Wheatley, 1 Eng. L. & Eq. 516, 15 Jur. 110; Ex parte Carnochan, T. U. P. Charl. 315; People v. Pearson, 3 Scam. 270; Ex parte Wood-

a mandamus;¹ the delinquent is liable to an attachment for contempt. But the order, process, or decree must be a valid one, which the court has the authority to make; otherwise to disregard it is no contempt.²

§ 257. Fourthly. *Contempts in the Absence of the Court by other Persons*: —

Exceptional Doctrine. — It is held by some tribunals, that there can be no contempts of this sort; but, if a person is not an officer of the court, or served with its process, or a suitor in it, or in some way specially under its jurisdiction, what he does out of its presence is not punishable as a contempt. It is not denied that the English law is otherwise; but, for example, in Mississippi it appears to be deemed that the constitution and general spirit of the laws have abrogated so much of the common law as comes within our present subdivision. Therefore the court held, that the publication, during its sitting, of a newspaper article, reflecting on the conduct of the presiding judge, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt.³ And there may be other States in which a like doctrine prevails.⁴

§ 258. **General Doctrine.** — But the English and better American rule recognizes such contempts, though under limitations not easily defined. Thus, —

Abusing Judge out of Court. — In Virginia, where one, interested in the event of a suit depending, but not a party, met the judge who was proceeding to take his seat on the bench; and, on being spoken to by him, responded, in substance, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and defenceless" (alluding to expressions made by the judge on the trial of the cause at a former term); this was held to be a contempt.⁵

Enticing away Witness. — If one procures a witness already

ruff, 4 Pike, 630; Patchin v. Brooklyn, 13 Wend. 664; Gorham v. Luckett, 6 B. Monr. 638. See Weaver v. Hamilton, 2 Jones, N. C. 343.

¹ Rex v. Edyvean, 3 T. R. 352; Rex v. Babb, 3 T. R. 579.

² Birdsall v. Pixley, 4 Wend. 196; People v. Brennan, 45 Barb. 344.

³ Ex parte Hickey, 4 Sm. & M. 751.

⁴ In Pennsylvania, there is a statute

which substantially covers this ground. Foster v. Commonwealth, 8 Watts & S. 77. See also In re Hirst, 9 Philad. 213. As to the United States, see post, § 260. See, also, Dunham v. The State, 6 Iowa, 245. As to Illinois, see Stuart v. People, 3 Scam. 395; People v. Wilson, 64 Ill. 195.

⁵ Commonwealth v. Dandridge, 2 Va. Cas. 408.

subpcnaed to absent himself from the trial in disobedience to the subpcna, this appears pretty plainly to be a contempt.¹

Conduct toward Juror. — And where a jury had rendered a verdict of guilty against an indicted person, whereupon his brother proceeded to the foreman's house, accused the latter of having bullied the jury into the verdict, and challenged him to mortal combat, this was held to be a contempt of the court.² It is likewise a contempt to solicit a juror to give a signal, after the jury have retired, indicating whether or not they are likely to agree, and thereby enable an outside party more safely to bet on the question.³

§ 259. **Publications about Cause pending.** — Again, according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice,⁴ — or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel,⁵ — may be visited as a contempt.⁶ And it makes no difference that the author of the article disclaims such a purpose, and that in fact it has not wrought out its natural results, if it has the evil tendency.⁷ The facts usually show, that the publication was made in term time; and perhaps this ingredient may under some circumstances be material.⁸ But, in general, it is only necessary, in point of law, that the cause should be pending.⁹

Publishing the Proceedings. — There are sometimes reasons why the proceedings in a cause should not be published, even accurately, or not published until the suit is terminated; then, if the judge makes an order forbidding or limiting the publication, in

¹ Burke v. The State, 47 Ind. 528; McConnell v. The State, 46 Ind. 298; Commonwealth v. Braynard, Thacher Crim. Cas. 146.

² Reg. v. Martin, 5 Cox C. C. 356.

³ The State v. Doty, 3 Vroom, 403.

⁴ Republica v. Oswald, 1 Dall. 319; Bayard v. Passmore, 3 Yeates, 485; People v. Few, 2 Johns. 290; Republica v. Passmore, 3 Yeates, 441; In re Cheltenham, &c. Railway, Law Rep. 8 Eq. 580; Daw v. Eley, Law Rep. 7 Eq. 49. In Rex v. Gilham, Moody & M. 165, the act was not sufficient.

⁵ Hollingsworth v. Duane, Wal. C. C. 77, 102; Bronson's Case, 12 Johns. 460;

People v. Freer, 1 Caines, 485, 518; Tenney's Case, 3 Fost. N. H. 162; Morrison v. Moat, 4 Edw. Ch. 25; Littler v. Thomson, 2 Beav. 129; In re Crawford, 13 Jur. 956.

⁶ People v. Wilson, 64 Ill. 195; Reg. v. Onslow, Law Rep. 9 Q. B. 219, 12 Cox C. C. 363, 5 Eng. Rep. 443; Reg. v. Skipworth, Law Rep. 9 Q. B. 219, 230, 5 Eng. Rep. 456; s. c. Reg. v. Castro, Law Rep. 9 Q. B. 219; Reg. v. O'Dogherty, 5 Cox C. C. 348.

⁷ People v. Wilson, supra.

⁸ In re Sturoc, 48 N. H. 428.

⁹ See post, § 262.

respect of time or otherwise, a violation of the order is a contempt.¹

§ 260. *United States Statute — Publication of Proceedings, continued.* — A statute of the United States provides, that the courts of the United States shall have power “to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.”² And it has been held in one of the circuits, that, though the court is restrained from punishing, as for a contempt, the publication during trial of the testimony in a cause, yet, having the power to regulate the admission of persons within its own bar, and the proceedings there, it may exclude a reporter who comes to take minutes of testimony for such publication. And in the particular instance the court made the order, that no person should be admitted within the bar “for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded.”³

§ 261. *How, in Principle.* — Looking at this question of contempts committed by persons neither attached to the court nor in its presence, from the point of legal reason as distinguished from specific adjudication, we can discern no difference between those attached and those not, or between persons in the presence of the tribunal and persons absent, other than arises from the very different degrees of ability to obstruct the working of the judicial machinery possessed by individuals of these differing classes. Since the whole doctrine of contempt of court grows out of the necessity for it to administer justice, the consequence must be, that, whenever any obstruction to its justice is laid before it, the judge must cause the obstruction to be removed.

¹ 4 Bl. Com. 285; *Matter of Clement*, 33 Howell St. Tr. 1335, 1563, 1564; *Rex v. Clement*, 4 B. & Ald. 218. And see *Morrison v. Moat*, 4 Edw. Ch. 25.

² R. S. of U. S. § 725; Act of March 2, 1831, c. 99, 4 Stats. at Large, 487. As

to which, and query whether it restrains the supreme court, see *Ex parte Robinson*, 19 Wal. 505.

³ *United States v. Holmes*, 1 Wal. Jr. 1, 11.

And though ordinarily men in no way connected with the tribunal, either as officers or parties, cannot obstruct the course of its justice without going into its presence, yet circumstances may and do occur in which they can. If they take advantage of these circumstances, and do what tends directly to impede the course of justice, or to corrupt the justice itself, they should be dealt with summarily for the contempt.¹

§ 262. *Cause depending or not.* — These observations enable us to see the true rule for the court in relation to some things coming not exactly under the present or any preceding head of this chapter. For example, it has been held in chancery, that an attachment for contempt should not be granted when the bill is no longer pending.² But this cannot be a universal rule;³ the question must be settled by the circumstances of the case. And it has accordingly been held, in a common-law court, that the termination of a cause in which a witness was summoned to give evidence, disobeying the summons, does not preclude the tribunal from afterward proceeding against the witness for the contempt. Said O’Neill, J.: The witness’s “offence against the court consists in disobeying its process. The interest of the party to compel his attendance by attachment is ended; but the offence against the court still exists, and ought to be punished, so that witnesses may learn the duty of obedience.”⁴ On the other hand, the Massachusetts tribunal has denied to justices of the peace the power to proceed against a witness disobeying a subpoena, after the termination of the cause; but whether the same would be held of a court of record, and whether this decision does not turn entirely on statutes, the case does not inform us.⁵ Plainly there are special circumstances in which this power should be exercised by a tribunal of justice after the cause is ended.⁶

§ 263. *Fifthly. Contempts against Justices of the Peace: — Distinguished from Superior Courts of Record.* — What has

¹ Suppose men should band together to offer bribes to the jurors when the court was not in session, or should send letters to unduly influence the judge, surely the court ought to have power to correct such conduct by the process for contempt.

² *Robertson v. Bingley*, 1 McCord Ch. 338, 349.

³ *Reg. v. O’Dogherty*, 5 Cox C. C. 348.

⁴ *Johnson v. Wideman*, Dudley, S. C. 70, 71.

⁵ *Clarke v. May*, 2 Gray, 410. Also, *Clarke’s Case*, 12 Cush. 320.

⁶ See, also, on this general question, *Williamson’s Case*, 2 Casey, 9; *Weaver v. Hamilton*, 2 Jones, N. C. 343; *The Laurens*, 1 Abb. Adm. 508.

been said thus far refers particularly to contempts against the higher courts of record. But there is an opinion, which may perhaps be well founded, that the authority of justices of the peace is somewhat more limited.¹ They may commit for contempts in their presence, while holding their court;² but Mr. Gabbett observes, that "courts of inferior jurisdiction cannot attach or commit a party for any contempt which does not arise in the face of the court."³ And there are many expressions in the English books apparently sustaining this general proposition. Thus, though the present county courts are of record, and by the statute are permitted to commit only for contempts in court, still, being of inferior jurisdiction, it is strongly intimated that the same result would proceed from common-law principles.⁴ It is also held, in England, that the sessions cannot proceed in this way against a man for disobeying an order of filiation, but only on his recognizance.⁵ And we have some American dicta limiting the power of justices of the peace to contempts in court.⁶ In reason, this power doubtless does not extend as far as that of the high tribunals, still there may be circumstances in which it should be permitted some scope beyond this narrowest limit.⁷

§ 264. Sixthly. *Contempts viewed as Indictable Offences* :—

Twofold Nature.—Many acts are both contempts of court and indictable crimes. Others, while analogous to contempts in their nature and tendencies, are indictable,⁸ but no more. And, as we saw in the preceding volume⁹ how the same thing may be equally a civil and a criminal injury, for which a civil suit and criminal prosecution may both be maintained; so here,

¹ 1 Gab. Crim. Law, 287.

² The State v. Johnson, 1 Brev. 155, 2 Bay, 385; Lining v. Bentham, 2 Bay, 1; The State v. Applegate, 2 McCord, 110; Rex v. Revel, 1 Stra. 420; Reg. v. Rogers, 7 Mod. 28; Reg. v. Langley, 2 Ld. Raym. 1029, 6 Mod. 124; ante, § 244.

³ 1 Gab. Crim. Law, 287.

⁴ Reg. v. Lefroy, Law Rep. 8 Q. B. 134.

⁵ Reg. v. West, 11 Mod. 59.

⁶ Lining v. Bentham, 2 Bay, 1, 8; Richmond v. Dayton, 10 Johns. 393; Hollingsworth v. Duane, Wal. C. C. 77; The State v. Applegate, 2 McCord, 110. None of these cases, except the last, con-

tain any thing more than dicta on the point; and the last merely decides, that a justice of the peace cannot commit a constable for contempt in not returning an execution and paying over the money collected thereon. See also ante, § 262.

⁷ Consult, also, on the general subject of this section, Ex parte Latimer, 47 Cal. 131; Winship v. People, 51 Ill. 296; Hill v. Crandall, 52 Ill. 70; Murphy v. Wilson, 46 Ind. 537; Richmond v. Dayton, 10 Johns. 393; The State v. Galloway, 5 Coldw. 326.

⁸ See Reg. v. Gray, 10 Cox C. C. 184; The State v. Early, 3 Harring. Del. 562.

⁹ Vol. I. § 264 et seq.

the indictment and the proceeding for contempt are entirely distinct, and neither will be a bar to the other.¹

§ 265. **What Contempt of Justice of Peace Indictable** — (**Oral Words, &c.**). — "An indictment can be supported for a contempt of a justice of the peace, which, though short of a breach of the peace, yet amounts to an obstruction of the execution of his office;" because "every obstruction of an officer in the execution of his office is a public injury, and, unless where the legislature has directed otherwise, is indictable."² Even mere words may constitute the obstruction here meant;³ the rule as to which is laid down in Starkie on Slander to be, that "any contemptuous or contumelious words, when spoken to the judges of any courts, in the execution of their office, are indictable."⁴

§ 266. **Whether all Contempts Indictable.** — The doctrine seems to have been supposed to be, that, in every instance where a magistrate may commit for contempt in consequence of what is done before him, the offender is liable likewise to this graver proceeding.⁵ But, —

Insolence in Witness. — Lord Holt observed: "If a witness be insolent, we may commit him for the immediate contempt, or bind him to his good behavior; but we cannot indict him for it."⁶

Oral Abuse. — And where one was convicted on an indictment for saying to justices before whom he was brought by warrant at their sessions, "This is no justice of peace's business; you shall not try this matter; have a care what you do; I have blood in me, if I had you in another place," — judgment was arrested; because the words did not carry with them any intent to break the peace, especially as the defendant was a wheelwright;⁷ still it is difficult to say, that even a wheelwright did not commit thereby a contempt of the justices. Even in a late Illinois case

¹ Vol. I. § 1067; The State v. Woodfin, 5 Ire. 199; The State v. Yancy, 1 Car. Law Repos. 519; Rex v. Ossulston, 2 Stra. 1107; The State v. Williams, 2 Speers, 26; Rex v. Pierson, Andr. 310. And see Vertner v. Martin, 10 Sm. & M. 103; Foster v. Commonwealth, 8 Watts. & S. 77; Ex parte Brounsall, Cowp. 829; In re King, 8 Q. B. 129; In re Wright,

1 Exch. 658; Reg. v. Martin, 5 Cox C. C. 356.

² Brooker v. Commonwealth, 12 S. & R. 175. And see Vol. I. § 465-468, 688.

³ Rex v. Revel, 1 Stra. 420.

⁴ 2 Stark. Slander, 194.

⁵ Rex v. Revel, 1 Stra. 420.

⁶ Reg. v. Rogers, 7 Mod. 28.

⁷ Reg. v. Nun, 10 Mod. 186, 187

it was held that a man did, who said to the magistrate: "You can fine and be damned."¹

Letter in name of Judge. — In another English case, the court was divided on the question whether a criminal information will lie against a person for writing, without authority, a letter in the name of the chief justice of the King's Bench, directed to one of the latter's friends, asking a visit from him.² Here was no contempt of court; and probably our judges would not hold such an act, however reprehensible, to be a crime.

Conclusion. — The result is, that, while most contempts of court are likewise indictable, there are some which are not.

§ 267. **United States Statute.** — A statute of the United States provides a punishment for "every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty; or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein."³ And the reader perceives, that this statute is, in substance, simply an affirmance of what, in the States, would be generally deemed to be the common-law doctrine, which is thus made of force in the tribunals of the United States.

III. *The Consequences of the Contempt.*

§ 268. **Only Court offended to punish.** — It is not within the plan of this volume to discuss questions of practice; yet it may be observed, that the very nature of a contempt compels the court against which it is committed to proceed against it, and, if the court has jurisdiction, precludes any other or superior tribunal from taking cognizance of it, whether directly or on appeal or otherwise.⁴

¹ Hill v. Crandall, 52 Ill. 70.

² Rex v. Emerton, 2 Show. 20.

³ R. S. of U. S. § 5399; Act of March 2, 1831, c. 99, 4 U. S. Stats. at Large, 488.

⁴ Crosby's Case, 3 Wils. 188; Gates v. McDaniel, 4 Stew. & P. 69; Moore v. Clerk of Jessamine, Litt. Sel. Cas. 104; The State v. Tipton, 1 Blackf. 166; Peo-

ple v. Nevins, 1 Hill, N. Y. 154; Rex v. Flower, 8 T. R. 314, 27 Howell St. Tr. 986; Yates v. Lansing, 9 Johns. 395, 4 Johns. 317, 366; Ex parte Adams, 27 Missis. 883; Floyd v. The State, 7 Texas, 215; Ex parte Kearney, 7 Wheat. 38, 43; Clark v. People, 1 Breese, 266; The State v. White, T. U. P. Charl. 123; Ex parte Summers, 5 Ire. 149; Johnston v. Com-

Exceptional Appeals. — Under peculiar provisions of law, however, in some of the States, and the pressure of modern opinions, the superior courts do in a measure, not fully, correct errors of the inferior ones in this matter.¹

§ 269. **Proceed Summarily.** — The proceeding is in all cases summary, before the judge, without the intervention of a jury.²

Jury. — The trial without jury is, in this country, no violation of constitutional rights.³

Offence against the State — How entitled. — The offence of contempt of court is against the State, not the judge, or the party in the cause. Therefore the proceeding should properly be entitled as of "The State" against the one in contempt.⁴

monwealth, 1 Bibb, 598; Lockwood v. The State, 1 Ind. 161; Ex parte Tillinghast, 4 Pet. 108; May Parl. Law, 2d ed. 70, 73; Penn v. Messenger, 1 Yeates, 2; Ex parte Chamberlain, 4 Cow. 49; Vilas v. Burton, 27 Vt. 56; Jordan v. The State, 14 Texas, 436; The State v. Mott, 4 Jones, N. C. 449; Matter of Cohen, 5 Cal. 494; In re Cooper, 32 Vt. 253; Crow v. The State, 24 Texas, 12; Ex parte Maulsby, 13 Md. 625; The State v. Towle, 42 N. H. 540; The State v. Galloway, 5 Coldw. 326.

¹ Stuart v. People, 3 Scam. 395; Stokeley v. Commonwealth, 1 Va. Cas. 330; Shannon v. The State, 18 Wis. 604; Whittam v. The State, 36 Ind. 196; Romeyn v. Caplis, 17 Mich. 449. In Kentucky the appellate court, it seems, will correct an erroneous sentence, as where the punishment is greater than the law warrants; but will not retry the question of contempt. Bickley v. Commonwealth, 2 J. J. Mar. 572, 575. See also Patton v. Harris, 15 B. Monr. 607; Turner v. Commonwealth, 2 Met. Ky. 619. In the case of Bickley v. Commonwealth, Underwood, J., observed: "We conceive, in cases of contempt, the appellate court has authority to correct erroneous judgments and sentences, although it cannot retry the question of contempt or no contempt. Suppose, for instance, a circuit court should inflict a fine of \$500 for a contempt, without the intervention of a jury, when the statute limits the fine to ten pounds; might not

this court rectify the error? We see no objection to doing it." So in a North Carolina case, Ex parte Summers, 5 Ire. 149, Ruffin, C. J., intimated, that, if the inferior court sets out in its order of commitment the facts constituting the contempt, and these facts are not sufficient, the superior tribunal may discharge the party on habeas corpus. It was held, however, that the inferior court need not state the facts in its order of commitment, which is good without. See also Hummell's Case, 9 Watts, 416; Adams v. Haskell, 6 Cal. 316; People v. O'Neil, 47 Cal. 109; People v. Sturtevant, 5 Scid. 263; People v. New York, 29 Barb. 622; People v. Cassels, 5 Hill, N. Y. 164; Cabot v. Yarrowborough, 27 Ga. 476; Jordan v. The State, 14 Texas, 436; The State v. Sheriff, 1 Mill, 145; Baltimore and Ohio Railroad v. Wheeling, 13 Grat. 40; Clarke v. May, 2 Gray, 410; Williamson's Case, 2 Casey, 9; Commonwealth v. Newton, 1 Grant, Pa. 453; Ex parte Pater, 9 Cox C. C. 544. Perhaps some of the doctrines of these cases may find favor everywhere.

² 4 Bl. Com. 283 et seq.; McConnell v. The State, 46 Ind. 298; Whittam v. The State, 36 Ind. 196; Crow v. The State, 24 Texas, 12.

³ The State v. Doty, 3 Vroom, 403; Neel v. The State, 4 Eng. 259.

⁴ Haight v. Lucia, 26 Wis. 355; Bowery Savings Bank v. Richards, 6 Thomp. & C. 59, 8 Hun, 386; Ex parte Kearney, 7 Wheat. 38; In re Mullee, 7 Blatch. 23.

Purging Contempt. — The defendant has the privilege of purging his contempt, if he can, on interrogatories put to him.¹ If he declares that nothing improper was intended, and that he acted in good faith, the declaration is in many instances sufficient.² But it is not sufficient always:³ especially where a private right is to be enforced, the party interested cannot be defeated in this way.⁴

§ 270. **How Punished.** — The punishment — if that may be called such which is rather a mere consequence — is usually fine or imprisonment or both, at the discretion of the judge.⁵

Removal from Office — Attorney. — And there is sometimes added to this, or substituted for it, in the case of an attorney or other officer, a removal or suspension from his office.⁶ But if an attorney is struck from the rolls of one court, he is not necessarily barred admission to practise in another.⁷

Bail. — A commitment for contempt is in execution, in distinction from *mesne* process, and no bail is therefore allowable.⁸

Stay of Proceedings in Main Cause. — Also when it is against a party in a cause which is pending, and concerns his conduct therein, he will sometimes be deemed disqualified to proceed in

Crook v. People, 16 Ill. 534; The State v. Sauvinet, 24 La. An. 119; Whittam v. The State, 36 Ind. 196.

¹ 4 Bl. Com. 287; The State v. Coulter, Wright, 421; The State v. Goff, Wright, 78; Coulson v. Graham, 2 Chit. 57; Rex v. Wheeler, 1 W. Bl. 311; Rex v. Morley, 4 A. & E. 849; Matter of Pitman, 1 Curt. C. C. 186; Crow v. The State, 24 Texas, 12; The State v. Earl, 41 Ind. 464; Burke v. The State, 47 Ind. 528.

² People v. Few, 2 Johns. 290; St. Clair v. Piatt, Wright, 532. And see The State v. Trumbull, 1 Southard, 139; Ex parte Beebees, 2 Wal. Jr. 127; Ex parte Woodruff, 4 Pike, 630; Clare v. Blakesley, 1 Scott N. R. 397; United States v. Dodge, 2 Gallis. 313; Hollingsworth v. Duane, Wal. C. C. 77.

³ People v. Freer, 1 Caines, 485, 518; United States v. Coolidge, 2 Gallis.

⁴ Buffum's Case, 13 N. H. 14; Mungeam v. Wheatly, 1 Eng. L. & Eq. 516, 15 Jur. 110; People v. Compton, 1 Duer, 512; The State v. Simmons, 1 Pike, 265; Anonymous, Lofft, 451. And see Mc-

Clure v. Gulick, 2 Harrison, 340; Ex parte Chamberlain, 4 Cow. 49.

⁵ 4 Bl. Com. 287. Blackstone adds, "and sometimes by a corporal or infamous punishment;" ib. And see People v. Bennett, 4 Paige, 282.

⁶ Ante, § 255; Smith v. Matham, 4 D. & R. 738; The State v. Williams, 2 Speers, 26; Stephens v. Hill, 10 M. & W. 28; Kimpton v. Eve, 2 Ves. & B. 349. And see Commonwealth v. Barry, Hardin, 237. See People v. Turner, 1 Cal. 188.

⁷ Ex parte Tillinghast, 4 Pet. 108. See In re Smith, 4 Moore, 319, 1 Brod. & B. 522; Ex parte Yates, 9 Bing. 455; Anonymous, 1 Exch. 463; In re Wright, 5 Dowl. & L. 394.

⁸ Ex parte Kearney, 7 Wheat. 38, 43; Farrell's Case, Andr. 298; Phelps v. Barrett, 4 Price, 23. A person may be attached for contempt before he is committed; and, until committed, he may have bail. 4 Bl. Com. 287. See People v. Bennett, 4 Paige, 282.

it until he purges his contempt,¹ — a matter, however, which appears to be regulated by the practice of the particular tribunal. This disability to proceed in the cause is not mentioned in the judgment of contempt, but flows from it as a legal consequence.

§ 271. **How escape from Punishment.** — When the proceeding is to enforce an order to do a particular thing, the only escape for the defendant from perpetual imprisonment is, usually, to comply.²

§ 272. **How far Attachment for Contempt discretionary.** — A judge is not obliged to notice every act which may be construed into a contempt; and so the granting of an attachment is, in many cases, matter of discretion with him.³ There are circumstances, however, such as where private rights are concerned, in which he has no discretion.⁴

§ 273. **Where there is another Remedy.** — Where the law has provided some other and sufficient remedy, the court may see in this a reason why it should be resorted to, rather than this summary process, which will, therefore, be refused. Thus, —

Testify before Grand Jury. — A statute having provided, that, if a witness summoned before the grand jury to give evidence of violations of the laws against gaming, "fail or refuse to attend and testify, . . . he shall be liable to indictment," — the Alabama tribunal would not proceed against a delinquent for contempt, observing: "At the common law, it was clearly competent for the court to treat as a contempt the refusal of a witness to give evidence to a grand jury;⁵ but, in a case coming within the statute we are considering, the perverseness of the witness is made an offence against criminal justice, punishable under an indictment, and the punishment denounced may be more efficacious for the correction of the evil."⁶

¹ Johnson v. Pinney, 1 Paige, 646; Lane v. Ellzey, 4 Hen. & M. 504; Attorney-General v. Shield, 11 Beav. 441; Newton v. Ricketts, 11 Beav. 67; Chuck v. Cremer, 1 Cooper temp. Cotten, 205, 247; Green v. Green, 1 Cooper temp. Cotten, 206, note; Morrison v. Morrison, 4 Hare, 590; Madden v. Woods, 7 Ir. Eq. 637; Crawford v. Holder, 3 Y. & Col. Ex. 718; Plumbe v. Plumbe, 3 Y. & Col. Ex. 622; Wilson v. Bates, 9 Sim. 54; Jeyes v. Foreman, 6 Sim. 384; Foreman v. Talmadge, 10 Paige, 443; Rogers v. Pat-

terson, 4 Paige, 450; Fisher v. Fisher, 4 Hen. & M. 484.

² Gorham v. Luckett, 6 B. Monr. 638; Barlee v. Barlee, 1 Add. Ec. 301.

³ People v. Few, 2 Johns. 290; The State v. Nixon, Wright, 763.

⁴ Ex parte Chamberlain, 4 Cow. 49; ante, § 269.

⁵ See Stat. Crimes, § 137.

⁶ The State v. Blocker, 14 Ala. 450. And see Ward v. The State, 2 Missc. 120; Harrington v. Jennings, Lofft, 188.

Required by Justice.— Yet neither a statutory provision,¹ nor one of the common law, for the punishment of an act, will prevent the court from treating the same as a contempt, if thereby the ends of justice may be best promoted. In short, this proceeding by attachment is a flexible one; and it should be used only under the sound discretion of the judge, for the promotion of good ends.

¹ *The State v. Williams*, 2 Speers. 26.

CHAPTER XIII.

COUNTERFEITING AND THE LIKE AS TO COIN¹

- § 274, 275. Introduction.
 276-279. Views of the English Law.
 280-282. Laws of United States.
 283-287. State Laws.
 288-298. Meaning of some Words.
 299, 300. Remaining and Connected Questions.

§ 274. **Scope of this Chapter.**— The offence of counterfeiting the coin is, in a certain sense, a branch of the broader one of Forgery, to be treated of further on. For a full view of it, that chapter must be examined in connection with this. It is proposed here, in a fragmentary chapter, to consider what is special to the coin.

§ 275. **How the Chapter divided.**— The following will be the order: I. Views of the English Law; II. Laws of the United States; III. State Laws; IV. Meaning of some Words in the Law of Counterfeiting; V. Remaining and Connected Questions.

I. *Views of the English Law.*

§ 276. **Coin.**— “Coin is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom; and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin.

Foreign Coin.— “But the coin of one king is not current in the kingdom of another, unless it be at great loss; though our king, by his prerogative, may make any foreign coin lawful money of England, at his pleasure, by proclamation.”²

¹ For matter relating to this title, see et seq. And see Stat. Crimes, § 211, 214, Vol. I. § 178, 179, 204, 359, 435, 479, 636, 225, 306-309.
 765, 769, 799, 989. See this volume, ² Tomlins Law Dict. Coin; referring
FORGERY. For the pleading, practice, to Termes de Ley.
 and evidence, see Crim. Proceed. II. § 246

§ 277. *Power of Crown as to Coin.*—In England, therefore, the coining of money, the legitimation of foreign coin, the giving of value to coin foreign and domestic, and the crying down of coin in circulation so as to prevent its being longer current, are branches of the ancient prerogative of the Crown. “And this prerogative has been considered,” says Gabbett, “to extend, not only to the enhancing of the coin in respect of its extrinsic value or denomination, but to the debasing of it in regard of its intrinsic value or measure of alloy. Great doubts have, however, been entertained, whether, by force of the several statutes which settle the standard of the gold and silver coin of the realm, the king is not in effect restrained from altering it, or increasing the alloy; and such an exercise of the prerogative is not any longer to be apprehended, for, as Lord Hale observes, it would be a dishonor to the nation to put in practice this prerogative of imbasing or debasing the coin, and not safe to be attempted without the assent of Parliament.”¹

§ 278. *Of what Metal.*—Anciently the coin of the realm was only of gold and silver, alloyed with a certain proportion of copper, constituting what is called sterling, or its legal standard; but in 1672² a copper coin was added.

§ 279. *Nature and Grade of Offence of Counterfeiting.*—From this relation of the Crown to the coin, the doctrine of the English courts became established from the earliest times, that the counterfeiting of the king’s coin was treason;³ though the counterfeiting of foreign money, made current by his proclamation, was punishable merely as a misdemeanor.⁴ But Stat. 1 Mary, sess. 2, c. 6, made the latter treason likewise.⁵ At present, in England, the principal offences against the coin are felony; though there are, connected with them, some misdemeanors.⁶

¹ 1 Gab. Crim. Law, 219. And for a great deal of interesting matter concerning the coin, see 1 Hale P. C. 188 et seq.; Case of Mixed Money, 2 Howell St. Tr. 118.

² 1 Hale P. C. 195.

³ See 1 Hale P. C. 192, 215, 219. Case of Mixed Money, 2 Howell St. Tr. 118, 119; Case of Mines, Plow. 310, 316.

⁴ 1 Hale P. C. 210; Hammond on Coining, parl. ed. 3, pl. 3.

⁵ 1 Hale P. C. 192, 210, 215, 218.

⁶ Stat. 24 & 25 Vict. c. 99, entitled “An Act to consolidate and amend the Statute Law of the United Kingdom against Offences relating to the Coin.”

II. *Laws of the United States.*

§ 280. *How under the Constitution.*—By provisions in the Constitution of the United States, Congress has the power “to coin money, regulate the value thereof, and of foreign coin,” and “to provide for the punishment of counterfeiting the securities and current coin of the United States.”¹ No State shall “coin money,” or “make any thing but gold and silver coin a tender in payment of debts.”²

§ 281. *Statutes—Common Law.*—But according to the doctrine laid down in the preceding volume, concerning the common law as a national system, there can be no common-law offences, against the United States,³ relating to its coin. Congress has therefore made, on this subject, such statutory provisions as seemed desirable.⁴

§ 282. *Importation of Counterfeit Coin—Constitutional.*—The reader has observed, that the express words of the Constitution empower Congress “to provide for the punishment of counterfeiting,” only. Still the statutes have included also, in their prohibitions, the importation into this country from abroad of counterfeit coin, and the uttering of such coin here. And this branch of our statutory law has been held to be constitutional; because, in the language of Daniel, J., “the power to coin money being given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power.”⁵

III. *State Laws.*

§ 283. *General Doctrine.*—The reader has observed, that the Constitution of the United States gives to Congress the power over the coin, and withholds it from the State legislatures.⁶ But the effect of this provision is not to deprive the States of all jurisdiction over the class of offences we are considering in this chapter.

¹ Const. U. S. art. 1, § 8.

² Const. U. S. art. 1, § 10.

³ Vol. I § 190 et seq.

⁴ See, for the principal provisions, R.

S. of U. S. § 5457–5462; Act of 1875, c 143, § 4.

⁵ United States v. Marigold, 9 How

U. S. 560, 567.

⁶ Ante, § 280.

§ 284. **Common Law of States.** — At the period when our forefathers brought to this country so much of the English law, common and statutory, as was applicable to our situation and circumstances, counterfeiting the coin and kindred offences were statutory treasons in our fatherland.¹ With us they cannot, for reasons already explained,² be of a grade higher than felony; even if, since the adoption of the United States Constitution, they are common-law offences in the States as against the State governments. Waiving the question, then, whether in the States they have ceased to be indictable at the common law, we shall proceed on the assumption that they have; because, if they have not, still the reader will find them sufficiently treated of in the older English books of the criminal law. And there is room for grave doubts, whether the effect of the United States Constitution was not to abrogate entirely this branch of the unwritten law of the individual States.³

§ 285. **Power of States.** — Whether the States have power, by legislation, to punish any offences against the coin of the United States, has, till recently, been a question of doubt. But at length it is settled that they have;⁴ for, as the citizen owes a double allegiance, to the government of his own State and to the General Government, the same wrongful act may be in its nature injurious to both.⁵ And it should be borne in mind, that the statutes of the United States, for the punishment of counterfeiting the coin, and the like, contain the provision, that nothing in them “shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by” them.⁶ But the particular act of counterfeiting, as distinguished from the cheat effected or attempted on the public or individuals, — that is, the act of counterfeiting in the aspect in which it was treason in England, — is evidently, as

¹ Ante, § 279; Vol. I. § 479; 1 Hale P. C. 188, 225.

² Vol. I. § 177, 456, 611, 612.

³ And see post, § 404-407.

⁴ Vol. I. § 178, 987. The State v. McPherson, 9 Iowa, 53, 55; Sizemore v. The State, 3 Head, 28.

⁵ And see the observations of Grier, J., in Moore v. Illinois, 14 How. U. S. 13, 20; Snoddy v. Howard, 51 Ind. 411.

⁶ Stats. April 21, 1806, c. 49, § 4, 2

U. S. Stats. at Large, 405; March 3, 1825, c. 65, § 26, 4 lb. 122. And see Vol. I. § 172 et seq. The Revised Statutes, in lieu of the words in the text, have the general provision, introductory to the title “Crimes,” that “nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.” R. S. of U. S. § 5328.

intimated in the last section, no offence against the sovereignty of an individual State.

§ 286. **Counterfeit as False Token.** — Yet a piece of counterfeit coin is a false token;¹ therefore the fraudulent passing of it for value, by one who knows it to be counterfeit, is an indictable cheat at the common law.²

Procuring and Uttering as Attempt to Cheat. — And to procure base coin, with the intent to utter it as good;³ or tools for making such coin, with the intent to use them;⁴ is in like manner an indictable common-law attempt to cheat.⁵ There is an English case, in which the allegation of “unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit,” was held insufficient to sustain a conviction; “it not being,” says Mr. East, “an indictable offence.”⁶ Yet we shall find it difficult to uphold this decision, unless on the ground that copper coins are tokens too small to be noticed by the criminal law, according to a doctrine discussed in the preceding volume.⁷

§ 287. **Same in our States.** — No reason appears why these misdemeanors, of cheating and attempting to cheat by false coin and the like, should not be deemed such under the common law of the States.

Counterfeiting. — Perhaps also, in the States, the counterfeiting of the coin of the United States may be an indictable common-law attempt to cheat the people of the State. The question is of little practical importance; for, in probably all the States, statutes have made every offence against the coin indictable as well under them as under the acts of Congress.⁸ That this should be so was contemplated by Congress, as we have already seen.⁹

¹ See ante, § 148.

² 1 Hale P. C. 214.

³ Rex v. Fuller, Russ. & Ry. 305; Reg. v. Fulton, Jebb, 48.

⁴ Rex v. Sutton, 1 East P. C. 172, 2 Stra. 1074, Cas. temp. Hardw. 370. And see the distinctions stated Vol. I. § 204.

⁵ Ante, § 168.

⁶ Cirwan's Case, 1 East P. C. 182. See, on the entire matter of this section,

Hammond on Coining, parl. ed. 45 et seq.

⁷ Vol. I. § 212 et seq.

⁸ It was assumed by Grier, J., in Moore v. Illinois, 14 How. U. S. 13, 20, that a conviction in the tribunals of one of these sovereignties will be no bar to proceedings in the other. But this point has not been adjudged; and it is by no means certain. See Vol. I. § 985-989.

⁹ Ante, § 285.

IV. *Meaning of some Words in the Law of Counterfeiting.*

§ 288. **General View.**—The laws relating to the coin being so many and diverse, we can profitably do but little more, in further discussing them, than simply direct attention to the legal meanings of various words and phrases. In the work on Statutory Crimes the author explained the terms, *utter*,¹ *put off*,² *pass*,³ *tool*,⁴ *mould or die*,⁵ *ten similar pieces of counterfeit gold or silver coin*.⁶

§ 289. **Counterfeit — Counterfeiting.**—Lord Hale observes, that “money consists principally of three parts: 1. The material whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp.”⁷ This view will help us understand what is a counterfeiting of coin. It is the making of false or spurious coin, to imitate—or, as the phrase commonly is, in the similitude of—the genuine.⁸

§ 290. **How much must be done.**—In this definition may be noticed, first, the making. Unless the coin is so far finished as to be capable of being used for purposes of fraud, it is not made.⁹ But there need be no uttering, for the offence is complete when the coin is ready to be uttered.¹⁰ Secondly, it must be base or spurious,—a point which needs no illustration.

§ 291. **Similitude.**—Thirdly, it must have a *resemblance* to the genuine. Whether it possesses this requisite is a question of fact for the jury;¹¹ but the court will instruct them, that the likeness need not be perfect. If the counterfeit looks so much

¹ Stat. Crimes, § 306.

² Stat. Crimes, § 307. “Uttered and put off,” Reg. v. Welch, 1 Eng. L. & Eq. 588, 2 Den. C. C. 78, Temp. & M. 409, 15 Jur. 136.

³ Stat. Crimes, § 308. The State v. Becler, 1 Brev. 482.

⁴ Stat. Crimes, § 319; Rex v. Leonard, 2 W. Bl. 807, 1 Leach, 4th ed. 90, 1 East P. C. 170; The State v. Bowman, 6 Vt. 594; Commonwealth v. Kent, 6 Met. 221; Rex v. Bell, 1 East P. C. 169.

⁵ Stat. Crimes, § 211.

⁶ Stat. Crimes, § 214; Brown v. Commonwealth, 8 Mass. 59, 71. And see Reg. v. Williams, Car. & M. 259; Commonwealth v. Griffin, 21 Pick. 523; Commonwealth v. Cone, 2 Mass. 132;

Commonwealth v. Whitmarsh, 4 Pick. 233; Commonwealth v. Houghton, 8 Mass. 107. And see Stat. Crimes, § 225.

⁷ 1 Hale P. C. 188.

⁸ Daniel, J., in United States v. Margold, 9 How. U. S. 560, 568, observes: “The term counterfeit, both by its etymology and common intendment, signifies the fabrication of a false image or representation.” And see Reg. v. Hermann, 4 Q. B. D. 284.

⁹ Rex v. Varley, 1 Leach, 4th ed. 76, 2 W. Bl. 682, 1 East P. C. 164; Reg. v. Bradford, 2 Crawf. & Dix C. C. 41. And see Stat. Crimes, § 225.

¹⁰ 1 East P. C. 165.

¹¹ 1 East P. C. 163; Rex v. Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364.

like the original, that it might deceive a person using ordinary caution,—the doctrine has been so laid down,—it will suffice.¹ “Thus,” says Mr. East, “a counterfeiting, with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin.”² There need be no impression on the counterfeit; for it may be in the likeness of the worn coin.³

§ 292. **Coloring.**—This word is found in the English statute of 8 & 9 Will. 3, c. 26, § 4.⁴ And it has been held, that preparing blanks with such materials as, when rubbed (before they were rubbed they looked like lead), will make them resemble the real coin, is a coloring, even before the resemblance has been produced by the friction.⁵ So, bringing to the surface the latent silver in a blank of mixed metal, by dipping it in aqua-fortis which corrodes the base metal, is a coloring within this statute.⁶

§ 293. **Milled Money.**—Says Mr. East:⁷ “As to what shall be considered as milled money within the statute of William, James Bunning was indicted for putting off to J. P. nine pieces of false and counterfeit *milled* money and coin, each counterfeited to the likeness of a piece of legal and current milled money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by the denomination import and were counterfeited for, *i. e.* at so much, &c. The fact of knowingly

¹ United States v. Morrow, 4 Wash. C. C. 733; Rex v. Elliot, 1 Leach, 4th ed. 176, 179; s. c. nom. Rex v. Elliott, 2 East P. C. 951; Rex v. Varley, 1 East P. C. 164, 1 Leach, 4th ed. 76, 2 W. Bl. 682; Rasnick v. Commonwealth, 2 Va. Cas. 356; Reg. v. Robinson, Leigh & C. 604, 10 Cox C. C. 107. And see Rex v. Collicott, Russ. & Ry. 212, 4 Taunt. 300, 2 Leach, 4th ed. 1048; Rex v. Ridgely, 1 East P. C. 171; Commonwealth v. Kent, 6 Met. 221; United States v. Burns, 5 McLean, 23.

² 1 East P. C. 164.

³ Rex v. Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364; Rex v. Wilson, 1 Leach, 4th ed. 285. See People v. Osmer, 4 Parker C. C. 242. The doctrine which demands a resemblance to the genuine coin seems not to be of a sort applicable alone in the law of counterfeiting and

forgery. If what is done for the purpose of accomplishing any fraud, or any other wrongful end, has no tendency, either apparent or real, to accomplish the thing meant, there is no such concurrence of act with intent as is required to constitute crime. The reader will see this general proposition in several different relations in the first volume. And see particularly, Vol. I. § 204 et seq., 430 et seq., 738-752.

⁴ Also among the more verbose provisions of the present statute, 24 & 25 Vict. c. 99, § 3.

⁵ Rex v. Case, 1 East P. C. 165, 1 Leach, 4th ed. 154, note.

⁶ Rex v. Lavey, 1 East P. C. 166, 1 Leach, 4th ed. 153. And see Rex v. Harris, 1 Leach, 4th ed. 135.

⁷ 1 East P. C. 180.

putting off counterfeit shillings at a lower value than according to their denomination was fully proved; but it could not be proved that the money had any marks of *milling* upon it. The prisoner being convicted, the objection was referred to the judges, who all held the conviction right. Milled money is so called to distinguish it from hammered money; and all the money now current is milled, *i. e.* passed through a mill or press to make the plate, out of which it is cut, of a proper thickness; though by a vulgar error it is frequently supposed to mean the marking on the edges, which is properly termed *graining*. The judges, therefore, thought it unnecessary that the counterfeit money should appear to have been milled; for, considering *milled-money* as one word (as if written with a hyphen), and descriptive of the money now current, if the counterfeit resemble the money which, if genuine, would have been milled, it is enough.”¹

§ 294. **Instrument adapted for Coining.** — A statute² made it an offence knowingly³ to possess, with a specified intent, any instrument adapted and designed for making counterfeit coin; and one was held to be punishable who, with the intent, had an instrument to make one side only of the coin. “Adapted for coining,” it was observed, “is matter of description, and applies to any instrument which may be used in the formation of any part of a coin.”⁴

Puncheon. — The like may be said of a “puncheon;” and, in England, though it have not the letters, it is sufficiently described in an indictment as a puncheon which will impress the head side of a shilling.⁵

§ 295. **Coin at the Time Current.** — Under the Missouri statute, art. 4, § 7, against counterfeiting “any gold or silver coin at the time current in this State by law or usage,” the genuine coin must be current, when the counterfeit is made; the offence not being committed if it has gone out of circulation then. But under § 21, whereby the passing of such counterfeit coin is equally criminal with the counterfeiting, there is no need

¹ *Rex v. Bunning*, 1 East P. C. 199.
² *Leach*, 4th ed. 621; *Dorrington's Case*, 1 East P. C. 181; *Jacob's Case*, 1 East P. C. 181.

³ *R. S. of Mass. c. 127, § 18.*

⁴ See *Sasser v. The State*, 13 Ohio, 453, 483, 484.

⁴ *Commonwealth v. Kent*, 6 Met. 221. And see *Stat. Crimes, § 212; Reg. v. Roberts, Dears. 589.*

⁵ *Rex v. Ridgely*, 1 East P. C. 171; *s. c. nom. Rex v. Ridgely*, 1 *Leach*, 4th ed. 189. See *Rex v. Foster*, 7 *Car. & P.* 495.

the genuine should be current at the time the counterfeit is passed.¹

§ 296. **Coin by Law made Current, &c.** — The Supreme Court of the United States held, in 1836, that a Spanish head pistareen is not a coin made current by law in the United States, within the act of Congress of 1825; consequently, that the counterfeiting of such a piece of money is not punishable under this act.²

§ 297. **Lawful Money, &c.** — In one case the court observed: It has been objected that the judgment “should have been rendered for lawful money of Virginia, according to the expression used in the writing. This we think, in substance, has been done; as lawful money of the United States would be lawful money of Virginia, or any other State or territory.”³ And especially must this be so with respect to the coin; since, by the Constitution of the United States, no State can coin money.⁴

§ 298. **Coin Current by Usage.** — In Massachusetts, a statute against counterfeiting “gold coin current by law or usage within the State,” is held not to include a “California five-dollar gold piece,” as it was called; because this coin was manufactured in one of the States contrary to the Constitution of the United States; and, “if proved to be in circulation,” said the judge, “it could never be denominated a coin ‘current by usage,’ for no usage can be set up in direct violation of a law forbidding it.”⁵

V. Remaining and Connected Questions.

§ 299. **Felony or Misdemeanor.** — If views before mentioned⁶ are correct, there is no common law in a State making an offence against the coin more than a misdemeanor. Wherever, therefore, in our States, this offence is felony, it is such only by force of some statute.⁷ In England, the uttering of counterfeit coin

¹ *The State v. Shoemaker*, 7 *Misso.* 177, 182.

² *United States v. Gardner*, 10 *Pet.* 618.

³ *Coeke v. Kendall*, *Hemp.* 236, 238.

⁴ *Ante, § 280.*

⁵ *Commonwealth v. Bond*, 1 *Gray,* 564.

⁶ *Ante, § 284 et seq.*

⁷ In Wisconsin, by statute, “the term felony when used in any statute shall be

construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State prison;” and the court deemed that this “does not necessarily make an offence a felony, which before the statute was a mere misdemeanor, but it affords a definite meaning for a technical law term, which, without this statute, in some respects would be indefinite and vague.” There-

is misdemeanor; ¹ differing herein from counterfeiting itself, which is now a felony.² But until lately the English courts, overlooking this distinction, have adjudicated cases of uttering as though the offence were a felony, applying to it the law of principal and accessory, and the like.³

§ 300. **Conclusion.** — To the casual reader, the present chapter will appear less complete than most others in this volume. But one who will place before him, first, the statutes of his own State, then the pages of this chapter, lastly those of the corresponding chapter on Forgery, will have nearly all the light on the subject derivable from books other than full reports. There are many points not mentioned in these pages simply because they have not become matter of judicial determination.

fore, though another statute made the uttering of counterfeit coin punishable in the State prison, yet, inasmuch as such uttering was only a misdemeanor at the common law, it was held to remain such notwithstanding the concurrent operation of the statutes. *Wilson v. The State*, 1 Wis. 184, 188, 194. See *Miller v. People*, 2 Scam. 233. On this general question, consult Vol. I. § 617; *Stat. Crimes*, § 123, 126, 145.

¹ *Reg. v. Greenwood*, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535; *Stat. 24 & 25 Vict. c. 99*, § 9-12.

² Vol. I. § 479; ante, § 279.

³ *Reg. v. Greenwood*, supra, in which Parke, B., said: "At common law per-

sons who, in felony, would have been accessories before the fact, in cases of misdemeanor were treated as principals. I think, therefore, that the case of *Rex v. Else*, Russ. & Ry. 142, and *Reg. v. Page and Jones*, 1 Russ. Crimes (3d Eng. ed.), 82, 9 Car. & P. 761, were wrongly decided, and the comments on those decisions in 1 Russ. Crimes, 82, are well worthy of consideration." And see *Reg. v. Gerrish*, 2 Moody & R. 219; *Rex v. Skeritt*, 2 Car. & P. 427; *Reg. v. Bannen*, 2 Moody, 309, 1 Car. & K. 295; *Rex v. Manners*, 7 Car. & P. 801; *United States v. Morrow*, 4 Wash. C. C. 733; *Rasnick v. Commonwealth*, 2 Va. Cas. 356; *The State v. Stutson*, Kirby, 52.

For DEAD BODIES, see SEPULTURE.

DISORDERLY HOUSE, see Vol. I. § 1106 et seq.

CHAPTER XIV.

DISTURBING MEETINGS.¹

§ 301. **Elsewhere — (Common Law).** — The common-law offence of disturbing meetings is sufficiently explained in the first volume.²

Here — (Statutory). — Practically the proceedings are nearly all upon the statutes, which, however, do not have the effect to abrogate the offence under the common law.³ We shall consider the doctrines under them, as far as the limited number of decisions in the books will enable us to do, in the present chapter.

§ 302. **Meeting of like Kind — (School — Temperance).** — A statute having made punishable "every person who shall wilfully interrupt or disturb any school or other assembly of people, met for a lawful purpose, within the place of such meeting or out of it,"⁴ the court refused to restrict its interpretation to meetings of a like kind with schools,⁵ and held it applicable to one for the discussion of temperance.⁶

§ 303. **Religious Meeting — (Services progressing or not).** — There are various statutes directed specifically against the disturbance of religious meetings. Thus in Virginia it is made punishable if "any person shall, on purpose, maliciously or contemptuously disquiet or disturb any congregation assembled in any church, meeting-house, or other place of religious worship." And this was held applicable to disturbances, not only during the progress of religious services, but equally at any time while the congregation is together for worship. Hence it protects a Methodist camp ground, at night, after the services are over for the

¹ For the pleading, practice, and evidence, see *Crim. Proced. II.* § 284 et seq. See, also, as to the law, *Stat. Crimes*, § 211, 560.

² Vol. I. § 542.

³ *People v. Crowley*, 23 Hun, 412.

⁴ *Mass. Stat.* 1849, c. 59.

⁵ *Stat. Crimes*, § 245, 246.

⁶ *Commonwealth v. Porter*, 1 Gray, § 476. And see post, § 307; *Summerlin v. The State*, 3 Texas Ap. 444.

day and the worshippers are retired to rest.¹ But the direct reverse of this conclusion was reached under the Missouri statute.² And it was also held in this State — the statutory words being “assembly met for religious worship” — that the offence is not committed by a disturbance in the church yard after the congregation is dismissed.³ Now, —

§ 304. *Continued.* — Whatever may be said of the last point, the general doctrine accords more nearly with the Virginia rulings than with the Missouri. And it is, that, at all times when the congregation is assembled for worship, a disturbance is within the statute and punishable, being as completely within its spirit as its terms, though the actual worship has not commenced, or though it has ended. It is so even where the congregation has been formally dismissed and is retiring, and a part of the people have left; “so long,” in the words of White, J., in a Texas case, “as any portion of the congregation remains upon the ground.”⁴ Still, to constitute a congregation “assembled,” there must be some collection of people already made.⁵ In Tennessee, the doctrine is illustrated as follows. The statutory words are, “if any person shall interrupt a congregation assembled for the purpose of worshipping the Deity,” &c.; and they are held to be violated by a disturbance at any time before the assembly has dispersed,⁶ even after the religious services are over, and the church authorities are together for the trial of a member. If, in the language of Caruthers, J., “a religious assembly, whether large or small,” is “engaged in public worship, or duties connected with their interests as a church,” to such an assembly the protection of the statute will extend.⁷

§ 305. *Continued.* — The words of the Indiana statute are, “any religious society, or any members thereof, when met or meeting together for public worship.” And, said Worden, J.: “The point of time when they should be considered as being met together, or when they should be considered as having dispersed,

¹ Commonwealth v. Jennings, 3 Grat. 624. ³ Kinney v. The State, 38 Ala. 224; The State v. Ramsay, 78 N. C. 448; The State v. Lusk, 68 Ind. 264.

² The State v. Edwards, 32 Miss. 548. ⁴ The State v. Bryson, 82 N. C. 576.

³ The State v. Jones, 53 Miss. 486. ⁵ Williams v. The State, 3 Sneed, 313.

⁴ Dawson v. The State, 7 Texas Ap. 59, 60; Richardson v. The State, 5 Texas Ap. 470; Lancaster v. The State, 53 Ala. 518, 520. ⁶ Hollingsworth v. The State, 5 Sneed, 518, 520.

we regard as a question of fact, or, perhaps, a mixed question of law and fact, rather than a pure question of law.” Therefore it was left with the jury to determine, whether, immediately after the benediction was pronounced, and the people had passed out of the house, but before the members had dispersed, they were “met together for public worship,” within the meaning of the statute.¹

§ 305 a. *Sunday-school.* — An ordinary Sunday-school, where the Bible and religious precepts are taught, is a worshipping assembly within these statutes.²

§ 306. *School.* — A statute made punishable the wilful disturbance or interruption of any teacher or pupils in any school, kept in “any school-house or other place of instruction.” And a private school for penmanship, in a district school-house, was held to be within its protection.³

§ 307. *Continued — Moral and Benevolent Object.* — A statute making it punishable to disturb persons met “for the promotion of any moral and benevolent object,” was held to include a meeting for culture and improvement in sacred and church music. The words of another statute being, “any district school, or any public, private, or select school, while the same is in session;” the court deemed that, to bring a case within them, there must be a teacher as well as pupils. Therefore a meeting of persons to sing together for mutual improvement in the art, but without any teacher, was not a “school,” such as the statute contemplates. “Indeed,” said Sanford, J., “the term ‘school’ alone, according to American usage, more generally denotes the collective body of pupils in any place of instruction, and under the direction and discipline of one or more instructors.”⁴

§ 307 a. *Rightfulness of Meeting.* — The statutes have been construed to extend their protection only to such meetings as are in a sense lawful or in their proper places. At least, if persons will hold their meetings in the streets, the laws will not protect them from interruptions which the common use of the streets creates.⁵ But under a statute making punishable the disturbance of “any

¹ The State v. Snyder, 14 Ind. 429, 430. See, however, ante, § 304; also The State v. Gager, 28 Conn. 232. As to the later law in Indiana, see Marvin v. The State, 19 Ind. 181; Vol. I. § 35 note.

² Martin v. The State, 6 Baxter, 234.

³ The State v. Leighton, 35 Maine, 195. See The State v. Adams, 2 Lea, 647.

⁴ The State v. Gager, 28 Conn. 232.

⁵ The State v. Schieneman, 64 Miss. 386.

congregation assembled for religious worship and conducting themselves in a lawful manner," it was held to be no defence for one that he believed the congregation to be, instead of so conducting, trespassing on the right of another congregation to occupy the meeting-house.¹ Perhaps, in some circumstances, it may be matter of consideration that the assembled persons are defending themselves by undue measures.²

§ 308. **What is Disturbance.**—Something of this, under the common law, was seen in the first volume.³ Shaw, C. J., contemplating a statute before quoted,⁴ said that the question "cannot easily be brought within a definition applicable to all cases; it must depend somewhat on the nature and character of each particular kind of meeting, and the purposes for which it is held, and much also on the usage and practice governing such meetings. . . . It must be decided as a question of fact in each particular case; and, although it may not be easy to define it beforehand, there is commonly no great difficulty in ascertaining what is a wilful disturbance in a given case. It must be wilful and designed, an act not done through accident or mistake."⁵ Still, —

¹ Dorn v. The State, 4 Texas Ap. 67. Compare with doctrines post, § 490, 501, 502, 504, 505.

² Rasberry v. The State, 1 Texas Ap. 664. And see Ross v. The State, 2 Dutcher, 224.

³ Vol. I. § 542.

⁴ Ante, § 302.

⁵ Commonwealth v. Porter, 1 Gray, 476, 480. **Rights of Audience at Theatre.**—In an Irish case, Bushe, C. J., speaking of the rights of an audience at a theatre, said, they were well defined, and were as follows: "They [the audience] may cry down a play or other performance, which they dislike, or they may hiss or hoot the actors who depend upon their approbation or their caprice. Even that privilege, however, is confined within its limits. They must not break the peace, or act in such a manner as has a tendency to excite terror or a disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment; for, if it be premeditated

by a number of persons confederated beforehand to cry down even a performance of an actor, it becomes criminal. Such are the limits and privileges of an audience, even as to actors and authors." Rex v. Forbes, 1 Crawf. & Dix C. C. 157. In another case, Sir James Mansfield, C. J., said to the jury: "I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessities of life; and any person may stay away who does not approve of the manner in which they are managed. . . . The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would even question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would

§ 309. **Disturbance defined.**—It is believed that, in a sort of general way, disturbance may be defined to be any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation in whole or in part. Thus, —

Part of Assembly.—Not all the assembly need be disturbed. It is immaterial that the witnesses were not, while others were.¹ Again, —

Noise.—The cracking of nuts and other forms of noise, contrary to the purposes of the meeting, — as, during a religious service, and more especially during the time of prayer, — are disturbances.²

Violent and Insulting Discourse — Speaking without Permission.—Where one is given leave to speak by the conductor of a meeting, he becomes guilty of a disturbance if he indulges in a violent and insulting discourse, contrary alike to the spirit of the permission and to good conduct. Nor is it any excuse or justification that he was not called to order.³ Especially, therefore, one who, without permission, and contrary to the remonstrance of the presiding officer, speaks and continues to speak when called to order, subjects himself to indictment as a disturber.⁴

Hisses and Applause.—We saw in a note to the last section, that an audience at a theatre may hiss and applaud. But no one would contend that either would be quite lawful in a solemn, religious service. Yet even religious meetings have been con-

amount to a conspiracy, and that the persons concerned in it might be brought to punishment. If people endeavor to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces." Clifford v. Brandon, 2 Camp. 358, 368, 369. In a note to this case, p. 372, the reporter says: "Macklin, the famous comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield; and, it being proved that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty under his lordship's direction; but the prosecutor de-

clined calling upon them to receive the judgment of the court. I have not been able to find any authentic account of the trial." And see ante, § 216. **Forcing One's Way into Meeting.**—As to disturbing a lyceum by attempting to force the way into a room where it was held, see The State v. Yeaton, 53 Maine, 125.

¹ Holt v. The State, 1 Baxter, 192. And see Friedlander v. The State, 7 Texas Ap. 204.

² Hunt v. The State, 3 Texas Ap. 116. Friedlander v. The State, 7 Texas Ap. 204; Hlicks v. The State, 60 Ga. 434. And see Copping v. The State, 7 Texas Ap. 61.

³ Lancaster v. The State, 53 Ala. 308.

⁴ The State v. Ramsay, 78 N. C. 445.

ducted in ways not solemn, with permitted applause if not also with hisses. In such a meeting, doubtless a round roar might be sent up, at the proper moment, in praise of the preacher, without rendering him who worshipped in that form liable to be indicted for crime. Again, among one class of religionists, a solemn amen would be permissible, where among another class it would not be.

Meeting not broken up. — When the interruption is of the indictable sort, it need not, to be obnoxious to the law, proceed so far as to break up the meeting, or create an actual pause in the proceedings.¹

§ 309 a. **Carrying Weapons into Meetings.** — In some of the States, statutes specifically forbid the carrying of weapons into meetings.²

§ 310. **The Intent.** — In Alabama, a statute having made punishable “any person who *wilfully*³ interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse,” &c., the offence was held not to be committed when the act was done “recklessly.” The disturbance, to be within the statute, it was said, must be intentional, in distinction from any mere reckless conduct.⁴ And in North Carolina it was held, that, where there is no intent to disturb the meeting, one who is admitted to be conscientiously taking a part in its exercises does not commit the offence though he joins in the singing in a voice so peculiar as to create “irresistible laughter.”⁵

§ 310 a. **Rules of Meeting.** — It accords with what has already been said to add, that, as meetings of different sorts are differently conducted and with different rights of the audience,⁶ such rights must be deemed to proceed from the will of those who control the meetings and are responsible for their results. For example, the presumption is, that the managers of a theatre allow hisses and applause, such being appropriate to the nature of the meeting and customary thereat. So every other meeting will have its implied rules.⁷ But, in reason, there may also be express rules, and to them the attendants on the meeting must con-

¹ *Brown v. The State*, 46 Ala. 175; *McElroy v. The State*, 25 Texas, 507.

² *Owens v. The State*, 3 Texas Ap. 404; *Bush v. The State*, 6 Texas Ap. 421.

³ See Stat. Crimes, § 824.

⁴ *Harrison v. The State*, 37 Ala. 154, 156; *Brown v. The State*, 46 Ala. 175.

⁵ *The State v. Linkhaw*, 60 N. C. 214. And see *Richardson v. The State*, 5 Texas Ap. 470.

⁶ Ante, § 308 and note, 309.

⁷ And see *The State v. Ramsay*, 78 N. C. 448.

form. So that, if the managers of a theatre should in terms forbid by rule all expressions of approbation and disapprobation, persons voluntarily attending a performance with notice thereof would be under compulsion to comply. But it has been deemed that a rule of a religious society, forbidding any one to leave a meeting which he has entered until its services are ended, except by permission, is void as to one who had no knowledge of it when entering. “We think it clearly illegal. It is an infringement upon natural liberty and private right not to be tolerated. Nor can it in law excuse or protect the officers of the church from the responsibility of any crime they may commit in enforcing such illegal rule.”¹

¹ *People v. Wertendyke*, 1 Wheeler Crim. Cas. 124, 125. In this case, there is no judicial intimation that the result would be otherwise if the person who undertook to go out knew of the rule when he went in. The facts did not raise that question. But plainly, in reason, if he had knowledge of the rule, he consented to it, and by the act of entering bound himself to a compliance with its terms.

For DRUNKENNESS, see Stat. Crimes. As an excuse for Crime, see Vol. I. § 397-416.

CHAPTER XV.

DUELLING.¹

§ 311. **The Killing is Murder.** — Persons who deliberately engage in a duel, conducted, however fairly, according to the law of honor, are not protected by the law of the land; and, when one kills the other, the party killing is guilty of murder.²

Seconds, &c. — So all present, giving countenance and encouragement to the transaction, such as seconds and the like, are in the same condemnation.³ This extends even to the surgeon.⁴

§ 312. **Acts short of Murder.** — In an early English case before the court of Star-Chamber, it was said in relation to duelling, "that, by the ancient law of the land, all inceptions, preparations, and combinations to execute unlawful acts, though they never be performed, . . . are punishable as misdemeanors." And where one of the defendants had sent a challenge, which was declined, and the other defendant had been the bearer of it, both

¹ For matter relating to this title, see Vol. I. § 10 and note, 143, 540, 654. And see post, HOMICIDE. For the pleading, practice, and evidence, see Crim. Proceed. II. § 302 et seq.

² Vol. I. § 10 and note, 654; Case of Duels, 2 Howell St. Tr. 1033, 1038; Mawgridge's Case, 17 Howell St. Tr. 67, 68; Smith v. The State, 1 Yerg. 223; 1 Hawk. P. C. p. 96, § 21. Mr. East says: "Where two persons deliberately agree to fight, and meet for that purpose, and one is killed; the other cannot help himself by alleging, that he was first stricken by the deceased, or that he had often declined to meet him, and was urged by importunity, or that he meant not to kill, but only to disarm his adversary. For since he deliberately engaged in an act highly culpable, in defiance of the laws, he must at his peril abide the consequences." 1 East P. C. 242.

³ Vol. I. § 628 et seq., 654; Reg. v.

Barronet, Dears. 51; 1 Hawk. P. C. Curw. ed. p. 97, § 31; Reg. v. Young, 8 Car. & P. 644; Reg. v. Cuddy, 1 Car. & K. 210. Mr. East, after the passage quoted in the last note, proceeds: "Where the principal in deliberate duelling would be guilty of murder, so will his second; and, some have considered, the second also of him who died, because the fighting was upon a compact; though Lord Hale thinks the latter opinion too severe; but he says, it is a great misdemeanor even in him." 1 East P. C. 242. It is difficult to doubt, that, in matter of principle, even he is guilty of murder. He gave to the unlawful transaction which resulted in death exactly the same concurrence of his will, and countenance of his presence, and active exertions, which the second of the other did.

⁴ Cullen v. Commonwealth, 21 Grat 624. And see Reg. v. Taylor, Law Rep 2 C. C. 147.

were convicted for the crime.¹ The doctrine is therefore settled, in England and the United States, that all acts of this sort, such as sending a challenge to fight,² writing a letter to provoke a challenge,³ and the like, are indictable misdemeanors.⁴ Blackstone puts this doctrine upon the proposition that such acts tend to excite breaches of the public peace;⁵ and this proposition is undoubtedly just and sufficient of itself to support the doctrine. But it rests equally on other reasons; namely, those which are found in the law of attempt, as explained in the preceding volume; and those which are embodied in the law of conspiracy, as set forth in this volume; and, when any one of these three reasons upholds an indictment, it stands. On all three grounds, parties who fight without the fatal result are punishable.⁶

§ 313. **Meaning of "Duel."** — A duel is a fighting together of two persons, by previous concert, and with deadly weapons, to settle some antecedent quarrel. Under the South Carolina statute, it was decided, that any agreement to fight with loaded pistols, and an actual fighting in pursuance of it, are a duel; the matter not depending upon when the agreement was made, but upon the fact of the agreement.⁷ This is clearly the correct doctrine, and the fighting is equally a duel if done with swords or rifles. Another proposition is plain, that, to constitute a duel, the fighting need not end fatally. Plainly, also, a mere challenge is not a duel; though, in a liberal use of words, it may be said to pertain to *duelling*. Again, if the fighting is a mere encounter with fists, where it is understood that neither is at liberty to take the other's life, it is not called a duel. Neither is it a duel where the fighting is on a sudden outburst of anger, and

¹ Case of Duels, 2 Howell St. Tr. 1033, 1046, 1047.

² Rex v. Philipps, 6 East, 464; Rex v. Newdigate, Comb. 10; Reg. v. Langley, 2 Id. Raym. 1029, 1031, 6 Mod. 124; Smith v. The State, 1 Stew. 506; The State v. Perkins, 6 Blackf. 20; The State v. Farrier, 1 Hawks, 487.

³ Rex v. Rice, 3 East, 581; Rex v. Williams, 2 Camp. 506; Rex v. Philipps, 6 East, 464; s. c. nom. Rex v. Phillips, 2 Smith, 550.

⁴ Commonwealth v. Tibbs, 1 Dana, 525. Hawkins says: "It is a very high offence to challenge another, either by

word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavor to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c." 1 Hawk. P. C. Curw. ed. p. 487, § 3.

⁵ 4 Bl. Com. 150. And see The State v. Taylor, 3 Brev. 243, 1 Tread. 107; 1 Russ. Crimes, 3d Eng. ed. 297.

⁶ Commonwealth v. Lambert, 9 Leigh, 603.

⁷ Herriott v. The State, 1 McMullan, 126.

not by mutual agreement. There are laws of honor, as they are called, regulating duels; yet doubtless a fighting may be, in law, a duel, though these laws are violated, — just as a confinement of a man may be an imprisonment, though not proceeded in lawfully. It may be a question whether or not the use of deadly weapons is absolutely essential to a duel; but, at least, the fighting must be on such mutual agreement as permits the one to take the life of the other.

§ 314. **The Challenge.** — The fighting is usually preceded by what is termed a challenge. It is immaterial, both under statutes and at the common law, whether the challenge is verbal or written.¹ For the crime is in the invitation to fight, and it is complete when this invitation is in any way delivered.² The words also in which it is given are unimportant: if they are intended for a challenge, and to be so understood, they come within the law, even though, to common apprehension, their signification is less broad.³ But in an old English case, the words, "You are a scoundrel, and defrauded the king of his duty; I will pick you to the heart, and call you to an account," were held, under the circumstances presented to the court, not to be sufficient to authorize an information for challenging to a duel; though an information was granted on them as for a libel.⁴ There is a difference between challenging and accepting a challenge; and the mere expression of a willingness to do the latter does not constitute the former.⁵

§ 315. **Where to be fought.** — It makes no difference, as to the indictability of the challenge, that the duel contemplated is to take place in another country or State.⁶

¹ The State v. Perkins, 6 Blackf. 20; 1 Hawk. P. C. Curw. ed. p. 487, § 3.

² The State v. Taylor, 1 Tread. 107; Commonwealth v. Tibbs, 1 Dana, 525. **Attempt short of Challenge.** — The sending of a letter provoking a challenge is an offence, though the letter never reaches its place of destination. Rex v. Williams, 2 Camp. 508.

³ Commonwealth v. Pope, 3 D. 418; Ivey v. The State, 12 Ala. 270; Gordon v. The State, 4 Misso. 375. And see The State v. Farrier, 1 Hawks, 487.

⁴ Rex v. Pownell, W. Kel. 58. In Illinois it has been deemed not to be a challenge to send a letter containing such

expressions as, "It appears that a nife is your favorite of setting fuses, and if so bea the case you can consider that it will sute me you are a Cowerd and darsent to except of the offer. I want the same change of sharpening mi nife you can set your day and i will be on hans." *Aulger v. People*, 34 Ill. 486.

⁵ Commonwealth v. Tibbs, 1 Dana, 525.

⁶ The State v. Farrier, 1 Hawks, 487; The State v. Taylor, 3 Brev. 243, 1 Tread. 107; Ivey v. The State, 12 Ala. 270; Vol. I. § 143. See The State v. Cunningham, 2 Speers, 246.

§ 316. **Statutes.** — Besides the common-law doctrine, we have various statutes, national and State, against duelling, and sending, receiving, and carrying challenges¹ to fight, and against some other offences connected therewith.² Some of the statutes are broader in their terms, some are less broad, than the common law. The Alabama act, for instance, does not extend to the case of giving a challenge; and the court seems to have entertained the opinion, that it operates as a constructive repeal of the common law on this point;³ a conclusion, however, which is repugnant to the doctrines of statutory interpretation generally applied elsewhere.⁴

§ 317. **The Punishment.** — Where the duel amounts to a felonious homicide, the punishment is not a part of the case needing explanation here. The minor offences now under consideration are misdemeanors at the common law, and the observations made in the former volume concerning the punishment of misdemeanor are applicable to them.⁵ A statute which provides, that the offender "shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, within this State," was held in New York to be constitutional.⁶

¹ The bearer, it has been held, must know that what he carries is a challenge. *United States v. Shackelford*, 3 Cranch, C. C. 178.

² The South Carolina act of 1812, against sending a challenge, embraces the principals. *The State v. Dupont*, 2 McCord, 334. And see further for the construction of this statute, *The State v. Cunningham*, 2 Speers, 246. See also

Moody v. Commonwealth, 4 Met. Ky. 1; *Heffren v. Commonwealth*, 4 Met. Ky. 5.

³ *Smith v. The State*, 1 Stew. 508.

⁴ *Stat. Crimes*, § 154-159.

⁵ Vol. I. § 940-947.

⁶ *Barker v. People*, 3 Cow. 686, 20 Johns. 457; Vol. I. § 944. See, also, as to this, *Commonwealth v. Jones*, 10 Bush, 725.

For EAVESDROPPING, see Vol. I. § 1122-1124.

ELECTION FRAUDS AND OBSTRUCTIONS, see *Stat. Crimes*.

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CHAPTER XVI.

EMBEZZLEMENT.¹

- § 318. Introduction.
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 352-355. Confidence in the Person embezzling.
 356-371. Thing embezzled.
 372-378. Act by which Embezzlement is effected.
 379. The Intent.
 380-383. Remaining and Connected Questions.

§ 318. *Order of this Chapter.* — We shall consider, I. History, Statutes, and General View; II. The Classes of Persons embezzling; III. The Confidence in the Person embezzling; IV. The Thing embezzled; V. The Act by which the Embezzlement is effected; VI. The Intent; VII. Remaining and Connected Questions.

I. *History, Statutes, and General View.*

§ 319. *Origin of the Law.* — The law of embezzlement is statutory. It sprang from attempts to amend the law of larceny; and is, indeed, a sort of statutory larceny.

Stat. 21 Hen. 8. — The first statute on the subject was the English one of 21 Hen. 8, c. 7, which, after a considerable preamble, provides, that, where any “caskets, jewels, money, goods, or chattels” are delivered to servants by their masters or mistresses “to keep, — if any such servant or servants withdraw him or them from their said masters and mistresses, and go away with the said caskets, &c., to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses; — else, being in the service of his said master or mistress, without assent or commandment of

¹ For matter relating to this title, see and evidence, see *Crim. Proceed. II. Vol. I. § 567.* And see this volume, § 314 et seq. See, also, *Stat. Crimes, LARCENY.* For the pleading, practice, § 271, 418.

his masters or mistresses, he embezzle the same caskets, &c., or otherwise convert the same to his own use, with like purpose to steal it,” — if the property is “of the value of forty shillings or above,” the transaction shall be felony; provided (§ 2), that this act shall not extend to “any apprentice or apprentices, nor to any person within the age of eighteen years,” &c.

§ 320. *Object of this Statute — How interpreted.* — According to the preamble, this statute was passed to remove doubts, whether or not such misbehavior was larceny at the common law. By construction, it was strictly confined to goods delivered to the servant to *keep*; not extending to money collected, or received on a sale of property, and the like.¹

Whether Common Law with us. — No reason appears why this statute should not have a common-law force in this country,² though there is little practical scope for it. In fact, it may be deemed a mere confirmation of a common-law doctrine concerning larceny.³

Re-enacted. — It has, in substance, been adopted into the legislation of New Jersey, New York,⁴ and perhaps some of the other States.

§ 321. *Modern Enactments: —*

Stat. 39 Geo. 3. — Coming now to the statutes of embezzlement, as the term is known in the modern law, we have, in the first place, of principal enactments, Stat. 39 Geo. 3, c. 85, A. D. 1799. Though adopted since the Revolution and repealed in England, the books contain so many cases adjudged upon it, now constantly referred to as authorities in the exposition of our own statutes, that its insertion here is imperative. After a preamble it proceeds: “If any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall,

¹ 1 Hawk. P. C. Curw. ed. p. 155, Binn. 595, 618, have declared that it is.

² 2 East P. C. 564. The English commissioners observe, “that this statute was superseded by subsequent declarations of the common law, which were more extensive in their operation than the statute itself.” 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 21.

³ Kilty, Report of Statutes, 71, seems to think it is not of force in this country; while the Vermont court, in *The State v. White*, 2 Tyler, 352, and the Pennsylvania Judges in Report of Judges, § 151.

⁴ *People v. Hennesey*, 15 Wend. 147.

by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on the account of his master or masters or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof; every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to or taken into the possession of such servant, clerk, or other person so employed; although such money, goods, bond, bill, note, banker's draft, or other valuable security was or were no otherwise received into the possession of his or their servant, clerk, or other person so employed; and every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas as his majesty, by and with the advice of his privy council, shall appoint, for any term not exceeding fourteen years," &c.¹

§ 322. Stat. 7 & 8 Geo. 4. — In 1827, the foregoing statute was superseded by 7 & 8 Geo. 4, c. 29, § 47. As to the provision now under consideration, this statute is precisely like the former one, except in employing some briefer forms of expression. It enacts "that, if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable at the discretion of the court to any of the punishments which the court may award," &c.² This was, till recently, the leading English statute on the subject; but there were statutes of secondary importance, providing for cases which this one was not sufficiently broad to comprehend.

¹ And see 1 Hawk. P. C. Curw. ed. p. 167; 3 Chit. Crim. Law, 920a.

² See 2 Russ. Crimes, 3d Eng. ed. 167.

§ 323. Stat. 24 & 25 Vict. — But, at the present time, the provision thus recited is superseded by 24 & 25 Vict. c. 96, § 68, as follows: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed," &c. And the reader perceives, that this statute operates to change the English law of embezzlement in one or two particulars, yet, in others, to leave it as before.¹

§ 324. *Our Statutory Laws:—*

General View. — Our law of embezzlement, therefore, had its origin in English statutes, not in the common law of England, or in any statutes which, by reason of their early date, became common law with us. We have seen that the earlier and later English statutes have differed somewhat from one another; ours, in a sort of general way, are modelled on the English, yet differing

¹ How differs from Earlier Provisions. — Mr. Greaves says: "The words of the former enactments were, 'shall, by virtue of such employment, receive or take into his possession any chattel, &c., for or in the name or on the account of his master.' In the present clause the words 'by virtue of such employment' are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, &c., is delivered to, received, or taken possession of by, the clerk or servant for or in the name or on account of the master. If, therefore, a man pay a servant money for his master, the case will be within the statute though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for, if my servant receive a thing, which is delivered to him for me,

his possession ought to be held to be my possession, just as much as if it were in my house, or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement if he converts it to his own use. The cases of *Rex v. Snowley*, 4 Car. & P. 390; *Crow's Case*, 1 Lewin, 88; *Rex v. Thorley*, 1 Moody, 343; *Rex v. Hawtin*, 7 Car. & P. 281; *Rex v. Mellich, Russ. & Ry.* 80, and similar cases, are consequently no authorities on this clause. These cases and the words of the former and present clauses were brought before the select committee of the Lords, and they unanimously agreed that the law ought to be altered, and that the present clause did alter it effectually." *Greaves' Crim. Law, Acts*, 156.

more or less from them, and they differ from one another. It will not be best to burden these pages with a collection of American statutes here, but we shall see something of their differences as we proceed.

§ 325. *Further General Views:—*

Embezzlement, what.—In terms not very precise, the offence to be discussed in this chapter may be described as the embezzling of property designated by the statutes, by the persons, and under the circumstances specified therein.¹ And embezzlement is, as proposed to be defined in New York, “the fraudulent appropriation of property by a person to whom it has been intrusted.”² This definition is a good one, taken in connection with statutory provisions in harmony with it; but, for a general definition, to be applied to varying and unknown statutes, some extending the offence to greater numbers of classes of fiduciary persons and to more kinds of property than others, and some requiring different circumstances of possession from others, the following is preferred: Embezzlement is the fraudulent appropriation of such property as the statutes make the subject of embezzlement, under the circumstances in the statutes pointed out, by the person embezzling, to the injury of its owner. It is true, that this does not appear to be really a definition at all; and, indeed, there is a sense in which it is not, because, of necessity, since the offence is statutory, we are obliged to look to the statute for its exact limits.

§ 326. **Caution.**—Seeing that the statutes are numerous, and in some respects diverse in their provisions, the practitioner should be cautious about coming to conclusions, upon a question under the law of embezzlement, unless, when he examines a decision relied upon, he first sees whether the statute on which it was rendered is, in its terms, the same with the one of his own State.³

§ 327. **Whether Embezzlement is Larceny.**—The statutes, above quoted, the reader perceives, declare that the person embezzling “shall be deemed to have feloniously stolen” the thing embezzled. And this is the more common form of the enactment, not only in England, but likewise in this country. Under these

statutes, is embezzlement larceny? In one view it plainly is; because the law is, in the absence of a constitutional impediment, what a statute declares it to be. Therefore,—

Receiving Stolen Goods.—If, after goods are embezzled contrary to a statute in this form, a third person feloniously receives them, he may be convicted on a count charging him with receiving stolen goods knowing them to be stolen.¹

Form of the Indictment.—Yet, in matter of form, a person indicted for larceny cannot be convicted on evidence showing a statutory embezzlement; but the indictment for the embezzlement must be framed upon the statute.² Counts for larceny and for embezzlement may perhaps be joined;³ or, to be exact, they may be where embezzlement is, like larceny, a felony;⁴ but, where the one is felony and the other misdemeanor, they cannot be joined under the common-law rules on the subject, while under modifications prevailing in some of our States they may be.⁵ Hence,—

Separate Offence.—In a practical view, this sort of statutory larceny is a separate offence, called embezzlement; and, under the latter name, and as a crime by itself, it is usually treated of in the books. Some of the American enactments depart from the English model, by omitting the clause which declares the offence to be larceny.

§ 328. **Whether same Act both Embezzlement and Larceny.**—According to a doctrine brought to view in our first volume,⁶ if embezzlement is misdemeanor while larceny is felony, the same evil act cannot be both; that is, if it is made embezzlement by the statute, as interpreted by the courts, it cannot thereafter be a larceny, whatever it was before; or, if it is still a larceny, it cannot also be embezzlement. But where both crimes are of the same grade, it accords with established principles to hold, that, if an act is sufficiently covered by the terms of the statute, it is embezzlement, while still, if before the statute it was larceny, it remains such, and it may be indicted as the one or the other at

¹ Reg. v. Frampton, Dears. & B. 585.

² Crim. Proceed. II. § 316–318; 1 Hawk. P. C. Curw. ed. p. 158; Commonwealth v. Simpson, 9 Met. 133; Fulton v. The State, 8 Eng. 163. And see People v. Allen, 5 Denio, 76. See Reg. v. Moah, Dears. 626, 86 Eng. L. & Eq. 592; Reg. v.

Gorbutt, Dears. & B. 163. For the reason of this, see Stat. Crimes, § 414–429.

³ 3 Chit. Crim. Law, 921; 2 Russ Crimes, 3d Eng. ed. 185.

⁴ Crim. Proceed. I. § 424.

⁵ Crim. Proceed. I. § 446, 446.

⁶ Vol. I. § 787.

¹ Ex parte Hedley, 31 Cal. 108, 111.

² Griffin v. The State, 4 Texas Ap.

³ Draft of a Penal Code, A. D. 1864, 390, 409.

the election of the prosecutor.¹ In fact, most of the statutes on this subject make embezzlement a felony, the same as larceny. Still it is sometimes assumed, that the two offences of larceny and embezzlement do not run into each other, but that where the one ends the other begins.² And Chitty seems to look upon the statute as not applying to cases which were larceny at the common law.³ On the other hand, the English commissioners, while proposing a rule the reverse of this which Chitty seems to accept, observe, it "is, perhaps, in strictness unnecessary," being "founded on the well-known principle that no one shall take advantage of his own wrong."⁴ As just intimated, this is plainly the sound view of the common law.⁵

§ 329. *Continued.* — Such, also, is the plain dictate of reason. Suppose, for instance, the taking of the article alleged to have been embezzled was such as amounts to a common-law larceny of it, why should not an indictment for this embezzlement be maintainable at the election of the prosecuting power, as well as one for larceny, provided the act done was within the terms of the statute, and no previous prosecution had been had for it as a larceny? This question, of course, assumes that there is no technical objection, such as occurs where embezzlement is only a misdemeanor while larceny is felony. But, again, if a man claiming to be a servant should sell an article of his master's under circumstances to make the sale of it a larceny of the article, yet also to bind the master by the sale, the money received

¹ Stat. Crimes, § 143, 154, 164, 173, 174.

² *Fulton v. The State*, 8 Eng. 168; *Kibs v. People*, 81 Ill. 599; post, § 366, 367 and note.

³ 3 Chit. Crim. Law, 921, referring to *Rex v. Headge*, 2 Leach, 4th ed. 1033, *Russ. & Ry.* 160; *Peck's Case*, 2 Stark. Ev. 842.

⁴ Act of Crimes and Punishments, A. D. 1844, p. 188. The Parliament, however, finally adopted the provision, that, "if, upon the trial of any person indicted for embezzlement, &c., it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return, as their verdict, that such person is not guilty of

embezzlement, but is guilty of simple larceny, or of larceny as a clerk, &c., and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny." Stat. 14 & 15 Vict. c. 100, § 13. See Archb. New Crim. Proc. 458. This statute was re-enacted in nearly the same words, in 24 & 25 Vict. c. 96, § 72, which superseded it, and contained also the like provision to meet the case if the indictment should be for larceny, and the proof should be of embezzlement. As to the construction of these enactments, see *Reg. v. Gorbutt*, Dears. & B. 166.

⁵ See, on this question, the principles stated in Stat. Crimes, supra, and Vol. I. § 791, 799, 812-815, 1060, 1064.

for the article would belong to the master, and an indictment ought to lie for embezzling this money. In this instance, the two transactions would be distinct; and, though embezzlement were misdemeanor and larceny felony, either form of the prosecution should properly be maintainable. Still it is plain to one who has read all the cases, that, in some of them, these obvious distinctions have been overlooked.

§ 330. *Diversities of Statutes — Consequences.* — In our examinations of this crime, we should constantly bear in our minds what has been already mentioned, that these statutes, English and American, are numerous, and differ more or less both in language and in meaning. A dozen differing statutes may be found to be alike at particular places; or, if not in exact phrase, so nearly so that the decisions upon any one of them may be received as reasonably safe guides for the exposition of any other. At other places, the dissimilar terms may require dissimilar judgments. The result is, that our inquiries in this chapter are of a complicated nature; and, if we would prosecute them to any profit, we must constantly keep in our minds both the words of the statutes, and the legal principles on which the individual adjudications proceed.

II. *The Classes of Persons embezzling.*

§ 331. *General View.* — These statutes of embezzlement, being penal, are not to be extended by construction to persons not within their words, even though within their obvious spirit and intent.¹ Now, the reader has seen, that there are various terms, such as "agent," "servant," "clerk," and the like, employed in them, to designate the classes of persons within their penalties. In "Statutory Crimes," is given a brief view of the meaning of some of the words;² but we must also look at them here, with special reference to the present subject.

§ 332. *Agent — Servant — Clerk.* — The most frequent terms to indicate the person embezzling, are "agent," "servant," and "clerk." We saw, in "Statutory Crimes," that, according to an old doctrine, now exploded in England, and not uniformly fol-

¹ Stat. Crimes, § 119, 193, 194, 220.

² See Stat. Crimes, § 271, 326.

lowed in this country, when a statute enumerates several things, in words so broad in meaning as to overlie one another, the less specific are narrowed in the interpretation to prevent this overlying."¹ Now, the words of our principal statutes are "agent, servant, or clerk;" and, if the exploded doctrine were to be applied to them, the person offending could be deemed to belong to only one of these three classes, not to two or to all, and the pleader must select, at his peril, one, and only one, which the count should charge him as being. But the author is not aware that any attempt has been made to apply this doctrine to these statutes; consequently, if the pleader is satisfied the defendant is either an "agent," a "clerk," or a "servant," he selects the term which pleases him best; then, should the proofs sustain the allegation in this respect, all is well, though it should appear that one of the other statutory terms would be equally appropriate.²

§ 333. **Correlatives — Master, Servant — Principal, Agent — Clerk, Employer.** — In considering whether a person is a servant, &c., or not, we should bear in mind, that, as in matrimonial law there cannot be a wife without a husband,³ so in the law of embezzlement there cannot be a clerk without an employer, a servant without a master, an agent without a principal. This is a nice test, yet it is an important one. Let us see, a little, how it is applied.

§ 334. **Illustrations — (Officers in Corporations — Relations to Fellow-officers).** — Thus, in an action of slander for accusing the plaintiff of embezzlement as the servant of the mayor, aldermen, and burgesses of the borough of Warwick, the evidence of his being such was, that he was one of the four chamberlains of some commonable lands belonging to the borough, chosen at a court-leet, and sworn in by the steward. The duties of chamberlain, which are discharged gratuitously, are to collect money from persons using the lands; to employ it in keeping them in order; to account, at the end of the year, to two aldermen of the corporation; and to pay over any balance to his successor in office. And it was held, that, this being his relation to the borough, and these his duties, he could not be guilty of embez-

zlement, within Stat. 7 & 8 Geo. 4, c. 29, § 47.¹ Said Bayley, B.: "The statute appears to me to apply to ordinary clerks or servants, having masters to account to for the discharge of their duties. Now, can the plaintiff be said to be such clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury of the court-leet held annually by the corporation as lords of the manor, and was sworn in there, as many other persons are. Then, can the mayor and corporation be said to be his masters within this act? In the cases cited for the plaintiff,² the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers, *e.g.*, the party appointed by the overseers to receive money. The parish clerk, who received and misapplied the sacrament money,³ was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the act; for he filled a distinct office of his own, in respect of which he received money which he was entitled to keep till the year ended, and was not bound to pay over at any time, as a mere clerk or servant would have been."⁴ And in the same case was cited also one of an indictment against the accountant of Greenwich hospital: he was held not to be a servant within Stat. 39 Geo. 3, c. 85, which, in its words, expressly comprehends servants of bodies corporate; because he was a sworn officer, not employed as an ordinary servant.⁵

§ 335. **Continued — (Friendly Societies).** — Again, though in England the treasurer of a friendly society is bound by the statute to account to the trustees in whom the funds of the society are vested, yet, being an officer, whose duties are defined by law and by the rules of the society, the trustees are not his masters or employers, and he is not their servant or clerk. "The treasurer," said Bovill, C. J., "is an accountable officer, but not a servant."⁶ Yet a treasurer, if employed by the trustees out-

¹ Ante, § 322.

² Rex v. Squire, Russ. & Ry. 349, 2 Stark. 349; Rex v. Tyers, Russ. & Ry. 402; Rex v. Beacall, 1 Moody, 15.

³ Rex v. Burton, 1 Moody, 237. See also Rex v. Nettleton, 1 Moody, 259.

⁴ Williams v. Stott, 3 Tyrw. 688, 1 Crompt. & M. 675. And see Kimball v. Boston, 1 Allen, 417.

⁵ Anonymous, stated 3 Tyrw. 692.

⁶ Reg. v. Tyree, Law Rep. 1 C. C. 177 182.

¹ Stat. Crimes, § 247.

² And see Stat. Crimes, § 326.

³ 1 Bishop Mar. & Div. § 161, 374; 2 Ib. § 156, 698, 700, 701.

side of his legal duties as treasurer, may thus become their clerk or servant, notwithstanding he is also their treasurer; and, as such, may be guilty of embezzlement within the statute.¹

§ 336. *Continued* — (*Officer — Whether Servant, &c.*). — Still it is possible for one to be an officer of a corporation, and at the same time to be the corporation's agent, servant, or clerk, by reason of his office. Thus in England, if, pursuant to a statute, the inhabitants of a parish elect an assistant overseer of the poor and define his duties, and then he is appointed to the office by warrant from two justices of the peace as the statute also directs, and then he appropriates to his own use moneys received by virtue of his office, he may be deemed a servant of the inhabitants of the parish, and, as such, convicted of the embezzlement.²

§ 337. *Corporation as Master*. — It is, therefore, no objection that the master or employer of the person indicted as a servant or clerk is, instead of being a private individual, a corporation. Thus, though the former English statute 7 & 8 Geo. 4, c. 29, § 47,³ does not use this word corporation, yet by construction it extends to the servants of these artificial bodies, the same as of natural persons.⁴

§ 338. *Continued*. — On the other hand, a statute of New York makes it embezzlement "if any clerk or servant of any private person, or of any copartnership (except apprentices and persons within the age of eighteen years), or if any officer, agent, clerk, or servant of any incorporated company, shall" commit the forbidden act. And it was held by a majority of the court, that the keeper of a county poorhouse, employed by the superintendent of the poor of the county, is not a servant of any "private person," or of any "incorporated company," within the meaning of this statute, though the superintendent of the poor, his employer, may be deemed an incorporate person. "My impression,"

¹ Reg. v. Murphy, 4 Cox C. C. 101. And see the observations on this case in Reg. v. Tyree, supra. I think the doctrine of the text may fairly enough be derived from these cases; though, Reg. v. Murphy, the defendant was not in fact treasurer in the sense in which he was such in Reg. v. Tyree. See, also, Reg. v. Stainer, Law Rep. 1 C. C. 280.

² Reg. v. Carpenter, Law Rep. 1 C. C. 29.

³ Ante, § 322.

⁴ Williams v. Stott, 1 Cramp. & M. 675, 689, 3 Tyrw. 688; Reg. v. Townsend, 1 Den. C. C. 167, 2 Car. & K. 168; Reg. v. Welch, 2 Car. & K. 206; Archb. New Crim. Proceed. 449, 451; Stat. Crimes, § 212; Commonwealth v. Wyman, 8 Met. 247; Reg. v. Atkinson, Car. & M. 525, 2 Moody, 278; Rex v. Hall, 1 Moody, 474.

said Selden, J., "after a careful examination of the subject, is, very decidedly, that the statute was never intended to embrace the agents or servants of any public body, either politic or corporate."¹ This is contracting the statute under a very strong pressure of strict interpretation, — hardly in accordance with the general doctrine.

§ 339. *Illegal Society*. — But where an association of persons was unlawful because of its administering to members an oath made unlawful by statute, some of the judges held, that, for this reason, its servant embezzling its money does not become in law guilty of the offence.² Yet if a society, otherwise lawful, has some rules which are against the policy of the law as being in restraint of trade, an officer of it may still commit embezzlement of its funds.³

§ 340. *Appointing Power*. — A person may be the servant or clerk of an individual or corporation, though the appointing power is in another.⁴ Therefore, —

Letter-Carrier. — One whom a post-mistress employs as a letter-carrier, paying him a weekly salary, to be refunded to her by the post-office, is a person employed in the post-office, within Stat. 52 Geo. 3, c. 143, § 2.⁵

Formal Appointment. — The servant or clerk need not have received a formal appointment in fact, and especially none need be proved, if only he has been permitted to act and has acted as such, and this is shown.⁶ Even were he hired in another relation, but served sometimes in this, in which he embezzled the money, it is sufficient.⁷

¹ Coats v. People, 22 N. Y. 245, 247. And see Coats v. People, 4 Parker, C. C. 662. The report in 22 N. Y. misprints the "if" which I have put in italics, "of."

² Reg. v. Hunt, 8 Car. & P. 642. See Rex v. Hall, 1 Moody, 474; Reg. v. Miller, 2 Moody, 249; Rex v. Beacall, 1 Car. & P. 454, 457.

³ Reg. v. Stainer, Law Rep. 1 C. C. 230.

⁴ Rex v. Jenson, 1 Moody, 434; Reg. v. Miller, 2 Moody, 249; Reg. v. Callahan, 8 Car. & P. 154. See Reg. v. Harris, Dears. 344, 25 Eng. L. & Eq. 579, 23 Law J. n. s. M. C. 110, 18 Jur. 408; Reg. v. Braumont, Dears. 270, 24 Eng. L. & Eq. 553.

⁵ Rex v. Salisbury, 5 Car. & P. 155.

⁶ Rex v. Rees, 6 Car. & P. 606; Rex v. Beacall, 1 Car. & P. 457. And see Reg. v. Townsend, Car. & M. 178; Rex v. Hall, 1 Moody, 474.

⁷ Rex v. Barker, Dowl. & Ryd. N. P. 19. *Duties defined*. — In one case, the prisoner was the paid secretary of a building society, whose surplus funds were lent upon mortgage. It was no part of his duty, as defined by the rules, to receive the money when the mortgages were redeemed; but the rules had not been adhered to strictly, and the prisoner had been in the habit of receiving this money, giving in exchange for it receipts previously signed by the trustees. And it was held, that, when he had misappro-

§ 341. **Payment.** — The mode of payment, or, ordinarily, whether the person is to be paid at all or not,¹ has no controlling effect on the question whether he is a servant, clerk, or the like; if only this circumstance does not operate to place him in some relation incompatible with the relation we are considering; as, for instance, to make him a partner.² Thus, —

Traveller on Commission. — If he travels to take orders for goods, and the money paid for them, and has a commission on his orders and receipts, instead of a salary, paying out of his receipts his expenses as he goes, he may still be a clerk.³ But a traveller on commission is not necessarily such.⁴ Consequently, in England, if one who has a commission is to take orders or not, as he pleases, and travel when and where he pleases, he is not deemed to be a “servant,” because he is not under sufficient control of a master.⁵ And for the same reason he appears not to be even a “clerk.”⁶ But he is an “agent.”⁷

printed such money, he was rightly convicted of embezzlement; for he had received it by virtue of his employment as ascertained by the actual course of business. “Although,” said Erie, C. J., “he was the secretary, and, as such, had his duties pointed out by the rules, yet he may also have had other duties as clerk to the trustees; and, while the one set of duties would depend on the rules, the other would be ascertained by the actual course of business.” *Reg. v. Hastie, Leigh & C.* 269, 274.

¹ See *Williams v. Stott*, stated ante, § 334; *Reg. v. Smith*, 1 Car. & K. 423. The compensation is matter proper to be considered in connection with other circumstances, as in the case of *Reg. v. Batty*, 2 Moody, 257, where it is observed: “The wages made the prisoner a servant.” And see *Reg. v. Hoare*, 1 Fost. & F. 647.

² See *Holme’s Case*, 2 Lewin, 256; post, § 342, 343.

³ *Rex v. Carr, Russ. & Ry.* 198; *Reg. v. Tite, Leigh & C.* 29, 8 Cox C. C. 47; *Reg. v. Bailey*, 12 Cox C. C. 56. In the case of *Reg. v. McDonald, Leigh & C.* 85, the prisoner was a cashier and collector to commission agents. He was

paid partly by a salary, and partly by a percentage on the profits; but was not to contribute to the losses, and he had no control over the management of the business. And it was held, that he was a servant, within Stat. 7 & 8 Geo. 4, c. 29, § 47 (ante, § 322), and not a partner. Said Pollock, C. B.: “Two men may be partners with respect to third persons, and yet not partners *inter se*. Here the prisoner was a servant to the prosecutors, and had a salary of £150 a year, which was afterwards increased by giving him a percentage on the profits; and it is therefore contended that he was a partner in the business. It is quite clear, that, although there might be a partnership *quoad* third persons, there was none *inter se*, so as to entitle the prisoner to help himself to his masters’ property.” p. 88.

⁴ *Reg. v. Negus*, Law Rep. 2 C. C. 34, 12 Cox C. C. 492.

⁵ *Reg. v. Bowers*, Law Rep. 1 C. C. 41.

⁶ *Reg. v. Marshall*, 11 Cox C. C. 490. In *Reg. v. Turner*, 11 Cox C. C. 551, 553, Lush, J., said to the jury: “If a person says to another carrying on an independent trade, ‘If you get any orders for me I will pay you a commission,’ and

⁷ Post, § 346.

Right to Mix the Fund. — In Massachusetts, a person employed by the proprietors of a newspaper establishment, to collect bills on commission, was held not to be indictable within the statute, on the ground, however, of his having the right to mix the money collected with his own money.¹

Stage Driver — Captain of Barge. — One is a servant who drives a stage, and has for his pay the gratuities.² And a person whom the owner of a colliery employs, as captain of a barge, to carry out and sell coal, receiving for his compensation two-thirds of the price taken above what would be charged at the colliery, is the owner’s servant.³

§ 342. **Common Carrier.** — In an English case, the prisoner’s only employment was to carry unsewed gloves from a glove manufactory doing business at a certain place to glove-sewers at another place, to take back the gloves when sewed, to receive the money for the work, and to pay it over to the sewers, with a deduction for his charges. The court held, that he was not a servant of the persons defrauded; Coleridge, J., observing: “The ordinary relation of master and servant cannot be said to have subsisted between them: the women [glove-sewers] would not have been responsible for the negligence of the prisoner; and, unless there were decided cases precisely in point, we could not come to the conclusion that he was a servant to them, within the meaning of the statutes against embezzlement. Though some of the decisions go very far in making persons liable as servants to punishment for embezzlement, none go so far as this. The prisoner was in fact a common carrier for all

that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a ‘clerk or servant;’ but, if a man says, ‘I employ you and will pay you, not by salary, but by commission,’ then the person employed is a servant. And the reason for such distinction is this, — that the person employing has no control over the person employed as in the first case, but where, as in the second instance I have put, one employs another and binds him to use his time and services about his (the employer’s) business, then the person employed is subject to control. Here Turner agrees with Mr. Edwards that he shall and will from the date of

the agreement ‘act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town. . . and soliciting orders.’ It is, therefore, clear that he was employed as ‘clerk or servant’ by Mr. Edwards, who had full control over his time and services.” And see *Reg. v. Mayle*, 11 Cox C. C. 150; *Reg. v. Walker, Dears. & B.* 600, 8 Cox C. C. 1; *Reg. v. Thomas*, 6 Cox C. C. 403; *Reg. v. Hoare*, 1 Fost. & F. 647.

¹ *Commonwealth v. Libbey*, 11 Met. 64; post, § 370. And see *Trafton v. United States*, 3 Story, 646, 653.

² *Reg. v. White*, 8 Car. & P. 742.

³ *Rex v. Hartley, Russ. & Ry.* 139, cited also in *Holme’s Case*, 2 Lewin, 256.

persons who chose to employ him within a limited district; and he was, like all carriers at common law, only bound to carry such description of goods, and between such places, as he professed to carry."¹

§ 343. **Part Owner.** — One cannot be a servant to himself; therefore, if a company, of which he is one, is the owner of a business about which he is employed, he cannot be an agent, servant, or clerk of such company.² But it may be otherwise if the ownership of the company's effects is vested in trustees.³

§ 344. **Female — "His."** — Within the principle that the masculine gender, in a statute, may be extended by interpretation to include the feminine,⁴ it was held under 7 & 8 Geo. 4, c. 29, § 47, and 39 Geo. 3, c. 85,⁵ that a female may be a servant, though the words are, "receive or take into *his* possession."⁶

§ 345. **More Masters than one — (Firm — Each Partner).** — It has been held, that the servant of a firm is still the servant of the individual partners; to the extent that, if he embezzles the private property of one of them, he is within the statutes.⁷ *A fortiori*, he may be the servant of more persons than one, severally employing him at the same time; as in the case of a traveller

¹ Reg. v. Gibbs, Dears. 445, 447, 6 Cox C. C. 456, 29 Eng. L. & Eq. 538, 24 Law J. n. s. M. C. 62, 1 Jur. n. s. 118. See *The State v. Foster*, 11 Iowa, 291. **Constable to collect Debts.** — The New York court, under a statute similar to the English, held, that a constable employed to collect debts without suit, if the debtors would pay, and, if not, to procure and serve process, is not a servant of the creditor. *People v. Allen*, 5 Denio, 76. See also on this subject, *Rex v. Mason*, Dowl. & R. N. P. 22; *Rex v. Barker*, Dowl. & R. N. P. 19; *Reg. v. Glover*, Leigh & C. 466; *Reg. v. Fletcher*, Leigh & C. 180; *Reg. v. Hastie*, 1 Leigh & C. 269.

² *Reg. v. Diprose*, 11 Cox C. C. 185. **Friendly Society.** — Thus, in *Reg. v. Bren*, Leigh & C. 346, the prisoner was a member of a friendly society, and of a joint committee appointed by it, own and another society to manage an excursion of its members by railway. **Excursion Manager.** — He was nominated by the committee to sell the excursion tickets, which, with the money pro-

duced by their sale, belonged to the two societies; and it was his duty to pay over the money taken for the tickets to another person named to receive it, — his services to be rendered without remuneration. And it was held, that he was not a clerk or servant within Stat. 24 & 25 Vict. c. 96, § 68 (ante, § 323); therefore he could not be convicted of embezzling the money taken on sales of the tickets. On the hearing of this case, counsel for the crown referred to *Reg. v. Proud*, Leigh & C. 97, where, it was said, the prisoner who had received money for a friendly society, and embezzled it, was a member of the society, and consequently a joint owner, yet he was convicted. But, said Martin, B., "In that case, the property of the society was vested in trustees."

³ *Reg. v. Proud*, supra.

⁴ Stat. Crimes, § 212.

⁵ Ante, § 321, 322.

⁶ *Rex v. Smith*, Russ. & Ry. 287.

⁷ *Rex v. Leech*, 3 Stark. 70. See *Reg. v. White*, 8 Car. & P. 742.

to collect money for various mercantile houses, who is therefore the servant of each individual house.¹

§ 346. **Length of Employment — The One Transaction.** — Evidently it is immaterial whether the time for which the servant or clerk is employed be long or short. But there are cases which indicate that the employment must extend beyond the particular transaction.² Probably most of these cases are explainable on special circumstances.³ And where the prisoner, keeping, as drover, some beasts for the prosecutor, was told to take a beast to a particular place, and to bring back the money for which it had been sold, but embezzled the money, the English judges held unanimously that he was rightly convicted, though he had no general authority to receive money, and acted only under instructions for this one instance.⁴ It is submitted, that his employment as mere drover could not alter the case; and that, without this element, the conviction was still right.⁵ Indeed, the doctrine is now settled, that the employment need not extend beyond the one transaction.⁶

§ 347. **Words "Clerk," "Agent," "Servant," distinguished.** — There is some difference in meaning, known to common use, between the words "clerk," "agent," and "servant;" but the cases on embezzlement seem to employ them almost interchangeably, especially "clerk" and "servant." At all events, we find no distinct lines of partition drawn between these two words;⁷ though undoubtedly the pleader would not be allowed, in framing his indictment, to make under all circumstances his own choice of terms. And the allegation must contain a word found

¹ *Rex v. Leech*, supra; *Rex v. Carr*, Russ. & Ry. 198; *Reg. v. Batty*, 2 Moody, 257. In *Reg. v. Goodbody*, 8 Car. & P. 665, Parke, B., expressed a wish to have this question further considered; "as," said he, "I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent." In respect to English authority, the case of *Reg. v. Batty*, decided by all the judges, is of a later date than this; but, aside from authority, it is submitted that the doctrine of our text is clearly correct.

² Stat. Crimes, § 271; *Rex v. Nettleton*, 1 Moody, 259.

³ Post, § 365; *Rex v. Freeman*, 5 Car. & P. 534.

⁴ *Rex v. Hughes*, 1 Moody, 370. s. p., where there was only an occasional general employment, and no authority to receive money except in the particular instance, *Rex v. Spencer*, Russ. & Ry. 299. And see *Rex v. Smith*, Russ. & Ry. 516; *Reg. v. Beaumont*, Dears. 270, 24 Eng. L. & Eq. 558.

⁵ Archb. New Crim. Proceed. 450.

⁶ *Reg. v. Negus*, Law Rep. 2 C. C. 34, 36; *Reg. v. Tongue*, Bell C. C. 289, 295; *Commonwealth v. Foster*, 107 Mass. 221; *The State v. Foster*, 37 Iowa, 404.

⁷ And see Stat. Crimes, § 326; *The Portland v. Lewis*, 2 S. & R. 197.

in the statute, else it will ordinarily be defective, as violating a well-known rule of criminal pleading.¹

§ 348. *Continued.* — Between “servant or clerk,” however, and “agent,” a distinction has been taken, demanding careful attention. Thus, as already observed,² it has been held, that a person employed to get orders for goods and receive payment for them, being compensated for his services by a commission on the goods sold, is not the “servant or clerk” of the employer if he is at liberty to get the orders and receive the money where and when he thinks proper. “In order to constitute the relation of master and servant,” said Erle, C. J., “the inferior must be under more control than is implied by having the option of getting orders with the right to receive a commission thereon.”³ Yet such a person is undoubtedly an agent. “There is nothing more common,” said Cockburn, C. J., in another case, “than for great insurance companies to have ‘agents’ abroad; as, for instance, in Asia. Can it be contended that a person so employed is a ‘clerk or servant?’ . . . So every agent would become a clerk or servant.”⁴

§ 349. *Some Particular Employments.* — The following enumerations will be helpful: —

Stage-Driver. — A stage-driver is a servant when authorized to act in the particular capacity to which the charge of embezzlement relates.⁵

Treasurer. — So, in England, is the treasurer of the guardians of the poor of Birmingham, appointed under Stat. 1 & 2 Will. 4, c. 67, local and personal, a “servant” of the guardians;⁶ and so was one a “clerk and servant,” who was employed at a yearly salary, under the appellation of accountant and treasurer to the overseers of a township, his duty being to receive and pay all moneys receivable or payable by them.⁷ The treasurer of a railroad corporation is an “officer, agent, clerk, or servant of an incorporated company.”⁸

¹ Hamuel v. The State, 5 Misso. 260; Budd v. The State, 3 Humph. 483.

² Ante, § 341.

³ Reg. v. Bowers, Law Rep. 1 C. C. 41.

⁴ Reg. v. May, Leigh & C. 13.

⁵ People v. Sherman, 10 Wend. 298; Reg. v. White, 8 Car. & P. 742.

⁶ Reg. v. Welch, 2 Car. & K. 296. See

Reg. v. Townsend, 1 Den. C. C. 167, 2 Car. & K. 168.

⁷ Rex v. Squire, 2 Stark. 349, Russ. & Ry. 349. And see Hassinger's Case, 2 Ashm. 287.

⁸ Commonwealth v. Tuckerman, 10 Gray, 173. As to county treasurer, see The State v. Smith, 13 Kan. 274; The State v. Clarkson, 59 Misso. 149.

Tax Collector. — A tax collector is a “public officer” within the Maine statute.¹

Selectman. — A selectman is in New Hampshire a “public officer,” and he may be a “receiver of public money.”²

Deputy Sheriff. — A deputy sheriff is an “officer” within the Texas statute.³

Apprentice. — An apprentice is not a servant, authorized by virtue of his apprenticeship, to receive money; but he may be shown to be a servant, in the facts of a particular case.⁴

Traveller, again. — A traveller for a mercantile house may be a “clerk;” he need not live with his employers, or act in their counting-house.⁵

Captain of Barge, again. — And a man may be servant though he goes out as captain of a barge, and has a share of what he receives.⁶

Receiver of Materials to work upon. — But it was held in Massachusetts, that one who receives materials to be made into shoes in his own shop is not the agent of the owner of the materials. “Both were principals in the contract entered into.”⁷

§ 350. **“Other Officer.”** — A provision for the punishment of embezzlement committed by any cashier “or other officer” of a bank, has been held to include embezzlement by the president and directors.⁸

§ 351. **“Waterman.”** — A statute of Virginia provides a punishment for “every free waterman who shall receive on board of his boat or other vessel, any produce, goods, wares, or merchandise, and shall embezzle the same or any part thereof, to the value of four dollars and upwards.” And the courts hold, that one need not be the captain of the vessel to commit the offence created by this statute.⁹

¹ The State v. Walton, 62 Maine, 106. And see Reg. v. Graham, 13 Cox C. C. 57.

² The State v. Boody, 53 N. H. 610.

³ The State v. Brooks, 42 Texas, 62. A State Treasurer is an “officer.” People v. McKinney, 10 Mich. 54. So is a deputy State treasurer. The State v. Brandt, 41 Iowa, 593. So is a School Treasurer. Commonwealth v. Morissey, 5 Norris, Pa. 416. See further of the word “officer,” The State v. Newton, 26 Ohio State, 265; The State v. Newton, 28 La. An. 65; Commonwealth v. Smith, 111 Mass. 407; Kavanaugh v. The State,

41 Ala. 399; Browne v. United States, 1 Curt. C. C. 16; Vol. I. § 464.

⁴ Rex v. Mellish, Russ. & Ry. 80.

⁵ Rex v. Carr, Russ. & Ry. 198; Reg. v. Wilson, 9 Car. & P. 27.

⁶ Rex v. Hartley, Russ. & Ry. 139; Ante, § 341.

⁷ Commonwealth v. Young, 9 Gray, 5, 6. And see People v. Burr, 41 How Pr. 293.

⁸ Commonwealth v. Wyman, 8 Met. 247.

⁹ Smith v. Commonwealth, 4 Grat 532.

III. *The Confidence in the Person embezzling.*

§ 352. **Confidence Violated.** — The leading doctrine under this sub-title is, that the statutes are for the protection of employers against the frauds of those in whom they have confided; and, where no confidence is reposed, and none is violated, the offence is not committed.

§ 353. **Illustrations** — (What comes to Servant in Course of Duty — By special Direction — Received without Authority). — Therefore, while, if the thing embezzled came into the servant's hands in the ordinary course of his duty;¹ or if it came, out of the ordinary course, in pursuance of a special direction from the master to receive it;² the case, so far as concerns our present inquiry, is within the statutes; yet, if he took it without specific authority, and also the taking was not in the line of his service, the result is otherwise.³ Even if a servant supposes he is authorized to receive money, while in truth he is not, and under this belief receives and embezzles it, he does not in point of law commit the offence.⁴

§ 354. **Money to which Master not entitled.** — But if authorized in fact by the master, he cannot defend himself by showing that the latter had no right to the money; as, that the person by whom it was paid in answer to a claim of right did not owe it,⁵ or that the master became a wrong-doer in causing the servant to receive it.⁶ The question of what circumstances will bring a case within the principles of this section and the last is best considered under our next sub-title.

§ 355. **Overpaying Deposit.** — The special terms of some of the statutes, to be explained under our next sub-title, have, in some of the cases, aided the courts in coming to the results above

¹ *People v. Sherman*, 10 Wend. 298; *Reg. v. White*, 8 Car. & P. 742; *Reg. v. Townsend*, Car. & M. 178; *Reg. v. Masters*, 3 New Sess. Cas. 326, 12 Jur. 342, 1 Den. C. C. 332, 2 Car. & K. 330, Temp. & M. 1; *People v. Hennessey*, 15 Wend. 13.
² *Rex v. Smith*, Russ. & Ry. 51.
People v. Dalton, 15 Wend. 581; *Rex v. Hughes*, 1 Moody, 370; *Rex v. Spencer*, Russ. & Ry. 299.
³ *Rex v. Mellish*, Russ. & Ry. 80; *Rex v. Salisbury*, 5 Car. & P. 155; *Reg. v. Wilson*, 9 Car. & P. 27; *Rex v. Hawtin*, 7 Car. & P. 281; *Rex v. Prince*, 2 Car. & P. 517; *Rex v. Thorley*, 1 Moody, 343; *Rex v. Snowley*, 4 Car. & P. 390; *Reg. v. Arman*, Dears. 575; *Reg. v. May*, Leigh & C. 13, 8 Cox C. C. 421. See *Rex v. Beacall*, 1 Car. & P. 310.
⁴ *Rex v. Hawtin*, 7 Car. & P. 281. And see Vol. I. § 438-441.
⁵ *Reg. v. Adey*, 19 Law J. N. S. M. C. 149, Archb. New Crim. Proceed. 453.
⁶ *Rex v. Beacall*, 1 Car. & P. 454, 457

stated. But, aside from such terms, the like doctrines appear to flow from the obvious purpose of the enactments, and the nature of the offence. Thus, in Massachusetts, there was the following simple provision: "If any person to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed by so doing to have committed the crime of simple larceny."¹ And it was held, that, when the cashier of a savings-bank, mistaking the sum due a depositor who was withdrawing his deposit, paid him a hundred dollars too much, the latter, by fraudulently converting to his own use this overpay, did not commit the statutory offence; because, though the terms of the statute are broad, the court deemed it applicable only where there is a trust or confidence reposed in one who, when he commits the wrongful act, abuses the confidence or trust.²

IV. *The Thing embezzled.*

§ 356. **General Doctrine.** — As this offence of embezzlement can be committed only by the classes of persons whom the statutes designate,³ so also it can be committed only of such things as are within the statutory terms. There are, in the statutes, many differing forms of expression to indicate the thing. Thus, —

Subject of Larceny. — By some of the statutes, whatever is the subject of larceny is likewise the subject of embezzlement. Now, since all statutory provisions, and the statutes and common law, are to be construed together,⁴ it follows that this expression, when employed, embraces both those things which are subjects of larceny at the common law, and those which are made subjects of larceny by statute.⁵ Again, —

Specific Terms. — Some of the statutes employ such terms as "money," "goods and chattels," "effects," and the like. The meaning of these various terms is considered in the work on

¹ Mass. Stats. 1857, c. 233.
² Commonwealth v. Hays, 14 Gray, 62.
³ Ante, § 331.
⁴ Stat. Crimes, § 82, 86-90, 128.
⁵ And see *The State v. Stoller*, 39 Iowa, 321.

Statutory Crimes; but a few explanatory words may be useful here.

§ 357. **Money.** — “Money” means, as a general proposition, what is legal tender, and nothing else.¹ The word may, perhaps, be pressed beyond this meaning by the particular frame of the statute in which it occurs.

§ 357 *a.* **Property.** — “Property” is a word quite flexible in meaning, and it is very broad in some connections.² A statute making indictable the embezzlement of “any money or property of another” includes promissory notes, bills of exchange, and other “property” of the like sort.³

§ 358. **Goods and Chattels.** — Though, in the large sense, these words mean any subject of property other than real estate, yet, in statutes like those under consideration, they are greatly restricted, — precisely how much, it is not easy to state. As a general rule, they include neither money nor *choses in action*. Yet, on this subject, the reader should carefully consult the fuller elucidations in “Statutory Crimes.”⁴

§ 359. **Effects.** — The word “effects,” sometimes found in these statutes, is broader in meaning than any of the foregoing, except “property;” but its precise limits cannot well be defined, and they probably differ in different statutes. It does not ordinarily include real estate, but it may include every sort of personal thing of value, even a thing the value of which is not fixed, or indeed ascertainable.⁵

§ 360. “*By virtue of his employment*” : —

Effect of these Words. — The doctrine stated under our last sub-title seems to have been drawn, as already observed,⁶ from general principles relating to this offence, without special consideration of the particular phraseology of the statute. Still it has been seen in these pages, that the former English provisions contain the words, “by virtue of his employment, receive or take into his possession;”⁷ and most of the American ones copy substantially this language. The present English statute is different.⁸ Before any thing can be embezzled, therefore, it must

come into the hands of the servant, and, when this language is found in the statute, however the rule may be when it is not, it must come by virtue of his employment.

§ 361. **Agent taking too little.** — Concerning what comes to the servant by virtue of the employment, Parke, J., in a *nisi prius* case, carried the doctrine to the verge, if not beyond it, when, after conferring with Littledale, J., he held, that the defendant could not be convicted, because, while his business was to lead a stallion under orders to charge and receive not over 30s. nor less than 20s. a mare, he contracted, in this particular instance, to take, and took, only 6s., which he embezzled.¹ In a later *nisi prius* case, Patteson, J., being hardly inclined to yield to the doctrine of this decision, directed, after conference with Parke, B., a conviction where the defendant, a drayman, was sent out by a brewer with porter to sell at only fixed prices, yet sold some at an under rate, without taking the money then, but, before he took it, the brewer privately told the purchaser to pay the drayman the amount, which the latter embezzled. “As the master,” said the judge, “in the present case had authorized the customer to make payment to the prisoner, the master was bound by that payment, and could not demand more of the customer.”²

Not in Line of Duty. — And where the business of a clerk was to receive, in-doors, money which out-door collectors got from customers, yet in one instance he took a sum directly from a customer out of doors, and embezzled it, all the judges held him to have committed the statutory offence.³ So, in California, the court, declining to follow the English case relating to the stallion, held, that, if an agent obtains the money of his principal in the capacity of agent, but still in a manner in which he was not authorized by his agency to receive it, he may commit the crime of embezzling this money.⁴

§ 362. **Miller departing from Duty.** — On the other hand, where the duty of a miller in a county jail required him to grind the grain delivered him with a ticket from the porter, yet he received a quantity without such ticket, and embezzled the money paid

¹ Stat. Crimes, § 217, 346.

² 2 Bishop Mar. Women, § 75-77.

³ The State v. Orwig, 24 Iowa, 102.

⁴ Stat. Crimes, § 344, 345; Rex v. Mead, 4 Car. & P. 535.

⁵ Bouv. Law Dict. Effects; Rex v.

Bakewell, 2 Leach, 4th ed. 943, Russ. &

Ry. 35; Rex v. Aslett, 1 New Rep. 1, 2

Leach, 4th ed. 954, 958, Russ. & Ry. 67.

⁶ Ante, § 355.

⁷ Ante, § 321, 322.

⁸ Ante, § 323 and note.

¹ Rex v. Snowley, 4 Car. & P. 390.

Rex v. Salisbury, 5 Car. & P. 155; Rex

² Reg. v. Aston, 2 Car. & K. 413.

v. Williams, 6 Car. & P. 626.

³ Rex v. Beechey, Russ. & Ry. 319.

⁴ Ex parte Hedley, 81 Cal. 108. And

And see Reg. v. Wilson, 9 Car. & P. 27; see post, § 363, 364.

for the grinding, he was adjudged not to be within the statute. "The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket," said Pollock, C. B., "is, that he intended to make an improper use of the machinery intrusted to him, by using it, not for the benefit of his masters, but for the benefit of himself. We think, therefore, that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement."¹

§ 363. *How in Principle.* — If, in the case last stated, it was understood between the miller and his customer that the former was grinding the grain on his own account, this circumstance would plainly, in principle, justify the conclusion to which the court arrived.² But, in the absence of any such understanding, where in fact the miller received the money "by virtue of his employment," as the statute expresses it, and the customer would not have paid it to him otherwise, it is a novelty in the law to hold that, because he departed from his duty in not requiring a ticket before grinding, therefore, having committed a wrong in addition to the statutory one, he is to escape punishment for the latter. A case of embezzlement not only may, but must, show a departure by the servant from the line of his duty. And it is contrary to the entire spirit of our law, as well in the criminal department as the civil, to permit a man to set up his own wrong in justification or evasion of any charge against him; or, in this instance, to say, that, because he added another wrong to the one inhibited by the statute, therefore he should escape all punishment. In like manner, where the servant let his master's stallion at a price below the limit fixed by the latter, he still, in fact, received the smaller sum "by virtue of his employment;" and, in principle, he should have been punished for the embezzlement.

§ 364. *Continued — Servant in own Wrong.* — But it is said, that, if one receives a thing contrary to his duties as servant or clerk, he is, therefore, not a servant or clerk in the particular transaction. Is this correct? May not a man be a clerk or ser-

¹ Reg. v. Harris, Dears. 344, 352, 25 Eng. L. & Eq. 579, 6 Cox C. C. 363, 23 Law J. n. s. M. C. 110, 18 Jur. 408. See also Reg. v. Goodenough, Dears. 210, 25 Eng. L. & Eq. 572; Reg. v. Cullum, Law Rep. 2 C. C. 28, 12 Cox C. C. 469; Reg. v. Christian, Law Rep. 2 C. C. 94, 12 Cox C. C. 502.
² Reg. v. Cullum, Law Rep. 2 C. C. 28, 12 Cox C. C. 469.

vant while disobeying orders? In civil jurisprudence he often is, and the master or employer is held responsible for his acts. This leads us to a still broader view of the subject; a view, however, which unfortunately is not quite in accord with the adjudications. In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. This proposition is not made without considering what may be said against it. And a most natural objection to it is, that, when a statute creates an offence which by its words can be committed only by a "servant," an extension of its penalties to one who is not a servant, but only claims to be such, violates the sound rule of statutory interpretation whereby the words, taken against defendants, must be construed strictly. But why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally in the criminal? If it is applied here, then it settles the question; for, by it, when a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal, asking for the thing, "Sir, I was not your agent in taking it, but a deceiver and a scoundrel." When, therefore, the principal calls the man under these circumstances to account, the man is estopped to deny the agency he professed, — why, also, if he is then indicted for not accounting, should he not be equally estopped on his trial upon the indictment?¹

§ 365. *As to the Master's Possession:* —

Must come to Servant from Third Person. — Another proposition is, that the money or other thing must not come into the master's possession before it does into the servant's;² for, if it does, the taking of it, whether delivered to the servant by the master or not, is larceny;³ but it must come directly (we have seen,⁴ in

¹ And see Ex parte Hedley, 31 Cal. Metcalf, 1 Moody, 433; Rex v. Hammon, 108, 113. This doctrine would appear to have been distinctly followed in Ex parte Ricard, 11 Nev. 237.

² Reg. v. Hayward, 1 Car. & K. 518.
³ Reg. v. Watts, 1 Eng. L. & Eq. 553, 2 Den C. C. 14, Temp. & M. 342; Reg. v. Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; Rex v. Metcalf, 1 Moody, 433; Rex v. Heath, 2 Moody, 33; Rex v. Paradise, 2 East P. C. 565; United States v. Clew, 4 Wash. C. C. 700; Reg. v. Smith, 1 Car. & K. 423; Rex v. Murray, 1 Moody, 276; Rex v. Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566; Rex v. Chipchase, 2 Leach, 4th ed. 692, 2 East P. C. 567; Rex v. Murray, 1

⁴ Ante, § 353-355, 360.

the course of the servant's employment) from a third person, and not from the master.¹ Still, if a master, to try his servant's honesty, gives money to a third person, who, with it, makes a purchase of the servant, the latter may be convicted of embezzling this money.²

§ 366. *Why? — How in Reason — New York Doctrine.* — The reason assigned for this doctrine is, that, since the chief object of these statutes of embezzlement was to meet a defect in the law of larceny, which requires a trespass, and consequently it is not larceny for a servant to appropriate to his own use what he rightfully receives from a third person, their spirit and purpose are fully responded to when they are restricted in interpretation to those circumstances in which a larceny could not, in point of law, be committed. Still the question arises, Why so restrict them? Why not, at least, suffer them to cover any case of an admitted criminal sort, not covered by the law of larceny, if the facts of the case come completely and exactly within their words? The New York court refused to follow the English interpretation; making a departure, it is submitted, in the right direction. Thus, where a traveller at an inn had delivered, for deposit in the post-office, a letter containing money, to the person having charge of the inn, and the latter had passed it to the barkeeper, who was accustomed to convey letters to and from the post-office, — the court held, that the bar-keeper, embezzling the money, was indictable under the statute. And Cowen, J., delivering the opinion, went so far as to say, — contrary to the doctrine of the last section, — that “the offence as proved is

Leach, 4th ed. 344, 2 East P. C. 688; Rex v. Stock, 1 Moody, 87; Rex v. Beauman, Car. & M. 595; Reg. v. Goode, Car. & M. 582; Reg. v. Jackson, 2 Moody, 32; Rex v. Abrahath, 2 Leach, 4th ed. 824, 2 East P. C. 569; Reg. v. Evans, Car. & M. 632; Rex v. Robinson, 2 East P. C. 565; Gill v. Bright, 6 T. B. Monr. 130; Reg. v. Wilson, 9 Car. & P. 27; Reg. v. Hayward, 1 Car. & K. 518. See Rex v. Walsh, 4 Taunt. 258, 2 Leach, 4th ed. 1054, Russ. & Ry. 215; Reg. v. Butler, 2 Car. & K. 340; Rex v. Bakewell, 2 Leach, 4th ed. 948.

¹ Reg. v. Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; United States v. Clew, 4 Wash. C. C.

700; Reg. v. Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 4 Cox C. C. 336, Temp. & M. 342; Rex v. Freeman, 5 Car. & P. 534; Reg. v. Smith, 1 Car. & K. 423; Rex v. White, 4 Car. & P. 46; Reg. v. Masters, 3 New Sess. Cas. 826, 12 Jur. 942, 1 Den. C. C. 332, Temp. & M. 1, 2 Car. & K. 930; Rex v. Murray, 1 Moody, 276; Peck's Case, 2 Russ. Crimes, 3d Eng. ed. 180. And see Rex v. Smith, Russ. & Ry. 267.

² Rex v. Whittingham, 2 Leach, 4th ed. 912; Rex v. Hedge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; Reg. v. Gill, Dears. 239, 6 Cox C. C. 295, 24 Eng. L. & Eq. 550, 23 Law J. n. s. M. C. 50, 13 Jur. 70.

exactly within the statute. It is intended to provide for a fraudulent conversion of money or goods by a servant, when they are delivered to him as such, either by his master or mistress, or, in their behalf, by a stranger. That was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime.¹ In a previous case, Savage, C. J., said: “The very term ‘embezzlement’ is peculiarly applicable to a fraudulent appropriation made by a servant of goods intrusted to him by his master.”² This interpretation gives to these statutes a much wider range than the English; and, in reason, it ought to be followed generally in this country. It cannot, however, fully prevail in a State in which there can be no conviction for embezzlement on facts which constitute a larceny.³

§ 367. *Continued — Alabama Doctrine.* — The Alabama court has held, that the fraudulent appropriation by a clerk, of a bill of exchange, which, having come into the possession of the employer, comes thence into the clerk's by virtue of his employment, is, under the statute of the State, embezzlement. And Stone, J., justified both the English and the differing Alabama and New York doctrine, as follows: “The words in the English statutes, ‘for, or in the name or on account of, his master,’ show clearly that the money, goods, &c., to come within those statutes, must have been taken or received from some person other than the master and employer. To say that a clerk received or took goods, &c., from his employer, ‘for,’ or ‘in the name,’ or ‘on the account,’ of said employer, would be a palpable solecism. We think the English decisions upon their statutes are manifestly

¹ People v. Dalton, 15 Wend. 581, 583.

This New York statute — which the reader may like to compare with the English, ante, § 321-323 — is, “If any clerk or servant of any private person, or of any copartnership (except apprentices and persons within the age of eighteen years), or if any officer, agent, clerk, or servant of any incorporated company, shall embezzle or convert to his own use, or take, make way with, or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employers, any money, goods, rights in action, or other valuable

security or effects whatever belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for feloniously stealing property of the value of the articles so embezzled, taken, or secreted, or of the value of any sum of money payable and due upon any right in action so embezzled.” 2 R. S. 678, § 59. See ante, § 338 and note.

² People v. Hennessy, 15 Wend. 147, 151.

* See ante, § 328, 329.

correct. Our statute (Code, § 3143) contains no such clause as that copied and commented on above. Its language is, 'Any officer, agent, or clerk of any incorporated company, or clerk or agent of any private person or copartnership, except apprentices and other persons under the age of eighteen years, who embezzles, or fraudulently converts to his own use, any property of another, which has come into his possession by virtue of his employment, must, on conviction, be punished as if he had feloniously stolen such property.' This section is much more comprehensive in its terms than either of the English statutes. It embraces and provides punishment for every case of embezzlement of property of another, which has come into the possession of the clerk or agent 'by virtue of his employment.' The bill of exchange mentioned in the record was the 'property of another,' and it went into the possession of the prisoner 'by virtue of his employment' as clerk. The case is within the very letter of the statute."¹

¹ *Lowenthal v. The State*, 32 Ala. 589, 595. This Alabama statute is substantially the same as the New York one. The words in the English statute, referred to by this learned judge as justifying the doctrine of the English courts, do not seem to me to have, by a just interpretation, this effect. If a servant receives money from the hands of his master, with a special direction to pay it over to a third person, it comes to him, it seems to me, "on account of his master," as truly as if a third person paid it to him. He must "account" for it to his master the same as though it came from a third person, and his relations to his master in respect of it are at all points the same. *Massachusetts*.—In Massachusetts, there are the following two statutory provisions: "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property, delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of simple larceny." Gen. Stats. c. 161, § 35. "If a carrier or other person to whom any property which may be the subject of larceny has been delivered to be carried for hire, or if any

other person intrusted with such property, embezzles, or fraudulently converts to his own use, or secretes with intent so to do, any such property, either in the mass or as the same was delivered, or otherwise, and before the delivery thereof at the place at which, or to the person to whom, it was to be delivered, he shall be deemed to be guilty of simple larceny." *Ib.* § 41. A servant was, by one member of a firm, intrusted with money to carry to another member; but, instead of executing his trust, he converted it to his own use. Thereupon he was indicted as for embezzlement under the latter of the two sections above quoted, as the bill of exceptions states, or, as the court observed, the indictment might be deemed to be on either section. It was, as the case stands in the published report, in special form, as for embezzlement. But the court held, that the offence was larceny at the common law; and, as a consequence, decided that this indictment could not be maintained. The learned judge, who delivered the opinion, relied on the doctrines of the English courts, as stated in our text, and did not advert to the difference between the English and Massachusetts statutes. I cannot discover that the Alabama case was be

§ 367 a. Continued — Other States — Other Views. — The defect in the English interpretations is, in England,¹ and in some of our States besides New York and Alabama, in some measure corrected,

fore the court, but the New York cases were. As to the latter, it was observed: "In *People v. Hennessey*, 15 Wend. 147, the money embezzled by the defendant had never come into the possession of his master. And in *People v. Dalton*, 15 Wend. 581, the possession of the defendant was that of a bailee." *Commonwealth v. Berry*, 99 Mass. 428, 430. Now, it will be instructive to explore this case a little further. **Concerning Reporting.** — Mr. Browne, who at this time was reporter of the Massachusetts decisions, has, at considerable trouble and some expense to himself, preserved all the briefs and other papers pertaining to each case reported by him, and from time to time presented them to the "Social Law Library" in Boston. There, nicely arranged and bound in volumes, they are accessible to all who visit the library. I cannot but pause to say, that not only the bench and bar of Massachusetts owe him a debt of gratitude; but, if this "new idea," or "Yankee notion," should gain currency elsewhere, he should be honored as the leader of a very important reform. **Form of Indictment.** — Turning to this collection of papers, I find that the indictment in this case of *Berry* ran as follows: "That Charles O. Berry, of, &c., on, &c., at, &c., did embezzle and fraudulently convert to his own use one hundred bank-bills each thereof being of the denomination and value of one dollar, one hundred bank-bills each thereof being of the denomination and value of two dollars, one hundred promissory notes of the United States each thereof being of the denomination and value of one dollar, five bank-bills each thereof being of the denomination and value of twenty dollars, divers other bank-bills and promissory notes of the value of seven hundred and twenty-six dollars, and a more particular description of which is to the said jurors unknown, the said bank-bills

and notes being then and there the subject of larceny, and the said bank-bills and notes being the property, money, goods, and chattels of, &c., and the said bills and notes having theretofore, to wit, on, &c., been there delivered to the said Charles O. Berry by one Edward Wyman in the trust and confidence and with the direction that the said Berry would and should deliver the said bills and notes and each thereof to one Daniel Shales, and the said bank-bills and notes and each thereof having been then and there received by the said Berry in the said trust and confidence and with the said direction; whereby and by force of the statute in such case made and provided, the said Berry is deemed to have committed the crime of simple larceny; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Berry then and there, in manner and form aforesaid, the said, of the property and moneys of the said, &c., feloniously did steal, take, and carry away; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided." **The Pleading discussed.** — Now, the reader perceives, that, rejecting the conclusion "against the form of the statute" as surplusage (*Crim. Proced.* I. § 601), and rejecting as surplusage the parts which charge embezzlement, if they can be so rejected, there is left a good indictment for larceny at the common law. As to the question whether the parts charging embezzlement can be rejected as surplusage, the rule applicable in a case like this is, that, if the indictment itself is good as for embezzlement, the embezzlement part cannot be so rejected, but, if it is insufficient as such, this part can be rejected. *Crim. Proced.* I. § 490, 493. Now, turning to the report of this case, we read: "The statutes creating that crime [embezzlement] were all devised for the purpose of punishing the

¹ *Reg. v. Cooper*, Law Rep. 2 C. C. 123, 12 Cox C. C. 800.

or even removed, by other statutes, or by judicial construction. Though the question is important, it is best left to the individual inquiries of practitioners into the special doctrines and enactments of their own States.¹

§ 368. **Goods in Transit to Master.** — When, to return to the English doctrines, the goods have left the possession of the third person, being in the custody of the new owner's servant, who has them in transit to his master, a second servant, through whose hands they must pass in the regular course of business, may commit embezzlement of them.² But this happens only in cases where they are not deemed to have reached, in coming to the first servant, their —

Ultimate Destination. — If they have reached their ultimate destination, though in the hands of a servant, his possession is the master's, and it is too late to commit embezzlement of them. Thus, —

Servant's Duty to keep. — Where the clerk of an insurance company took from the hands of the messenger a cancelled check which the latter had received at the bank, and his duty required him to keep the check for the directors, he was held to have committed, not embezzlement of it, but larceny, in afterward

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 the possession of the owner was not violated [by the act of misusing it], so that he could not be convicted of larceny for appropriating it," p. 429. But the allegations in the indictment, it is seen, do not bring the case within this doctrine. They accord with the facts as actually proved, but do not come up to the facts which, the court say, must be proved to show embezzlement. Therefore they are insufficient as a charge of embezzlement, and may be rejected as surplusage, and the indictment remains good as for a simple larceny. On it, as such, if the view of the court was sound, the conviction, as for larceny, should have been sustained. But, it may be said, the indictment fills the words of the statute. That makes no difference, where the statute is bent by construction; for, in such a case, it is not sufficient to follow the statutory words. Crim. Proced. I.

§ 624 et seq. **Same Act as Embezzlement and Larceny.** — This brings us back to the inquiry, whether it is a sound rule of interpretation which thus tampers with the statutory terms. The statute declares, that, if one does so and so, his act shall be deemed simple larceny. Now, suppose the words are broad enough to embrace some things which were simple larceny before: are these things, in reason, less within the statute than those which were not larceny before? I can see no reason whatever for the distinction. To make it, is to violate analogies running through the entire field of the criminal law, and the entire field of the law of statutory interpretation. And see ante, § 328, 329.

¹ See *The State v. Healy*, 48 Misso. 581; *Barclay v. Breckinridge*, 4 Met. Ky. 374; *The State v. Fann*, 65 N. C. 317.

² *Reg. v. Masters*, 1 Den. C. C. 382, 2 Car. & K. 930, Temp. & M. L. 3 New Sess. Cas. 328.

abstracting it from its place of deposit; this place being deemed its ultimate destination.¹

Received from Fellow-servant. — And where a clerk receives of another clerk the master's money to be applied to a particular purpose, such receipt is the same as if direct from the master, therefore the embezzlement of the money is not within the statutes.²

To procure Change. — Where one was handed a check, and was to have sixpence for getting it cashed at a banker's, he was held, by Parke, J., on conferring with Taunton, J., in a *nisi prius* case, not to be guilty of embezzlement.³ On the other hand, where a servant, sent with a bank-note for the change, embezzled a part of the change, the judges decided that he could not be convicted of larceny, and intimated that he could be of embezzlement.⁴

§ 369. **Remaining Questions:** —

Ownership. — In a New York case, under a statute⁵ worded somewhat differently from the English one of 7 & 8 Geo. 4, c. 29, § 47, as concerns the point to be stated, the defendant claimed that the goods embezzled must belong to a person other than the master; but the court held, that they need only be the goods of some person other than the servant.⁶ This question could not arise in England, where they must at least be received on account of the master;⁷ but, everywhere, even without reference to the statute, they must, on common-law principles, not be the servant's,⁸ or even the goods of a firm in which the supposed servant is a partner.⁹

§ 370. **Right to mix the Fund** — (**Auctioneer — Collector on Commissions, &c.**) — Therefore the Massachusetts court decided, that an auctioneer cannot be convicted for embezzling the proceeds of his sales;¹⁰ neither can the collector of bills on commission for a newspaper, by appropriating the money to himself;¹¹ because both the auctioneer and the collector have the right to mix such funds with their own, simply holding themselves indebted to

¹ *Reg. v. Watts*, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558.

² *Rex v. Murray*, 1 Moody, 276.

³ *Rex v. Freeman*, 5 Car. & P. 534.

And see *Rex v. White*, 4 Car. & P. 46.

⁴ *Rex v. Sullens*, 1 Moody, 129.

⁵ Ante, § 366, note.

⁶ *People v. Hennessey*, 15 Wend. 147.

⁷ See the statute, ante, § 322.

⁸ And see *Reg. v. Townsend*, 1 Den. C. C. 167, 2 Car. & K. 168; *Rex v. Hall*, 1 Moody, 474; *Reg. v. Hunt*, 8 Car. & P. 642; *Reg. v. Miller*, 2 Moody, 249.

⁹ Ante, § 341.

¹⁰ *Commonwealth v. Stearns*, 2 Met. 348.

¹¹ *Commonwealth v. Libbey*, 11 Met. 64.

his employer for the amount due him. Yet we have seen,¹ that the fact of the servant's being paid a commission or percentage, instead of a salary, is not conclusive against his power to commit embezzlement. In such a case, the reader perceives, the money comes to the servant's hands already mixed; that is, the part which is commissions belongs to the servant, while the rest is the master's. And it is not clear that all courts will follow the Massachusetts doctrine.² "With respect to money," the English judges observed in one case,³ "it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away." And in the case before referred to,⁴ where the captain of a barge was paid, for taking out and selling coals, two-thirds of the sum he got for them above what would have been charged at the mine, the court overruled the objection that the money which the servant received was in part his own; observing, "As to the price at which the coals were charged at the colliery in this instance, namely, fourteen shillings per chaldron, that sum the prisoner received solely on his master's account, as his servant, and by embezzling it became guilty," &c.⁵ So where a servant, paid according to what he did, was to get orders for goods, do them out of his master's materials, receive from customers the price of the manufactured articles, then carry it to his master, and, at the end of the week, have out of it the proportion agreed upon for his work, — embezzled the sum received for a particular article, one-third of which sum was to be his for his work, — the judges held that he was rightly convicted of embezzling the whole.⁶ In Massachusetts, if, under a special contract, a broker, for example, is without authority to mix the money with his own, it may be the subject of embezzlement by him.⁷

§ 371. Continued — How in Legal Reason. — When a thing of a nature to be embezzled has come into the hands of the servant,

¹ Ante, § 341; *Rex v. Carr*, Russ. & Ry. 198.

² Various English cases furnished scope for this Massachusetts doctrine, yet the objection was not taken. See, for example, *Reg. v. Bailey*, 12 Cox C. C. 36. And see and compare *Reg. v. Hall*, 13 Cox C. C. 49; *The State v. Kent*, 22 Minn. 41; *Reg. v. Brownlow*, 14 Cox C. C. 116.

³ *Rex v. Taylor*, 3 B. & P. 596, 2 Leach, 4th ed. 974, Russ. & Ry. 63.

⁴ Ante, § 341.

⁵ *Rex v. Hartley*, Russ. & Ry. 139. See also *Reg. v. Atkinson*, Car. & M. 525, 2 Moody, 278; *Rex v. Hall*, Russ. & Ry. 403, 3 Stark. 67.

⁶ *Rex v. Hoggins*, Russ. & Ry. 145.

⁷ *Commonwealth v. Foster*, 107 Mass. 221; *Commonwealth v. Smith*, 129 Mass. 104.

he is in reason to be held guilty of embezzling it, in all circumstances which show a malicious intent to appropriate it to himself. Suppose, for instance, he has the right to mix it with his own property, and does mix it, with the intent thereby to embezzle it, — why let him escape on the ground, that his act alone was no violation of duty, but only his act coupled with his intent? Many criminal acts are such only because of the intent with which they are done. But suppose, in these circumstances, the intent to embezzle arose after the mixing, — for instance, arose after the money was deposited by the servant to swell his own account in a bank, — could he then be held for the embezzlement? Before this question is answered, let us observe, that, if the servant had no right so to deposit the money, yet deposited it without the evil intent, his case would necessarily be merely the same as when he had deposited it with right. Does, then, this act of mixing by the servant stand in reason against the possibility of his committing the offence of embezzlement afterward? Plainly, an inability arising afterward to pay over the money would not constitute embezzlement. He must have the criminal intent. But if he has this intent, and, in pursuance thereof, not in consequence of any inability, refuses, he certainly commits in the eye of morals the offence, — in the eye of ordinary reason, also, — precisely as if he had not made the deposit, or otherwise mixed the fund. The legal difficulty is to know, and state in the indictment, what particular coin or bank-notes he embezzles. And this difficulty merely runs the question into one of pleading. Now, this question of pleading is not for discussion here, only we may observe, that a court departs from its duty when it does not allow some form of pleading to cover every form of offence known in the law.¹ We conclude, therefore, that embezzlement may in reason be committed under the circumstances mentioned in this section, and that those courts which have determined otherwise have erred.

¹ See *Crim. Proc.* I. § 498 et seq.; *him*. And if, when he draws the money, he does not mean to embezzle it, he may do it afterward on the evil intent coming over him; even though, at the time of the fraudulent conversion, he intends to restore the amount, and has property sufficient to secure its restoration. *Commonwealth v. Tuckerman*, 10 Gray, 173

V. *The Act by which the Embezzlement is effected.*

§ 372. *Compared with Larceny.*— We have seen that, according to the English and possibly the more prevalent American doctrine, the thing to be embezzled must not come to the servant from the master or his possession, but the former must receive it from a third person for the master.¹ And the question now is, by what act, after it is received, does the servant commit the embezzlement. There is always, in all departments of jurisprudence, civil and criminal, a distinction between an act and the evidence of it; and our present inquiry concerns the act, not the evidence. But, on this question, we find little light in the authorities; still we may infer from them, and from the reason of the law, that, if the servant does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing short of this is sufficient.²

§ 373. *Illustrations*—(Pledging—Absconding—Not accounting, &c.).— For example, if the servant, instead of delivering the property to his master or another, as his duty requires him to do, pledges it for his own debt,³ or runs away with it,⁴ or neglects or refuses to account for it,⁵ or otherwise wrongfully diverts its course toward its destination to make it his own,⁶ he embezzles it. Yet much of even this is to be deemed rather as evidence than as the offence itself. For, to constitute the offence, it is not necessary there should be a demand for the money alleged to be embezzled, or a denial of its receipt, or any false account, or false statement, or false entry, or refusal to account.⁷

§ 374. *Illustrations from Indictment, &c.*— For illustration: on common-law principles, the indictment under the statute must set out specifically some article of the property embezzled; an allegation that the prisoner “took and received, on account of his master, divers sums of money, amounting in the whole to

¹ Ante, § 365.

² The State v. Leonard, 6 Coldw. 307.

³ And see Ex parte Hedley, 31 Cal. 108; Commonwealth v. Shepard, 1 Allen, 575; Kiba v. People, 81 Ill. 599; Commonwealth v. Gateley, 126 Mass. 52.

⁴ Calkins v. The State, 18 Ohio State, 306; Johnson v. Commonwealth, 5 Bush, 490.

⁵ Commonwealth v. Butterick, 100 Mass. 1.

⁶ Commonwealth v. Tuckerman, 10 Gray, 173; The State v. Hannicut, 34 Ark. 562.

⁷ Commonwealth v. Berry, 99 Mass. 428.

a large sum of money, to wit, the sum of £10, and afterwards embezzled the same,” not being sufficient.¹ In other words, the indictment must describe, according to the fact, some of the identical goods or money.² So the evidence must establish the embezzlement of the specific articles described.³

§ 375. *Continued*—*General Deficiency of Accounts.*— On this subject, however, the English statute of 7 & 8 Geo. 4, c. 29, § 48, contained the provision, not in the former enactments, “That it shall be lawful to charge in the indictment, and proceed against the offender for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and, in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.”⁴ On common-law

¹ Rex v. Flower, 5 B. & C. 736, 8 D. & R. 512; Rex v. Furneaux, Russ. & Ry. 335.

² See, on this question, Crim. Proceed. II. § 316-323.

³ Rex v. Tyers, Russ. & Ry. 402.

⁴ See 2 Russ. Crimes, 8d Eng. ed. 167. This, however, is now repealed in England; and, in place of it, is Stat. 24 & 25 Vict. c. 96, § 71, to the same effect in substance, but differing somewhat, as follows: “For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts

of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty or against the same master or employer, within the space of six months from the first to the last of such acts; and, in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or

principles, a statute providing a simpler form of indictment does not change the nature of the offence, or diminish the quantity, or modify the species, of proof. And this enactment, notwithstanding doubts created by one case,¹ has not so operated practically in England, but even now it will not suffice merely to show at the trial a general deficiency in account; some specific sum must be proved to have been embezzled, the same as in larceny some particular article must be shown to have been stolen.² In some of our States there are statutes similar to this English one.³

§ 376. *Illustrations from the Evidence.*—The nature of the evidence informs us also of the nature of the offence. Thus,—

The Accounts.—Though there may be embezzlement of money without false accounts;⁴ yet, if a servant keeps true accounts, or otherwise duly acknowledges the receipt of money, he cannot ordinarily be convicted of embezzling it, however he may appropriate it to his own use;⁵ though, on the other hand, the mere fact of his making an entry in the books of account will not necessarily exempt him from the charge of embezzlement.⁶

Neglect to pay over.—At all events, the mere fact of not paying the money over is clearly insufficient,⁷ even though he sets up an excuse never so frivolous, or a claim in himself wholly unfounded,⁸ or though he absconds;⁹ yet, under the circumstances of one case, absconding was ruled to be enough to warrant the jury in convicting the prisoner.¹⁰ “I think,” said Bolland, B., on another occasion, “it is essential that there should be a denial of having received the money, or else that some false account should

disposed of any amount, although the particular species of coin or valuable security of which such amount was composed, should not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.”

¹ *Reg. v. Grove*, 1 Moody, 447, 7 Car. & P. 636.

² *Reg. v. Jones*, 8 Car. & P. 288. A

conclusion, however, somewhat shaken by the later case of *Reg. v. Moah*, Dears. 626, 38 Eng. L. & Eq. 592.

³ *Commonwealth v. Wyman*, 8 Met. 247.

⁴ *Ante*, § 373.

⁵ *Rex v. Hodgson*, 3 Car. & P. 422; *Reg. v. Norman*, Car. & M. 501; *Reg. v. Creed*, 1 Car. & K. 63. And see *Rex v. Beacall*, 1 Car. & P. 310.

⁶ *Reg. v. Lister*, Dears. & B. 118, 87 Eng. L. & Eq. 600.

⁷ *Rex v. Smith*, Russ. & Ry. 267. See *The State v. Leonard*, 6 Coldw. 307.

⁸ *Reg. v. Norman*, Car. & M. 501.

⁹ *Reg. v. Creed*, 1 Car. & K. 63.

¹⁰ *Rex v. Williams*, 7 Car. & P. 338.

be given.”¹ Still, in a public officer, the mere neglect to pay over to the government the moneys received is pretty distinct evidence of embezzlement,² and stringent evidence if accompanied by a refusal.³

The Usual Evidence—False Accounts.—The proof commonly relied upon and held sufficient, is, either that the servant has wilfully made in his books false entries,⁴ or else that he has denied or wilfully omitted to acknowledge the receipt of the embezzled article or fund.⁵ But, as we have seen, this is not the only proof.

§ 377. *Further of False Entries.*—Where a clerk, receiving £18 in one-pound notes, immediately entered it as £12, intending to embezzle the £6, the majority of the judges held, that he was rightly convicted as of the latter amount; although the further fact appeared, that afterward, and during the same day, before the time came to pay over his receipts to his employer, he had taken a larger sum, of which he made a correct entry; and that he accounted for all his receipts of the day, except the six pounds, and so the particular six one-pound notes might, for any thing appearing to the contrary, have been delivered over.⁶ Here the offence was complete when the false entry was made; and matter subsequent, at least such matter, could not undo what had been done.

§ 378. *Altering Entry.*—When, however, a clerk, having already in his hands funds of his employer, received £7 2s. 6d., of which he made a correct entry in his books of account, and put it with those funds, but afterward altered the entry to £5 6s. 10½d., for which latter sum only he accounted, the judges were

¹ *Reg. v. Jones*, 7 Car. & P. 884.

² *The State v. Cameron*, 3 Heisk. 78.

³ *The State v. Leonard*, 6 Coldw. 307; *Reg. v. Guelder*, Bell C. C. 284, 8 Cox C. C. 372.

⁴ *Rex v. Hall*, Russ. & Ry. 463. A mere omission to enter the sum is not in itself alone sufficient. *Rex v. Jones*, 7 Car. & P. 833. And see *Rex v. Tyers*, Russ. & Ry. 402; *Reg. v. Chapman*, 1 Car. & K. 119.

⁵ *Reg. v. Jackson*, 1 Car. & K. 384; *Rex v. Jones*, 7 Car. & P. 833; *Rex v. Taylor*, 2 Leach, 4th ed. 974, Russ. & Ry. 63, 3 B. & P. 596; *Rex v. Hobson*,

Russ. & Ry. 56, 2 Leach, 4th ed. 975; *Reg. v. Muddock*, 2 Den. C. C. 298, 8 Eng. L. & Eq. 577; *Rex v. Borrett*, 6 Car. & P. 124; *Reg. v. Aston*, 2 Car. & K. 413; *Reg. v. White*, 8 Car. & P. 742; *Reg. v. Wortley*, 2 Den. C. C. 333, 15 Jur. 1187; *Reg. v. Welch*, 1 Den. C. C. 199; *Reg. v. Betts*, Bell C. C. 90, 8 Cox C. C. 140. See also *United States v. Forsythe*, 6 McLean, 584; *Batchelder v. Tenney*, 27 Vt. 578.

⁶ *Rex v. Hall*, Russ. & Ry. 463, 3 Stark. 67. And see *Reg. v. Welch*, 1 Den. C. C. 199; *Rex v. Hoggins*, Russ. & Ry. 145; *ante*, § 374.

of opinion, that he could not be convicted of embezzling the difference between these two sums; because he "might have paid over the whole of what he received for the £7 2s. 6d., and have taken the £1 15s. 7d. from the other moneys."¹ But, in principle, this case should be set down among the doubtful. If he embezzled the sum alleged, what matter from what fund he took it?

Precise Sum. — In a jury case, before Williams, J., an acquittal was ordered on facts not greatly differing from these; because the prosecutor could not show, what the judge said was necessary, a precise sum received by the prisoner on his master's account, and the whole or part of the very sum appropriated to his own use.²

VI. *The Intent.*

§ 379. **General View.** — This is not an offence which requires any special observations concerning the intent; therefore the reader need only be referred to the general doctrines on this subject, stated in the first volume.³ If a man commits the act of embezzlement, the presumption is, that he means to embezzle.⁴ Still there must be a criminal intent.⁵

VII. *Remaining and Connected Questions.*

§ 380. **Felony or Misdemeanor.** — This offence being statutory, the terms of the statute will determine whether it is felony or misdemeanor in a particular State. But, in England,⁶ it is felony; and so it is generally in our States, though there may be States in which it is only misdemeanor.⁷ Where it is, as in England, a statutory larceny, if larceny remains a felony as at common law, plainly embezzlement will be a statutory felony; or, if there is a general provision making all crimes punishable in a particular way felonies, embezzlement will be such if so punishable.

¹ *Rex v. Tyers*, *Rass. & Ry.* 402.

² *Reg. v. Chapman*, 1 *Car. & K.* 119.

³ Vol. I. § 204-207, 285 et seq. And see *United States v. Sander*, 6 *McLean*, 598.

⁴ *People v. Hennessey*, 15 *Wend.* 147.

⁵ *United States v. Sander*, *supra*.

⁶ *Archb. New Crim. Proced.* 448.

⁷ Vol. I. § 614 et seq.

§ 381. **Partial Legislation — Unconstitutional.** — In Tennessee, the act incorporating the Union Bank having made it felony if any of "the officers, agents, or servants" of this particular bank should embezzle its funds, or make false entries, the provision was held to be unconstitutional and void; because, as it embraced only the officers of one bank, not all persons in the like situations, it was partial in its operation. If it had extended to the officers of all banks, it would not have been so. The constitutional inhibition violated was said to be, that no person shall be imprisoned, &c., but by the judgment of his peers, or "the law of the land."¹

§ 382. **State and United States — Constitutional.** — In connection with this subject, some questions arise which, in their general aspects, are considered elsewhere in these volumes.² If a State statute is in terms sufficiently broad, embezzlement, committed by an officer of a national bank, may, there is authority for holding, be punished under it in the State courts, provided the criminal fact does not fall also within a statute of the United States.³ But, in the cases which have arisen, it has been assumed and decided, without much consideration, that, where the act of embezzlement falls equally within the inhibitions of the State law and a law of Congress, it can be punished only under the latter.⁴ And it was even held in Massachusetts, that, if the principal is indictable under the national law, and the accessory is not, still the latter cannot be indicted under the State law.⁵ It is not proposed to inquire here, how far the doctrines of this section are sound; that has been done, in part, in other connections, at the places cited at the opening of this section.

§ 383. **Conclusion.** — In passing from this subject let us still bear in mind, what has been already observed, that the statutes of our States are many and diverse; consequently we should not hastily accept as authority upon one statute what has been decided under another. We should also bear in mind, that, at

¹ *Budd v. The State*, 3 *Humph.* 433.

² Vol. I. § 178, 179, 987, 989; *ante*, § 284-287.

³ *The State v. Tuller*, 34 *Conn.* 230; *Commonwealth v. Tenney*, 97 *Mass.* 50.

⁴ *The State v. Tuller*, *supra*; *Commonwealth v. Felton*, 101 *Mass.* 204.

⁵ *Commonwealth v. Felton*, *supra*. I have deemed it not best to inquire whether the Revised Statutes of the United States have wrought any change on this subject.

some points, adjudication has departed widely from principle. Now, a particular point of this sort may not have been settled in our own State; and, where such is the fact, it will be well to endeavor to bring the courts to principle, instead of suffering them unwarned to follow decisions from England or other States, which, while they are not binding, are wrong.

CHAPTER XVII.

EMBRACERY.¹

§ 384. *How defined — General Description.* — The crime of embracery is mentioned in the old books. It is a species of maintenance, consisting of an attempt corruptly to influence a jury.² Blackstone defines it as “an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.”³ And Hawkins says: “It seems clear, that any attempt whatsoever to corrupt or influence or instruct a jury, or any way to incline them to be more favorable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery; whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.”⁴

¹ For the pleading, practice, and evidence, relating to this offence, see *Crim. Proced. II.* § 344-347. And see *Stat. Crimes*, § 568.

² 4 *Bl. Com.* 140; 1 *Hawk. P. C. Curw. ed.* p. 466, § 1; *Vol. I.* § 468.

³ 4 *Bl. Com.* 140.

⁴ 1. 1 *Hawk. P. C. Curw. ed.* p. 466, § 1. *Old English Statutes.* — There are, upon this subject, old English statutes, some of which may doubtless be deemed to be common law in this country. See *Roberts's Eng. Stats.* in force in Pa. 382 et seq. Of the more important of these are the following: —

2. 5 *Edw. 3, c. 10*, entitled “The Punishment of a Juror that is Ambidexter and taketh Money.” Its important words are: “If any juror, in assizes, juries, or inquests, take of the one party or of the other, and be thereof duly attainted, that hereafter he shall not be put in any assizes, juries, or inquests,

and nevertheless he shall be commanded to prison, and further ransomed at the king's will.”

3. 34 *Edw. 3, c. 3*, entitled, “The Penalty of a Juror taking Reward to give his Verdict.” It provides, “that, in every plea, whereof the inquest or assize doth pass, if any of the parties will sue against any of the jurors, that they have taken of his adversary, or of him, for to give their verdict, he shall be heard, and shall have his plaint by bill presently before the justices before whom they did swear, and that the juror be put to answer without any delay; and, if they plead to the country, the inquest shall be taken presently. And if any man other than the party will sue for the king against the juror, it shall be heard and determined as afore is said. And if the juror be attainted at the suit of other than the party, and maketh fine, the party that sueth shall have half the

§ 385. **Exhorting Juror to do Justice.** — Hawkins attenuates the doctrine thus: "The law so abhors all corruptions of this kind, that it prohibits every thing which has the least tendency to it,

fine; and that the parties to the plea shall recover their damages by the assessment of the inquest; and that the juror so attainted have imprisonment for one year, which imprisonment the king granteth that it shall not be pardoned for any fine. And if the party will sue by writ before other justices, he shall have the suit in form aforesaid."

4. 38 Edw. 3, stat. 1, c. 12, entitled, "The Punishment of a Juror taking Reward to give Verdict, and of Embracers." It is: "As to the article of jurors in the four and thirtieth year, it is assented and joined to the same, that, if any juror in assizes sworn, and other inquests to be taken between the king and party, or party and party, do any thing take by them or other of the party plaintiff or defendant, to give their verdict, and thereof be attainted by process contained in the same article [that is, process mentioned in the foregoing Stat. 34 Edw. 3, c. 8], be it at the suit of the party that will sue for himself, or for the king, or any other person, every of the said jurors shall pay ten times as much as he hath taken; and he that will sue shall have the one half, and the king the other half. And that all the embracers that bring or procure such inquests in the country to take gain or profit, shall be punished in the same manner and form as the jurors; and, if the juror or embracer so attainted have not whercof to make gree in the manner aforesaid, he shall have the imprisonment of one year. And the intent of the king, of the great men, and of the commons, is, that no justice nor other minister shall inquire of office upon any of the points of this article, but only at the suit of the party, or of other, as afore is said."

5. Lastly, we have 32 Hen. 8, c. 9, entitled, "The Bill of Bracery and Buying of Titles." It is of but little consequence in this connection; the more material part of it relates to the buying and selling of pretended titles; and, as to this part, it is not received in all the

States. See ante, § 172, 173. It is not, for example, in Georgia. *Cain v. Monroe*, 23 Ga. 82; *Harring v. Barwick*, 24 Ga. 59; *Webb v. Camp*, 26 Ga. 354. But this Georgia opinion, dissented from by one judge, does not necessarily exclude the operation of the statute in cases of embracery. In the preamble it is said, "that there is nothing within this realm that conserveth his [the king's] loving subjects in more quietness, rest, peace, and good concord, than the due and just ministration of his laws, and the true and indifferent trials of such titles and issues as been to be tried according to the laws of this realm; which his most royal majesty perceiveth to be greatly hindered and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labor, buying of titles and pretended rights of persons not being in possession; whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs, and disinherittance." It is therefore enacted, § 1, "that from henceforth all statutes heretofore made concerning maintenance, champerty, and embracery, or any of them, now standing and being in their full strength and force, shall be put in due execution according to the tenures and effects of the same statutes." § 3. That, among other things, "no person, &c., do hereafter unlawfully retain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors," &c.

6. **Interpretations of these Statutes** — It is perceived, that, in part at least, these statutes were passed to authorize a civil action against the person guilty of embracery. But Hawkins observes, in answer to the inquiry "how far offences of this kind are restrained by the common law," that "there can be no doubt but that they subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law." 1 Hawk. P. C. Curw. ed. p. 467, § 2.

what specious pretence soever it may be covered with; and therefore it will not suffer a mere stranger so much as to labor a juror to appear and act according to his conscience."¹ But this latter clause is carrying an old refinement quite far; for an honest exhortation to do justice should never be construed into guilt.

§ 386. **Giving Money to Juror.** — "Also it is said," continues Hawkins, "that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savoring of the nature of embracery; because, if such practices were allowable, it would be easy to evade the law by giving jurors secret intimations of such an intended reward for their service, which might be of as bad consequence as the giving of money beforehand. But it seems clear that the giving of jurors such a reasonable recompense as is usually allowed them for their expenses in travelling, &c., and which may fairly be expected by them from either side that shall prevail, is no way criminal; because, if no such allowance were to be expected, it would be often difficult to prevail with persons to serve on a jury at their own charge. And therefore by experience it hath been found necessary to permit the parties to give jurors some amends for their charges."² In our States, the matter of compensation to jurors is generally, perhaps universally, regulated by statutes; consequently there is no room for suffering any other compensation to be given by the parties.

§ 387. **Continued — Efforts to secure Verdict.** — "It hath been adjudged," continues Hawkins, "that the bare giving of money

Moreover, a nice attention to the words of the statutes shows, that they were not meant to take away the right of indictment for the acts for which they provide an additional restraint.

7. **Old Idea of the Offence.** — In the law dictionary, latterly known under the name of Tomlins, formerly of Jacob, we have the following: "*Embracoeur*. He that, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labors the jury, or stands in the court to survey or overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. But lawyers, attorneys, &c., may speak in the case for their clients, and not be

embracers. Also the plaintiff may labor the jurors to appear in his own cause, but a stranger must not do it; for the bare writing a letter to a person, or personal request for a juror to appear, not by the party himself, hath been held within the statutes against embracery and maintenance. Co. Lit. 369; Hob. 294; 1 Saund. 891. If the party himself instructs a juror, or promises any reward for his appearance, then the party is likewise an embracoeur. And a juror may be guilty of embracery, when he, by indirect practices, gets himself sworn on the *tales*, to serve on one side. 1 Lil. 513."

¹ 1 Hawk. P. C. Curw. ed. p. 466, § 2.

² 1 Hawk. P. C. Curw. ed. p. 466, § 3.

to another to be distributed among jurors is an offence of the nature of embracery, whether any of it be actually so distributed or not. Also it is clear, that it is as criminal in a juror as in any other person to endeavor to prevail with his companions to give a verdict for one side by any practices whatsoever, except only by arguments from the evidence which was produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as, where persons by indirect means procure themselves or others to be sworn on a tales in order to serve one side."¹

§ 388. **Why an Offence.** — Whatever may be said of maintenance proper, with which this offence of embracery is in the books found connected, and of which it constitutes in some sense a part, there can be no doubt that embracery is to be reckoned among our common-law crimes, not merely because it was punishable in England when this country was settled, but also because the form of evil-doing, which its penalties were ordained to suppress, is contrary to good morals at all times, and subversive always of justice in the courts, and a grievous wrong of a nature always held to be indictable. The law on this subject should, with us, be more "put in ure," to use an old expression, than it is.

§ 389. **Attempts.** — Embracery being an attempt, as well as a consummated act, there appears to be no room for such an offence as an attempt to commit embracery; because, if there is an attempt which is indictable, it is itself embracery.²

¹ 1 Hawk. P. C. Curw. ed. p. 467, § 4. ² Ante, § 384, 387; Crim. Proc. II § 347; The State v. Sales, 2 Nev. 268.

For ENROSSING, see Vol. I. § 518 et seq.

ENTRY, FORCIBLE, see FORCIBLE ENTRY AND DETAINEE.

ESCAPE, see PRISON BREACH, &c.

ESTRAY ANIMALS, see Stat. Crimes.

EXPOSURE OF PERSON, see Vol. I § 1126 et seq.

CHAPTER XVIII.

EXTORTION.¹

§ 390, 391. Introduction.

392. May be committed only by an Officer.

393. Must be by Color of his Office.

394, 395. The Act must be within a Legal Prohibition.

396-400. Must be corruptly done.

401, 402. The Thing obtained by Extortion.

403, 404. English and American Statutes.

405-408. Remaining and Connected Questions.

§ 390. **Why Indictable.** — In the preceding volume we saw, that all persons who assume official position place themselves thereby in circumstances to exert a peculiar power, which brings with it corresponding obligations cognizable by the criminal law; consequently they are liable to indictment for any malfeasance in office.² Among wrongful official acts, open to special reprehension, is extortion.

How defined. — It is the corrupt demanding or receiving, by a person in office, of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due.³

¹ For matter relating to this title, see Vol. I. § 573, 587, 715. For the pleading, practice, and evidence, see Crim. Proc. II. § 357 et seq. And see, as to both law and procedure, Stat. Crimes, § 171, note, 217, 346, note, 570.

² Vol. I. § 218, 219, 239, 316, 321, 459, 468, 469, 573.

³ Blackstone defines: "Extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or before it is due." And he adds: "The punishment is by fine and imprisonment, and sometimes by a forfeiture of the office." 4 Bl. Com. 141. Hawkins: "It is said, that extortion in

a large sense signifies any oppression under color of right; but that in a strict sense it signifies the taking of money by any officer, by color of his office, either where none at all is due, or not so much is due, or where it is not yet due." 1 Hawk. P. C. Curw. ed. p. 418, § 1. The New York commissioners propose the following: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Draft of Penal Code, A. D. 1864, p. 220. It will be perceived that this proposed definition extends the boundaries of the offence over a wider field of indictable wrong than it occupies, under the same name, in the common law.

Corrupt. — Implying an evil mind, it is not committed when the fee comes voluntarily, in return for real benefits conferred by extra exertions put forth.¹

§ 391. We shall consider, I. The Offending Person must be an Officer; II. The Thing extorted must be obtained by Color of his Office; III. The Act must be within the Prohibitions of Law; IV. The Act must proceed from a Corrupt Motive; V. What must be the Thing obtained; VI. Statutes, English and American, relating to this Subject; VII. Remaining and Connected Questions.

I. *The Offending Person must be an Officer.*

§ 392. **General Doctrine.** — The law has not confined this offence to any class of officers; but, wherever it has cast official duties, and conferred official privileges, it has subjected the individual to liability for acts of extortion. Thus, —

Particular Officers. — All justices of the peace,² sheriffs and their deputies,³ constables,⁴ jailers,⁵ lawyers admitted to practice,⁶ collectors of taxes,⁷ persons in England who preside over the ecclesiastical courts,⁸ clerks of courts,⁹ and indeed every other description of person upon whom the mantle of office has fallen,¹⁰ may commit this offence.

¹ See Vol. I. § 573. And see *The State v. Stotts*, 5 Blackf. 460; *Rex v. Baines*, 6 Mod. 192; *Williams v. The State*, 2 Sneed, 160; *Evans v. Trenton*, 4 Zab. 764.

² *Rex v. Seymour*, 7 Mod. 882; *The State v. Maires*, 4 Vroom, 142; *Cutter v. The State*, 7 Vroom, 125; *Reg. v. Tisdale*, 20 U. C. Q. B. 272.

³ *Commonwealth v. Bagley*, 7 Pick. 279; *Hescott's Case*, 1 Salk. 330.

⁴ *The State v. Merritt*, 5 Sneed, 67.

⁵ *Commonwealth v. Mitchell*, 3 Bush, 25.

⁶ *Adams v. Tertenants of Savage*, Holt, 179; *Troy's Case*, 1 Mod. 5. But in New Hampshire, the statutory penalty for taking illegal fees is incurred only where a public officer, or some one in his behalf, and with his assent, demands and receives compensation for a service rendered in the discharge of his official

duties, other or greater than the law allows. And attorneys, while receiving pay in their offices for services rendered to their clients, in what is preliminary to proceedings before a judicial tribunal, cannot be regarded as public officers acting officially. The provision of the statute that only one dollar shall be allowed for a writ, including the blank, in bills of cost taxed in the Supreme Court or Court of Common Pleas, is not violated by an attorney's receiving a larger sum as his compensation for making a writ, while adjusting a suit for his client, before it has been entered in court. *Wilcox v. Bowers*, 36 N. H. 372.

⁷ *Reg. v. Buck*, 6 Mod. 306.

⁸ *Smythe's Case*, Palmer, 318.

⁹ *Rex v. Baines*, 6 Mod. 192. And see *Commonwealth v. Rodes*, 6 B. Monr. 171.

¹⁰ *Smith v. Mall*, 2 Rol. 263; *Rex v.*

Officer de Facto. — There is no necessity for the officer to be one *de jure*, if only he holds the office *de facto* it is sufficient.¹ Indeed a person who serves as an officer, and claims to be such, is estopped to deny his official appointment.²

One falsely Pretending. — Even an offence analogous to extortion may be perpetrated by an unofficial person who falsely pretends to be an officer.³

Analogous Offences — Railroad Fare. — And there are still other analogous offences, both at the common law and under statutes, sometimes in a sort of loose way called extortion, to commit which it is not necessary the offender should be an officer. Thus, in New York, a railroad company which exacts the legal rate of fare in gold coin, or its value in paper currency, is said to be guilty of extortion. It is liable to the penalty of fifty dollars for asking and receiving a greater fare than is allowed by law.⁴

II. *The Thing extorted must be obtained by Color of Office.*

§ 393. **General Doctrine.** — The thing taken must be procured by the officer under color of his office.⁵ Thus, —

Arrest on Forged Warrant. — If such person arrests a man on a warrant which he knows to be forged, and thereby extorts money from him, he takes it under color of his office, and so commits this offence.⁶

III. *The Act must be within the Prohibitions of Law.*

§ 394. **English Examples.** — Russell says:⁷ "It has been held to be extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the defendants knew that it had been proved before in the prerogative court.⁸

Burdett, 1 Ld. Raym. 148; *The State v. Burton*, 3 Ind. 93; *Commonwealth v. Hagan*, 9 Philad. 574.

¹ 1 Gab. Crim. Law, 788. And see *The State v. McEntyre*, 8 Ire. 171, 174; post, § 407.

² *The State v. Sellers*, 7 Rich. 368, 372. And see *People v. Cook*, 4 Seld. 67; *Rex v. Borrett*, 6 Car. & P. 124.

³ *Serlested's Case*, Latch. 202; Vol. I. § 468 and note, 587.

⁴ *Lewis v. New York Central Railroad*, 49 Barb. 330. And see ante, § 390, note.

⁵ *Rex v. Baines*, 6 Mod. 192. And see *People v. Whaley*, 6 Cow. 681; *Shattuck v. Woods*, 1 Pick. 171; *Gallagher v. Neal*, 3 Pa. 183; *Runnells v. Fletcher*, 15 Mass. 525; *Evans v. Trenton*, 4 Zab. 764. See *Reg. v. Best*, 2 Moody, 124.

⁶ *Reg. v. Tracy*, 6 Mod. 30.

⁷ 1 Russ. Crimes, 3d Eng. ed. 148.

⁸ *Rex v. Loggen*, 1 Stra. 73.

And it is extortion in a church-warden to obtain a silver cup or other valuable thing, by color of his office.¹ And a coroner is guilty of this offence who refuses to take the view of a dead body until his fees are paid.² So if an under-sheriff obtain his fees by refusing to execute process till they are paid,³ or take a bond for his fee before execution is sued out,⁴ it will be extortion. And it will be the same offence in a sheriff's officer to bargain for money to be paid him by A, to accept A and B as bail for C, whom he has arrested;⁵ or to arrest a man in order to obtain a release from him;⁶ and also in a jailer to obtain money from his prisoner by color of his office.⁷ In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion;⁸ and the same, if a ferryman takes more than is due by custom for the use of his ferry.⁹ And it was held, that, if the farmer of a market erects so many stalls as not to leave sufficient room for the market-people to stand and sell their wares, so that, for want of room, they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such a case is extortion.¹⁰ Where a collector of post-horse duty demanded a sum of money of a person, charging him with having let out post-horses without paying the duty, and threatened him with an exchequer process, and he thereon gave him a promissory note for five pounds, which was afterwards paid, and the proceeds handed over to the farmer of the post-horse duties, it was held to be an extortion."¹¹

§ 395. *American*. — Some of the cases thus cited by Russell show a form of extortion which could not be practised in this country; yet all are instructive, as illustrating the principle on which this offence rests. For example, —

Fees in Advance. — The rule, settled in England,¹² that extortion may be committed by an officer demanding his fees in advance, has been expressly adopted in this country.¹³

¹ Rex v. Eyres, 1 Sid. 307.

² 3 Inst. 149; Rex v. Harrison, 1 East

P. C. 382.

³ Hescott's Case, 1 Salk. 330.

⁴ Empson v. Bathurst, Hut. 52.

⁵ Stotesbury v. Smith, 2 Bur. 924.

⁶ Williams v. Lyons, 8 Mod. 189.

⁷ Rex v. Broughton, Trem. P. C. 111;

Reg. v. Tracy, 6 Mod. 178.

⁸ Rex v. Burdett, 1 Ld. Raym. 148.

⁹ Rex v. Roberts, 4 Mod. 101.

¹⁰ Rex v. Burdett, 1 Ld. Raym. 148.

¹¹ Rex v. Higgins, 4 Car. & P. 247.

¹² Ante, § 394; Rex v. Baines, 6 Mod.

192, W. Jones, 65; Hescott's Case, 1

Salk. 330.

¹³ Commonwealth v. Bagley, 7 Pick.

279; The State v. Maires, 4 Vroom, 142;

Where none Demandable. — And if, under the circumstances, no fee is demandable, it is extortion corruptly to demand and receive one.¹ In a New York case, where a cause before a justice of the peace was discontinued by laches of the plaintiff, but the justice adjourned it and gave judgment for the plaintiff afterwards, receiving from the defendant the amount of the debt, together with 12½ cents for his fees, under the pretence of there being a valid judgment rendered, — the court decided that the taking of the 12½ cents by the justice for fees was extortion in him, if the jury should believe him to have acted from a corrupt motive.²

Not within Official Duty. — If an officer performs services not within the duties of his office, he may lawfully receive pay for them.³

IV. *The Act must proceed from a Corrupt Motive.*

§ 396. *General Doctrine*. — No act, carefully performed, from motives which the law recognizes as honest and upright, is punishable as a crime.⁴ And it has always been held, that extortion proceeds only from a corrupt mind.⁵

§ 397. *Perquisites*. — Hawkins, speaking of Stat. Westm. 1, c. 26,⁶ which is merely confirmatory of the prior common law, says: "It hath been holden, that the fee of twenty pence, commonly called the bar fee, which hath been taken time out of mind by the sheriff, of every prisoner who is acquitted, and also the fee of one penny, which was claimed by the coroner of every visne when he came before the justices in eyre, are not within the meaning of the statute; because they are not demanded by the sheriff or coroner for doing any thing relating to their offices,

The State v. Vassel, 47 Misso. 444; The State v. Vassel, 47 Misso. 416.

¹ Commonwealth v. Mitchell, 3 Bush, 25; Cross v. The State, 1 Yerg. 261.

² People v. Whaley, 6 Cow. 661.

³ Dutton v. The City, 9 Philad. 597; ante, § 390.

⁴ Vol. I § 285 et seq.

⁵ People v. Whaley, 6 Cow. 661; Jacobs v. Commonwealth, 2 Leigh, 709; The State v. Stotts, 5 Blackf. 480; Res-

publica v. Hannum, 1 Yeates, 71, The State v. Bright, 2 Car. Law Repos. 634.

⁶ This statute, otherwise cited as 8 Edw. 1, c. 26, is, — "And that no sheriff, nor other the king's officer take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure."

but claimed as perquisites of right belonging to them, whether they do any thing or not. But there seemeth to be no necessity for this distinction; for it cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labor and attendance of their officers. For the chief danger of oppression is from officers being left at their liberty to set their own rates on their labor, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded without the highest resentment."¹

§ 398. **Fees added to Salary.** — So much from Hawkins is doubtless sound in law at the present day. But we may question the following, in its application to our time and country: "Also it having been found by experience, that generally it is in vain to expect that any officers who depend upon a known fixed salary, without having any immediate benefit from any particular instances of their duty, should be so ready in undertaking, or diligent in executing them, as they would be if they were to have a present advantage from them, it hath been thought expedient to permit them to take certain fees in many cases." The rest of what follows is correct: "But it is certain that they are guilty of extortion if they take any thing more."² The light of the present time should be deemed sufficient to enable men employed on salaries to perform their duties when paid once, without the stimulant of a second payment for each instance of discharging the obligation they assumed in accepting office.³

§ 399. **Usage as justifying Excess of Fees, &c.** — We have some American cases to the question whether, if, following a general usage, an officer takes a larger fee than the law has prescribed, or demands and receives the prescribed fee before it is due, he can rely on this usage in his defence when charged with extor-

¹ 1 Hawk. P. C. Curw. ed. p. 418, 419, § 3.

² 1 Hawk. P. C. Curw. ed. p. 419, § 4.

³ **No Fee allowed.** — In Pennsylvania, if a justice of the peace demands and receives a fee for a service for which none is allowed by law, he incurs the

penalty prescribed for taking illegal fees. **Overcharge.** — So if he charges more than 18½ cents for a copy of his proceedings, including the judgment, this being the statutory fee. *Simmons v. Kelly*, 9 Casey, 190. See also *Debolt v. Cincinnati*, 7 Ohio State, 237.

tion. There is a Pennsylvania case wherein the opinion seems to be that he can.¹ On the other hand, the Massachusetts court has directly adjudged that he cannot.² The motive, in this instance, is not what a non-professional man would call corrupt, but it is so legally. For, as we saw in the preceding volume,³ every person is conclusively presumed to know the law, and to know, what is well settled, that there can be no custom or usage made legal in opposition to a statute; consequently, if the fee is prescribed by law, no individual officer can excuse himself by showing that other officers have violated the law, or that he himself has, as often as he has had the opportunity. Even Hawkins, who, we have seen,⁴ is inclined to hold the rein loosely over these functionaries, takes substantially this ground.⁵

§ 399 a. **Fee taken under Mistake of Law.** — At the same time, the question of the effect of a mistake in law is, in a case of this sort, a very nice one, and one upon which it is not easy to lay down any rule with a perfect assurance that it will be accepted in all tribunals. "If," said Beasley, C. J., in a late New Jersey case, "a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, it would seem palpably unjust, and therefore inconsistent with the ordinary grounds of judicial action, to hold such conduct criminal, if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it." Therefore, on an indictment against a magistrate for taking illegal fees, he may, the court deemed, show

¹ *Republica v. Hannum*, 1 Yeates, 71.

² *Lincoln v. Shaw*, 17 Mass. 410; *Shattuck v. Woods*, 1 Pick. 171; *Commonwealth v. Bagley*, 7 Pick. 279. But see *Commonwealth v. Shed*, 1 Mass. 227. The first two of these cases are the only ones which exactly cover the point of the text; and in them the proceeding was civil in form, for the recovery of the penalty, but the rule in such circumstances is the same as though the proceeding were by indictment. In New York it was held, that, if a justice of the peace refuses an adjournment because the party will not pay his fees for drawing a bond, on demanding the adjourn-

ment, he is indictable for misdemeanor. And Marcy, J., observed: "The magistrate misapprehended his duty in refusing the adjournment unless his fees for drawing the bond were paid. The payment of the fees was not a condition precedent to the adjournment of the cause; and the magistrate erred in withholding from the party his right on account of the non-payment of them." *People v. Calhoun*, 3 Wend. 420, 421.

³ Vol. I. § 292 et seq.

⁴ Ante, § 398.

⁵ 1 Hawk. P. C. Curw. ed. p. 418, § 2. s. p., *Rex v. Seymour*, 7 Mod. 382.

that they were honestly demanded and received under a mistake of his legal rights.¹ There are some analogies in the criminal law favoring this view. And in a case where there is a right to a fee, and the question is how much, and the law has provided no reference of it to any person other than the officer taking the fee, probably it is not obnoxious to established principle to hold, that, for the particular case, and as respects criminal liability, the honest and pains-taking decision of the officer should be accepted as the judgment of the law on the point.²

§ 400. *Fee taken under Mistake of Fact.* — If the mistake is one of fact,³ and it proceeds from no carelessness or other fault, beyond all controversy it will excuse, in the criminal law, the act which otherwise would be extortion. Thus, where, in England, a clerk to justices of the peace demands and receives a fee for the taking of recognizances as for a principal and two sureties, there being really but one, he commits no offence and incurs no forfeiture, under Stat. 26 Geo. 2, c. 14, § 2, if he believes that there are two sureties. Said Lord Campbell, C. J.: "On the point whether an offence has been committed by the defendant acting in ignorance of the fact, I am clearly of opinion that the complaint fails. *Actus non facit reum nisi mens sit rea.*"⁴

V. What must be the Thing obtained.

§ 401. *Of Value — Mere Agreement.* — In the facts of most cases, what is obtained is money. A mere agreement to pay has been held insufficient.⁵ The agreement is not a thing of value; but probably any thing of value will do. It need not be money.⁶

§ 402. *Under Statutes.* — Yet sometimes a statute specifies the thing which is forbidden to be taken; then the indictment, to be good under the statute, must specify the particular thing, and it must be proved.⁷

¹ *Cutter v. The State*, 7 Vroom, 125, 128. See post, § 404.

² Stat. Crimes, § 805, 806. And see the whole discussion there on "Election Frauds and Obstructions."

³ Vol. I. § 292 et seq.

⁴ *Bowman v. Blyth*, 7 Ellis & B. 26, 43.

⁵ *Commonwealth v. Cony*, 2 Mass. 523; *Commonwealth v. Pease*, 16 Mass. 91; *Rex v. Burdett*, 1 Ld. Raym. 148. But see ante, § 394.

⁶ *Rex v. Burdett*, 1 Ld. Raym. 148. See *Reg. v. Johnson*, 11 Mod. 62; *The State v. Stotts*, 3 Blackf. 460.

⁷ *Garner v. The State*, 5 Yerg. 160.

VI. Statutes, English and American, relating to this Subject.

§ 403. *English.* — The offence of extortion is deemed so heinous, that from earliest times it has been made the subject of legislation; though it is equally indictable under the earlier English common law.¹ The English statutes are multitudinous; yet, of all which were passed before the settlement of this country, no one seems to be here of any practical consequence.²

§ 404. *American.* — In the United States there are many statutes, not abrogating the common law,³ but furnishing additional remedies against officers committing this offence. But they have not called forth many expositions of general principles, rendering advisable other mention of them than a reference in the notes.⁴ In Ohio, the office of township treasurer being abolished in Cincinnati, and its duties transferred to the county treasurer of Hamilton County, it was held, that he could not charge the fees of a township treasurer; because no officer whose compensation is regulated by fees can charge for a particular service, unless the law specifically gives him fees therefor. "Fees," said J. R. Swan, J., "are not allowed upon an implication; but, if they were, the implication in this case is, that the legislature, if they intended to give the fee of a township treasurer to a county treasurer, would have said so."⁵

The Intent. — The words of the New Jersey statute are general, — "shall receive or take, by color of his office, any fee or reward

¹ See 1 Hawk. P. C. Curw. ed. p. 418.

² The principal statute mentioned by Hawkins is that quoted ante, § 397 and note, of Westm. 1 (3 Edw. 1), c. 26. It is but declaratory of the common law; and neither Kilty, nor the Pennsylvania judges in their Report, 3 Binn. 595, mention it among acts applicable. For a decision on Stat. 7 & 8 Vict. c. 84, § 79, see *Reg. v. Badger*, 6 Ellis & B. 137, 84 Eng. L. & Eq. 326.

³ The Pennsylvania and Illinois statutes supersede the common law, at least to some extent. *Commonwealth v. Evans*, 13 S. & R. 426; *Pankey v. People*, 1 Scam. 80. But not the Massachusetts. *Commonwealth v. Bagley*, 7 Pick. 279; *Shattuck v. Woods*, 1 Pick. 171.

⁴ *Gallagher v. Neal*, 3 Pa. 183; *Reed v. Cist*, 7 S. & R. 183; *Commonwealth v. Evans*, 13 S. & R. 426; *Commonwealth v. Bagley*, 7 Pick. 279; *Shattuck v. Woods*, 1 Pick. 171; *Lincoln v. Shaw*, 17 Mass. 410; *Dunlap v. Curtis*, 10 Mass. 210; *Runnells v. Fletcher*, 15 Mass. 525; *Commonwealth v. Shed*, 1 Mass. 227; *Commonwealth v. Murphy*, 12 Allen, 449; *The State v. Brown*, 12 Minn. 490; *The State v. Lawrence*, 45 Misso. 492; *The State v. Maires*, 4 Vroom, 142; *The State v. Bruce*, 24 Maine, 71; *Stat. Crimes*, § 250, note.

⁵ *Debolt v. Cincinnati*, 7 Ohio State, 237, 239.

whatsoever not allowed by the laws of this State for doing his office,"—and these were held not to preclude inquiry into the intent, the same as at the common law.¹

VII. *Remaining and Connected Questions.*

§ 405. **Misdemeanor—Punishment.**—Extortion is misdemeanor at the common law, punishable, therefore, by fine and imprisonment;² "also," adds Hawkins, "by a removal from the office in the execution whereof it was committed."³

§ 406. **Accessories—Persons not Officers.**—Whether one, not an officer, who abets an officer in this offence, is punishable as for extortion, the authorities are not apparently distinct; but it has been held, that several persons may be made defendants jointly in one indictment, and therefore the inference seems to be, that the law does not require each defendant to be an officer, if only one is such.⁴ Yet two officers—for example, two justices of the peace—may by acting in concert commit the joint offence.⁵

§ 407. **Persons not Officers, continued—Threat.**—In an English case it was held criminal at common law, to extort money from one by a threat to indict him for perjury; Holt, C. J., observing, "If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will [therefor] lie."⁶

§ 408. **Extortion from Corporation.**—There may be an extortion from a county⁷ or other corporation, the same as from an individual.

¹ *Cutter v. The State*, 7 Vroom, 125; ante, § 399 a.

² Ante, § 55 and note.

³ 1 Hawk. P. C. Curw. ed. p. 419, § 5.

⁴ See 1 Russ. Crimes, 3d Eng. ed. 144.

⁵ *Reg. v. Tisdale*, 20 U. C. Q. B. 272.

⁶ *Reg. v. Woodward*, 11 Mod. 187. See *The State v. Bruce*, 24 Maine, 71; ante, § 392.

⁷ *The State v. Moore*, Smith, Ind.

316, 1 Ind. 548.

For FALSE IMPRISONMENT, see KIDNAPPING AND FALSE IMPRISONMENT.

FALSE NEWS, see Vol. I. § 472 et seq., 540.

FALSE PERSONATING, see ante, § 152-155; post, § 439, 440; Vol. I. § 468.

CHAPTER XIX.

FALSE PRETENCES.¹

§ 409. Introduction.

410-414. General Doctrine and Statutes.

415-459. What is a False Pretence.

460-475. What must concur with the False Pretence.

476-484. What Property must be obtained.

485-488. Remaining and Connected Questions.

§ 409. **Order of this Chapter.**—We shall consider, I. The General Doctrine and the Statutes; II. What is a False Pretence III. What must concur with the False Pretence to constitute the Statutory Cheat; IV. What must be the Property obtained; V. Remaining and Connected Questions.

I. *The General Doctrine and the Statutes.*

§ 410. **Scope of this Discussion.**—We have already, under the separate title of "Cheats at the Common Law," considered the general doctrine of defrauding individuals and the public by false tokens, both under the ancient unwritten law and the declaratory statute of 33 Hen. 8, c. 1.² It remains for us, in this chapter, to take a view of the later statutes and their interpretations.

Views of the Statutes.—For, in the progress of trade and refinement, it became apparent that neither this statute nor the common law went far enough in the protection of fair dealing against knavery, and other provisions were added.³ These consist in enactments against what is called the obtaining of property, or cheating, by false pretences. The American statutes are in substance copied from the English,⁴ and the later Eng-

¹ For matter relating to this title, see Vol. I. § 110, 257, 389, 438, 585, 586, 686, 815. See this volume, CHEATS. For the pleading, practice, and evidence, see Crim. Procd. II. § 157 et seq. See, also, Stat. Crimes, § 138, 134, 260, 450-452.

² Ante, § 141 et seq.

³ Vol. I. § 685, 586.

⁴ See *People v. Clough*, 17 Wend. 351; *People v. Johnson*, 12 Johns. 292; *People v. Stone*, 9 Wend. 182; *The State v. Rowley*, 12 Conn. 101; *Commonwealth v. Warren*, 8 Mass. 72; *Commonwealth v.*

lish from the earlier which are now repealed. Therefore, to the proper understanding of our subject, and the decisions upon it, the English statutes, whether repealed or in force, are important. The principal ones are the following:—

§ 411. 30 Geo. 2—52 Geo. 3.—Stat. 30 Geo. 2, c. 24, § 1, repealed, provides, “that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same . . . shall be deemed offenders against law and the public peace,” and punished by fine, imprisonment, &c.¹ But this statute having been found defective in not providing against obtaining *choses in action* by false pretences, there was added Stat. 52 Geo. 3, c. 64, § 1, now also repealed, which enacts, “that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, or from any body politic or corporate, any money, goods, wares, or merchandise, or any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money or delivery or transfer of goods, or other valuable thing, with intent to cheat or defraud any person, &c., shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished in like manner as if they had knowingly and designedly, by false pretence or pretences, obtained any money, goods, wares, or merchandise, from any person or persons, with intent to cheat or defraud any person or persons of the same.”²

§ 412. 7 & 8 Geo. 4.—Following these statutes and repealing them, and repealing 33 Hen. 8, c. 1,³ respecting privy false tokens,⁴ came Stat. 7 & 8 Geo. 4, c. 29, § 53, since also repealed. It recites, that “a failure of justice frequently arises from the subtle distinction between larceny and fraud;”⁵ and, for remedy thereof, enacts, “that, if any person shall, by any false pretence, obtain from any other person, any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor,” and pun-

Wilgus, 4 Pick. 177; Commonwealth v. Hulbert, 12 Met. 446.

¹ See 2 East P. C. 827.

² See 1 Hawk. P. C. Curw. ed. p. 321.

³ Ante, § 143.

⁴ 1 Deac. Crim. Law, 227. Strictly, the repeal was by 7 & 8 Geo. 4, c. 27.

⁵ Ante, § 165, 166.

ished, &c.: “*provided, always, that, if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, . . . and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.*”¹

§ 413. 24 & 25 Vict.—The statute at present in force in England is 24 & 25 Vict. c. 96, § 88 (A.D. 1861), as follows: “Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement. Provided, that, if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts; provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.”

§ 414. American.—As already observed, the American enactments are copied in substance from the English, but there are more or less minor differences. It will not be best to occupy with them the very great space which they would fill should we introduce them; since every practitioner will have before him those of his own State, and such differences as are important to a general understanding of the subject will be pointed out as we

¹ See 2 Russ. Crimes, 3d Eng. ed. 287.

go along. From the cases cited in a preceding note,¹ and from a general doctrine of statutory interpretation,² we learn, that our courts should, and do, in expounding our own statutes, follow in a general way the English interpretations.

II. What is a False Pretence.

§ 415. **General Doctrine.**—These statutes, like all criminal ones, must, as against defendants, be construed strictly, and nothing not within their words be held to be within their meaning;³ while, on the other hand, as the construction must be liberal in favor of defendants,⁴ “there may be,” in the language of Gross, J., “false pretences not within the statute.”⁵ Therefore the word “pretence,” instead of being understood exactly in the popular sense, has obtained a legal and technical one,⁶ which it is our purpose here to ascertain.

How defined.—In general terms, a false pretence was defined in a Massachusetts case to be, “a representation of some fact, or circumstance, calculated to mislead, which is not true.”⁷ A fuller and practically better definition would be: A false pretence is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.⁸ And the offence discussed in this chapter is the obtaining of valuables by means of the false pretence.⁹

§ 416. **“Symbol or Token”—“Pretence.”**—We saw, in a previous chapter, what is a false token or symbol.¹⁰ Some American statutes employ the words “symbol or token,” in connection with “pretence;”¹¹ and, in those statutes which do not, the

latter word alone must doubtless be construed as co-extensive in signification with the three combined. For it is plain that whatever is a false symbol or false token is also a false pretence.¹

§ 417. **“False”—Erroneous Belief.**—By the terms of the statutes the pretence must be “false.”² And the doctrine undoubtedly is, that, if it is not false, though believed to be so by the person employing it, it is insufficient. Thus, if a man passes as good the note of a bank which has stopped payment, yet if there is found to be liable on it some party not a bankrupt, he cannot be convicted of this cheat.³

§ 418. **How many Pretences.**—But there need be only one false pretence; and, though several are set out in an indictment, yet, if any one of them is proved,—being such as truly amounts in law to a false pretence,—the indictment is sustained.⁴

Harris, Pa. 253; *The State v. Layman*, 8 Blackf. 330; *People v. Gates*, 13 Wend. 311.

¹ For example, compare ante, § 145-158, with *The State v. Vanderbilt*, 3 Dutcher, 328; *Reg. v. Prince*, Law Rep. 1 C. C. 150, 11 Cox C. C. 193.

² *People v. Tompkins*, 1 Parker C. C. 224.

³ *Rex v. Spencer*, 3 Car. & P. 420.

Passing Bad Money.—This was a *nisi prius* case; and Gaselee, J. said: “On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away.” It will be observed, that, in this case, the evidence failed to prove even a depreciation in the intrinsic value of the note. It seems to me that the pretence might be false, and as such sufficient within the statute, though the note was not worthless; as, suppose it was really of half of its nominal value, yet passed on the representation of its being of full value; but the prosecutor, to convict, must prove this depreciation of value. And I think this view is sustained by judicial dicta, taken in connection with the case itself, in *Reg. v. Evans*, Bell C. C. 187, 8 Cox C. C. 257, particularly as reported by Bell. There a £5 note was passed; the note was proved to be that of a private bank no longer in existence, which had paid a dividend of

2s. 4d. in the pound; and a neighboring bank had refused to change it. The chairman of the sessions, at the trial, had submitted it to the jury to determine, as a ground for their verdict, whether the note was, or not, of no value. And the judges held, that the case had not been correctly submitted. *Said Pollock, C. B.*: “Probably this case might have been left to the jury in such a way that the verdict of guilty might have warranted the sustaining of the conviction. Had the prisoner represented the note to be of £5 value when she knew it was not of that value, and the jury had found the false pretence, and that the note was of less value than the £5 to her knowledge, it would have been sufficient to sustain a verdict of guilty.” p. 191. s. p. by Crowder, J. p. 192. It was likewise held in Massachusetts, that the passing of a bill of a broken bank at its nominal value, by one who represents it to be of such value, yet knows it to be nearly if not quite worthless, is an indictable false pretence under the statute, although the bill may be of some value. *Commonwealth v. Stone*, 4 Met. 43.

⁴ *The State v. Dunlap*, 24 Maine, 77; *The State v. Mills*, 17 Maine, 211; *People v. Haynes*, 14 Wend. 546; *Reg. v. Hewgill*, Dears. 815, 24 Eng. L. & Eq. 556; *Bielschofsky v. People*, 5 Thomp. & C. 277; *Crim. Proceed. II. § 171.*

¹ Ante, § 410, note.

² Stat. Crimes, § 97, 242.

³ Stat. Crimes, § 191 et seq.

⁴ Stat. Crimes, § 133, 196, 227-231; Vol. I. § 586.

⁵ *Rex v. Fuller*, 2 East P. C. 837. And see Stat. Crimes, § 133, 206; Vol. I. § 585, 586.

⁶ *McKenzie v. The State*, 6 Eng. 594. And see Stat. Crimes, § 268, 269.

⁷ *Commonwealth v. Drew*, 19 Pick. 179, 184, by Morton J. And see *Reg. v. Woolley*, 1 Den. C. C. 559, 1 Eng. L. &

Eq. 537, 4 New Sess. Cas. 341, Temp. & M. 279; *Reg. v. Henderson*, Car. & M. 328.

⁸ And see *The State v. Vanderbilt*, 3 Dutcher, 328; *Commonwealth v. Hutchinson*, 1 Pa. Law Jour. Rep. 802; *The State v. Evers*, 49 Misso. 542; *Scott v. People*, 62 Barb. 62; *The State v. Penley*, 27 Conn. 587.

⁹ *The State v. Phifer*, 65 N. C. 321. *Bowler v. The State*, 41 Missis. 570.

¹⁰ Ante, § 145-158.

¹¹ See *Commonwealth v. Henry*, 10

§ 419. **Promise.** — A promise is not a pretence.¹ And if a man says, that he will do an act, which he does not mean to do, — as that he will pay for goods on delivery, his purpose being to defraud the seller of them, — the case is not within the statute.² Thus also, —

“**Would tell.**” — An allegation in an indictment, that the defendant falsely pretended he “would tell” the prosecutor where certain strayed animals were, on being paid a sovereign down, was held insufficient. The proof was, that he pretended he knew and would tell; and, the judges said, the indictment should have stated that he pretended to know, in which case the conviction would have been sustained.³ Again, —

“**Will.**” — A pretence by the defendant that he will pay over moneys which he may receive,⁴ or will make an assignment of a particular *chase in action*, is insufficient, because it is merely a promise;⁵ as is also the pretence, the defendant being a physician, that he will cure a person of the pox in three weeks.⁶

§ 420. **Future Event.** — And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretence within the statute; for it must relate either to the past or to the present.⁷ Thus, —

“**About to have,**” &c. — A representation, that the party to whom it is made is about to have his goods and chattels attached, is insufficient.⁸

Distinguished from Pretence as to the Present. — But where the pretence was, that the one making it had a warrant to arrest the defrauded person's daughter for a public offence, punishable

¹ Ryan v. The State, 45 Ga. 128; Reg. v. Gemmill, 26 U. C. Q. B. 312; The State v. Evers, 49 Misso. 542; Colly v. The State, 55 Ala. 85; Reg. v. Woodman, 14 Cox C. C. 179.

² Rex v. Goodhall, Russ. & Ry. 461. **Not meaning to pay.** — Merely to buy goods without the expectation of paying for them does not constitute an indictable false pretence. Tefft v. Windsor, 17 Mich. 486.

³ Rex v. Douglas, 1 Moody, 462. And see Commonwealth v. Hutchinson, 1 Pa. Law Jour. Rep. 302; Commonwealth v. Hickey, 1 Pa. Law Jour. Rep. 436.

⁴ Glackan v. Commonwealth, 3 Met. Ky. 232.

⁵ McKenzie v. The State, 6 Eng. 594. See Reg. v. Burgon, Dears. & B. 11, 36 Eng. L. & Eq. 615.

⁶ Rex v. Bradford, 1 Ld. Raym. 386.
⁷ Rex v. Parker, 7 Car. & P. 825, 2 Moody, 1; Commonwealth v. Drew, 19 Pick. 179; McKenzie v. The State, 6 Eng. 594; Burrow v. The State, 7 Eng. 65; Dillingham v. The State, 5 Ohio State, 280. And see Reg. v. Woolley, 1 Den. C. C. 559, 1 Eng. L. & Eq. 537; Reg. v. Henderson, Car. & M. 328.

⁸ Burrow v. The State, 7 Eng. 65. And see People v. Williams, 4 Hill, N.Y. 2

by fine and imprisonment, whereby he obtained valuables of the latter, the case was held to be within the statute.¹

§ 421. **Pretence and Promise further distinguished.** — There are circumstances of great practical difficulty in applying the distinctions mentioned in the last two sections. Thus, —

Check and no Funds — Post-dated. — While the general proposition is clear, that it is a false pretence to profess untruly to have funds with a banker, and to draw and deliver a check for them,² there occurred the following case, on which the English judges were divided: The prisoner, on purchasing an article for which he was to pay cash, represented he had money in a particular bank; but for his own accommodation post-dated his check, the seller consenting to receive it thus; and said, that it was good and it would be paid on the day of its date, — all of which was, as he knew, false. He was convicted by the jury; and a majority of the judges held the conviction right, on a count which charged him with having falsely pretended that the check “was a good and genuine order for £25, and of the value of £25.”³ Again, —

§ 422. **Promise to marry — Pretence of being Unmarried.** — Where the pretence was made by a man to a woman, that he intended to marry her, on a day agreed between them; and thereby he got from her money to pay for his wedding suit which he had purchased, and for furniture which he said he was going to purchase; this was held by all the English judges to be insufficient.⁴ But where the pretence, which was false, was that the prisoner was *unmarried*, coupled with the promise to marry the woman, this was held to be sufficient.⁵ And, —

§ 423. **Having Money.** — Where the prisoner had obtained from the accommodation acceptor of his bill for £2,600 a loan of £250 toward taking it up, on the pretence of having the remainder of the money himself, while in truth he had but £300, Patteson, J., considered the case to be within the statute; though, as the prisoner was acquitted, it never went before the other judges.⁶

¹ Commonwealth v. Henry, 10 Harris, Pa. 253. See, on this point, People v. Stetson, 4 Barb. 151, stated post, § 468.

² Rex v. Jackson, 3 Camp. 370; Smith v. People, 47 N. Y. 303; Foote v. People, 17 Hun, 218; Reg. v. Hazelton, Law Rep. 2 C. C. 134.

³ Rex v. Parker, 7 Car. & P. 825, 2 Moody, 1. And see Reg. v. Hughes, 1 Post. & F. 355.

⁴ Reg. v. Johnston, 2 Moody, 254. See post, § 446.

⁵ Reg. v. Jennison, 1 Leigh & C. 157.

⁶ Rex v. Crossley, 2 Moody & R. 17, 2

§ 424. **Promise coupled with Existing Fact.** — And this leads us to the proposition, that, though there is a promise connected with the pretence of an existing fact, this promise does not take the case out of the statute. It is, as to the criminal consequence, a mere nullity. If there is a sufficient pretence of a false existing or past fact, the consequence attached to it by the law is not overthrown by the promise; if there is not a sufficient pretence of this sort, the promise does not supply the defect.¹

Lewin, 164. The case of *Rex v. Asterley*, 7 Car. & P. 191, in which the prosecution succeeded, contains also a mixture of promise and pretence. So also *The State v. Rowley*, 12 Conn. 101; *Young v. Rex*, 3 T. R. 98.

¹ 1. The reader will find stated, in our first volume, much to illustrate this proposition; as, for example, at § 284, 338, 339, 774 et seq., 819. In the case of *Reg. v. Jennison*, Leigh & C. 157, mentioned in the section before the last, where it was held, that, though a false promise of marriage is not a false pretence, yet a false representation of being unmarried is, Erle, C. J., giving the opinion of himself and the rest of the judges, said: "Now, it is clear that a false promise cannot be the subject of an indictment for obtaining money by false pretences. Here, however, we have the pretence that he [the prisoner] was an unmarried man. This was false in fact, and was essential; for, without it, he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises, neither of which alone would have supported the conviction." p. 158.

2. The New York commissioners proposed so to change the terms of the statute that it shall read as follows: "Every person who, with intent to cheat or defraud another, designedly, by color or aid of any false token, &c., obtains," &c. And they say, that the words "color or aid" are suggested to be used in the place of the single word "color," as found in the present statute, for the purpose of meeting a decision, which, with their comments upon it, I will state in their own language: "It is held, that

though the false pretence need not be the *only* inducement influential with the injured party, it must be the *controlling* one. *People v. Crissie*, 4 Denio, 525; see also *People v. Haynes*, 11 Wend. 557; *People v. Herrick*, 13 Wend. 87. This rule sometimes leads to a failure of justice; as, for instance, in the late case of *Ranney v. People*, 22 N. Y. 413. In that case the accused represented to one Hock that he had employment for him at a distance in travelling to collect money and do other business; and he promised to give him certain wages therefor, upon condition that Hock should deposit with the accused one hundred dollars as security for his faithful performance of the duty. It was held, that, although the representation and promise were false and fraudulent, an indictment could not be sustained. 'There must be,' say the court, 'a direct and positive false assertion as to some existing matter by which the victim is induced to part with his money or property. In this case the material thing was the promise of the accused to employ the person defrauded and to pay him for his services. There was a statement, it is true, that the prisoner had employment which he could give to Hock; but this was obviously of no importance without the contract which was made. The false representation complained of was, therefore, essentially promissory in its nature, and this has never been held to be the foundation of a criminal charge.' The commissioners doubt the soundness of this decision, even under the existing law. See *Reg. v. Bates*, 3 Cox C. C. 201, where it is held that an indictment which charges a false pretence of an existing fact calculated to induce the confidence which led to the

As influencing the Prosecutor. — The pretence may, on familiar principles,¹ be sufficient, though, in the particular instance, the prosecutor would not have yielded to it had there not been also a promise; as, if a sick man is struck by a blow which would have done him no harm had he been well, yet the blow takes his life, the person who committed the homicide is just as guilty as if, the man being well, he had co-operated with another's muscular power, instead of the invisible agency disease, in bringing about the death. Yet we are here approaching a doctrine to be elucidated further on, namely, that the cheat must have been actually effected by the false pretence, in distinction from another and independent cause.²

§ 425. **Further of Promise coupled with Fact.** — These nice distinctions may be further shown as follows: —

Having Rent to pay. — In one case, the prisoner, who, it was understood, and truly, owed rent, representing that he had the rent to pay borrowed some money; but he did not mean to pay the rent, and did not pay it; and the judges held his conviction to be wrong.³ Here, the pretence was, that he owed the rent; and this was true; therefore the decision was plainly correct.

About to receive Money. — In another case, the prisoner's representation was, that a third person owed him, but he did not say how much, and nothing appeared as to the ability of the alleged

prosecutor's parting with his property, though mixed up with false pretences as to the prisoner's future conduct, is sufficient. Where the false pretence is as to the *status* of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute. See also *Reg. v. Burnside*, 8 Cox C. C. 370 [s. c. Bell C. C. 282], where the indictment charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had a daughter married some time back, had been at him, about twelve yards, by which, &c.; whereas no person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woollen carpet; and the evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for

a family in a large house in the village, who had a daughter lately married, and thereby obtained twenty yards of carpet from him; and it was held that there was a sufficient false pretence alleged." *Draft of a Penal Code*, A. D. 1864, p. 223-225.

3. As general exposition of the criminal law, it is safe to state, that, when a particular forbidden cause contributes to the effect which renders a party punishable, we do not inquire whether it acted alone, or in concert with something else. Did the cause contribute? If it did, the law regards it as having done the thing, the same as though it operated alone. And see, for illustrations of this doctrine, Vol. I. § 212 et seq., 628 et seq., and various other places.

¹ See the last note.

² Post, § 451.

³ *Reg. v. Lee*, Leigh & C. 309.

debtor to pay. And this was held not to be a sufficient false pretence; but the main ground of the decision was, that an indefinite indebtedness from a person of unknown means was not such a fact as, if it were true, would induce any person of ordinary prudence to part with his money; therefore the pretence could not be deemed a means by which the fraud was effected.¹

§ 426. **Owning Property — (Mortgage).** — Where a man obtained a loan of money on the false representation that a house had been built on his land, and he would execute a mortgage thereon for the money, the case was held to be within the statute, notwithstanding there was no mortgage made when the money was got; but, instead thereof, there was given an obligation to execute a mortgage afterward.² In like manner, it is a sufficient false pretence for one to represent untruly, that he owns some articles of personal property, and thus to obtain a loan which he in form secures by a mortgage on the property.³

§ 427. **Pretence and Promise influencing Mind together.** — According to the facts of perhaps most cases, the representation extends more or less into the field of promise, as certainly the parting with the property extends into the field of hope. And if there is a sufficient false pretence of an existing or past fact, as already defined, blended nevertheless with a promise for the future, the pretence is still sufficient, as already mentioned.⁴ And — a point which perhaps belongs further on in our discussion — the English judges have held, that, where the pretence and the promise, blended together, acted jointly on the mind of the defrauded person as the inducement to part with his goods, and he would not have parted with them by reason of the pretence alone without the promise, the case falls still within the statute.⁵ If this doctrine seems, at the first impression, to carry the law far toward the shadowy ground of mere promise, a single consideration, added to what has already been said, shows that it does not carry it over the line. Were a promise not permitted to intervene between the pretence and the cheat, without destroying the indictable quality of the transaction, the statute itself would

¹ The State v. Magee, 11 Ind. 154.

⁴ Ante, § 419-425.

² Reg. v. Burgon, Dears. & B. 11, 7
Cox C. C. 131, 26 Eng. L. & Eq. 615.
See post, § 444.

⁵ Reg. v. West, Dears. & B. 575, 8
Cox C. C. 12; Reg. v. Fry, Dears. & B.
449, 7 Cox C. C. 394.

³ Commonwealth v. Lincoln, 11 Allen,
233. See also post, § 444.

be rendered almost null. And no construction of any statute is allowable, the consequence of which is to nullify it.¹ When a man says on his oath, that, without the promise, he should not have parted with his goods, he says nothing legally different from the assertion, that, if the defendant had not asked him for them, he should not have let them go. The request is not a pretence, yet without it the goods would not have gone; the promise is not a pretence, yet without it the goods would not have gone. These are things not to be taken into the account. Would the prosecutor have parted with his goods without the pretence? did the pretence so operate with the request and the promise as to defraud him of them? — these are the relevant questions.²

§ 428. **False Affirmation.** — Another distinction, perhaps substantial, but a little thinner than the last, is between a false pretence and a false affirmation, the latter not being sufficient.³

False Excuse. — And, on a like distinction, when a man, accustomed to receive parochial relief, was told by an overseer of the poor to go to work and help maintain his family, but said he could not because he had no shoes; whereupon he was supplied with a pair, while in truth he had two pairs previously received of the parish, — the judges held the conviction against him to be wrong; “the statement made by the prisoner being rather a false excuse for not working, than a false pretence to obtain goods.”⁴

§ 429. **Fact as distinguished from Opinion, &c.** — The general idea, in part developed in the foregoing sections, is, that the false pretence must be of some existing fact, in distinction alike from a mere promise and a mere opinion, and this fact must be such in its nature as is known to the person employing the pretence.⁵ Therefore, —

Sum due. — An indictment, alleging that the defendant falsely pretended a sum of money, parcel of a certain larger sum, was

¹ Stat. Crimes, § 82.

² See also ante, § 424 and note, 425;
post, § 461.

³ Rex v. Reed, 7 Car. & P. 848. The law of this case, which was decided by all the judges, is so connected with a question of pleading, that, since there are no reasons given in the opinion, it is not much to be relied upon as an au-

thority. See also post, § 429, 432; Commonwealth v. Norton, 11 Allen, 266; The State v. Penley, 27 Conn. 587.

⁴ Rex v. Wakeling, Russ. & Ry. 504.

⁵ People v. Tompkins, 1 Parker C. C. 224, 238; Johnson v. The State, 41 Texas, 65; The State v. Webb, 26 Iowa, 262; The State v. Hefner, 84 N. C. 751; People v. Jacobs, 35 Mich. 36.

“due and owing” to him for work which he had executed for the persons to whom the pretence was made, whereby, &c., was held not to be sufficient. The allegation was not of a false pretence of an existing fact; because it might be satisfied in the proof by showing a mere opinion concerning facts complicated with questions of law.¹ And, —

“**Did not think.**” — Where a broker, negotiating a mortgage, falsely declared that he did not think his principal would take less than a sum named, the majority of the judges deemed that an indictment would not lie.² Also, —

Value of Business. — The like was ruled, by Byles, J., of a false representation of the value of a business.³ This, it is perceived, is in substance mere opinion. But, —

Soundness of Horse. — A representation that a horse is sound, by one who knows it not to be, is, within the statute, indictable.⁴

How distinguish. — In cases like these, there is always a point at which mere opinion ends and fact begins. Doubtless there may be expressions about the value of a business, or what one's principal will do, and certainly there may be as to what sum is due, which will be adequate false pretences; and there may be expressions as to the soundness of a horse, not adequate. Plainly the test must be the common sense of judge and jury, applied to the special facts of each case.

§ 429 a. **Pretensions to Power.** — If one pretends to possess the power to do something, whether natural or supernatural, while conscious he has it not, — is this mere opinion, or is it a false pretence? It is deemed, in some English cases, perhaps correctly, to be the latter. Thus, —

Bring back Husband. — A wife having been deserted by her husband, the defendant, a woman, pretended to her, that, by the use of “a certain stuff,” she could bring him back “over hedges and ditches.” “She said she was what they called the Cunning Woman, and there was not another woman such as her about handy.” The deserted wife paid the fee, but the husband did not return until she went for him; and it was held that an indictment would lie. If the defendant had really believed that

¹ Reg. v. Oates, Dears. 459, 29 Eng. L. & Eq. 552, 6 Cox C. C. 540, 24 Law J. n. s. M. C. 123, 1 Jur. n. s. 429, 3 Com. Law, 661; Reese v. Wyman, 9 Ga. 430. See post, § 454-457.

² Scott v. People, 62 Barb. 62.
³ Reg. v. Williamson, 11 Cox C. C. 228. See post, § 438.
⁴ The State v. Stanley, 64 Maine, 157 post, § 458.

she possessed the power claimed, the prosecution, it was conceded, could not have been maintained.¹

Witchcraft. — And it has been ruled that a gypsy, obtaining money under the pretence of practising witchcraft, is indictable — for false pretence or for larceny.²

§ 430. **Need not be in Words.** — Again; the pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party.³

Appearing in Cap and Gown. — If, therefore, at Oxford, in England, a person, not a member of the University, goes to a shop for the purpose of fraud, wearing a commoner's cap and gown, and gets goods; this appearing in a cap and gown is a sufficient false pretence of being a member of the University to satisfy the statute, although nothing verbal passed.⁴

Uttering. — And the fact of uttering a counterfeit note, as a genuine one, is tantamount to a representation of its being genuine.⁵ Moreover, in the language of Robinson, C. J., “When a person tenders to another a promissory note of a third party, in exchange for money or goods, although he may say nothing upon the subject, yet he should be taken by his conduct to affirm or pretend that the note has not to his knowledge been paid, either wholly or to such an extent as has almost destroyed its value, leaving only such a trifling sum due as would make the note a wholly inadequate consideration for what was obtained in exchange.”⁶

§ 431. **Different Conversations connected.** — Where the representation is in words, and there are conversations at different times, they may be connected to show a false pretence, though what was said on any one occasion would not be alone sufficient. And the question is for the jury, whether the different conversations can be so connected as to constitute one transaction.⁷

¹ Reg. v. Giles, Leigh & C. 502, 10 Cox C. C. 44. And see Reg. v. Ball, Car. & M. 240; Reg. v. Evans, Bell C. C. 187, 8 Cox C. C. 257; Commonwealth v. Nason, 9 Gray, 125; Cheek v. The State, 1 Coldw. 172;

² Reg. v. Bunce, 1 Fost. & F. 523.
³ Rex v. Freeth, Russ. & Ry. 127; Reg. v. Copeland, Car. & M. 516; Rex v. Story, Russ. & Ry. 81; Commonwealth v. Drew, 19 Pick. 179; Reg. v. Giles, Leigh & C. 502, 10 Cox C. C. 44; Reg. v. Partridge, 6 Cox C. C. 182.

⁴ Reg. v. Barnard, 7 Car. & P. 784.
⁵ Rex v. Freeth, Russ. & Ry. 127.

⁶ Reg. v. Davis, 18 U. C. Q. B. 180, 184. And see Lesser v. People, 78 N. Y. 78.
⁷ Reg. v. Welman, Dears. 188, 20 Eng. L. & Eq. 588, 22 Law J. n. s. M. C. 118, 17 Jur. 421.

§ 432. **Proximate to the Fraud.**— Another proposition is, that the pretence must be of some matter sufficiently proximate to the obtaining of the goods. Therefore, —

Contract intervening.— Where one had falsely represented that he was a naval officer; “upon which he made with the prosecutrix a contract for board and lodging, at the rate of one guinea a week, and he was lodged and fed as the result of the contract;” the pretence was held not to be sufficient. “We are of opinion,” said Jervis, C. J., “that the conviction was not right, because we think that the supply of articles, as it was said, upon the contract made by reason of the false pretence was too remotely the result of the false pretence in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretences.”¹ Yet the mere fact of a contract intervening between the pretence and the consummated fraud, does not of itself take away the indictable quality of the transaction.²

§ 432 a. **Known equally to both Parties.**— It appears to be laid down in Massachusetts, that, in the language of the judge, “a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the party who made it,” is not such a false pretence as will sustain an indictment, though within the terms of the statute. In its interpretation, it ought to be restricted. Therefore, —

Pretending wrong Change.— To obtain money of a trader by pretending that on a previous occasion he had not returned adequate change is not indictable. “The case,” said the judge, “was one of a demand of money as of right, growing out of what might have been an illegal sale of liquors, and was yielded to by the seller, he being personally connected with all the alleged facts, and voluntarily submitting to the demand thus made upon him. . . . We are aware,” he continued, “that some of the English judges have given a more extended construction of their statute in cases that have there arisen.”³

How in Principle.— To the present author, it seems impossible to imagine a case more completely within the spirit of the statute than this, while it is admitted to be within its letter. A person constantly making change to customers, and one taking

¹ Reg. v. Gardner, Dears. & B. 40, 46,
7 Cox C. C. 186, 36 Eng. L. & Eq. 640.
But see post, § 483.

² Post, § 483.

³ Commonwealth v. Norton, 11 Allen,
266, 267, 268.

it in a single instance, stand on entirely unequal ground, both because the former cannot be expected to remember the instance while the latter can, and because the former has parted with the change while the latter has it constantly in possession to count and recount as often as he chooses. And there is no villany more deserving of reprehension, or more detrimental to confidence in trade, than for one, taking advantage of an honest purpose, to get money by a trick of this nature.¹

§ 433. **Shallow Devices.**— There remains one question not quite free from difficulty. We saw, in the preceding volume,² that, as a general proposition, the criminal law is not administered on the plan of giving a particular protection to the weak and feeble; and we shall presently see,³ that a false pretence, to be indictable otherwise than as an attempt,⁴ must be successful. It is plain, therefore, that a device so shallow as to be incapable of imposing on any person, cannot constitute a false pretence. But must the pretence be such as is calculated to mislead men of ordinary prudence? Some of the older cases lay down the doctrine that it must.⁵ But, in reason, and it is believed according to the better modern authorities, a pretence calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, practised on the latter. Thus, —

§ 434. **Weak Mind.**— Caton, J., in an Illinois case, observed: “Should an article, the essential value of which consisted in its color, be offered to a person fully possessed of the sense of sight, and with every opportunity for inspection, with the pretence that it was white when in fact it was black, under such circumstances the false pretence might be very innocent, because it was not calculated to deceive; while the same pretence made to a blind person would be calculated to deceive, and might subject the party to punishment.”⁶ And the same truth is applicable to the possession and lack of the other faculties of the human understanding. Therefore, —

¹ And see post, § 435.

² Vol. I. § 251, 585.

³ Post, § 460.

⁴ Post, § 488.

⁵ The State v. Simpson, 3 Hawks, 620;
Commonwealth v. Wilgus, 4 Pick. 177,
178; People v. Haynes, 11 Wend. 557, 14

Wend. 549, note; People v. Williams, 4
Hill, N. Y. 9; Skiff v. People, 2 Parker
C. C. 139, 147. Contra, Chancellor Wal-
worth in People v. Haynes, 14 Wend. 546,
557. And see Moore v. Turbeville, 2
Bibb, 602; ante, § 425.

⁶ Cowen v. People, 14 Ill. 348. And

Ordinary Prudence.—The doctrine, that, in the language of Russell, the pretence “need not be such an artificial device as will impose upon a man of ordinary caution,” is fully established, at least in the English courts. At the same time there may be devices too frivolous for the law to notice.¹ And the pretence need not be such—a proposition not essentially differing from the last—as cannot be guarded against by common prudence.²

§ 435. **Carelessness**—(Cheat in making Change).—This doctrine has been carried so far in England, that, when a man passed out to another, for change, a bank-note, saying it was for £5, when really it was, as he knew, for only £1, and received the change as for a £5 note, he was held to have committed this offence, though the person to whom he passed the note could read. Said Lord Campbell, C. J.: “We are all of opinion that the conviction was right. In many cases, a person giving change would not look at the note; but, being told it was a £5 note and asked for change, would believe the statement of the party offering the note, and change it. Then, if, giving faith to the false representation, the change is given, the money is obtained by false pretences.”³

§ 436. **How in Principle, as to Shallow Devices, Weak Minds, &c.**—Practically, it is impossible to estimate a false pretence, otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth, there is not one who would not be pronounced by the rest to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath

see Reg. v. Coulson, 1 Eng. L. & Eq. 550, Temp. & M. 332, 1 Den. C. C. 502, 14 Jur. 557.

¹ 2 Russ. Crimes, 3d Eng. ed. 289, and see the note of Mr. Greaves; Reg. v. Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, 4 New Sess. Cas. 341, Temp. & M. 279. And see Reg. v. Smith, 1 Den. C. C. 510, 2 Car. & K. 882, Temp. & M. 214.

² The State v. Mills, 17 Maine, 211; Reg. v. Woolley, supra; Rex v. Freeth, Russ. & Ry. 127; Smith v. People, 47 N. Y. 303, 307; People v. Pray, 1 Mich. N. P. 69; Hamilton v. Reg. 2 Cox C. C. 11, 15; Colbert v. The State, 1 Texas Ap. 314.

³ Reg. v. Jessop, Dears. & B. 442, 7 Cox C. C. 399. Compare this with ante, § 432 a.

could not be done by a man of ordinary judgment and discretion. These things being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretence, an argument, an inducement to action, in any other scale than that of its effect.

§ 437. **Further Illustrations of False Pretences:**—

Pecuniary Condition.—With these general principles before us, we may profitably look at some further illustrations of false pretences. A common instance is where one represents himself or his firm to be in a sound pecuniary condition, or to owe only so much,¹ or to be worth so much money, knowing the facts are otherwise;² or falsely pretends to have a particular fund in his own hands³ or another's;⁴ whereby he gains a credit.

§ 438. **Business, Social Standing, &c.**—Or the representation may be concerning his business, situation, or standing in life, as in the instance already mentioned⁵ of pretending to be a member of the university. Again, where the defendant said untruly that he was a captain of the 5th Dragoons, the indictment was held good.⁶ And the false pretences of carrying on an extensive business as auctioneer and house agent,⁷ of being a chaplain in the army in need of money,⁸ and of being a married woman living with her husband, and authorized to pledge his credit, while in fact she is living apart from him on a separate maintenance,⁹ have been severally held to be sufficient.

¹ The State v. Pryor, 30 Ind. 350.

² Commonwealth v. Davidson, 1 Cush. 33; People v. Haynes, 11 Wend. 557; Reg. v. Howarth, 11 Cox C. C. 588; Commonwealth v. Poulson, 4 Pa. Law Jour. Rep. 20. Such a representation, falsely made, was held not to be within the statute in Vermont, whereby, “If any person shall by false tokens, messages, letters, or by other fraudulent, swindling, or deceitful practices, obtain or procure from any person or persons any money, goods, or chattels,” he shall be punished, &c. The court considered that the words “other fraudulent,” &c., were added, not to enlarge the definition of the offence from positive acts to mere declarations, but to extend the meaning to all other cases of the like nature with those mentioned previously. The State v. Sumner, 10 Vt. 587. And see Stat. Crimes, § 245, 246.

³ Commonwealth v. Burdick, 2 Barr, 163; People v. Kendall, 25 Wend. 399; Reg. v. Henderson, Car. & M. 328; Rex v. Crossley, 2 Moody & R. 17, 2 Lewin, 164; Reg. v. Adamson, 1 Car. & K. 192, 2 Moody, 286.

⁴ People v. Herrick, 13 Wend. 87; The State v. Reidel, 26 Iowa, 430.

⁵ Ante, § 430; Rex v. Barnard, 7 Car. & P. 784.

⁶ Hamilton v. Reg. 9 Q. B. 271, 16 Law J. n. s. M. C. 9. See ante, § 432. A case of misrepresenting the business connections is Reg. v. Archer, Dears. 449, 1 Jur. n. s. 479, 33 Eng. L. & Eq. 528, 6 Cox C. C. 515.

⁷ Reg. v. Crab, 18 Law Times, n. s. 370, 11 Cox C. C. 85. And see Commonwealth v. Jeffries, 7 Allen, 548.

⁸ Thomas v. People, 84 N. Y. 351.

⁹ Reg. v. Davis, 11 Cox C. C. 181.

§ 439. **False Personating.** — The false personating of another, concerning which we have seen,¹ there was doubt under the ancient common law and the false-token statute of Hen. 8, is a false pretence. Thus, where one, to obtain money, falsely represented himself to be Mr. H. who had cured Mrs. C. at the Oxford Infirmary, he was held to be indictable for the cheat effected thereby.²

§ 440. **Assuming False Name.** — And so, generally, is the assuming of a false name,³ or even of a fictitious one, a false pretence, though here, as in all the other cases of cheating by false pretences, there must be the necessary fraud effected by the act.⁴ Consequently, —

Money Order. — Where a person with a money order upon a post-office, falsely assumed to be the individual mentioned in it, and so got it cashed, he was held to have committed this offence; notwithstanding, when he received the money, he signed his real name, which was Story, while the name mentioned in the order was Storer.⁵

§ 441. **Being authorized.** — So, although a representation, which is untrue, of being authorized to get money or goods for a person is not a false token,⁶ it is a false pretence.⁷

Forged Order. — *A fortiori*, this is so also, if the party making the representation carries with him, as from the other, a forged order.⁸

§ 442. **Sum due — False Accounts, &c.** — And where the secretary of an Odd Fellows' lodge, by the mere naked falsehood of telling a member he owed the lodge 13s. 9d., obtained that sum of him fraudulently, whereas the amount owed was only 2s. 2d., he was held to be rightly convicted of getting money under a

¹ Ante, § 152-155.

² Rex v. Bloomfield, Car. & M. 537.

³ Commonwealth v. Wilgus, 4 Pick. 177.

⁴ Post, § 460, 461; Commonwealth v. Drew, 19 Pick. 179.

⁵ Rex v. Story, Russ. & Ry. 81. And see People v. Peacock, 6 Cow. 72.

⁶ Ante, § 145.

⁷ People v. Johnson, 12 Johns. 292; Commonwealth v. Hulbert, 12 Met. 446; Reg. v. Davis, 11 Cox C. C. 181; McCorkle v. The State, 1 Coldw. 833; Reg. v.

Robinson, 9 L. Canada, 278. See Reg. v. Tully, 9 Car. & P. 227; Chapman v. The State, 2 Head, 36, post, § 458.

⁸ Tyler v. The State, 2 Humph. 37. And see Rex v. Cartwright, Russ. & Ry. 106. Of course, if the uttering is, as in some States, a statutory felony, an indictment for false pretences cannot be maintained where this cheat is only a misdemeanor; Vol. I. § 815; unless there is a provision in the statute, like that in the present English one, ante, § 412, 413, to meet the case.

false pretence.¹ Various other cheats, by false representations of the sum due, by false accounts, and the like, have been held to be indictable false pretences.²

Weight. — Moreover, it appears that a mere false representation of the weight of an article sold is a sufficient false pretence.³

§ 443. **Further as to Weight.** — On the latter question, some interesting cases have arisen. Thus, where the prisoner had sold a load of coal to the prosecutor, representing its weight to be so many pounds, while he knew it was less, and he had so packed the coal in his cart as to make it appear to be of larger bulk than it was, the pretence was held to be sufficient.⁴ In another case, the prisoner, selling loads of soot by weight, had them weighed at a distance from the place of delivery, and brought with him tickets of their weight; but, subsequently to their being weighed, he lightened the loads. And he was held to be rightly convicted. "Suppose," said Pollock, C. B., "a man offers a basket of apples for sale, and, on being asked what quantity there is, says, 'Two bushels,' and is paid for them at the rate of so much a bushel, would he not be indictable if the upper part of the basket only contained apples, and the lower part sand and cinders?"⁵ The distinction seems to be, that,

¹ Reg. v. Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, Temp. & M. 279, 4 New Sess. Cas. 341. See ante, § 429, for a case almost like this, where the contrary result was obtained. And see Reg. v. Prince, Law Rep. 1 C. C. 150, 11 Cox C. C. 193.

² Reg. v. Steels, 11 Cox C. C. 5; Reg. v. Leonard, 1 Den. C. C. 304, 3 Cox C. C. 284, 2 Car. & K. 514; Reg. v. Cooke, 1 Fost. & F. 64; Reg. v. Cooke, Law Rep. 1 C. C. 295, 12 Cox C. C. 10, 2 Eng. Rep. 167; Reg. v. Byrne, 10 Cox C. C. 369. See Reg. v. Butcher, Bell C. C. 6, 8 Cox C. C. 77.

³ Rex v. Reed, 7 Car. & P. 848; Reg. v. Sherwood, Dears. & B. 251, 7 Cox C. C. 270, 40 Eng. L. & Eq. 584.

⁴ Reg. v. Ragg, Bell C. C. 214, 217, 8 Cox C. C. 262; Erle, C. J., observing: "There was a false representation that there were 15 cwt. of coals in the cart when there were only about 8 cwt.; so that, as to 7 cwt., there was a pretence

of a delivery which was altogether false, and, although the falsehood related only to a part of the entire quantity to be delivered, yet, as to that part, such a case has been held to be within the class where payment for goods is obtained by a pretence of a delivery which is false as to the entire quantity that was to have been delivered. This is a false pretence of a matter of fact cognizable by the senses." And see, as confirming this case, Reg. v. Kerrigan, Leigh & C. 383.

⁵ Reg. v. Lee, Leigh & C. 418. The reporter in this case refers to Reg. v. Ridgway, 3 Fost. & F. 838, where Bramwell, B., observed: "If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is selling it by the quantity, and says there is a greater quantity than there

aside from any element of special device, if a man says a quantity of stuff he is offering for sale measures so much, or weighs so many pounds, and the purchaser buys it, relying on the representation, which the seller knows to be false, the pretence is within the statute. But if the sale is in lump, and the seller merely expresses an opinion as to the weight or measure, he is not indictable, though the opinion is exaggerated.¹

§ 444. **Title to Property.** — The false pretence of having title to property, or of its being unincumbered by mortgage, made by one offering it for sale, is within the statute.²

Warranty. — Whether, if the purchaser takes a conveyance with covenant of warranty, this does not create a distinction, on the ground that he must be presumed to rely on his covenant, and not on the pretence, is a question. In an English *nisi prius* case, where the main misrepresentation proved was in the deed of conveyance itself, which contained also this covenant, the presiding judge ruled against the prosecution; because, he said, “the doctrine contended for would make every breach of warranty or false assertion at the time of a bargain a transportable offence.”³ But, in Maine, it is held, that if, on an exchange of personal property, one falsely pretends to own unincumbered what he is disposing of, and also warrants it against incumbrances, he is liable to indictment, provided the pretence, and not the warranty, was the inducement to the other to make the exchange.⁴ And this is doubtless the true doctrine.⁵

§ 445. **Being unmarried — Right to bring Suit.** — The pretence of being unmarried, and in a condition to contract matrimony, is, we have seen, sufficient.⁶ In an English case, a married man

really is, and thereby gets paid for a quantity of coal, over and above the quantity delivered, I am quite satisfied he is indictable.”

¹ The reader will see, in the last note, the distinction somewhat differently expressed, and accept for himself the form of expression which he deems the more accurate. See also post, § 453, note, 457.

² Ante, § 426; *The State v. Newell*, 1 Misso. 248; *Commonwealth v. Lincoln*, 11 Allen, 233; *Reg. v. Meakin*, 11 Cox C. C. 270. See *Reg. v. Martin*, 1 Fost. & F. 501.

³ *Rex v. Codrington*, 1 Car. & P. 661,

Littledale, J.; the property being a reversionary interest in one-seventh share of a sum of money left by the defendant's grandfather. And see *Rex v. Pywell*, 1 Stark. 402; *Reg. v. Burgon*, Dears. & B. 11, 26 Eng. L. & Eq. 616; *The State v. Dozier*, Dudley, Ga. 156; ante, § 426; *The State v. Chunn*, 19 Misso. 233.

⁴ *The State v. Dorr*, 33 Maine, 498. And see *Reg. v. Adamson*, 1 Car. & K. 192, 2 Moody, 286.

⁵ See *Commonwealth v. Lincoln*, 11 Allen, 233; ante, § 426.

⁶ See ante, § 422.

had paid his addresses to the prosecutrix, and got from her a marriage promise, which she refused to ratify. He then threatened her with an action at law, and obtained from her, in ignorance of the impediment, £100 to forbear. The indictment against him charged the pretences to be, first, that he was unmarried; secondly, that he was entitled to maintain a suit for breach of promise. Lord Denman, C. J., left it for the jury to say, whether the money was in fact obtained by the false pretence of the prisoner that he was single. They found him guilty, and the chief justice conferred with Maule, J., and both were “clearly of opinion, that there was evidence to go to the jury that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and Mr. Justice Maule was further of opinion, that there was also evidence of the money having been obtained by the false pretence of the prisoner that he was entitled to maintain an action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute.”¹

§ 446. **Bet on Race.** — An early pretence, under Stat. 30 Geo. 2, c. 24, § 1, was of having made a bet on a race to be run the next day (the person of whom the money was obtained was to share the bet); and this was held to be within the statute.²

Intrusted with Horses. — So it was held, of pretending to have been intrusted by one to take his horses from Ireland to London, and to have been detained by contrary winds till his money was spent; thereby getting a loan.³

Delivered Parcel. — The like is held where a carrier, to get the carriage-money, falsely says he has delivered the goods, and lost the receipt for them.⁴

§ 447. **Common Tricks of Trade:** —

General View. — A “common trick of trade” is a thing not easily defined, but a variety of vices have prevailed from the earliest times, often designated by this general term. And defendants have struggled with the courts to induce them to hold, that whatever may be deemed a common trick of trade is not within these false-pretences statutes. Sometimes they have

¹ *Reg. v. Copeland*, Car. & M. 516.

² *Rex v. Villeneuve*, 2 East P. C. 830.

³ *Young v. Rex*, 3 T. R. 98, 2 East P. C. 828.

⁴ *Rex v. Airey*, 2 East P. C. 831; *Rex v. Coleman*, 2 East P. C. 672.

overcome the judicial mind on this sort of question; but, in a general way, they have been overborne, and it is substantially settled, that any false representation, extending beyond mere opinion, concerning the quality, value, nature, or other incident of an article offered for sale, whereby a purchaser, relying on the representation, is defrauded, is a violation of these statutes.

§ 448. **Passing Worthless Bank Bill, &c.** — The difficulty lies in the application of this principle. Clearly, the passing for value, of a worthless piece of paper, known to be such, — as, for example, of a bill on a broken bank,¹ or any other specious and valueless bank-bill,² even though, according to the majority of the English judges, the bill on its face would be good for nothing if true,³ — is a sufficient false pretence, being also, we have seen,⁴ a false token.

§ 449. **Selling by "Taster."** — A plain case, also, occurred in the purchase of a cheese. Before the prosecutor bought it, the prisoner bored it with an iron scoop, and produced a piece called a "taster," at the end of the scoop, for him to taste. This taster was not in fact taken from the cheese, as it appeared to be, but the prisoner had extracted it from another and superior cheese, and fraudulently inserted it into the top of the scoop. The prosecutor tasted, was satisfied, bought; and the prisoner's conviction was held by the English judges to be right.⁵ These facts are even sufficient to constitute a cheat at the common law.⁶

¹ Commonwealth v. Stone, 4 Met. 43; Reg. v. Dowey, 11 Cox C. C. 115.

² Commonwealth v. Hulbert, 12 Met. 446, 448. And see ante, § 441 and note.

³ Rex v. Freeth, Russ. & Ry. 127.

⁴ "Writing." — In New York, under a statute with the clause, "by color of any false token, or writing, or by any other false pretence," the court held, that the word "writing" did not include a paper in the form of a bond, neither having nor purporting to have the signature of any person attached to it. "Writing, as used in the statute, must mean some instrument or at least letter — something in writing or purporting to be the act of another, or certainly of some person; but the paper presented in this case does

not answer any such description; it was no writing at all, because it did not purport to be the act of any person. Writing, as used in the statute, cannot mean any thing written upon paper, not purporting to be of any force or efficacy; but some instrument in writing, or written paper, purporting to have been signed by some person." And it was observed, that the writing must be false, while there was no falsity about this one; "it was exactly what it purported to be." People v. Gates, 13 Wend. 311, opinion by Savage, C. J.

⁵ Ante, § 148, 149.

⁶ Reg. v. Abbott, 1 Den. C. C. 273, 2 Car. & K. 630. In a later case, the prosecutor bought of the prisoner eight

⁶ Ante, § 145 et seq.

Sample of Turpentine. — In like manner, a sale of barrels of crude turpentine, under the representation that "they are all right, just as good at bottom as top," when their chief contents are chips, comes even within a statute against cheating by false tokens.¹

§ 450. **Opinion blending with Fact.** — But when we depart from such cases as these, and come to those in which it is uncertain whether what seems to be fact is not mere opinion, the difficulties of our present inquiry increase. Thus, —

Sheep free from Disease. — In New York, the majority of the court sustained an indictment which alleged, that the defendants falsely represented a drove of sheep, offered by them for sale, to be free from disease and foot-ail, and a lameness apparent in some of them to be owing to accidental injury, which pretences were false, &c.; but Bronson, C. J., dissented, deeming the case to be one simply of representing goods as better than they are.²

§ 451. **Identity of Horse.** — In Maine, where the owner of a horse pretended it was a particular one called the Charley, knowing it was not, and thereby effected an exchange of it for other

cheeses, on the latter's representation that certain "tasters" produced had been extracted from these cheeses, while in fact they were, as he knew, from another cheese. And it was held that he was rightly convicted. Wightman, J., observed: "If the prisoner had said, that the cheeses were equal to the tasters produced, that would have fallen within Bryan's Case [see post, § 454-456]; but he said to the prosecutor, 'These tasters are part of the very cheese I propose to sell you;' and therefore it was a representation of a definite fact." Reg. v. Goss, Bell C. C. 203, 219, 8 Cox C. C. 262.

¹ The State v. Jones, 70 N. C. 75.

² People v. Crissie, 4 Denio, 525. Generally of Tricks of Trade. — Walworth, Ch., sitting in the old "Court of Errors" of this State, once said: "I am aware, from numerous cases which have come under my observation, judicially and otherwise, that the rule of morality, established by the decisions under these statutes [against cheating by false pretences], and by the common law of Scot-

land, has been deemed too strict for those who, in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their little all, which in many instances was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn, that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any wilful misrepresentation, or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York, or of any other part of the State." People v. Haynes, 14 Wend. 546, 559.

property, the court held this to be a sufficient false pretence, even if the horse were as good and as valuable as the Charley.¹

§ 452. **Desire to Purchase.** — In a Connecticut case, there was a false pretence in the nature of a conspiracy. By an arrangement between two defendants, who had severally property they wished to sell for more than it was worth, each represented to a different third person that he desired to purchase the other's property, and requested the third person to buy it in his own name, at a sum mentioned, greatly above its value, promising to purchase it of him; but, on its being bought, refused. This was held to be obtaining money by false pretences.²

§ 453. **Rule of Morality — (Silver — Horse).** — Two late English cases go far to establish the rule of morality as a part of the law on this subject. In one it appeared, that the prisoner offered a chain in pledge to a pawnbroker, falsely affirming it to be of silver, while in truth he knew it to be, not of silver, but of a metal nearly valueless. And the court held, that this was a sufficient false pretence.³ In the other case, a false statement concerning the soundness of a horse, which the prisoner sold, was deemed to be sufficient.⁴ Still the court clings to the idea, that the statute was not meant to enforce fully the rule of right in dealings of this kind. But where the line is to be drawn which separates what is allowed to the frailty of man from what the statute condemns, we have no means at present of stating with exactness.⁵

§ 454. **Opinion and Fact further distinguished.** — If we look to

¹ The State v. Mills, 17 Maine, 211. And see Reg. v. Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848.

² The State v. Rowley, 12 Conn. 101.

³ Reg. v. Roebuck, Dears. & B. 24, 36 Eng. L. & Eq. 631, 7 Cox C. C. 126. The conviction was in fact for an attempt only, because the pawnbroker tested the metal, relying on his test, and not at all on the pretence.

⁴ Reg. v. Keighley, Dears. & B. 145. Here also was no conviction, because of a formal defect. s. r. The State v. Stanley, 64 Maine, 157.

⁵ In the case of Reg. v. Lee, Leigh & C. 418, 425, already mentioned, ante, § 443, where the false pretence consisted

in misrepresenting the weight of the article sold, Pollock, C. B., observed: **Overpraise of Article — Trick.** — "It has been said that what took place was in the course of a transaction of buying and selling; and, no doubt, where, in the actual course of bargaining, when one man is seeking to exalt, and the other to depreciate the subject-matter of the bargain, the vendor indulges in overpraise of the thing he has to sell, that is not within the statute. Yet, although there may be a real bargain, if some device is used by which the buyer is imposed on, the vendor may be indicted and convicted." And see ante, § 443 and note.

the reason of the law, and especially to its words, we shall see, that its aim is to prevent cheating, and the specific cheat denounced is the one effected by a "false pretence." Now, a mere opinion is not a false pretence; but any statement of a present or past fact is, if false. When two men are negotiating a bargain, they may express opinions about their wares to any extent they will; answering, if they lie about the opinions, only to God, and to the civil department of the law of the country. But when the thing concerns fact, as distinguished from opinion, and a man knowingly misstates the fact, his words in reason amount to a false pretence. Thus, —

Stamp on Wares. — In England, a false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company, and that the number 18 therein meant eighteen-carat gold, referring to the fineness of the case, is held to be an indictable false pretence; nor is it the less so because the watch was further represented to be a gold one, and there was some gold in its composition.¹ In this instance, good morals and sound law happily blend. On the other hand, —

Thickness of Silver Plating — Quality of Foundations. — A man was indicted for obtaining money by the false pretences, that some spoons which he pledged for it as silver-plated had on them as much silver as "Elkington's A," and the foundations were of the best material. Here were two representations, one concerning the quantity of silver which formed the plating, the other concerning the quality of the foundations: both representations were false, known to be so by him who made them. The one, concerning the quantity of silver, was, it is submitted, of a matter of fact; the other, concerning the quality of the foundations, was, it is submitted, of a matter of opinion. On the question whether the pretence was within the statute, the judges differed; the majority held that it was not. They did not put the case in the form here presented, and exactly what was their view the report does not render very plain. The following, from Lord Campbell, C. J., of the majority, not speaking, however, for the rest, conveys a general idea of the reasoning on this side: "With regard to quality, it has been said, that it is lawful to lie. The seller exaggerates, and the buyer depreciates the quality.

¹ Reg. v. Suter, 10 Cox C. C. 577 See, and query, Reg. v. Lee, 8 Cox C. C. 238 255

The only specific fact here is, that the spoons were equal to Elkington's A. . . . If you look at what is stated upon the face of the case, it resolves itself into a mere representation of the quality of the article; and, bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them, although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming; for, not only would sellers be liable to be indicted for exaggerating the good quality of the goods, but purchasers would be liable to be indicted if they depreciated the quality of the goods, and induced the sellers, by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation."¹ This reasoning is in itself sound, but not all will deem it to fit the case. The exact words (referring again to the report) are: "that the foundation was of the best material, and that they had as much silver upon them as *Elkington's A.*" As "*Elkington's A.*" was a standard plate, this was an exact statement of the quantity of silver, and it was, within the knowledge of him who made it, false. If this is not a false representation of an existing fact, therefore a false pretence, what is?

§ 455. **Thickness of Silver Plating, continued — Exaggerations.** — This case was observed upon, in a later one in which a sale of cheese by a false taster was held to be within the statute,² by Erle, C. J., as follows: "Dissatisfaction has been expressed with that decision as if it must operate as an encouragement to falsehood and fraud; but it should be recollected what an extremely calamitous thing it is for a respectable man to have to stand his trial at a criminal bar upon an indictment brought against him

¹ Reg. v. Bryan, Dears. & B. 265, 267, 270, 7 Cox C. C. 312, 40 Eng. L. & Eq. 589. See Reese v. Wyman, 9 Ga. 430.

² Ante, § 449 and note.

for cheating by a false pretence at the instance of a dissatisfied purchaser. It is easy for an imaginative person to fall into an exaggeration of the praise of the article which he is selling; and, if such statements are indictable, a purchaser who wishes to get out of a bad bargain made by his own negligence might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead of being obliged to bring an action where each party would be heard on equal terms. It is of great public importance to endeavor to define the line within which false representations become indictable."¹

§ 456. **Continued — Fineness of Gold.** — Since the foregoing sections appeared in an earlier edition of this work, a case has passed to judgment in England, by the unanimous opinion of the judges, exactly confirmatory of these views of the author. A man effected the sale of a gold chain by representing that it was 15-carat gold, while in truth it was, as he knew, only a little better than 6-carat. And this was held to be a false pretence within the statute. "How does that differ," asked Bovill, C. J., "from the case of a man who makes a chain of one material and fraudulently represents it to be of another?"² The learned judges distinguished this case from the one commented on in the section before the last, on which the defendant relied, by calling attention to the words of the different members of the court uttered in pronouncing their opinions. An expedient like this enables a court to get round a decision which it does not like to take the responsibility of overruling in terms; but, in the actual merits of the two cases, one cannot distinguish between a falsehood as to the thickness of silver plating, and the same as to the quality of gold, except that the former is more certainly within the statute, because the thickness of the silver plating cannot be seen, while the fineness of the gold is in some measure open to inspection by the eye of the purchaser.

§ 457. **Solvent or not.** — In a New Jersey case, a man was induced to part with a claim against a third person at a sacrifice, on the wilfully false representation that this person was insolvent and largely indebted, possessed only of small means, and unable to pay this debt in full. And it was contended for the defendant, that the several questions, whether the person was

¹ Reg. v. Goss, Bell C. C. 208, 218, 8 Cox C. C. 262.

² Reg. v. Ardley, Law Rep. 1 C. C. 301, 305.

solvent or not, largely indebted or not, able to pay in full or not, pertained merely to opinion; but the majority of the court held that they extended to fact, and sustained the indictment.¹ Here, again, sound law and good morals blended.

Effect of combining certain Substances. — So where the representation was, that a certain recipe in writing, combining certain articles, would produce, as a compound, a non-explosive burning fluid and camphene, of great value, this was held to be a representation of a fact, and not of a mere opinion; and, being false, to be a false pretence within the statute.²

Value of Watch. — But where the representation was as to the value of a watch left in pawn, this was held to be wholly inadequate,³ — it was of a mere matter of opinion.

§ 458. *Magnitude of the Pretence:* —

Not Frivolous, &c. — Something has already been mentioned,⁴ looking to the proposition that the pretence must not be of too frivolous a nature, or of too small a thing; and, if it is, it will not be sufficient. It is not easy to state the exact limits of this doctrine: it is to be received; yet, cautiously. In a Tennessee case it was held, that, under the particular circumstances disclosed, the obtaining of a quart of whiskey through the false representation of having been sent for it by a third person, was not indictable under the statute.⁵

§ 459. **General Caution.** — The reader should bear in mind, that the foregoing are mere illustrations of false pretences, which may assume numerous other forms in future developments of fraud.

¹ The State v. Tomlin, 5 Dutcher, 13.

² In re Greenough, 31 Vt. 279.

³ The State v. Estes, 46 Maine, 150.

⁴ Ante, § 423, 428, 432, 433. And see Vol. I. § 212 et seq.

⁵ Chapman v. The State, 2 Head, 36, 42, 43, Caruthers, J., observing: "We are not disposed to open the door so wide, in the construction of this severe and penal act, as to convert every case of falsehood and dishonesty, by which one may get the advantage of another in the most insignificant matter, into a felony. It surely was not intended that barely telling a lie, for the purpose of getting twenty-five cents' worth of something to eat or drink, should constitute a felony punishable by at least three years' confinement in the penitentiary. . . . The defendant must be a very degraded creat-

ure, but she seems to have been a customer of the prosecutor. The lie was not calculated in itself, under the circumstances, to impose upon the prosecutor, and there is some reason to doubt whether it really did so." Consult, in this connection, People v. Winslow, 39 Mich. 505; The State v. Paul, 69 Maine, 215; The State v. McConkey, 49 Iowa, 499; The State v. Nichols, 1 Houst. Crim. 114; Reg. v. Burgon, Dears. & B. 11, 7 Cox C. C. 131; Rex v. Ledbitter, 1 Moody, 76; The State v. Stanley, 64 Maine, 157; The State v. Munday, 78 N. C. 460; People v. Sully, 1 Buf. 17; The State v. De Hart, 6 Baxter, 222; Reg. v. Foster, 2 Q. B. D. 301, 13 Cox C. C. 393; Reg. v. Lerner, 14 Cox C. C. 497; Delaney v. The State, 7 Baxter, 28; The State v. Young, 76 N. C. 258.

III. *What must concur with the False Pretence.*

§ 460. **How far the Cheat must be accomplished.** — Further on we shall advert to attempts.¹ But to constitute the full offence, in the absence of special terms in the statute, the fraud intended must be accomplished.² Thus, in England, under 30 Geo. 2, c. 24, the crime was not complete until the money was actually received.³ But, —

Signature to Instrument. — Under the New York statute against obtaining the signature of any person to a written instrument by false pretences, the full offence is committed when the instrument is signed, and delivered to one who takes it with the intent to cheat or defraud, though no loss or injury has followed.⁴ Yet merely subscribing the name is not alone sufficient, though the words are, "obtain the signature of any person to any written instrument." There must be also averred in the indictment, and proved at the trial, "a delivery," — which is necessary to give to the writing its significance and effect.⁵

§ 461. **Pretence the Means of the Cheat.** — A doctrine often adverted to is, that, supposing a person to have been defrauded, yet, if the false pretence did not prevail with him, but something else did, the case is not within the statute.⁶ This proposition is plain; but, —

Partly the Pretence. — In the facts of most cases, not one motive alone, but several in combination, induced the defrauded person to part with his goods. And there are various analogies in the criminal law⁷ whence the proposition is derivable, that, if the pretence influenced the mind in any degree, though it was but an inferior and minor motive, it is sufficient, however many other motives were impelling it in the same direction. There are perhaps no adjudications which lay down the doctrine quite so broadly; yet all maintain, that the pretence need not have

¹ Post, § 438.

² See Stat. Crimes, § 225; Commonwealth v. Drew, 19 Pick. 179.

³ Rex v. Buttery, cited in Pearson v. McGowan, 5 D. & R. 616, 3 B. & C. 709.

⁴ People v. Genung, 11 Wend. 18; People v. Gates, 13 Wend. 311, 320.

⁵ Fenton v. People, 4 Hill, N. Y. 126. And see People v. Gates, 13 Wend. 311;

People v. Genung, 11 Wend. 18; People v. Galloway, 17 Wend. 540.

⁶ Commonwealth v. Davidson, 1 Cush. 33; Commonwealth v. Drew, 19 Pick. 179; Rex v. Dale, 7 Car. & P. 352; People v. Herrick, 13 Wend. 87; People v. Tompkins, 1 Parker C. C. 224, 238; Clark v. People, 2 Lans. 329; Vol. I. § 438.

⁷ Vol. I. § 264, 339, 815.

been the only inducement; and the proposition is generally stated to be, that it is adequate, if, operating either alone or with other causes, it had a controlling force, if, as some of the cases say, it materially influenced the mind; in other words, if, without the pretence, the defrauded person would not have parted with his goods.¹ This question has already been considered in this chapter in some of its bearings, and to the former discussion the reader is referred.²

§ 462. **Pretence must be believed.** — From the foregoing proposition it follows, that the false pretence must be believed by the person to whom it is addressed, else the case is not within the statute.³ Thus, —

Promise relied on. — In England, a prisoner was charged with obtaining a filly under the false representations, that he was a gentleman's servant, that he lived in Brecon, and that he had bought twenty horses in the Brecon fair. The proof was, that he made these representations, which were false; and also told the prosecutor, that he would meet him in half an hour at Cross Keys, and pay him. And the prosecutor testified, that he parted with his property because he expected the prisoner would do in respect of payment as agreed, and not because he believed the other representations. Whereupon Coleridge, J., ruled, that there must be an acquittal. "The question for you to consider," he said to the jury, "is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner."⁴

¹ Commonwealth v. Drew, 19 Pick. 179; People v. Haynes, 11 Wend. 557, 14 Wend. 546; People v. Herrick, 13 Wend. 87, 91; Rex v. Witchell, 2 East P. C. 839; Reg. v. Eagleton, Dears. 515, 83 Eng. L. & Eq. 540, 24 Law J. n. s. M. C. 158, 1 Jur. n. s. 940; The State v. Thatcher, 6 Vroom, 445; Reg. v. Lince, 12 Cox C. C. 451, 6 Eng. Rep. 314; Reg. v. English, 12 Cox C. C. 171, 2 Eng. Rep. 224. In Commonwealth v. Drew, Morton, J., stated the doctrine thus: "That the false pretences, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that, without their weight, he would not have parted with his property." p. 183. In People v. Haynes,

Chancellor Walworth said, that, if the pretences "were a part of the moving causes which induced the owner to part with his property, and the defendant would not have obtained the goods if the false pretences had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner," they will sustain a conviction. p. 555. s. r. The State v. Tessier, 32 La. An. 1227.

² Ante, § 424-427.

³ Reg. v. Mills, Dears. & B. 205, 7 Cox C. C. 293, 40 Eng. L. & Eq. 562.

⁴ Rex v. Dale, 7 Car. & P. 352. And see People v. Herrick, 13 Wend. 87; People v. Stetson, 4 Barb. 151.

§ 463. **Plans to entrap.** — How the proposition of the last section affects cases wherein a plan has been laid to entrap a person into the commission of this offence — a question which, in its general bearings, was discussed in the preceding volume¹ — is worthy of consideration. We have not authorities very distinct to this exact point; yet the doctrine has been laid down in general terms, that these plans do not prevent the cheat from being indictable; while still the mind of the person defrauded must, to render the other guilty, have been influenced by the pretence.²

§ 464. **Folly of the Person cheated.** — If the prosecutor believed the pretence, and parted with his property relying on it, there is no need he should have acted in the transaction with ordinary care and caution.³ This seems pretty plainly to be the better doctrine, though cases may be found in the books hardly sustaining it. It rests on the same general principle with an analogous proposition stated under another head, in a previous section.⁴ The objection of this want of caution was taken, without avail, in the case where the secretary of an Odd Fellows' lodge told a member he owed more than he did;⁵ in that of the defendant pretending to be the payee in a post-office money order, yet signing his real name;⁶ and in the case of uttering a counterfeit note, as genuine, though on its face it would have been good for nothing in law if true; Lawrence, J., in the last-mentioned case, dissenting.⁷

§ 465. **Pretence after Property parted with.** — If the fraud is fully effected before the false pretences are made, they cannot be

¹ Vol. I. § 256-263.

² Rex v. Ady, 7 Car. & P. 140.

³ Reg. v. Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, 4 New Scss. Cas. 341, Temp. & M. 279, in which Erle, J., observed: "It was once thought, that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." In a Vermont case, Bennett, J., observed: "It [the statute] was designed to protect the weaker part of mankind; and it has been held to be law at the present day that it is none the less a false pretence although the party imposed upon might, by common prudence, have avoided the imposition. If he was, in fact, imposed upon, it is no good reason for the of-

fender to allege, that, by the use of due diligence or ordinary care, the imposition might have been prevented." In re Greenough, 31 Vt. 279, 290. So, in a civil case, it is no defence, in law, to a party making fraudulent representations upon the sale of property by him, that a by-stander stated the real facts. Haight v. Hayt, 19 N. Y. 464.

⁴ Ante, § 433-436; and see the cases cited there.

⁵ Ante, § 442.

⁶ Ante, § 440.

⁷ Ante, § 448, the case of Rex v. Frceth, Russ. & Ry. 127. See also Reg. v. Ball, Car. & M. 249; People v. Williams, 4 Hill, N. Y. 9.

deemed the cause of the injury, and the offence is not committed. Therefore, —

Reclaim Goods. — If, after goods are delivered, the vendor becomes suspicious of the solvency of the purchaser, and expresses his intention to reclaim them; whereupon the latter by false pretences induces him to relinquish this purpose, there is no offence against the statute; the sale having been complete before the pretences were made. And though the right of stoppage *in transitu* may remain, the rule appears to be the same, the relinquishment of that right not being deemed a parting with the goods.¹

Condition subsequent. — But, where the sale is on condition subsequent, and a delivery thereupon, and afterward the vendor is induced by false pretences to give up his property in the goods, this is probably within the statute.²

§ 466. **Debt collected by False Pretence.** — It is not punishable within the statute for one to obtain, by a false pretence, payment of a debt already due, because no injury is done.³ And where the servant of a creditor went to the debtor's wife, and got from her two sacks of malt, saying his master had purchased them of her husband, which was false, it was ruled, by Coleridge, J., on an indictment against the servant, that, if his object was, not to defraud, but merely to enable his master to compel payment of the debt, he must be acquitted.⁴

§ 467. **Money in Charity.** — The New York court took a doubtful step further, and held, that, where money is given in charity to a person soliciting it under a false pretence, the case is not within the statute, though within its words; the ground being, that the statute is for the protection of trade and credit, while begging needs no protection,⁵ — a construction aided perhaps by the preamble.⁶ The contrary is held in England⁷ and Massachu-

¹ *People v. Haynes*, 14 Wend. 546; s. c. in the Supreme Court, 11 Wend. 557.

² *Ib.*

³ Vol. I. § 488; *People v. Thomas*, 3 Hill, N. Y. 169; *Commonwealth v. McDuffy*, 126 Mass. 467; *The State v. Hurst*, 11 W. Va. 54, 71. And see *People v. Genung*, 11 Wend. 18; *People v. Getchell*, 6 Mich. 406; post, § 471, note.

⁴ *Rex v. Williams*, 7 Car. & P. 354.

⁵ *People v. Clough*, 17 Wend. 351.

It was said also in this case, that begging is a crime by statute; which raises another point. See post, § 468, 469.

⁶ Stat. Crimes, § 49-51. See observations of Chapman, C. J., in *Commonwealth v. Whitcomb*, post, at p. 487 of the report; and of Peckham, J., in *McCord v. People*, 46 N. Y. 470, 475, 476.

⁷ *Reg. v. Jones*, 1 Eng. L. & Eq. 533; 1 Den. C. C. 551, 4 Cox C. C. 198, Temp. & M. 270; *Reg. v. Hensler*, 11 Cox C. C. 570.

setts;¹ and, in New York, the legislature interposed, providing, that the statutes shall apply to cases where the thing obtained is "for any alleged charitable or benevolent purpose whatsoever."²

§ 468. **Defrauded Person also in the Wrong.** — Another doctrine sustained in New York is, that, where if the false pretences were true the person parting with his goods would be guilty of a crime therein, or where he actually commits an offence in parting with them, the indictment for the cheat cannot be maintained.³

§ 469. **Continued.** — On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was, that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretence. "Supposing," said Dewey, J., "it should appear that [the individual defrauded] had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offence, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally."⁴ And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisprudence into a system of laws to which it is alien.⁵

§ 470. **Previous Confidence.** — In an early English case it was claimed by the defendant, that the statute does not apply where there is a previous confidence between the parties; but the court overruled the point, and considered, that, if the false pretence succeeded, it was enough. Therefore a conviction was held to be right, against a workman, who, in the service of clothiers, was to keep an account of the number of shearsmen employed, with their earnings and wages, deliver it weekly in writing to a clerk, and receive from the clerk the amount due them; the false pretence being, that this account contained charges for more work,

¹ *Commonwealth v. Whitcomb*, 107 Mass. 486.

² N. Y. Stat. 1851, c. 144, § 1.

³ *People v. Stetson*, 4 Barb. 151; *McCord v. People*, 46 N. Y. 470, Peckham, J., dissenting. And see *People v. Clough*,

17 Wend. 351; *People v. Wilson*, 6 Johns. 820; ante, § 467, and compare with ante, § 466.

⁴ *Commonwealth v. Morrill*, 8 Cush. 571.

⁵ Vol. I. § 256, 257, 267, 268.

and of other men, than the facts justified, whereby he got a larger sum than was his right.¹

§ 471. **The Intent to defraud.** — Again; there must be an intent to defraud,² — a proposition which grows out of doctrines discussed in the previous volume,³ — although the intent may, as in other criminal cases, be inferred from the act.⁴ And the false pretences must have been used for the purpose of perpetrating the fraud.⁵ Still it has been held in Indiana, and it would seem to be sound general doctrine, that, if the false pretences are employed with the view of obtaining a particular article of value, and not that article but another is parted with, the case is within the statute.⁶

"Knowingly" false — Form of Indictment. — The fraudulent intent implies a knowledge of the falsity of the pretences; consequently an indictment omitting the word "knowingly" is, in England, held to be insufficient, though it pursues the exact words of the statute of 7 & 8 Geo. 4, c. 29, § 53,⁷ on which it is drawn,⁸ — a defect, however, which was cured after verdict by 7 Geo. 4, c. 64, § 21. This latter statute provides, among other things, that a count shall be sufficient after verdict if it describes the offence in the words of the enactment.⁹

Purpose to pay. — It will not avail the defendant that he meant to pay for the goods when he should be able.¹⁰

§ 472. **Must all Steps in Offence be against same Person?** — Now,

¹ Rex v. *Witchell*, 2 East P. C. 830.

² Commonwealth v. *Drew*, 19 Pick. 179; Reg. v. *Bloomfield*, Car. & M. 537.

³ Vol. I. § 204 et seq., 285 et seq.

⁴ People v. *Herrick*, 13 Wend. 87. And see Vol. I. § 734, 735.

⁵ Commonwealth v. *Drew*, 19 Pick. 179; Bowler v. *The State*, 41 Miss. 570; Reg. v. *Stone*, 1 Fost. & F. 311. **Contract.** — In a Michigan case, where the indictment was for obtaining, by a false pretence, a signature indorsing a promissory note, it was offered in defence that the prosecutor was under contract to make the indorsement, therefore, though he was not disposed to fulfil his contract, the defendant could have no intent to defraud him, when, by false means, he sought to obtain what was his due. See ante, § 466. And the court held, that this evidence should have been

admitted. Said Martin, C. J.: "A falsehood does not necessarily imply an intent to defraud; for it may be uttered to secure a right, and, however much and severely it may be reprobated in ethics, the law does not assume to punish moral delinquencies as such. To defraud is to deprive another of a right, of property, or of money." People v. *Getchell*, 6 Mich. 496, 504.

⁶ Todd v. *The State*, 31 Ind. 514.

⁷ Ante, § 412.

⁸ Reg. v. *Henderson*, 2 Moody, 192; Reg. v. *Philpotts*, 1 Car. & K. 112.

⁹ Reg. v. *Bowen*, 13 Q. B. 790, 13 Jur. 1045. This case even casts a doubt over the previous decisions as to the form of the indictment, though not as to the proof required at the trial.

¹⁰ Reg. v. *Naylor*, Law Rep. 1 C. C. 4.

here are three distinct things; namely, the intent to defraud, the false pretence made with the intent, the fraud accomplished. And while they must all concur to constitute a case under the statute, there seems to be no necessity, that, as a universal rule, they should operate severally against the same person.¹ Therefore an indictment has been held good which averred, that the defendant made the false pretences to one, and thereby got his money, with intent to injure another.²

Pretence to Bailee. — Without the aid of this doctrine, and on an obvious principle of frequent application in the law of larceny, if, at the trial, the money obtained appears not to have belonged to the prosecutor, but only to have been in his custody as bailee, there may still be a conviction.³

Pretence to Agent. — Also under the general law of agency, a false pretence to the agent, especially if communicated to the principal, and acted on by him, is a false pretence to the principal.⁴ "It is immaterial whether it passed through a direct or a circuitous channel."⁵

§ 473. **Further as to Pretences by and through Agents.** — From these and other principles of the criminal law,⁶ it follows, that the party obtaining the goods or other thing need not be acting on his own account, to make him an offender, neither need he expect to derive pecuniary or other benefit to himself.⁷ But there may be an "innocent agent," in this offence the same as any other, — the doctrine of which has already been explained.⁸

¹ In Rex v. *Lara*, 2 Leach, 4th ed. 647, 2 East P. C. 810, 824, 6 T. R. 565. It appears to have been held, that an indictment for a fraud at common law, charging the false pretence to have been made to one person and the deceit to have been practised on another, is bad. Concerning this case, see, in disapproval, Commonwealth v. *Call*, 21 Pick. 515, 520.

² Commonwealth v. *Call*, 21 Pick. 515. See Reg. v. *Kealey*, 1 Eng. L. & Eq. 585, 2 Den. C. C. 68; Reg. v. *Tully*, 9 Car. & P. 227. **Pretence to Wife.** —

Where a forged request for the delivery of goods was addressed to a married woman in her maiden name, it was held that the party uttering it might be convicted on an indictment charging the intent to be to defraud the husband. Rex v.

Carter, 7 Car. & P. 134. **Delivery by Wife.** — If the wife, by direction of the husband, delivers the property to the person making the false pretence, this is the same as though the delivery were by the husband himself. Reg. v. *Moseley*, Leigh & C. 92, 9 Cox C. C. 16.

³ Britt v. *The State*, 9 Humph. 31.

⁴ And see Crim. Proced. I. § 332.

⁵ Commonwealth v. *Call*, 21 Pick. 515; Commonwealth v. *Harley*, 7 Met. 462; Stat. Crimes, § 134. And see Thompson v. *Rose*, 16 Conn. 71.

⁶ See Vol. I. § 335, 628-642.

⁷ Commonwealth v. *Harley*, 7 Met. 462.

⁸ Vol. I. § 310, 651; Reg. v. *Butcher*, Bell C. C. 6, 8 Cox C. C. 77; Reg. v. *Dowey*, 11 Cox C. C. 115.

§ 474. *Continued — Check on Bank — Agent to draw the Money.* — If one makes his check on a bank in which he has no fund, and gets it cashed by a third person, who supposes it to be good, he does not thereby constitute this person his agent to draw the check, so as to become holden for an attempted cheat by a false pretence in the place at which the check is presented for payment. Said Lord Campbell, C. J.: "The act of Parliament contemplates the money being obtained according to the wish and for the advantage, or at all events to gain some object, of the party who makes the false pretence. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the check being honored. He had obtained his full object in St. Petersburg [where the check was cashed], and had the money in his pocket, and it would have been for the advantage of the defendant if the draft had been burnt or sent to the bottom of the sea. The statute was intended to meet a failure of justice arising from the distinction between larceny and fraud." And Platt, B., observed: "It cannot be said that a party who presents a check for his own benefit is the agent of another who receives no benefit whatever."¹

§ 475. *Effect of Consideration paid.* — A defendant once undertook to maintain, that, where a consideration, however inadequate, has actually been paid for the article, an indictment for obtaining it by false pretences will not lie. This proposition was plainly in conflict with the entire current of adjudication on the subject, and with the reason on which the law of false pretences proceeds; because, if the receipt of a part consideration had its influence, still the false pretence had its influence also, and was therefore sufficient;² and because so much of the article as was

¹ Reg. v. Garrett, Dears. 232, 241, 243, 22 Eng. L. & Eq. 607, 6 Cox C. C. 260, 23 Law J. n. s. M. C. 20, 17 Jur. 1060. The New York commissioners recommend the following to be enacted: "The use of a matured check, or other order for the payment of money, as a means of obtaining any signature, money, or property, &c., by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token, &c., although no representation is made in respect thereto." And they add: "As

to the necessity of such a provision, see Allen's Case, 3 City H. Rec. 118; Conger's Case, 4 City H. Rec. 65; 1 Wheeler Crim. Cas. 446; Van Pelt's Case, 1 City H. Rec. 137; People v. Tompkins, 1 Parker C. C. 224;" Draft of Penal Code, A. D. 1864, p. 226. Query, however, whether principles already discussed in this chapter do not make such a case indictable without the aid of a special provision. See ante, § 417 and note, 430, 438, 441, 448, 449, 457.

² Ante, § 427, 461.

not paid for was obtained as distinctly and wholly by the false pretence as the entire article would have been if no consideration whatever had passed. The case was of a sale of bread, and "an attempt," in the language of Parke, B., "to obtain money by the false and fraudulent representation of an antecedent fact; namely, that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of 2*d.* as the number of loaves falsely pretended to have been furnished amount to." And the conviction of the defendant for an indictable attempt to cheat was sustained.¹

IV. *What Property must be obtained.*

§ 476. *Diversities of Statutes.* — Upon this subject, the statutes differ, while none of them are as broad as the common law, explained under the title Cheats.² The practitioner is, therefore, cautioned to look carefully at the enactments of his own State as they affect the present question. The meanings of some of the words employed in these statutes are given at length in "Statutory Crimes;" where they may be found by consulting the index.

§ 477. "Obtain." — The words of the English statute, 24 & 25 Vict. c. 96, § 88, are, "Whosoever shall, &c., obtain from any other person any chattel," &c., and the reader will observe that the same words are employed in the earlier English enactments;³ they are common, too, in this country. Upon this it is held, that, —

Rule of Larceny — (Use — Ownership). — If the purpose of the wrong-doer was merely to procure the use of the chattel, the case is not within the statute, the same rule applying here as in larceny. Therefore, when one was convicted for getting, by a false pretence, the use of a horse from a livery stable for a day, the conviction was quashed.⁴ It appears to be essential also that

¹ Reg. v. Eagleton, Dears. 515, 33 Eng. L. & Eq. 640. See ante, § 429, 442.

² Ante, § 180.

³ Ante, § 411-413.

⁴ Reg. v. Killham, Law Rep. 1 C. C. 261. Said Bovill, C. J., speaking for the

whole court: "The word 'obtain,' in this section, does not mean obtain the loan of, but obtain the property in, any chattel, &c. This is, to some extent, indicated by the proviso, that, if it be proved that the person indicted obtained

the owner should have intended to part with his ownership in the property.¹

§ 478. **Rule of Larceny, continued.** — The North Carolina court, in interpreting the statutes of that State, followed in another respect the rule of larceny. The statutory words were “money, goods, property, or other thing of value,” “or any bank-note, check, or order for the payment of money,” &c.; and from these, viewed in connection with other provisions, the result was derived, that nothing can be the subject of this offence except what is also the subject of larceny either at the common law or under statutes. Therefore, —

Land. — The false-pretence act was held not to extend to a conveyance of land.²

§ 479. **Further Analogy to Larceny** — (“Chattel” — Dog). — And in England the word “chattel,” in this act, is held not to include a dog. Said Lord Campbell, C. J.: “There is a specific mitigated punishment in the 7 & 8 Geo. 4, c. 29, § 31, for dog-stealing, but it is not larceny at common law; and, if it is not, I am of

the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made more clear by referring to the earlier statute from which the language of § 38 is adopted. 7 & 8 Geo. 4, c. 29, § 53, recites, that ‘a failure of justice frequently arises from the subtle distinction between larceny and fraud,’ and, for remedy thereof, enacts, that, ‘if any person shall, by any false pretence, obtain,’ &c. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny. But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property. And this intention did not exist in the case before us. **Railroad Ticket.** — In support of the conviction, the case of *Reg. v. Boulton*, 1 Den. C. C.

508, 19 Law J. n. s. M. C. 67, was referred to. There the prisoner was indicted for obtaining, by false pretences, a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. **Distinguished.** — In this case, the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time.” p. 263, 264.

¹ *The State v. Vickery*, 19 Texas, 326.

² *The State v. Burrows*, 11 Ire. 477. And see *Commonwealth v. Woodrun*, 4 Pa. Law Jour. Rep. 207; *Dord v. People*, 9 Barb. 671.

opinion that it is not, within this statute, the subject of false pretences. Are we to suppose, that the legislature intended that for obtaining a dog by false pretences a man should be liable to penal servitude; but that if he actually steals a dog, he should only be liable to three months’ imprisonment?”¹

§ 480. **Credit.** — In harmony with the foregoing interpretations it is held, that, if the thing obtained is not money, or other article within the express words of the statute, but merely a credit in account which may bring money, the substantive offence is not committed; though the transaction constitutes a criminal attempt to get, by the false pretence, the money which the credit may ultimately bring.²

Indorsement of Payment. — And it is the same where the thing obtained is the indorsement of a payment on a promissory note.³ But, —

“Valuable Thing.” — The words of the New Jersey statute are “money, wares, merchandise, or other valuable thing;” and it is held that to procure one to execute his own note or contract is to obtain of him a “valuable thing” within this provision.⁴ Possibly this interpretation does not accord with that in the next section, yet plainly there is a difference between “valuable thing” and “valuable security.”

§ 481. **“Valuable Security.”** — By the English statute of 7 & 8 Geo. 4, c. 29, § 53, now repealed, the thing obtained must be “any chattel, money, or valuable security.”⁵ And the judges held, that, —

One’s own Acceptance. — It is not within this statute to procure a person to write his own acceptance on a piece of mercantile paper. The thing obtained, said Lord Campbell, C. J., “must, we conceive, have been the property of some one other than the prisoner. Here there is great difficulty in saying, that, as against the prisoner, the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written. . . . We apprehend, that, to support the indictment,

¹ *Reg. v. Robinson*, 8 Cox C. C. 115, § 344.

² *Reg. v. Eagleton*, Dears. 515, 33 Eng. L. & Eq. 640.

³ *The State v. Moore*, 15 Iowa, 412.

⁴ *The State v. Thatcher*, 6 Vroom, 445. As to the meaning of the term “valuable thing,” see *Stat. Crimes*, § 346, note, 875.

⁵ *Ante*, § 412.

the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor, it was of no value to him, nor to any one else, unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud; but we think not of a fraud contemplated by this act of Parliament."¹ This case has been followed in Canada.²

Views of Interpretation. — This sort of nice distinction is not uncommon in the criminal law. And to the writer it seems eminently beneficial when its object is to eject out of a statute something which, though within its words, is not within its spirit. But when a case is quite within the mischief to be remedied, it seems to the writer that no just rules of interpretation can restrict terms to a narrower meaning than is given them by the ordinary understandings of men.³ And if one persuades another to put his name to a piece of mere paper, valueless before, but rendered a valuable mercantile security by the name, to the ordinary understanding he obtains thereby of the other a "valuable security," — then, as the case is completely within the mischief of the law, why bend the law by interpretation to screen the delinquent? In accord with what would seem to be the spirit of this suggestion, the New York court has held, that —

"Effects" — **Indorsement.** — Procuring by a false pretence the indorsement of a promissory note — in a case where the party has afterward used the note for his own benefit — is within the words "money, goods, chattels, or other effects."⁴

§ 482. **Loan of Money.** — Where the thing obtained is money, which is converted to the use of the wrong-doer,⁵ it is no objection that it was asked and ostensibly received as a mere loan.⁶

§ 483. **Contract.** — Under a statute making the obtaining of "money" or "goods" by false pretences indictable, a contract is no better than a credit;⁷ and, obviously, the obtaining of a contract is not sufficient.⁸ But, —

Money through Contract. — If a contract is obtained, and then

¹ Reg. v. Danger, Dears. & B. 307, 323, 324, 7 Cox C. C. 303. See Stat. Crimes, § 339, note.

² Reg. v. Brady, 26 U. C. Q. B. 13.

³ Stat. Crimes, § 204, 212.

⁴ People v. Stone, 9 Wend. 182, 190.

⁵ Ante, § 477.

⁶ Rex v. Crossley, 2 Moody & R. 17, 2 Lowin, 164.

⁷ Ante, § 480.

⁸ See Stat. Crimes, § 217, 344-346.

the money is paid pursuant to it, there is authority for holding that this is an obtaining of the money.¹ Still, where the party got from his own banker a credit by drawing on a person upon whom he had no right to draw a bill which, therefore, had no chance of being paid, — even though the banker consequently paid money for him to an extent he would not otherwise have done, — this was held by the English judges to be insufficient. "The prisoner could not be said to have obtained any specific sum on the bill, all that was obtained was credit on account."² And it has even been held, contrary to the foregoing doctrine, that, if a contract is entered into by reason of false representations, then money or goods are delivered under the contract, "it is," in the language of Hill, J., "too remote to say that" the wrong-doer "obtained the goods or money by the false pretences."³ And in Canada it has been adjudged, that an indictment for obtaining a given sum by false pretences is not supported by evidence of obtaining a promissory note for that sum, which note was paid before maturity.⁴ The question is perhaps a nice one; still, in principle, if, at the time when the money was paid under a contract which the fraud had rendered void, the party paying it remained ignorant of the fraud and under its influence, this should pretty plainly be deemed to be an obtaining of the money by the pretence, to which the fraudulent contract (to be treated as a nullity⁵) would be no impediment. If the fraud had been discovered, and had ceased to influence the mind of the defrauded person when he paid the money, the case would be different.⁶

§ 484. **Signature to Instrument.** — Besides the provision against getting money, goods, chattels, and the like, by false pretences, there is, in many of the States, a clause against so obtaining the signature of a person to any written instrument.⁷

¹ Reg. v. Kenrick, 5 Q. B. 49, Dav. & M. 208; Reg. v. Abbott, 1 Den. C. C. 273, 2 Car. & K. 330; Reg. v. Dark, 1 Den. C. C. 276. And see People v. Herick, 13 Wend. 87; Reg. v. Adamson, 1 Car. & K. 192, 2 Moody, 286; Reg. v. Eagleton, Dears. 515, 33 Eng. L. & Eq. 540.

² Rex v. Wavell, 1 Moody, 224.

³ Reg. v. Bryan, 2 Fost. & F. 567, a jury case, the learned judge adding that

the point had been decided in Reg. v. Gardner, 25 Law Jour. n. s. M. C. 100, and Dears. & B. 40, ante, § 482, and the decision bound him.

⁴ Reg. v. Brady, 26 U. C. Q. B. 13.

⁵ Bishop First Book, § 124, 125.

⁶ See, as perhaps having some relation to this question, Reg. v. Watson, Dears. & B. 343, 7 Cox C. C. 364. And see post, § 486.

⁷ See People v. Galloway, 17 Wend.

Nature of the Instrument. — In New York it was held, that, to bring a case within the words "obtain the signature of any person to any written instrument," the instrument must be of such a character as may work a prejudice to the property of him who affixes the signature, or of some other person. Therefore, where the defendant had thus got his wife's name to a deed of land, but the deed was not acknowledged by her before an officer qualified to take the acknowledgment; and under other statutes the deed of a married woman is, before acknowledgment, a mere nullity; the court held the offence not committed. "If the defendant," said the judge, "could not have been convicted of forgery, had he affixed the name of his wife to this instrument without her consent, I think he should not have been convicted of the offence of obtaining her signature to the instrument by false pretences."¹

V. *Remaining and Connected Questions.*

§ 485. **Felony or Misdemeanor.** — The obtaining of property by false pretences, being a statutory offence, and nowhere punishable with death, is, on common-law principles, a misdemeanor, not a felony.² But it will undoubtedly be found to be felony under the statutes of many of the States.³ Thus, in Mississippi, the statute makes it felony where the value exceeds one hundred dollars.⁴

Principal and Accessory. — The practitioner, before proceeding in a case, will see how this is under the statutes of his own State; and will bear in mind the principles, taught in the previous volume,⁵ concerning procuring, aiding, abetting, and the like.⁶

540; *People v. Stone*, 9 Wend. 182; *People v. Genung*, 11 Wend. 18; *People v. Gates*, 18 Wend. 311; *Fenton v. People*, 4 Hill, N. Y. 126; *Roberts v. The State*, 2 Head, 501; *The State v. Layman*, 8 Blackf. 330, which see for a construction of the Indiana statute of false pretences; ante, § 457.

¹ *People v. Galloway*, 17 Wend. 540, opinion by Bronson, J. And see *People v. Gates*, 13 Wend. 311. **Indorsement of Note.** — An indorsement of a negotiable promissory note is a signature to

a written instrument within the meaning of this statute. *People v. Chapman*, 4 Parker C. C. 56.

² Vol. I. § 614 et seq.

³ Vol. I. § 618, 622.

⁴ *Bowler v. The State*, 41 Missis. 570.

⁵ See Vol. I. § 616-708.

⁶ See *Commonwealth v. Harley*, 7 Met. 462; *Commonwealth v. Call*, 21 Pick. 515; *People v. Parish*, 4 Denio, 153; *Reg. v. Moland*, 2 Moody, 276; *Cowen v. People*, 14 Ill. 348; *Long v. The State*, 1 Swan, Tenn. 287.

§ 486. **Partly in each of two States.** — Where the transaction is partly in one State and partly in another, it has been deemed that the courts of the State in which the thing was transferred to the possession of the wrong-doer may take cognizance of the offence, though the false pretences were uttered in the other State. For the gist of the wrongful thing done was considered to be, not the uttering of the pretences, but the obtaining of the money or goods.¹

§ 487. **The Punishment.** — This is a matter generally regulated by statutes, and depending on principles sufficiently considered in the preceding volume.²

§ 488. **Attempts.** — According to doctrines fully discussed in the preceding volume,³ an attempt to commit this statutory offence is, though it fail, indictable as a common-law misdemeanor. There seems to be little inducement to prosecute wrong-doers in cases where no harm has actually been accomplished, and so the books contain few instances of indictments for these attempts. Yet the English courts not unfrequently of late have sustained such indictments; and no question can arise concerning the correctness of the proceeding.⁴ The act done must be sufficiently near the fraud meant to be accomplished;⁵ but the obtaining of a credit has been held to be in close enough proximity to the money it was to bring, to constitute the criminal attempt.⁶ If the person to be defrauded does not believe the pretence to be true, still an indictment for the attempt to defraud

¹ *Commonwealth v. Van Tuyl*, 1 Met. Ky. 1, 3. In this case, "the facts proved upon the trial were, that the defendant was in the State of Ohio, and had along with him a negro named John, whom he represented to be a runaway slave belonging to him, that he was trying to take back to a slave State; stating that he was a resident of Tennessee, from which place the slave had some three or four months previously made his escape. That whilst he was in the State of Ohio, he sold and delivered said negro to B. W. Jenkins, at the price of five hundred dollars, which Jenkins was to pay him when they arrived in Kentucky, and the purchaser was to run the risk of taking the slave to that place." When the parties to the transaction arrived in Kentucky,

a bill of sale with warranty was executed, and the money paid. But the negro was free, and not a slave, and both he and the defendant resided in the State of New York. The Kentucky court held, that the offence was complete in Kentucky.

² Vol. I. § 927 et seq. As to Massachusetts, see *Wilde v. Commonwealth*, 2 Met. 408.

³ Vol. I. § 723 et seq.

⁴ *Reg. v. Ball*, Car. & M. 249; *Reg. v. Eagleton*, Dears. 515, 33 Eng. L. & Eq. 540; *Reg. v. Rocbuck*, Dears. & B. 24; *Reg. v. Francis*, Law Rep. 2 C. C. 128, 12 Cox C. C. 612.

⁵ Vol. I. § 759-765.

⁶ *Reg. v. Eagleton*, Dears. 515, 33 Eng. L. & Eq. 540. And see ante, § 480.

may be maintained against the wrong-doer.¹ *A fortiori* it is an indictable attempt where the pretences are believed, and the goods laid out, but the cheat is discovered before they are taken away.² We have seen,³ that this doctrine of attempt applies also to cheats at the common law.

¹ Reg. v. Hensler, 11 Cox C. C. 570. 102. And see Reg. v. Jarman, 14 Cox

² Mathews v. The State, 33 Texas, C. C. 111.

³ Ante, § 168.

For FALSE TOKEN, see CHEATS.

FALSE TOLL-DISIL, offence of keeping, see Stat. Crimes.

FARO BANK, exhibiting, see Stat. Crimes.

FERRY, see WAY.

FIGHTING, see Vol. I § 536. And see AFFRAY.