CHAPTER XX.

FORCIBLE ENTRY AND DETAINER.[1]

§ 489–491. Introduction.
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§ 489. **In General.** — Forcible entry and forcible detainer are in substance and in principle but one offence, and are treated of in the books together, as forcible entry and detainer. A general view of this breach of public tranquillity was given in the first volume.[2]

How defined. — A forcible entry is an entry on another's real estate, or in some special circumstances on one's own, of a nature to be the subject of a personal occupation, made with such an array of force as to create terror in those who are present opposing. A forcible detainer is a detaining of the possession of an estate, to which the person has no perfect title, by force of the same kind.

§ 490. **Why Indictable — Possession of Land by Force.** — According to some writers,[3] a man disseised of his lands was at the common law allowed to use any degree of force necessary to gain possession. And this might have been so in civil jurisprudence; because, if a plaintiff were in the wrong in holding possession of lands, he was in no situation to complain of the defendant's wrong in expelling him, where the latter was the true owner.[4] But there is likewise another doctrine of the com-

[1] See also FORCIBLE TRESPASS. For the pleading, practice, and evidence, see Crim. Proced. II. § 369 et seq. See also Stat. Crimes, § 400, 541, 560.

[2] Vol. I. § 536–538.

[3] 1 Hawk. P. C. Curw. ed. p. 495; 4 Bl. Com. 148.

[4] Vol. I. § 256, 267, 268; 1 Gab. Crim. Law, 321; Taunton *v.* Costar, 7 T. R. 431; Turner *v.* Meymott, 1 Bing. 158; Higgins *v.* The State, 7 Ind. 549. And see Hyatt *v.* Wood, 4 Johns. 150.

mon law; namely, that no one has the right to enforce a claim, however just, by the commission of a breach of public order and tranquillity.[1] Consequently it is now established, that forcible entry, and, in some circumstances, forcible detainer, are indictable crimes, without regard to any statute, English or American.[2]

§ 491. **How the Chapter divided.** — But this matter has furnished a considerable field for legislation, both in England and the United States. Let us, therefore, consider, I. The Old English Statutes; II. The Ownership, Estate, or Possession necessary; III. The Act which constitutes the Offence; IV. The Restitution of Possession awarded; V. Remaining and Connected Questions.

I. *The Old English Statutes.*

§ 492. **Stats. 5 Rich. 2 — 2 Edw. 3 — Whether Common Law, &c.** — The earliest of these enactments is 5 Rich. 2, stat. 1, c. 8,[3]

[1] **Landlord ejecting Tenant.** — In a Massachusetts case, where a tenancy at will had been terminated by the tenant's refusing to pay rent, and the landlord's statutory notice to quit, the latter effected a peaceable personal entry into the premises, which was a room in a dwelling-house, the tenant being therein. He then commenced removing door, windows, and the tenant's furniture, when the tenant resisted him, and a scuffle ensued, and the tenant received a blow upon the head with a hatchet held in the hand of the landlord. The landlord was thereupon indicted for assault and battery; and, on the trial, his counsel requested the court to rule, that, if he got into the premises unopposed, he was in the peaceable possession of his own, with the right to remove the tenant's effects; and, if resisted, he might lawfully oppose force with force. But the court refused, yet told the jury, that, the tenancy being at an end, the landlord might resume his possession without legal process if he could do so without a breach of the peace; that his right to take out windows and door, and to remove the tenant's property, depended on the contingency of his being able to do so without opposition or resistance; that, on being resisted, and finding he could not proceed further without a breach of the peace, it became his duty to desist; and he had no right to eject the tenant by force. This ruling was held to be correct. Commonwealth *v.* Haley, 4 Allen, 318. Compare this with Collins *v.* Thomas, 1 Fost. & F. 416. And see Langdon *v.* Potter, 3 Mass. 215; Saunders *v.* Robinson, 5 Met. 343; Commonwealth *v.* Dudley, 10 Mass. 403; The State *v.* McClay, 1 Harring. Del. 520; Evill *v.* Conwell, 2 Blackf. 133; Burt *v.* The State, 2 Tread. 489; Helm *v.* Slader, 1 A. K. Mar. 320; Bartlett *v.* Draper, 23 Misso. 407; Tucker *v* Phillips, 2 Met. Ky. 416; Commonwealth *v.* Kensey, 3 Pa. Law Jour. Rep. 233.

[2] Vol. I. § 536; Commonwealth *v.* Shattuck, 4 Cush. 141; Rex *v.* Bake, 3 Bur. 1731; Henderson *v.* Commonwealth, 8 Grat. 708; The State *v.* Speirin, 1 Brev. 119; Butts *v.* Voorhees, 1 Green, N. J. 13; Rex *v.* Wilson, 8 T. R. 357; 1 Russ. Crimes, 3d Eng. ed. 304; Newton *v.* Harland, 1 Man. & G. 644; The State *v.* Wilson, 3 Misso. 125; The State *v.* Morris, 3 Misso. 127. Query, whether this is an indictable offence in Alabama. Childress *v.* McGehee, Minor, 131, 134.

[3] In preparing the first edition of this volume, I copied this statute from Pulton, and cited it as 5 Rich. 2, c. 7; because it there so stands, and I have seen it so elsewhere. The text is now corrected from Ruffhead.

in the following words: "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and, in such case, not with strong hand nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." This is the entire statute; it creates, if there were doubt before, a misdemeanor. There appears to be no room for question that it is a part of the common law of this country.[1] But the reader observes, that it applies only to forcible entries, not to detainers. Of prior date to this statute is 2 Edw. 3, c. 3, commonly called the Statute of Northampton, spoken of likewise by Hawkins;[2] yet this one has no very close connection with our present subject. It provides: "That no man, great nor small, of what condition soever he be, — except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [those of feats of arms of peace] upon a cry made for arms to keep the peace, and the same in such places where such acts happen, — be so hardy to come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armor to the king, and their bodies to prison at the king's pleasure."

§ 493. **Stat. 15 Rich. 2.** — The next English enactment, which it is important to mention here, is 15 Rich. 2, c. 2; namely, "that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also of

[1] Kilty Report of Statutes, 222; Harding's Case, 1 Greenl. 22. The Pennsylvania judges have omitted it, possibly by accident, as they mention Stat. 15 Rich. 2, c. 2 (see next section), among the acts in force. Report of Judges, 3 Binn. 595, 613, 614. But in Roberts's Digest of British statutes, the reason of the omission is suggested to be, "probably, because the act of 1700 [Pennsylvania] was considered analogous, and as supplying the place of the statute." p. 283, note.

[2] 1 Hawk. P. C. Curw. ed. p. 496, § 5, and p. 488, § 4.

those that make insurrections, or great ridings, riots, routs, or assemblies, in disturbance of the peace or of the common law, or in affray of the people, shall be holden and kept and fully executed; joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of the peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and, if they find any that hold such place forcibly, after such entry made, they shall be taken and put in the next gaol, there to abide convict, by the record of the same justices or justice, until they have made fine and ransom to the king."[1]

Summary Conviction. — The reader perceives, that the chief effect of this enactment is to provide for a summary conviction of offenders by the magistrate on view.

Common Law with us. — It is of a date sufficiently early to be common law with us; it was received in Maryland[2] and Pennsylvania;[3] and, with all the other acts of Parliament on the subject of forcible entry and detainer, was expressly made of force in South Carolina.[4] But unquestionably there are other States into which it has not come, — a matter, however, depending chiefly on questions of local jurisprudence. The process of summary conviction on view is itself unknown in some of the States, probably in most of them.

Others as Common Law in our States. — Whether the enactments mentioned in the succeeding sections under our present subdivision are common law in any particular State, is a question which each practitioner, in the absence of decisions of the courts, will determine for himself.[5] No particular suggestions can aid him, but the general doctrines by which this sort of inquiry is to be answered are stated elsewhere in these volumes, and more at large in the author's "First Book of the Law."[6]

§ 494. **Stat. 8 Hen. 6.** — The next of these statutes is 8 Hen. 6, c. 9, A. D. 1429. It was intended to correct some defects in the last-recited act; "as," says Hawkins, "in not giving any remedy

[1] See, for some expositions of this statute, 1 Hawk. P. C. Curw. ed. p. 497.

[2] Kilty Report of Statutes, 223.

[3] Report of Judges, 3 Binn. 595, 614; Blythe v. Wright, 2 Ashm. 428.

[4] The State v. Huntington, 3 Brev. 111.

[5] They were all received in Maryland Kilty Rep. Stats. 222, 227, 236.

[6] Bishop First Book, § 43–59.

against those who were guilty of a forcible detainer after a peaceful entry; nor even against those who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a justice of the peace; and in not giving the justices of the peace any power to restore the party injured by such force to his possession."[1] And we may add, that it seems to be the first statutory provision making forcible detainers indictable; though they were doubtless so at the common law. The more important parts of it are the following: "That from henceforth, where any doth make any forcible entry in lands and tenements or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of the peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statute (that is, 15 Rich. 2, c. 2) duly to be executed."

§ 495. **Continued.** — And in § 3 this statute of 8 Hen. 6, c. 9, further provides, that the justices or either of them "shall have authority and power to inquire by the people[2] of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same hold with force." Then follows a provision for the restitution of the premises to the rightful possessor; thus, "And if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden as afore, and shall put the party so put out in full possession of the same lands and tenements, so entered or holden as before." There are other minor provisions, not necessary to be copied, but the whole closes in the following words: "§ 7. Provided always, that they which keep their possessions with force, in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute."

§ 496. **Stats. 31 Eliz. — 21 Jac. 1.** — The restitution of posses-

[1] 1 Hawk. P. C. Curw. ed. p. 497.

[2] The meaning of which is, that they may proceed by indictment, as in other cases of misdemeanor. That an indictment lies under this statute, see Rex v. Williams, 4 Man. & R. 471, 9 B. & C 549; Anonymous, 4 Co. 48 *a*; Anonymous, 2 Dy. 122, pl. 24; Rex v. Taylor 7 Mod. 123.

sion was put on a more exact foundation by 31 Eliz. c. 11 (A. D. 1589); declaring, "That no restitution upon any indictment of forcible entry or holding with force be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession, by the space of three whole years together, next before the day of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same. And if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."[1] And Stat. 21 Jac. 1, c. 15 (A. D. 1623), removed a doubt by enacting, that the right to give restitution should exist, not only in favor of persons having the fee, &c., but also it should extend "unto tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by *elegit*, statute merchant, and staple."[2]

II. *The Ownership, Estate, or Possession necessary.*

§ 497. **Whether Real Estate — (Forcible Trespass).** — The common-law doctrine seems to be, that the kind of property concerning the possession of which the forbidden tumult arises, is immaterial; hence we have the common-law offence of forcible trespass, to be considered in the next chapter. But to call a forcible trespass to personal property a forcible entry would be a misuse of terms, though it would lead to no error in a legal view. Under the statutes, however, — namely, the statutes of England which are common law in the United States, — the property must be real estate.

What Real Estate. — And though nothing in their words excludes the offence from being committed on any kind of real

[1] See 1 Hawk. P. C. Curw. ed. p. 493, § 14.

[2] 1 Hawk. P. C. Curw. ed. p. 499.

property, yet the nature of some kinds prevents it; indeed, it can probably be committed only on such as is capable of manual occupation.

§ 498. **Further of the Sort of Real Property.** — Hawkins says: "It hath been holden for a general rule, that one may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes, &c. But I do not find any good authority that such an indictment will lie for a common or office; but it seems agreed that an indictment for forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of any of the above-mentioned possessions: as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt if he dare put in his beasts into the common, &c. Yet it seems clear, that no one can come within the danger of these statutes, by a violence offered to another in respect of a way, or such like easement, which is no possession. Also it seemeth, that a man cannot be convicted upon a view, by force of 15 Rich. 2, of a forcible detainer of any such tenement wherein he cannot be said to have made a precedent forcible entry, because that statute gives the justices a jurisdiction of no other forcible detainer but what follows a forcible entry."[1]

§ 499. **Dwelling-house — Distinguished from other Realty.** — Therefore the entry need not be into a dwelling-house.[2] Yet there are circumstances in which, if it is, it will be indictable, while the same things done on open ground would not be so;[3] as, for example, if there are persons in the dwelling-house, and they are put in fear.[4]

§ 500. **Tenant in Common.** — A leading principle is, in the language of Lord Kenyon, "that no one shall with force and violence assert his own title."[5] Therefore, though a tenant in common has no right to resist the entry of his co-tenant upon

[1] 1 Hawk. P. C. Curw. ed. p. 502, § 31.

[2] Rex v. Nicholls, 2 Keny. 512.

[3] And see Benson v. Strode, 2 Show. 150; Harding's Case, 1 Greenl. 22; The State v. Tolever, 5 Ire. 452; The State v. Caldwell, 2 Jones, N. C. 468; The State v. Bordeaux, 2 Jones, N. C. 241; post, § 504. And see ante, § 490, note.

[4] The State v. Fort, 4 Dev. & Bat. 122. And see The State v. Morgan, Winston, No. 1, 246.

[5] Rex v. Wilson, 8 T. R. 357, 361.

the estate,[1] yet the co-tenant may commit the offence of a forcible entry when the tenant does resist.[2]

Wife. — Even the doctrine seems to be, that a wife may be guilty of this offence in respect of premises held by her husband.[3]

§ 501. **Further of the Estate.** — Hence the common-law rule, as unaffected by statutes English or American, is, that an indictment for a forcible entry need not contain any allegation of estate or interest in the premises. The requisite is, that the person claiming possession, whether by right or wrong, should be in actual and peaceable possession.[4] Not even is evidence of title admissible.[5]

Bare Custody. — Yet there must be, by right or wrong, an actual possession[6] in distinction from a bare custody;[7] therefore a man is not indictable for a forcible entry upon premises held merely by his servant.[8]

Under the Old Statutes. — The same rule appears also to apply to indictments under Stat. 5 Rich. 2, stat. 1, c. 8,[9] before recited;[10] while, under 8 Hen. 6, c. 9, the indictment must state, says Chitty, "that the place was the freehold of the party aggrieved;"[11] or state some other interest in the prosecutor.[12] But on principle we may not easily see how, under any of these statutes, the matter can be otherwise than as at the common law, except where the prosecutor proposes to ask for a judgment of restitution. Where he does so propose, clearly the indictment, on authority and perhaps on principle, must set out his title.[13]

[1] Commonwealth *v.* Lakeman, 4 Cush. 597.

[2] Rex *v.* Marrow, Cas. temp. Hardw. 174, Dublin ed. 164.

[3] Rex *v.* Smyth, 1 Moody & R. 155, 5 Car. & P. 201; 1 Russ. Crimes, 3d Eng. ed. 807.

[4] Rex *v.* Wilson, 8 T. R. 357; Beauchamp *v.* Morris, 4 Bibb, 312; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Speirin, 1 Brev. 119; Commonwealth *v.* Keeper of Prison, 1 Ashm. 140; People *v.* Leonard, 11 Johns. 504; The State *v.* Pollok, 4 Ire. 305; The State *v.* Anders, 8 Ire. 15; Higgins *v.* The State, 7 Ire. 549.

[5] Reg. *v.* Cokely, 13 U. C. Q. B. 521, decided on Rex *v.* Williams, 4 Man. & R. 471.

[6] Pitman *v.* Davis, Hemp. 29; People *v.* Fields, 1 Lans. 222; Gates *v.* Winslow, 1 Wis. 650; McCauley *v.* Weller, 12 Cal. 500; Pogue *v.* McKee, 3 A. K. Mar. 127; Hunt *v.* Wilson, 14 B. Monr. 44; Bennet *v.* Montgomery, 3 Halst. 48; Mairs *v.* Sparks, 2 Southard, 513; Stewart *v.* Wilson, 1 A. K. Mar. 255.

[7] Commonwealth *v.* Keeper of Prison, 1 Ashm. 140.

[8] The State *v.* Curtis, 4 Dev. & Bat. 222.

[9] 3 Chit. Crim. Law, 1136; Harding's Case, 1 Greenl. 22.

[10] Ante, § 492.

[11] 3 Chit. Crim. Law, 1136; Rex *v.* Taylor, 7 Mod. 123.

[12] Rex *v.* Wilson, 8 T. R. 357.

[13] Torrence *v.* Commonwealth, 9 Barr

How adjudged in New Hampshire. — According to a New Hampshire case, a complaint for a forcible entry must allege, that the complainant was seised of the premises, or possessed of them for a term of years. The judge said, that, on the authorities, "any person who is seised of land in fee for life, or possessed thereof for a term of years, and who is with strong hand and armed power turned out of possession, or held out of possession in the same manner, may have this process. It is of no importance whether the seisin be by right or by wrong, or whether the term for years be legal or not. But there is no doubt that the complaint must allege that the complainant was seised or possessed for a term of years."[1]

§ 502. *As to Forcible Detainer:* —

The Doctrine in Brief. — The question of the possession or estate in forcible detainer is more difficult, being less illuminated by authority. On principle, no one should be held for this offence merely because he defends by force a peaceable possession, in defeasible, of any estate to which another has no real claim. And if one through mistake should honestly suppose, as a question of fact, not of law, that he was occupying this position, he would stand on the same ground, according to a doctrine illustrated in the preceding volume,[2] as if the truth were what he believed it to be. And probably the law will be found, on examination, to be exactly as thus stated.[3]

§ 503. **Detainer distinguished from Entry.** — The word "detainer" implies a previous entry of the party detaining, which indeed may have been peaceable; or a right to enter in the person against whom the premises are detained.[4] And Russell defines

184; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Anders, 8 Ire. 15; Respublica *v.* Campbell, 1 Dall. 354; The State *v.* Butler, Conference, 331; Vanpool *v.* Commonwealth, 1 Harris, Pa. 391; Burd *v.* Commonwealth, 6 S. & R. 252; Respublica *v.* Shryber, 1 Dall. 68. And see Rex *v.* Williams, 9 B. & C. 549; Crim. Proced. II. § 383, 384.

[1] The State *v.* Pearson, 2 N. H. 550, opinion by Richardson, C. J.

[2] Vol. I. § 303. And see other sections in this connection. See Faris *v.* The State, 3 Ohio State, 159.

[3] See also Vol. I. § 556; Harrington *v.* People, 6 Barb. 607; The State *v.* Elliot, 11 N. H. 540.

[4] The words of the Connecticut statute are, "shall make forcible entry, &c., and with strong hand shall detain the same; or, having made a peaceable entry without the consent of the *actual possessor*, shall hold and detain the same with force and strong hand," &c.; and, under this statute, the court has held, that an allegation of actual possession when the defendant entered, is essential in a complaint for a forcible detainer after a peaceable entry. Phelps *v.* Baldwin, 17 Conn. 209.

forcible detainer to be, "where a man, who enters peaceably, afterwards detains his possession by force."[1] And adds: "This doctrine will apply to a lessee, who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined;[2] and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is forfeited, or by the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence."[3] Plainly, if a man enters by stratagem, and then retains possession by force, he commits a forcible detainer; and it is even laid down, that this will be regarded as a forcible entry.[4] The North Carolina court has held, that forcible detainer is not indictable at the common law where the entry was peaceable and lawful,[5] — a proposition which seems too narrow. We have seen[6] what forcible detainers were excepted out of Stat. 8 Hen. 6, c. 9, confirmed by 31 Eliz. c. 11.[7]

III. *The Act which constitutes the Offence.*

§ 504. **Complications of Doctrine — What Principles.** — On this branch of our subject it is difficult to lay down exact rules. The offence depends on several distinct legal principles, operating not always uniformly. There are, first, the doctrine of breach of the peace in the nature of assault;[8] next the doctrine of breach of the peace by combinations of numbers, the same as in riot;[9] then, the doctrine that people are liable to grow excited over quarrels concerning their own interests, which last is the peculiar one governing this offence, but in actual development is always found more or less connected with the former two. While these three ingredients mix not equally in the cases, they are

[1] 1 Russ. Crimes, 3d Eng. ed. 810. And see ante, § 498.

[2] See Parke, J., in Rex v. Oakley, 4 B. & Ad. 307.

[3] Com. Dig. tit. Forcible Entry, &c. (B) 1.

[4] Burt v. The State, 3 Brev. 413, 2 Tread. 489; post, § 508.

[5] The State v. Godsey, 18 Ire. 348.

[6] Ante, § 495.

[7] Ante, § 496.

[8] See The State v. Batchelder, 5 N. H. 549; Commonwealth v. Taylor, 5 Binn. 277.

[9] See Rex v. Stroude, 2 Show. 149; Rex v. Wyvill, 7 Mod. 286; Henderson v. Commonwealth, 8 Grat. 708; The State v. Wilson, 3 Misso. 125.

also subjected to the action of what may be termed outside influences: as, whether the place be inhabited or not;[1] whether the party acting has a clear and just claim, or one but feignedly so; whether the possession is of long standing and entirely undisturbed, or is recent and not fully acknowledged by the other party. Indeed we should find it impossible to enumerate all the circumstances of this general nature which more or less vary results. Still there are developed in the decisions some principles to which we shall find it not unwise to refer.

§ 505. **Exceed mere Trespass.** — One principle is, that the act must in all cases exceed a mere trespass.[2] Another is, that, of —

Combination of Numbers. — Combined numbers, striking terror, sometimes supply the place of force, and so constitute the offence, though no actual force is employed. Three persons have been held to be sufficient within this rule.[3] Yet, —

One Person. — The offence may be committed by one person only, who, however, must ordinarily use actual force, or some actual threatening demonstration, in distinction from this constructive force.[4]

Creating Apprehension. — The general idea is, that there must be such violence used, or such an array of numbers, or such language employed, as to create, in the minds of the persons opposing, an apprehension either of bodily harm, or of breach of the peace, if they do not yield up the possession or claim of possession.[5] This applies to cases in which there is some person present to resist; for pretty clearly there may be a forcible entry into a dwelling-house, and possibly into other estate, which will be indictable though no such person is present.[6] Yet evidently

[1] See ante, § 499.

[2] Vol. I. § 538; Rex v. Smyth, 5 Car. & P. 201, 1 Moody & R. 155; Rex v. Bake, 3 Bur. 1731; Reg. v. Newlands, 4 Jur. 322; Rex v. Deacon, Ryan & Moody N. P. 27; The State v. Tolever, 5 Ire. 452; Gray v. Finch, 23 Conn. 495; The State v. Ross, 4 Jones, N. C. 315; People v. Smith, 24 Barb. 16; The State v. McClay, 1 Harring. Del. 520; Hopkins v. Calloway, 3 Sneed, 11. See Reg. v. Dyer, 6 Mod. 96; Olinger v. Shepherd, 12 Grat. 462.

[3] Vol. I. § 538; The State v. Simpson, 1 Dev. 504; The State v. Pollok, 4 Ire. 305; The State v. Armfield, 5 Ire. 207.

[4] Burt v. The State, 3 Brev. 413; The State v. Pollok, 4 Ire. 305; The State v. Bordeaux, 2 Jones, N. C. 241; The State v. Caldwell, 2 Jones, N. C. 468.

[5] Commonwealth v. Shattuck, 4 Cush. 141; The State v. Pollok, 4 Ire. 305; Rex v. Smyth, 5 Car. & P. 201, 1 Moody & R. 155; Milner v. Maclean, 2 Car. & P. 17; The State v. Cargill, 2 Brev. 445, Butts v. Voorhees, 1 Green, N. J. 13; Commonwealth v. Dudley, 10 Mass. 403; Berry v. Williams, 1 Zab. 423; Commonwealth v. Rees, 2 Brews. 564; The State v. Smith, 2 Ire. 127; Cammack v. Macy, 3 A. K. Mar. 296.

[6] See post, § 508, 510; ante, § 499.

the doctrines applicable under such circumstances differ considerably from those which govern forcible entries in the face of the occupant.[1]

§ 506. **Old English Books on this Subject.** — The old books contain, on this subject, much that is law in some circumstances, not in others; owing, perhaps, to their authors not having taken into the account all needful distinctions.[2] What is said in those books should not be disregarded; yet, as accepted, it should be adjusted and limited by the proper qualifying principles. Let us, therefore, set down the points collected by Mr. Gabbett,[3] in his own words, attended by his own references to authorities. He says:[4] —

§ 507. **"What Acts of Violence or Terror constitute a Forcible Entry within the Meaning of the Statutes.** — An entry, to be forcible within the meaning of these statutes, must be accompanied with some circumstances of actual violence or terror; and therefore an entry which hath no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes.[5] The entry may be said to be forcible, not only in respect of the violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other violence in the manner of the entry; as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house.[6] And wherever a man, either by his behavior or speech at the time of his entry, gives those who are in possession of the tenement which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, whether he cause such a terror by carrying with him an unusual number of ser-

[1] See The State *v.* Fort, 4 Dev. & Bat. 192; The State *v.* Bennett, 4 Dev. & Bat. 43. Breaking the door of an unoccupied school-house is not indictable in Pennsylvania. Kramer *v.* Lott, 14 Wright, Pa. 495.

[2] Ante, § 504.

[3] Gabbett. — The reason why I quote from this book, here and in one or two other places, is, not that it is of the highest merit, but because its author excels in stating mere points, and nothing else. He collects the old points from the standard books as servilely and almost as accurately as if he were a machine. If he possessed capacity of a higher order, he would not be likely to do this drudgery so well; or, at least, he would not be likely to copy a legal absurdity in precisely the same way as a well-proportioned legal truth. For the present English law of the subject, see 1 Russ. Crimes, 5th ed. by Prentice, 404–417.

[4] 1 Gab. Crim. Law, 324–326.

[5] Lamb. 133, 134; Dalt. c. 125, p. 297; 1 Hawk. c. 28, § 25, p. 500, 501.

[6] 1 Hawk. c. 28, § 26, p. 501.

vants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force; or by actually threatening to kill, maim, or beat those who shall continue in possession; or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance; these are all such circumstances of terror, as that, in respect of them, an entry may be deemed forcible.[1] And the terror may also be excited, and the forcible entry made, by a single person.[2] But it seemeth that no entry shall be adjudged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage which is not personal.[3] And, notwithstanding some opinions to the contrary,[4] an entry into a house through a window, or by drawing a latch, or opening a door with a key, cannot bring a man within the meaning of these statutes, which speak of entries with strong hand or multitude of people.[5] But though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of his possession by threats, it is a forcible entry.[6]

§ 508. **"The Force need not be upon the Land, &c., nor in the very Act of the Entry.** — And it seems that it is neither necessary that the force should be actually done upon the land, &c., or in the very act of the entry; for if one find a man out of his house, and forcibly withhold him from returning to it, though said person take peaceable possession thereof in the party's absence, this would amount to a forcible entry, because the force is used or employed in such case with an immediate intent to make the entry, and to prevent any opposition to it, and cannot therefore be properly separated from such entry; and it is no objection that the violence is not to the house, but to the person only.[7]

§ 509. **"A Claim of the Lands is essential to accompany the Violence or Terror.** — Besides such circumstances of violence or terror as are above mentioned, the entry must also be accompanied with a claim of the lands, &c., so entered upon; for it is obvi-

[1] 1 Hawk. c. 28, § 27.

[2] Lamb. 35; 1 Hawk. c. 28, § 29, p. 502.

[3] Dalt. c. 126, § 4; 1 Hawk. c. 28, § 28, p. 502.

[4] Noy, 146, 147.

[5] 3 Bac. Ab. Forcible Entry (B); 1 Hawk. c. 28, § 26, p. 501.

[6] Dalt. c. 126, p. 299; 3 Bac. Ab. Forcible Entry (B).

[7] 1 Hawk. c. 28, § 26, p. 501.

ous, that, if one who pretends a title to lands barely go over them, either with or without a number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act which, expressly or impliedly, amounts to a claim of such lands, he cannot be said to make an entry thereinto within the meaning of these statutes.[1] But no one can be in danger of those statutes by entering with force into a tenement whereof he himself had the sole and lawful possession, both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it.[2]

§ 510. **"The Person whose Possession is entered upon need not be upon the Lands, &c.** — And it is also to be observed, that, when a claim is made, it is not necessary that the person whose possession is so entered upon shall be upon the lands, &c., at the time; for there may be a forcible entry where any person's wife, children, or servants are upon the lands to preserve the possession; because whatsoever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession.[3] But if an actual claim of the lands, &c., be made with any circumstances of force or terror, it will amount to a forcible entry, whether his adversary actually quit his possession or not;[4] and, if a man enters with force to distrain for rent, this is equally a forcible entry; because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force.[5]

§ 511. **"When the Offence shall be deemed joint; when several.** — As to the co-operation which is required to make others *participes criminis*, the law is, that, if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one, only, use force, it is a forcible entry in them all; and in such case all who accompany him will be guilty of the forcible entry, and be deemed to enter with him, whether they actually come upon the lands or not; but it is otherwise where one of them has a right of entry; for then they

[1] Dalt. c. 126, § 3; 1 Hawk. c. 28, § 20, p. 500.
[2] 1 Hawk. c. 28, § 32, p. 503.
[3] 3 Bac. Ab. Forcible Entry (B).
[4] 1 Hawk. c. 28, § 21, p. 500.
[5] 3 Bac. Ab. Forcible Entry (B).

only come to do a lawful act, and therefore it is the force only of him who used it.[1] And if divers enter by force to the use of another, but without his knowledge or privity, if he afterwards agrees to it, though such subsequent agreement thereto will make him a disseisor, yet he shall not be adjudged to make a forcible entry within these statutes; because he no way concurred in, nor promoted the force.[2]

§ 512. **"What constitutes a Forcible Detainer, and who shall be said to be guilty of it.** — The same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. Whoever, therefore, having a defeasible title (as a lessee after his term is expired), keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, or person claiming a right of entry thereto, if he dare return; or keeps possession of house or land with such circumstances of terror or show of force as are calculated to deter the rightful owner from resuming his possession, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.[3] It seems, however, that a man ought not to be adjudged guilty of this offence, for barely refusing to go out of a house, and continuing therein in despite of another; as if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it, or shuts the door against the lessor when he would enter.[4] But if a man shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in; or if one place men at a distance from the house in order to assault any one who shall attempt to make an entry into it, he shall, in either case, as it seems, be guilty of a forcible detainer.[5] And it is at least equally clear, that, though a man shall have been in possession for a great length of time by a defeasible title, yet, if such wrongful possessor still continue his occupation with force and arms after a claim made by another, who hath a right of entry thereunto, he shall be punishable for a forcible entry and detainer against the purport of these statutes; because all the estate whereof he was

[1] 3 Bac. Ab. Forcible Entry (B).
[2] Cromp. 69; Dalt. 77; 1 Hawk. c. 28, § 24, p. 500.
[3] Cromp. 70 *b*; Lamb. 145; Dalt. c. 126, § 4; Snigge *v.* Shirton, Cro. Jac. 199; 1 Hawk. c. 28, § 30, p. 502.
[4] Ibid.
[5] Ibid.

seised before such claim, was defeated by it; and his continuance in his possession afterwards amounted, in judgment of law, to a new entry or disseisin." [1]

§ 513. **Possession of Main House — Out-buildings.** — The facts of a North Carolina case were, that a person bought a house, and a shed connected with it, put in a tenant, and failed to pay the purchase-money. The owner then sold the premises to another person, who was admitted by the tenant of the first purchaser into the main part of the house. But the first purchaser had himself locked the shed; and so the second, on being admitted, broke it open. Whereupon the court held, that this breaking open of the shed was no forcible entry into it; because the possession, peaceably taken, of the main house, carried with it in law the possession of all the rest, which was parcel thereof, even of the closed shed.[2]

IV. *The Restitution of Possession awarded.*

§ 514. **General View.** — The leading doctrine is, that a complainant is not entitled, as of course, to this judgment of restitution, even though the defendant is convicted. He must show, *prima facie*, a right of possession.[3] In most of our States, there are statutes for gaining possession, by a summary civil process, of premises wrongfully withheld; practically taking the place of this judgment of restitution upon indictment.

[1] Co. Lit. 256, 257; Cromp. 69 *b*; Lamb. 160, 161; Dalt. c. 128, § 2; 1 Hawk. c. 28, § 34, p. 503.

[2] The State *v.* Pridgen, 8 Ire. 84. See O'Brien *v.* Henry, 6 Ala. 787.

[3] See, on this general subject, Anonymous, 2 Dy. 122, pl. 24; Hardesty *v.* Goodenough, 7 Mod. 138; Rex *v.* Burgess, T. Raym. 84; Rex *v.* Marrow, Cas. temp. Hardw. 174, Dublin ed. 164; Rex *v.* Williams, 4 Man. & R. 471, 9 B. & C. 549; Rex *v.* Harris, Carth. 496, 1 Ld. Raym. 440; Rex *v.* Harnisse, Holt, 324; Lovelace's Case, Comb. 260; Anonymous, 6 Mod. 115; St. Leger *v.* Pope, Comb. 327; Anonymous, March 6, pl. 12; Tawney's Case, 2 Ld. Raym. 1009; Rex *v.* Jones, 1 Stra. 474; Matter of Shotwell, 10 Johns. 304; The State *v.* Anders, 8 Ire. 15; The State *v.* Butler, Conference, 331; Vanpool *v.* Commonwealth, 1 Harris, Pa. 391; Reg. *v.* Connor, 2 Rob. Pract. U. C. 139; Rex *v.* Jackson, Draper, 50; ante, § 495, 496, 501. Where a defendant pleaded guilty to an indictment for forcible entry and detainer, and his son-in-law took possession of the premises before the writ of restitution issued, the writ was held to empower the sheriff to turn the latter out. It was held also, that one who takes possession in this way may be indicted therefor, as for an original entry and detainer. The State *v.* Gilbert, 2 Bay, 355.

V. *Remaining and Connected Questions.*

§ 515. **Misdemeanor.** — Forcible entry and detainer are common-law misdemeanors, in distinction from felony. The consequences of this doctrine sufficiently appear in the preceding volume.

§ 516. **Civil in Criminal Form — Husband and Wife.** — Under the New Hampshire statute of Feb. 16, 1791, the court held, that, though the process provided is criminal in form, yet it is in some other respects civil; consequently partaking of the double nature of civil proceedings and of criminal. Therefore, where a husband and his wife committed this offence jointly, the two were joined as defendants; but the fine, which was the punishment, was imposed only on the husband.[1]

[1] The State *v.* Harvey, 3 N. H. 65.

CHAPTER XXI.

FORCIBLE TRESPASS.[1]

§ 517. **How defined.** — A forcible trespass is the same act done to personal property which constitutes a forcible entry when committed on real estate.[2] In the first volume, a general view was presented of this offence.[3]

Presence of Injured Person. — A forcible trespass, however the doctrine may be in forcible entries, can be committed only in the actual presence of the person claiming possession of the property which is thus to be wrested away.[4]

Possession, not Title. — Like forcible entry, "the gist of the offence of forcible trespass is a high-handed invasion of the

[1] See FORCIBLE ENTRY AND DETAINER. For the pleading, practice, and evidence, see Crim. Proced. II. § 389 et seq. And see Stat. Crimes, § 541, 560.

[2] Vol. I. § 536. See ante, § 497.

[3] Vol. I. § 536–538.

[4] The State *v.* McDowell, 1 Hawks, 449; The State *v.* Flowers, 1 Car. Law Repos. 97; The State *v.* Simpson, 1 Dev. 504; The State *v.* Mills, 2 Dev. 420; The State *v.* McCauless, 9 Ire. 375. There is a Tennessee case possibly contrary to this proposition. Two men claimed property, each adverse to the other, in a negro slave woman. The claimant not in possession, while riding on horseback along the public way, met this woman; but the report fails to show whether or not the other claimant was present. He compelled her to go with him to his own house; and he was held to be indictable therefor, not on the ground of any indignity or wrong done to the woman, but of forcible trespass to property. And the court considered, that it made no difference whether the negro woman were willing or unwilling to go with this claimant. Said Overton, J. — it was a case before this single judge: "When an individual claims property, to which another has claim also, he is not justifiable in using any kind of force, either actual or implied, to regain property. The law is the arbiter, and recourse must be had to it. If two men are disputing the property of a horse, and he is in the possession of one, being in his use, the other cannot, without violating the order of society, take and carry him away." The State *v.* Thompson, 2 Tenn. 96. In North Carolina, where the doctrine of the text is distinctly held, the following case occurred. Two white men went to the house of a negro, and one of them claimed a cow in the possession of the latter, who also claimed to own it. They declared that they would take it away; the force was overpowering, and the negro was put in fear. He went to a neighbor's to procure evidence of his ownership, returned, and found the two men driving off the cow, and followed them up still persisting in his claim. It was held that they were guilty of a forcible trespass. The State *v.* McAdden, 71 N. C. 207.

actual possession of another, he being present — title is not drawn in question."[1]

§ 518. **Breach of Peace.** — Perhaps the doctrine of forcible trespass rests, more than that of forcible entry, upon the idea of a breach of the peace, or of the tendency of the act to break the peace. Nothing is indictable as such trespass which does not fall fully within this principle.[2]

Mere Trespass — Fraud. — Evidently, therefore, a mere trespass against the effects of another,[3] or a taking by fraud and stratagem,[4] does not constitute this offence. So, also, —

Words. — Mere words, however violent, though accompanied by a carrying away of the property, are not alone adequate.[5] But, when accompanied by violent demonstrations and putting in fear, the combined facts will constitute the offence.[6]

§ 519. **Combinations of Numbers.** — The idea of combinations of numbers, supplying the place of physical force, prevails here the same as in forcible entry and detainer.[7] When, therefore, in the time of slavery, three persons took away a slave from an old and feeble man, in his presence and against his will; and he was restrained from insisting on his rights by a conviction that it would be useless, and by a want of physical power; this offence of forcible trespass was held to be committed. Said Daniel, J.: "If the acts of the defendants, in the taking of the slave, *tended* to a breach of the peace, they were as much guilty of a forcible trespass as if an actual breach of the peace had taken place."[8]

What Demonstration. — In another case it was observed: "There must be a demonstration of force, as with weapons, or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate or put in fear."[9]

§ 520. **Possession maintained by Force.** — The owner of personal property, as of real,[10] has the right to maintain his possession by force.[11]

[1] Pearson, J., in The State *v.* McCauless, 9 Ire. 375, 376. And see The State *v.* Graham, 8 Jones, N. C. 397.

[2] Rex *v.* Gardiner, 1 Russ. Crimes, 3d Eng. ed. 53; The State *v.* Phipps, 10 Ire. 17; The State *v.* Mills, 2 Dev. 420; The State *v.* Flowers, 1 Car. Law Repos. 97.

[3] The State *v.* Watkins, 4 Humph. 256; The State *v.* Farnsworth, 10 Yerg. 261.

[4] The State *v.* Ray, 10 Ire. 39.

[5] The State *v.* Covington, 70 N. C. 71.

[6] The State *v.* Widenhouse, 71 N. C. 279.

[7] Ante, § 505; The State *v.* Simpson, 1 Dev. 504. And see The State *v.* McAdden, 71 N. C. 207, stated ante, § 517, note.

[8] The State *v.* Armfield, 5 Ire. 207.

[9] Pearson, J., in the State *v.* Ray, 10 Ire. 39.

[10] Vol. I. § 536; ante, § 502.

[11] Vol. I. § 536, Commonwealth *v.*

Forcible Detainer. — And it has been laid down that the offence of forcible detainer does not extend to personal property.[1]

§ 520 *a*. **Analogous Statutory Offences.** — In some of our States, there are statutory offences analogous to this common-law one of forcible trespass; as, for example, —

Malicious Trespass. — This is analogous also to malicious mischief, and commonly it extends equally to real estate as to personal.[2] But offences of this sort are for "Statutory Crimes."

Kennard, 8 Pick, 133. And see Faris *v.* The State, 3 Ohio State, 159. On this general subject, see Vol. I. § 838 et seq. Concerning the right to defend one's person and property, see Vol. I. § 836 et seq.

[1] The State *v.* Marsh, 64 N. C. 378.

[2] The State *v.* Merrill, 3 Blackf. 346; Bock *v.* The State, 50 Ind. 281; Dawson *v.* The State, 52 Ind. 478; Lossen *v.* The State, 62 Ind. 437; The State *v.* Sherrill, 81 N. C. 550.

For FORESTALLING, see Vol. I. § 518–529.

CHAPTER XXII.

FORGERY OF WRITINGS WITH ITS KINDRED OFFENCES.[1]

§ 521, 522. Introduction.
523, 524. Definition and General Doctrine.
525–532. The Writing at Common Law.
533–547. Legal Efficacy of the Writing.
548–571. The Writing under Statutes.
572–595. The Act of Forgery.
596–601. The Intent.
602, 603. The Progress toward effecting the Fraud.
604–608. Offences depending on and growing out of Forgery.
609–612. Remaining and Connected Questions.

§ 521. **Nature of Forgery — Species of Cheat.** — Forgery is, as already observed,[2] a common-law offence of the class known as cheats, and it includes both the unsuccessful attempt and the consummated fraud. In other words, when a cheat, attempted or accomplished, assumed a particular form, the common law gave it the name of forgery, and the rank of a separate offence. Also, to this common law, there have been added many statutes. The consequence is, that forgery in the modern law is an offence of a very complicated nature, — much more so than "Cheats at the Common Law," treated of in a previous chapter.

§ 522. **How the Chapter divided.** — We shall consider, I. The Definition and General Doctrine of Forgery; II. The Writing of which, at the Common Law, it may be committed; III. The Legal Efficacy of the Writing; IV. The Writing under Statutes against Forgeries; V. The Act by which Forgery is committed; VI. The Intent; VII. The Progress toward effecting the Fraud; VIII. Offences depending on and growing out of Forgery; IX. Remaining and Connected Questions.

[1] For matter relating to this title, see Vol. I. § 341, 479, 572, 584, 585, 650, 654, 676, 734, 748, 815, 942 and note, 974, 975. See this volume, COUNTERFEITING AND THE LIKE AS TO COIN. For the pleading, practice, and evidence, see Crim. Proced. II. § 398 et seq. And see Stat. Crimes, § 185, 205, note, 206, 306, 325–343, 568.

[2] Vol. I. § 572; ante, § 143, 157, 158.

I. *The Definition and General Doctrine of Forgery.*

§ 523. **How defined.** — Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[1] In form thus extended the definition was in the preceding volume given for the sake of clearness; but it may be reduced to the briefer expression, — Forgery is the fraudulent making[2] of a false writing, which, if genuine, would be apparently of some legal efficacy.[3]

§ 524. **Viewed as an Attempt.** — From this definition, and from what has already been observed,[4] we perceive that forgery is an

[1] Vol. I. § 572; The State *v.* Pierce, 8 Iowa, 231, 235; The State *v.* Thompson, 19 Iowa, 299, 303. Adopted, Rembert *v.* The State, 53 Ala. 467, 468.

[2] An altering of an instrument amounting to forgery is, in law, a forging of the instrument altered. See Commonwealth *v.* Woods, 10 Gray, 477; Commonwealth *v.* Butterick, 100 Mass. 12, 18; People *v.* Marion, 29 Mich. 31; post, § 573.

[3] The books abound in definitions of forgery. **English Commissioners.** — The English commissioners proposed: "Forgery consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right." 5th Rep. Crim. Law Com. A. D. 1840, p. 69. And they cite the following definitions, by English authors and judges: —

Blackstone. — "The fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Bl. Com. 247.

Mr. Justice Buller. — "The making a false instrument with intent to deceive." Rex *v.* Coogan, 2 East P. C. 853.

Mr. Baron Eyre. — "A false signature made with intent to deceive." Rex *v.* Taylor, 2 East P. C. 853. "The false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons." Rex *v.* Jones, 1 Leach, 4th ed. 366, 367.

Mr. Justice Grose. — "The false making a note or other instrument with intent to defraud." Rex *v.* Parkes, 2 Leach, 4th ed. 775, 785.

Sir E. H. East. — "Forgery, at common law, denotes a *false* making (which includes every alteration or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 East P. C. 852.

Lord Coke. — "To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will; the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge is *falsare* or *fabricare*. And this is properly taken when the act is done in the name of another person." 3 Inst. 169. In a late English case we have the following: —

Blackburn, J. — "Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced to writing." In re Windsor, 10 Cox C. C. 118, 123, 6 B. & S. 522.

Shee, J. — "It is the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another." Ib. at p. 124 of Cox.

[4] Ante, § 521.

offence involving, to a great extent, the obscure doctrines which were discussed in our first volume under the title "Attempt."[1] Thus, to constitute an attempt, the act done with the criminal intent must have some real or apparent adaptation to accomplish the ulterior mischief;[2] but if the adaptation is apparent it is sufficient, it need not be real.[3] Consequently, —

Legal Efficacy. — A false writing, to be indictable as a forgery, must be such as, in the language of the foregoing definition, "would, if genuine, be apparently of some legal efficacy." If it is not, the making of it cannot be deemed in law an attempt to cheat.

Writing. — That the thing must be a "writing" depends on a mere technical rule of the law, which has thus drawn the boundaries of the crime itself; while yet, in reason, since the transactions of men are made solemn by writing, it is proper the law should render specially odious this sort of attempted cheat.

II. *The Writing of which Forgery at the Common Law may be committed.*

§ 525. **Made with Pen — Printed, &c.** — In reason, whether the writing is made with the pen, with a brush, with printers' type and ink, or with any other instrument, or by any other device, — whether in characters which stand for words or for ideas, in the English language or in any other, — is immaterial, provided the representation to the eye conveys to any mind the substance of what constitutes forgery. The decisions may not have fully covered this ground, but such is the principle involved in them.

Convey Idea. — A single letter, constituting no word, and conveying no idea, is not a writing, — it must be a vehicle of ideas.[4]

§ 526. **Impressions of Seals.** — Hammond puts the question, "whether seals, or rather their impressions, with other similar subjects, are upon a similar footing with writings [here employing the word in its restricted sense];" and adds, "in all probability it will be found that they are, though no positive authority has sanctioned this notion."[5] Indeed, the forging of deeds was always indictable; and, — Was not the impression of the seal

[1] Vol. I. § 723 et seq.

[2] Vol. I. § 738 et seq., 749 et seq.

[3] Vol. I. § 752, 769.

[4] Teal *v.* Felton, 12 How. U. S. 284, 291.

[5] Hammond on Forgery, part. ed. 7, pl. 18.

the exact thing against which the law, in its earlier periods, was directed?[1]

§ 527. **Printing.** — Printed matter is a writing.[2] Thus, —

Printed Votes. — Printed votes are "written votes," within a provision of the Massachusetts constitution.[3] And, —

Printed Railroad Ticket. — The counterfeiting of a mere printed railroad ticket is forgery at the common law. In broad terms, this offence may be committed as well of an instrument entirely printed or engraved, as of one written partly or fully with the pen.[4]

Foreign Language. — So forgeries in other languages than the English are frequently the subjects of indictment.

§ 528. **Name of Writing — Under Seal or not.** — It is immaterial by what name the writing is known, and whether it is under seal or not, provided it has the other requisites.[5]

§ 529. **Illustrations of Private Writings the Subjects of Forgery.** — Thus, among forgeries tending to defraud individuals,[6] a bond or

[1] And see observations of the English commissioners quoted post, § 530.

[2] Such, also, is the doctrine proposed by the English commissioners. 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 70; Act of Crimes and Punishments, A. D. 1844, p. 205.

[3] Henshaw *v.* Foster, 9 Pick. 312. This case was as follows: The Constitution of Massachusetts provided, that "every member of the House of Representatives shall be chosen by written votes." The plaintiff, at an election for representatives, tendered a printed vote; and it was refused by the defendants, who were inspectors of the election, on the ground, that, being printed, it was not within the meaning of the constitution, "written." But the court held that it was written, and gave the plaintiff damages against the defendants for its rejection.

[4] Commonwealth *v.* Ray, 3 Gray, 441. **No Part with Pen.** — Dewey, J., observed: "The cases of forgery generally are cases of forged handwriting. The course of business, and the necessities for greater facilities for despatch, have introduced, to some extent, the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound. . . . It has never been considered any objection to contracts, required by the Statute of Frauds to be in writing, that they were printed." p. 447. In a case before one of the New York judges (Sutherland), it was held, that forgery may be committed of an instrument wholly printed or engraved, by making the impressions from an engraved plate; where no part, either of the original or of the counterfeit, is performed with a pen. This was a case under a statute with the words "instrument or writing;" but the judge appeared to be of the opinion, that the result would be the same at the common law. People *v.* Rhoner, 4 Parker C. C. 166. See also Reg. *v.* Closs, Dears. & B. 460, 7 Cox C. C. 494; Reg. *v.* Smith, Dears. & B. 566, 8 Cox C. C. 32; Wheeler *v.* Lynde, 1 Allen, 402.

[5] 2 East P. C. 852; Pennsylvania *v.* Misner, Addison, 44; Rex *v.* Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Commonwealth *v.* Chandler, Thacher Crim. Cas. 187.

[6] The State *v.* McGardiner, 1 Ire. 27; Commonwealth *v.* Linton, 2 Va. Cas. 476; Reg. *v.* King, 7 Mod. 150.

other deed,[1] a bill of exchange or promissory note,[2] a check,[3] an assignment of a legal claim or a power of attorney to collect it, an indorsement of a promissory note,[4] an indorsement of a payment,[5] a receipt or acquittance,[6] a letter of credit,[7] a transfer of stock,[8] an order for the delivery of money or goods,[9] an acceptance of a bill of exchange[10] or of an order for the delivery of goods,[11] an affidavit in England for the purpose of obtaining money due to an officer's widow from the treasurer of the queen's bounty,[12] a deposition to be used on the trial of a cause in court,[13] a private act of Parliament,[14] a copy of any instrument to be used in evidence in the place of a real or supposed original,[15] a testimonial of character as a school-master[16] or otherwise,[17] a letter of recommendation to the appointment of a police constable,[18] the entries in the journal[19] or the other books of a mercantile house, an entry in a banker's pass-book,[20] the book itself,[21] and many other such things, — are instruments of which the forgery can be committed. Of course, the particular instrument

[1] 1 Hawk. P. C. Curw. ed. p. 263, 265, § 1, 10; Hammond on Forg. parl. ed. p. 13.

[2] Rex *v.* Birkett, Russ. & Ry. 86; Commonwealth *v.* Ward, 2 Mass. 397; Rex *v.* Morton, 2 East P. C. 955; Butler *v.* Commonwealth, 12 S. & R. 237; Hales's Case, 17 Howell St. Tr. 161; Reg. *v.* White, 2 Fost & F. 554.

[3] Crofts *v.* People, 2 Scam. 442; Hendrick *v.* Commonwealth, 5 Leigh, 707.

[4] Rex *v.* Lewis, Foster, 116, 2 East P. C. 957; Powell *v.* Commonwealth, 11 Grat. 822; Poage *v.* The State, 8 Ohio State, 229.

[5] Pennsylvania *v.* Misner, Addison, 44.

[6] Rex *v.* Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Snell *v.* The State, 2 Humph. 347; Commonwealth *v.* Ladd, 15 Mass. 526; Rex *v.* Thomas, 2 Leach, 4th ed. 877, 2 East P. C. 934; People *v.* Hoag, 2 Parker C. C. 36.

[7] Ames's Case, 2 Greenl. 365; Rex *v.* Savage, Style, 12. And see Reg. *v.* Yarrington, 1 Salk. 406.

[8] Rex *v.* Gade, 2 Leach, 4th ed. 732, 2 East P. C. 874; Reg. *v.* Hoatson, 2 Car. & K. 777; Reg. *v.* Marcus, 2 Car. & K. 356.

[9] Rex *v.* Ward, 2 East P. C. 861; People *v.* Fitch, 1 Wend. 198; Harris *v.* People, 9 Barb. 664; The State *v.* Holly, 2 Bay, 262.

[10] Reg. *v.* Rogers, 8 Car. & P. 629.

[11] Commonwealth *v.* Ayer, 3 Cush. 150.

[12] Rex *v.* O'Brian, 7 Mod. 378.

[13] The State *v.* Kimball, 50 Maine, 409.

[14] Morris's Case, 4 Howell St. Tr. 951.

[15] Upfold *v.* Leit, 5 Esp. 100. And see The State *v.* Smith, 8 Yerg. 150.

[16] Reg. *v.* Sharman, Dears. 285, 24 Eng. L. & Eq. 553, 23 Law J. N. S. M. C. 51, 18 Jur. 157.

[17] Post, § 534, 535, 601; Reg. *v.* Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626; Reg. *v.* Wilson, Dears. & B. 558, 8 Cox C. C. 25.

[18] Reg. *v.* Moah, Dears. & B. 550, 7 Cox C. C. 503.

[19] Biles *v.* Commonwealth, 8 Casey, 529. Such entries, when false, are not necessarily forgeries. The doctrine is, simply, that they may be. The particular entries in the State *v.* Young, 46 N. H. 266, were held not to come within the law of forgery. See post, § 586.

[20] Reg. *v.* Smith, Leigh & C. 168.

[21] Reg. *v.* Moody, Leigh & C. 173.

must have an apparent legal validity, and the act must be otherwise such as is pointed out in this chapter.

§ 530. **Continued.** — "The offence," observe the English commissioners, "extends to every writing used for the purpose of authentication; as in the case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender.

Seals — Stamps — Other visible Marks. — "The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted; and, consequently, where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due." [1]

§ 531. **Public Writings.** — If the forging of writings prejudicial to individuals is indictable, *a fortiori* it may be when prejudicial to many individuals, or the public. Indeed this is the kind of common-law forgery mostly spoken of in the older books. Hawkins mentions as —

Examples. — "Falsely and fraudulently making or altering any matter of record,[2] or any other authentic matter of a public nature; as a parish register," [3] or "a privy seal,[4] or a license from the barons of Exchequer to compound a debt, or a certificate of holy orders, or a protection from a Parliament man." [5] We may add, the entry of a marriage in a register; [6] which, indeed, is substantially one of Hawkins's illustrations. Therefore the counterfeiting or altering of any judicial process is forgery; [7] as, for

[1] 5th Rep. Crim. Law Com. A. D. 1840, p. 65.

[2] "It is forgery to fabricate a judgment or other record." Hammond on Forgery, parl. ed. p. 12. Refers to Garbutt *v.* Bell, 1 Rol. Abr. 65, 76, pl. 1, 3; Rex *v.* Marsh, 3 Mod. 66.

[3] 1 Hawk. P. C. Curw. ed. p. 263, § 1.

[4] "A commission under the privy seal," Hammond on Forgery, parl. ed. p. 13. Refers to Baal *v.* Baggerley, Cro. Car. 326; s. c. nom. Ball *v.* Baggarley, 1 Rol. Abr. 68.

[5] 1 Hawk. P. C. Curw. ed. p. 265, § 8, 9. And see Briton, P. C., by Kel 33.

[6] Hammond on Forgery, parl. ed. p. 15; Dudly's Case, 2 Sid. 71.

[7] 2 East P. C. 868; Rex *v.* Collier, 5 Car. & P. 160; Commonwealth *v.* Mycall, 2 Mass. 136. In a New York case, it was held not to be forgery in an attorney to alter the figures indicating the day appointed for executing a writ of inquiry, served upon him in a replevin suit; his object, as charged in the indictment, being to defraud by making the notice appear to be irregular. "It was urged," said Nelson, C. J., "that the fraudulent intent consisted in a design to have the inquest set aside for irregularity, on the ground that the notice was short. This argument, however, rests upon mere conjecture; for the act charged had no tendency to produce any such result." People *v.* Cady, 6 Hill, N. Y. 490.

instance, a writ.[1] So forgery may be committed by writing falsely a pretended order, as from a magistrate to a jailer, to discharge a prisoner because of bail having been given.[2]

§ 532. **Compared with Private Forgeries.** — These forgeries prejudicial to the public are less discussed in the modern books than those which are prejudicial merely to individuals. Yet probably the leading doctrines governing the one class are applicable also to the other. A difference, however, will be seen, by and by, in respect of the intent.[3] A particular false writing may be adapted to injure individuals in a special manner, and the public in a general way; and, as such, be indictable on both grounds.

III. *The Legal Efficacy of the Writing.*

§ 533. **Some Legal Efficacy.** — But, to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud.[4]

§ 534. **Illustrations.** — The following are some illustrations: —

Certificate to procure Appointment. — Perhaps the English judges went to the verge, yet trod on no doubtful ground, in holding, as they did, that a certificate of service, sobriety, and good conduct at sea — the object of the certificate being to enable the corporation of the Trinity House to examine the person voluntarily applying, and give him, if found worthy, a certificate of nautical skill, and fitness to act as master mariner — was a subject of forgery at the common law.[5] But it is otherwise of a —

[1] Wiltshire *v.* ——, Yelv. 146; Sale *v.* Marsh, Cro. Eliz. 178.

[2] Rex *v.* Harris, 1 Moody, 393, 6 Car. & P. 129; Rex *v.* Fawcett, 2 East P. C. 862. See Rex *v.* Froud, Russ. & Ry. 389, 1 Brod. & B. 300; s. c. nom. Rex *v.* Froude, 3 Moore, 645.

[3] Post, § 596.

[4] 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 70; Act of Crimes and Punishments, A. D. 1844, p. 205; Vol. I. § 572, where the cases are cited; Clarke *v.* The State, 8 Ohio State, 630; Abbott *v.* Rose, 62 Maine, 194; John *v.* The State, 23 Wis. 504; Howell *v.* The State, 37 Texas, 591; Reed *v.* The State, 28 Ind. 396.

[5] Reg. *v.* Toshack, Temp. & M. 207, 1 Den. C. C. 492. So it was held, one judge doubting, that the false making of a letter of recommendation, with intent fraudulently to obtain a situation as a police constable, is a forgery at

Certificate to obtain Courtesies. — A false writing directed "to any railroad superintendent," stating that "the bearer has been employed," &c., and "any courtesies shown him will be duly appreciated, and reciprocated should opportunity offer," is not indictable as a forgery, being of no legal validity.[1]

§ 535. **Certifying a Note.** — A writing certifying a particular promissory note to be good was held not to be within the Alabama act of 1836, because it expressed a mere opinion; but how this would be at the common law the case does not decide.[2] Plainly, however, the writing is sufficient at common law, if, were it genuine, it would subject the maker to —

Any Liability. — And when the liability would be "either in the form of an action of assumpsit, as a letter of credit to the amount of five hundred dollars; or to an action on the case in the nature of deceit, as a false representation made with intent to defraud," — the tribunal in Maine held it to be adequate. "The forgery of any writing by which a person might be prejudiced was punishable as forgery at common law."[3]

§ 536. **False Label.** — In England, a man named Borwick was in the habit of putting up for the market, enclosed in printed wrappers, two kinds of powders, called respectively "Borwick's Baking Powders" and "Borwick's Egg Powders." Another man printed wrappers of his own, imitating these, and put in them his own powders, which thus he was enabled to sell as Borwick's. He was indicted, and the offence was laid in the indictment as forgery. But the judges considered, that, though he

the common law. Reg. v. Moah, Dears. & B. 550, 7 Cox C. C. 503. See ante, § 529.

[1] Waterman v. People, 67 Ill. 91.

[2] The State v. Givens, 5 Ala. 747. This statute provides, "that, if any person, &c., shall falsely, &c., forge, &c., any letters patent, gift, grant, covenant, bond, writing obligatory, note of any bank of the United States, or of any bank established by law in any one of the said States, or branch of any territory of the United States, or any bill or order, or acceptance of such bill or order, cotton receipt, receipt for the payment of money or other articles of value, promissory note, bill of exchange or acceptances thereof, will, indenture or deed, or any instrument of writing whatever, to secure the payment or delivery of money, or other article of value, or in discharge of any debt or demand, with intention to defraud any person or persons," &c. &c. — an illustration of the evil of employing a needless array of words to express an idea. **Terms of Statutes.** — Specific terms are not always, even in legal writing, such as statutes, better than more comprehensive ones.

[3] Ames's Case, 2 Greenl. 365. See, on these points, Foulkes v. Commonwealth, 2 Rob. Va. 836, in which the court was divided. And see Jackson v. Weisiger, 2 B. Monr. 214; People v. Harrison, 8 Barb. 560.

was probably liable to the criminal law in another form of charge, what he did came short of this offence.[1] And plainly — not adverting now to the words employed by the learned judges — the genuine label put by Borwick on his powders could not be deemed a writing of legal validity, however useful it was to him as an advertisement or a trade mark.

§ 537. **Distinction.** — In descending to the more minute consideration of this question of validity, we should carry in our minds the distinction between writings the validity or invalidity of which appears on their face, and those which are on their face uncertain. And, as to the latter, we should remember that extrinsic evidence may be introduced, showing them to be either valid or invalid.

§ 538. First. *Writings valid or invalid on their Face:* —

Invalid on Face. — A writing invalid on its face cannot be the subject of forgery; because it has no legal tendency to effect a fraud.

Contrary to Statutory Form. — But here we must call to mind the distinction,[2] many times adverted to in these volumes, that every man is presumed to know the law, yet not to know the facts. Whether, for instance, a bond or other instrument is valid, is a question of law; if, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one in a form not provided for by the statute,[3] even though it is so like the genuine as to deceive most persons.[4] For example, —

Will inadequately witnessed. — It is not indictable to forge a will attested by a less number of witnesses than the law requires.[5] And, —

Bank-note declared Void. — If a statute not only prohibits a particular bank-note, but declares it void, the forging of its similitude is not forgery.[6]

[1] Reg. v. Smith, Dears. & B. 566, 8 Cox C. C. 32. See also Reg. v. Closs, Dears. & B. 460, 7 Cox C. C. 494.

[2] Vol. I. § 292 et seq.

[3] People v. Harrison, 8 Barb. 560; The State v. Jones, 1 Bay, 207; The State v. Gutridge, 1 Bay, 285; Rex v. Rushworth, Russ. & Ry. 317; 2 Russ. Crimes, 3d Eng. ed. 517; 1 Stark. 396; Rex v. Burke, Russ. & Ry. 496. And see Reg. v. Barber, 1 Car. & K. 434; Commonwealth v. Linton, 2 Va. Cas. 476; Crofts v. People, 2 Scam. 442.

[4] The State v. Gutridge, 1 Bay, 285; Cunningham v. People, 4 Hun, 455.

[5] Rex v. Wall, 2 East P. C. 953; The State v. Smith, 8 Yerg. 150.

[6] Rex v. Moffatt, 1 Leach, 4th ed

§ 539. **Forbidding and declaring void distinguished.** — Yet here we should be on our guard. Merely to prohibit the circulation of a particular denomination of bank-note does not render the note null; and, where there is such mere prohibition, the forgery of the prohibited paper is criminal.[1] There are in our statutes other directory provisions concerning the forms of instruments, the non-compliance with which will not cause the instrument to be invalid; and, in such a case, though the instrument is not in the exact form prescribed, it may be the subject of forgery.[2]

Charter of Bank expired. — Of course, the offence is committed by counterfeiting the bills of a bank whose charter is expired.[3]

§ 540. **Unstamped Instruments.** — Moreover, the English courts, considering the stamp-acts to be mere revenue laws, hold the forging of promissory notes on unstamped paper to be indictable.[4] The like doctrine prevails in this country as to instruments requiring stamps under the United States laws; a forgery, which has no stamp attached, is equally indictable with one which is duly stamped; or, if it is stamped, the indictment is sufficient, and there is no variance, though it does not set out the stamp, — propositions which are reasonably well settled, though a case or two may be found in conflict with them.[5]

431; s. c. nom. Moffat's Case, 2 East P. C. 954. And see Rex *v.* Catapodi, Russ. & Ry. 65; People *v.* Wilson, 6 Johns. 320.

[1] Butler *v.* Commonwealth, 12 S. & R. 237; Thompson *v.* The State, 9 Ohio State, 354; The State *v.* Van Hart, 2 Harrison, 327, the statute, however, providing that the validity of the prohibited bills should not be affected by the prohibitory clause; Van Horne *v.* The State, 5 Pike, 349. Rex *v.* Humphrey, 1 Root, 53, seems the other way. And see Twitchell *v.* Commonwealth, 9 Barr, 211; Rex *v.* Burke, Russ. & Ry. 496; Hendrick *v.* Commonwealth, 5 Leigh, 707; Rex *v.* Chisholm, Russ. & Ry. 297. The Illinois court held, that a conviction cannot be sustained under an indictment, which charges the uttering of a bill of a bank of some other State, of a less denomination than five dollars, with intent to defraud an individual; it being a penal offence to pass or to receive such bills. Gutchins *v.* People, 21 Ill. 642.

[2] Vol. I. § 303; Rex *v.* Randall, Russ. & Ry. 195; Rex *v.* Lyon, Russ. & Ry. 255; Rex *v.* Richards, Russ. & Ry. 193; Rex *v.* McIntosh, 2 East P. C. 942, 956; s. c. nom. Rex *v.* Mackintosh, 2 Leach, 4th ed. 883; Reg. *v.* McConnell, 1 Car. & K. 371, 2 Moody, 298.

[3] Buckland *v.* Commonwealth, 8 Leigh, 732; White *v.* Commonwealth, 4 Binn. 418.

[4] Rex *v.* Morton, 2 East P. C. 955, 1 Leach, 4th ed. 258, note; Rex *v.* Hawkeswood, 2 T. R. 606, note, 2 East P. C. 955, 1 Leach, 4th ed. 257; Rex *v.* Reculist, 2 Leach, 4th ed. 703, 2 East P. C. 956; Reg. *v.* Pike, 2 Moody, 70; Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979.

[5] Crim. Proced. II. § 409; Cross *v.* People, 47 Ill. 152; The State *v.* Haynes, 6 Coldw. 550; People *v.* Frank, 28 Cal. 507; Carpenter *v.* Snelling, 97 Mass. 452; Weltner *v.* Riggs, 3 W. Va. 445; Govern *v.* Littlefield, 13 Allen, 127; Tobey *v.* Chipman, 13 Allen, 123; Dudley *v.* Wells, 55 Maine, 145; Hunter *v.*

§ 541. **Good on Face, but invalid in Fact.** — Since men are not legally presumed to know facts, a false instrument which is good on its face may be legally capable of effecting a fraud, though inquiry into extrinsic facts should show it to be invalid even if it were genuine: therefore the forging of such an invalid instrument is a crime.[1] Thus, —

By Unauthorized Person. — If an order of a board of guardians of a poor-law union must be signed, to be binding, by its chairman, still a prisoner charged with forging such an order cannot defend himself by showing that the person purporting, on the face of it, to sign as chairman, was not such.[2] So a defendant was rightly convicted for counterfeiting a protection, though in the name of one who, not being a Parliament man, could not grant it.[3] And, —

Paid Bill or Note. — Though a promissory note or bill of exchange, after being paid, is *functus officio* and no note or bill, yet, if this does not appear on its face, a forgery may be committed by altering it.[4] Likewise, —

Cobb, 1 Bush, 239; The State *v.* Young, 47 N. H. 402. Contra, John *v.* The State, 23 Wis. 504. The State *v.* Mott, 16 Minn. 472. **Further as to the Reasoning.** — It is perceived that these are all cases before the State courts. They contain many reasons, of which some are of such a nature that any one of them is alone sufficient, rendering the better doctrine of the text clear and conclusive. When the case is in the United States' courts, the reasons for this conclusion are not so strong; yet, I submit, they are even then adequate. For example, in the above case of The State *v.* Young, Smith, J., observes: "The order, although unstamped, might, if genuine, be 'apparently of some legal efficacy' (see 2 Bishop Crim. Law, 3d ed. § 495), since any holder of it might, on application to the collector, be permitted to affix the proper stamp, upon payment of the penalty, or without any penalty if the omission appeared to have been 'by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States.' See U. S. Laws, Stat. July 13, 1866, § 9." Again, in the State courts, the omission of a revenue stamp is no defence to an action upon the instrument. Duffy *v.* Hobson, 40 Cal. 240 (overruling Hallock *v.* Jaudin, 34 Cal. 167). And see Frink *v.* Thompson, 4 Lans. 489; Janvrin *v.* Fogg, 49 N. H. 340; Rheinstrom *v.* Cone, 26 Wis. 163; Brown *v.* Thompson, 59 Maine, 372; Morris *v.* McMorris, 44 Missis. 441. It is so of deeds of lands. Congress, having no power to regulate conveyances in the States, cannot render the deed void for the want of a revenue stamp. Moore *v.* Moore, 47 N. Y. 467. To the like effect is Moore *v.* Quirk, 105 Mass. 49.

[1] "There is a distinction between the case of an instrument apparently void, and one where the invalidity is to be made out by the proof of some extrinsic fact. In the former case, the party who makes the instrument cannot, in general, be convicted of forgery, but in the latter he may." People *v.* Galloway, 17 Wend. 540, 542.

[2] Reg. *v.* Pike, 2 Moody, 70, 3 Jur. 27.

[3] Rex *v.* Deakins, 1 Sid. 142.

[4] Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979. I think I am justified

No such Denomination. — It is no defence to a charge of forging bank-bills, that the bank never issued bills of the particular denomination forged.[1]

No Legal Capacity. — Though the person whose name is forged had no legal capacity to make the instrument, this is not a defence.[2]

§ 542. **Drawer altering own Order.** — The following New York case might seem to the casual reader to hold a doctrine different from the foregoing, but it does not. One made his order on a third person for a cow. This third person took the order and delivered the cow, without writing any acceptance. Subsequently, on a settlement, the drawer received back his order from the third person; and afterward, to aid himself in a fraud, altered its date, and undertook to use it in a court of justice. This was held not to be forgery; for the alteration was at most only drawing a new order, since it bore no name but the defendant's.[3]

§ 543. **Fictitious Name — Deceased Person.** — From the foregoing doctrines it follows, that, if the person whose instrument the forgery purports to be is dead,[4] or if he is a mere fictitious person,[5] still, as the question of the existence of such a person is one of fact, not of law, and the instrument appears valid on its face, the offence is complete. But, there is a distinction to be noted as to the —

Form of the Indictment. — The common form of the indictment for forgery sets out an intent to defraud a particular person, and

in citing this case to the very obvious point mentioned in the text; though it seems, from the report, to have turned on those considerations of the stamp laws stated ante, § 540. See Brittain *v.* Bank of London, 3 Post. & F. 465. And see post, § 542.

[1] The State *v.* Fitzsimmons, 30 Misso. 236. By the Tennessee Act 1851–2, c. 113, § 3, banks organized under its provisions were empowered to issue notes of the denominations allowed to the incorporated banks of the State. Therefore, if one is indicted for having in possession a counterfeit on one of these banks, it is no defence that it is of a denomination different from any actually issued by the bank, which had thus the power to issue it. Trice *v.* The State, 2 Head, 591.

[2] People *v.* Krummer, 4 Parker C. C. 217.

[3] People *v.* Fitch, 1 Wend. 198. And see The State *v.* Greenlee, 1 Dev. 523; post, § 584–586.

[4] Henderson *v.* The State, 14 Texas, 503.

[5] Vol. I. § 572, where the authorities are cited. And see The State *v.* Hayden, 15 N. H. 355; Sasser *v.* The State, 13 Ohio, 453; Commonwealth *v.* Baldwin, 11 Gray, 197. **Cheat.** — So obtaining goods by means of such a forgery is also a cheat at the common law. Commonwealth *v.* Speer, 2 Va. Cas. 65; The State *v.* Patillo, 4 Hawks, 348; ante, § 148.

this intent must always be proved as laid.[1] And if, for any reason, the person could not, as the case appears in proof, be defrauded by the writing, the defendant is to be acquitted.[2] Now it is very common in practice for the indictment to allege, that the intent was to defraud the person or corporation whose name was forged;[3] but this is not necessary, for an allegation of a forgery, for instance, of the bill of an incorporated bank, with the intent to defraud an individual, is sufficient.[4] Yet if the allegation is of an intent to defraud the corporation, and no such corporation exists; or an individual, and no such individual exists; the defendant cannot be convicted on the particular indictment, though he could have been on one differently drawn.[5]

Non-existing Corporation. — That a non-existing corporation must generally be regarded, for the purpose of this distinction and of the general doctrine of this section, the same as a non-existing individual, is evident; because, whether the legislative act of incorporation be deemed a public or private one,[6] the organization and existence of the persons made a body corporate under it, is as much a question of fact as the birth of an individual person. Perhaps a different consideration may apply to corporations of the nature of counties and towns.

§ 544. **The Doctrine restated.** — Therefore the general doctrine is, that the invalidity of an instrument must appear on its face, if the defendant would avail himself of this defect on a charge of forgery.[7] In still other words, the forged instrument, to be the foundation for an indictment, must appear on its face to be

[1] 1 Stark. Crim. Pl. 2d ed. 112, 180, Am. ed. 122, 200; 3 Chit. Crim. Law, 1042; The State *v.* Odel, 3 Brev. 552; West *v.* The State, 2 Zab. 212. See post, § 598, 599.

[2] Reg. *v.* Marcus, 2 Car. & K. 356. In Reg. *v.* Tylney, 1 Den. C. C. 319, 18 Law J. N. S. M. C. 36, the judges would seem to have been divided on this question.

[3] See Brown *v.* Commonwealth, 2 Leigh, 769.

[4] Commonwealth *v.* Carey, 2 Pick. 47; United States *v.* Shellmire, Bald. 370. See Hooper *v.* The State, 8 Humph. 93; Hess *v.* The State, 5 Ohio, 5; People *v.* Rynders, 12 Wend. 425; West *v.* The State, 2 Zab. 212. And see Reg. *v.* Hoatson, 2 Car. & K. 777; Reg. *v.* Carter, 1 Den. C. C. 65.

[5] The State *v.* Givens, 5 Ala. 747; People *v.* Peabody, 25 Wend. 472; People *v.* Davis, 21 Wend. 309; De Bow *v.* People, 1 Denio, 9; Commonwealth *v.* Carey, 2 Pick. 47. See The State *v.* Dourdon, 2 Dev. 448; Commonwealth *v.* Morse, 2 Mass. 128.

[6] See Portsmouth Livery Company *v.* Watson, 10 Mass. 91.

[7] Rex *v.* McIntosh, 2 East P. C. 942; s. c. nom. Rex *v.* Mackintosh, 2 Leach, 4th ed. 883; The State *v.* Pierce, 8 Iowa, 231. And see Rex *v.* Fawcett, 2 East P. C. 862; Rex *v.* Catapodi, Russ. & Ry. 65; Rex *v.* Gade, 2 Leach, 4th ed. 782, 2 East P. C. 874; Reg. *v.* Barber, 1 Car. &

good and valid for the purpose for which it was created.[1] In another aspect, —

Evidence of Fact. — The instrument must be such that, if it were genuine, it would be evidence of the fact it sets out. In illustration of this, the Tennessee court, during slavery, held it to be no forgery in law to give to a slave, with the intent of helping him to freedom, a false paper purporting to be a certificate of another that he was born free.[2]

§ 545. *Writings the Validity of which is uncertain on their Face:* —

Shown to be Forgeries by Extrinsic Facts. — If a writing is so incomplete in form as to leave an apparent uncertainty, in law, whether it is valid or not, a simple charge of forging it fraudulently, &c., does not show an offence; but the indictment must set out such extrinsic facts as will enable the court to see, that, if it were genuine, it would be valid. When such extrinsic circumstances are set out, and also proved at the trial, the defendant may be convicted; while, without them, he must be discharged.[3] Thus, —

§ 546. **Naked Promise.** — It is familiar doctrine that a mere naked promise, no consideration appearing, creates no legal liability. Therefore, —

To pay in Labor. — The New York court held, that such a promise to pay a sum of money in labor is not a writing which shows a legal validity without this extrinsic averment and proof.[4]

Railroad Ticket. — The same was held in Massachusetts concerning a forged railroad ticket, in these words: —

"New York Central Railroad.
Albany to Buffalo.
Good this day only, unless indorsed by the conductor.
D. L. FREMYRE."[5]

Order. — In a Tennessee case the instrument alleged to be forged was as follows: "Mr. Bostick, You will please to charge

K. 434; Reg. v. Hoatson, 2 Car & K. 777; Reg. v. Pike, 2 Moody, 70.

[1] Rex v. Jones, 2 East P. C. 991; People v. Harrison, 8 Barb. 560.

[2] The State v. Smith, 8 Yerg. 150. And see Upfold v. Leit, 5 Esp. 100.

[3] People v. Harrison, 8 Barb. 560, People v. Shall, 9 Cow. 778; Commonwealth v. Ray, 3 Gray, 441. And see Butler v. The State, 22 Ala. 43.

[4] People v. Shall, 9 Cow. 778.

[5] Commonwealth v. Ray, 3 Gray, 441

Mr. J. S. Humphreys' account to us up to this date. Feb. 7, 1849. Twyman and Tannehill;" and the court adjudged the indictment insufficient, because it did not aver — what must therefore have been also proved on the trial — that Humphreys was indebted to Bostick. "It could not be of any benefit to the defendant, or prejudice to the other parties, unless the defendant were indebted at the time to Bostick; and it could have no other effect, if genuine, but to discharge that indebtedness."[1]

Receipt. — On the other hand, a receipt, as for money paid, was held not to be such an instrument that an indebtedness from the person to whom it purports to be given, to the apparent maker of it, need be shown; because, if in fact there were no such indebtedness, still the party giving it "would be liable to an action for the money acknowledged to have been received."[2]

§ 547. **Fictitious Name in these Cases.** — In these cases, wherein we look outside of the writing to determine the question of its validity, it has probably not been decided whether the doctrine applies that the forgery of a fictitious name, the same as of a real one, is indictable.[3] In many, perhaps most, instances of this sort, this legal query would not arise in the facts as disclosed to the court; because these necessary extrinsic facts often depend, for their existence, on the existence of the person or corporation whose name is forged, and if there were no such person or corporation there could be no such facts, and no indictment would be attempted. And there may be a difficulty in laying down a general rule on the question, in advance of the decisions. Still, if the inquiry into the extrinsic facts does not lead directly to the fact of the existence or non-existence of the person or corporation, no obvious reason appears why such existence becomes essential, in this class of cases more than in the other.

IV. *The Writing under Statutes against Forgeries.*

§ 548. **Needless Legislation.** — From the earliest times to the present, a legislative mania seems to have prevailed on this subject of forgery. The reader has seen that the common law is

[1] The State v. Humphreys, 10 Humph. 442. See Reg. v. Taylor, 4 Fost. & F. 511; People v. Krummer, 4 Parker C. C. 217; Thompson v. The State, 49 Ala. 16.

[2] Snell v. The State, 2 Humph. 347.

[3] Ante, § 543.

broad enough to cover all sorts of forgeries which, in their nature, can be harmful either to individuals or the community; yet this has not satisfied the law makers, who, nevertheless, have piled statute on statute upon the top of the common law to overwhelm it. The reason for this, however, has largely been, that, since forgery is only misdemeanor at the common law, it was deemed advisable to make particular species of it felony; or, if the statute has still left the new forgery a misdemeanor, it has made some provision respecting it not within the rules of the common law.

§ 549. *Old English Statutes as Common Law in our States:* —

Not, in General. — Are there old acts of Parliament which are common law with us? The principal ancient ones, and many modern, are collected by Hawkins;[1] but an examination of them will show, that probably no one which he mentions could ever have had any practical force here, unless it be —

5 Eliz. c. 14. — Concerning this statute (A. D. 1562), Kilty says, there were formerly indictments upon it in Maryland; though, at the time when he wrote, it was superseded by a statute of the State.[2]

§ 550. **Stat. 5 Eliz. c. 14, continued.** — It enacts, that (§ 2), "if any person or persons whatsoever, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilely, and falsely forge or make, or subtilely cause or wittingly assent to be forged or made, any false deed, charter, or writing sealed, court roll, or the will of any person or persons in writing, to the intent that the state of freehold or inheritance of any person or persons of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged; or shall pronounce, publish, or show forth in evidence any such false and forged deed, &c., as true, knowing the same to be false and forged as is aforesaid, to the intent above remembered; and shall be thereof convicted, either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the party grieved, or otherwise according to the order and due course of the laws of this realm, or upon bill or infor-

[1] 1 Hawk. P. C. Curw. ed. p. 266 et seq.

[2] Kilty Report of Statutes, 167. The Pennsylvania judges do not mention this statute as in force in that State. Report of Judges, 3 Binn. 595. See post, § 553.

mation to be exhibited into the court of the star-chamber, according to the order and use of that court; shall pay unto the party grieved his double costs and damages, &c., and also shall be set upon the pillory in some open market town, or other open place, and there to have both his ears cut off, and also his nostrils to be slit and cut and seared with a hot iron, so as they may remain for a perpetual note or mark of his falsehood, and shall forfeit to the queen, &c., the whole issues and profits of his lands and tenements during his life, and also shall suffer and have perpetual imprisonment," &c.

§ 551. **Continued.** — By § 3, if, in like manner, any one shall forge, or assent to the forgery of, "any false charter, deed,[1] or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years of, in, or to any manors, lands, &c., or any annuity in fee-simple, fee-tail, or for term of life, lives, or years; or shall, as is aforesaid, forge, &c., any obligation, or bill obligatory,[2] or any acquittance, release,[3] or other discharge of any debt, account, action, suit, demand, or other thing personal;[4] or shall pronounce, publish, or give in evidence[5] any such, &c., as true, knowing the same to be false and forged,[6] and shall be thereof convicted, &c., he shall pay unto the party grieved his double costs and damages,[7] and shall be also set upon the pillory in some open market town, or other open place, and there to have one of his ears cut off, and shall also have and suffer imprisonment by the space of one whole year, without bail or mainprise."

§ 552. **Continued.** — Subsequent sections provide, that a second commission of the offence, after a conviction, shall be felony without benefit of clergy; and these sections exempt from the penalty of the statute certain persons mentioned, when they commit a literal violation through ignorance,[8] — an exemption

[1] Post, § 567.

[2] Post, § 566.

[3] Post, § 564, 565.

[4] The forgery of a deed containing a gift of mere personal chattels is not within any of these words. 1 Hawk. P. C. Curw. ed. p. 300, § 21.

[5] Stat. Crimes, § 306–309.

[6] He who is truly informed by another knows it. 1 Hawk. P. C. Curw. ed. p. 300, § 23.

[7] Lord Coke says, it has been adjudged, that, if there is a bond with penalty, the double damages are double the penalty; "for the penalty should be recovered by law if the forged release had not been." 3 Inst. 172, — a reason which shows the proposition not to be universally true.

[8] 1 Hawk. P. C. Curw. ed. 298, 299.

which the common law would make without the special provision. And, by construction, —

Second Offence. — One who has been found guilty of publishing a forged deed may commit the felony of a second offence as well by forging as by publishing another deed; for the words are, "If any person or persons, being hereafter convicted or condemned of any of the offences aforesaid, &c., shall, after any such his or their conviction or condemnation, eftsoons commit or perpetrate any of the said offences."[1]

What repealed. — This statute is in fourteen sections, containing other regulations not important to be mentioned here; and it repeals all prior enactments against the "forgery of false deeds, charters, muniments, or writings."

§ 553. **Whether Common Law, again.**[2] — The English punishments for crimes having been nearly superseded in this country by statutory ones,[3] there is little room for this act of 5 Eliz. c. 14, to have more than a declaratory force with us. Yet the practitioner will now and then find a reference to it convenient. Our statutes providing punishments for what was before indictable have ordinarily no repealing effect upon the prior law, whether that law, as inherited by us, was in England common law or statutory.[4]

§ 554. **Stat. 21 Jac. 1.** — Another statute, not mentioned by Hawkins under the head of Forgery,[5] is 21 Jac. 1, c. 26 (A. D. 1623), passed after the first settlements in this country. Perhaps it may have a common-law force in some of the States.[6] It is, "That all and every person and persons which shall acknowledge, or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds enrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or

[1] 1 Hawk. P. C. Curw. ed. 301, § 25; 1 Hale P. C. 686. A few other points of minor importance have been adjudged, as see Hawkins; 3 Inst. 168 et seq.; 1 Hale P. C. 682 et seq.; Hammond on Forgery, parl. ed. 69 et seq. There is no need to state them here.

[2] See ante, § 549.

[3] Vol. I. § 933.

[4] Stat. Crimes, § 166–173, 363, 384, 418, 469.

[5] But see "Of Offences against Records," 1 Hawk. P. C. 6th ed. c. 45, § 9, 10, where this statute may be found.

[6] Kilty says there were no prosecutions under it in Maryland. Kilty Report of Statutes, 90. It is not enumerated by the Pennsylvania judges as received in the latter State. Report of Judges, 3 Binn. 595, 623.

consenting to the same, and being thereof lawfully convicted or attainted, shall be adjudged, esteemed, and taken to be felons, and suffer the pains of death, &c., without the benefit or privilege of clergy, &c. § 3. Provided always, That this act shall not extend to any judgment or judgments acknowledged by any attorney or attorneys of record, for any person or persons against whom any such judgment or judgments shall be had or given."[1]

§ 555. **How interpreted — (Bail).** — The courts held that "bail," taken before a judge, is not within this statute until filed and made matter of record in court. "And if it be not filed, the acknowledging thereof in another's name makes not felony, but a misdemeanor only."[2] Neither does this statute include the case of putting in bail under a forged name; because a name forged or fictitious is not another person's name. But such an act is a misdemeanor at the common law.[3]

§ 556. *American Statutes:* —

General View. — Congress and the legislatures of the States have enacted laws against forgery. It would be contrary to the plan of these volumes to insert those statutes here. Every practitioner is supposed to have before him the acts of Congress and the enactments of his own State.

§ 557. **States — United States.** — The reader scarcely needs to be reminded, that the offence of forgery, when it is against the United States, can be punished only under the acts of Congress;[4] while, according to the general doctrine, the statutes of the several States do not supersede the common law, within the jurisdiction of the State tribunals.[5] Accordingly, —

Making Statutory out of Common-law Forgery. — If a statute makes a particular act forgery, which was such at the common law, the offender may be prosecuted under either the statute or the common law at the election of the prosecuting power.[6] Perhaps a partial exception occurs under a peculiar view of statutory interpretation held by the courts of Massachusetts and of some of the other States;[7] yet, —

[1] And see, as to this statute, Hammond on Forgery, parl. ed. p. 81, pl. 301 et seq.

[2] 1 Hale P. C. 696; 1 Hawk. P. C. 6th ed. c. 45, § 10; Timberlye's Case, 2 Sid. 90.

[3] Anonymous, 1 Stra. 384.

[4] Vol. I. § 189–203; Stat. Crimes, § 232, 233, 241–244.

[5] Ante, § 553; Stat. Crimes, § 154, 165; The State *v.* Kimball, 50 Maine, 409.

[6] The State *v.* Jones, 1 McMullan, 236.

[7] Stat. Crimes, § 150.

Forgery not covered by Statute. — Even where this exception prevails, an offender is indictable for any common-law forgery which has not been specifically provided for in any statute.[1]

§ 558. **Elevating the Offence to Felony.** — But, as a wrongful act cannot be both a felony and a misdemeanor, if the statute makes a particular forgery, which was a misdemeanor at the common law, a felony, it can be proceeded against only under the statute.[2]

§ 559. *Words used in Statutes to designate the Instrument forged:* —

Generally of the Words. — To a considerable extent, these are the same words which are employed in creating statutory larcenies, and in giving form to various other offences depending on statutes. They were, as far as practicable and convenient, explained in "Statutory Crimes." We shall here repeat some of them, and add others, together with such further illustrations and authorities as may seem to be desirable. Yet the reader should consult, together with these disquisitions, those in the other work.

§ 560. **"Order" — "Warrant" — "Request."** — A common designation of the instrument is, "order for the payment of money, or order for the delivery of goods."[3] Another is, "warrant for

[1] Commonwealth *v.* Ray, 3 Gray, 441, 448; Commonwealth *v.* Ayer, 3 Cush. 150, Fletcher, J., observing: "The common law could be superseded only by a statute as broad and comprehensive in its terms as the definition of the offence."

[2] Vol. I. § 787–789, 815.

[3] Stat. Crimes, § 325–331, 335. And see for illustrations, where the question was one of forgery, Reg. *v.* Illidge, 1 Den. C. C. 404, Temp. & M. 127; Rex *v.* Froud, 7 Price, 609, 1 Brod. & B. 300, Russ. & Ry. 389; s. c. nom. Rex *v.* Froude, 3 Moore, 645; Rex *v.* Harris, 6 Car. & P. 129; Reg. *v.* Anderson, 2 Moody & R. 469; Rex *v.* Bamfield, 1 Moody, 416; Reg. *v.* Carter, 1 Den. C. C. 65; Rex *v.* McIntosh, 2 East P. C. 942, 956; s. c. nom. Rex *v.* Mackintosh, 2 Leach, 4th ed. 883; Rex *v.* Jones, 1 Leach, 4th ed. 53, 2 East P. C. 941; Reg. *v.* Carter, 1 Car. & K. 741; Rex *v.* Lockett, 1 Leach, 4th ed. 94, 2 East P. C. 940; Rex *v.* Richards, Russ. & Ry. 193; Rex *v.* Ravenscroft, Russ. & Ry. 161; Reg. *v.* Raake, 2 Moody, 66; The State *v.* Cooper, 5 Day, 250; Walton *v.* The State, 6 Yerg. 377; Reg. *v.* McConnell, 1 Car. & K. 371, 2 Moody, 298; Rex *v.* Williams, 1 Leach, 4th ed. 114, 2 East P. C. 937; Reg. *v.* Thorn, Car. & M. 206; People *v.* Howell, 4 Johns. 296; Tyler *v.* The State, 2 Humph. 37; Reg. *v.* Snelling, Dears. 219, 22 Eng. L. & Eq. 597, 23 Law J. N. S. M. C. 8, 17 Jur. 1012; Evans *v.* The State, 8 Ohio State, 196; Noakes *v.* People, 25 N. Y. 380; Carberry *v.* The State, 11 Ohio State, 410; Reg. *v.* Lonsdale, 2 Cox C. C. 222; Reg. *v.* Dixon, 3 Cox C. C. 289; Reg. *v.* Autey, Dears. & B. 294, 7 Cox C. C. 329; Reg. *v.* Tuke, 17 U. C. Q. B. 296; Reg. *v.* Reopelle, 20 U. C. Q. B. 260; Reg. *v.* Mitchell, 2 Fost. & F. 44; Noakes *v.* People, 25 N. Y. 380; The State *v.* Lamb, 65 N. C. 419; Reg *v.* Boreham, 2 Cox C. C. 189.

the payment of money, or warrant for the delivery of goods."[1] And another, "request for the payment of money, or request for the delivery of goods."[2] One of the most obvious propositions, respecting these several forms of instruments, is, that the person making, for example, the order, need not have had authority in fact to draw on the party named as drawee;[3] because the instrument is equally valid on its face,[4] and equally capable of defrauding, whether such authority existed or not. But this proposition, when applied to a "warrant," or an "order," refers, at least according to the English doctrine, only to writings which are such on their face;[5] for, if extrinsic proofs have to be resorted to, then, perhaps, all the facts appearing, there is no "order" or "warrant," though there may be a "request," when the person making the instrument has no disposing power over the funds. But, on these topics, the reader should carefully examine the fuller discussions in the work on Statutory Crimes. In determining whether a particular writing is to be deemed an "order," "warrant," or "request," resort may be had, among other things, to the usages and understanding of the parties.[6]

§ 561. **"Promissory Note."** — In general terms, any writing which, by mercantile usage, is a promissory note, is such also within the meaning of these statutes. But the particulars may be seen in "Statutory Crimes," and in the cases here cited.[7] A bank-note is a promissory note; and, for a reason stated in the last section, it is equally so in forgery, though the bank purporting to issue it has, like a fictitious person, no existence.[8]

[1] Stat. Crimes, § 326, 332, 333, 335. And see, for illustrations, where the question was one of forgery, Reg. *v.* McConnell, 1 Car. & K. 371, 2 Moody, 298; Reg. *v.* Vivian, 1 Car. & K. 719; Reg. *v.* Thorn, Car. & M. 206; Reg. *v.* Mitchell, 2 Fost. & F. 44; Reg. *v.* Pilling, 1 Fost. & F. 324; Reg. *v.* Autey, Dears. & B., 294, 7 Cox C. C. 329; Reg. *v.* Ferguson, 1 Cox C. C. 241.

[2] Stat. Crimes, § 326, 334, 335. And see, as to cases of forgery, Rex *v.* Evans, 5 Car. & P. 553; Rex *v.* Thomas, 7 Car. & P. 851, 2 Moody, 16; Reg. *v.* White, 9 Car. & P. 282.

[3] Hale *v.* The State, 1 Coldw. 167.

[4] Ante, § 541.

[5] Stat. Crimes, § 327–332 et seq.

[6] Reg. *v.* Kay, Law Rep. 1 C. C. 257.

[7] Stat. Crimes, § 336. And see, for cases of forgery, Rex *v.* Dunn, 1 Leach, 4th ed. 57; Rex *v.* Pateman, Russ & Ry. 455; People *v.* Wilson, 6 Johns. 320; Reg. *v.* Keith, Dears. 486, 29 Eng. L. & Eq. 558, 6 Cox C. C. 533, 24 Law J. N. S. M. C. 110, 1 Jur. N. S. 454, 3 Com. Law, 692; People *v.* Rathbun, 21 Wend. 509; Hobbs *v.* The State, 9 Misso. 855; Butler *v.* The State, 22 Ala. 43; People *v.* Way, 10 Cal. 336; Reg. *v.* Howie, 11 Cox C. C. 320. In People *v.* Finch, 5 Johns. 237, the following paper, "Due Jacob Finch one dollar on settlement this day," &c., was held to be a note for the payment of money, within the New York statute.

[8] Reg. *v.* McDonald, 12 U. C. Q. B. 548.

§ 562. **"Bill of Exchange."** — This instrument is, in substance, governed by the same rules as a promissory note.[1] In forgery, under statutes making it punishable to forge any "bill of exchange," the bill must, to come within the penalty, be on its face completed;[2] and, if it has not the drawer's name, it is not so.[3] Therefore an acceptance to a writing in the form of such a bill, without such name, is not, within 11 Geo. 4 & 1 Will. 4, c. 66, § 4, "an acceptance of a bill of exchange." The statute does not, observed the court, "make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange."[4] And where the instrument was payable to *or order*, the English judges held it to be no bill, there being no payee.[5] But if it is payable to the drawer's own order, there needs no indorsement to make it complete;[6] neither is an acceptance requisite.[7] Whether the name of the drawee must be expressed in the writing seems not entirely clear; a bill simply directed, "at Messrs. P. & Co., bankers," was held in England to be sufficient.[8] Where the document was in the ordinary form of a bill of exchange, but required the drawee to pay to his own order, another objection was sustained; namely, that it was nothing more than a request to a man to pay himself, which, though accepted, imposed no obligation on him to any third person; and so it was no bill.[9] It is not quite certain that this case is, in principle, sound. Does it, for example, accord with the following? On a full examination of authorities, the Massachusetts court held, that, in the language of Foster, J., "an order for the payment of money, drawn by one in his own favor on himself, and by himself accepted and indorsed, may be treated as a bill of exchange, and so described in an indictment. Such instruments," he added, "are well known in commerce; especially in the case of mercantile firms which have branches in different cities, all composed of the same partners. Perhaps such a bill may also be declared upon as a promissory note. But we agree with the Court of Queen's Bench, in the latest English case on the question, decided in 1852,[1] that 'it is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or a bill of exchange.'"[2]

[1] Stat. Crimes, § 338.

[2] Ante, § 529; Reg. *v.* Butterwick, 2 Moody & R. 196; Reg. *v.* Mopsey, 11 Cox C. C. 143.

[3] Reg. *v.* Mopsey, supra.

[4] Reg. *v.* Butterwick, 2 Moody & R. 196.

[5] Rex *v.* Randall, Russ. & Ry. 195.

[6] Rex *v.* Wicks, Russ. & Ry. 149.

[7] Reg. *v.* Smith, 2 Moody, 295; Rex *v.* Wicks, supra.

[8] Reg. *v.* Smith, 2 Moody, 295. The judges considered Gray *v.* Milner, 8 Taunt. 739, to be in point. And see Stat. Crimes, § 335. A comparison, however, of Reg. *v.* Curry, 2 Moody, 218 (the reporter's head-note to which appears to be incorrect), with Reg. *v.* Hawkes, 2 Moody, 60, seems to show, that, as general doctrine, the drawee's name must be expressed; though, under some circumstances, as where there is an acceptance, the defendant is estopped to deny that the instrument is a bill of exchange. And see Rex *v.* Ravenscroft, Russ. & Ry. 161. Reg. *v.* Snelling, Dears. 219, 22 Eng. L. & Eq. 597, 23 Law J. N. S. M. C. 8, 17 Jur. 1012, perhaps affords comfort to those who think the name of the drawee unnecessary.

[9] Reg. *v.* Bartlett, 2 Moody & R. 362. See Rex *v.* Birkett, Russ. & Ry. 251, as to a bank post-bill.

§ 563. **"Undertaking."** — Another form of words employed in these statutes is "undertaking for the payment of money, or undertaking for the delivery of goods." Every promissory note is an undertaking for the payment of money, but every such undertaking is not a promissory note, — undertaking being a word of larger meaning. To constitute an undertaking, the consideration need not be expressed in the writing. These and other views on the subject are more fully explained in "Statutory Crimes" and in the cases here cited.[3]

§ 564. **"Receipt."** — Again, a common form of words is "receipt for money, or receipt for goods." What is a "receipt" also is explained in "Statutory Crimes."[4]

"Accountable Receipt." — Some statutes employ the words "accountable receipt for money, goods, or other property;" and, under such a statute, the following has been held not to be such a receipt: "Boston, August 15th, 1868. Rec'd of Wm. J. Dale, Surgeon General of Mass., my discharge and check No. 6979, for $100;" for, said Chapman, C. J., "it does not acknowledge that

[1] Referring to Lloyd *v.* Oliver, 18 Q. B. 471.

[2] Commonwealth *v.* Butterick, 100 Mass. 12, 16.

[3] Stat. Crimes, § 339. And see Reg. *v.* White, 9 Car. & P. 282; Reg. *v.* Stone, 1 Den. C. C. 181, 2 Car. & K. 364; Reg. *v.* Reed, 8 Car. & P. 623, 2 Lewin, 185; Reg. *v.* Thorn, Car. & M. 206; The State *v.* Humphreys, 10 Humph. 442; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Reg. *v.* Mitchell, 2 Fost. & F. 44.

[4] Stat. Crimes, § 341, 342; post, § 565. And for cases of forgery, see Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483; The State *v.* Martin, 9 Humph. 55; Reg. *v.* Houseman, 8 Car. & P. 180; Reg. *v.* Vaughan, 8 Car. & P. 276; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Kegg *v.* The State, 10 Ohio, 75; Reg. *v.* Inder, 1 Den. C. C. 325; Reg. *v.* Pringle, 2 Moody, 127; Rex *v.* Hope, 1 Moody, 414; Reg. *v.* Hill, 2 Cox C. C. 246; Reg. *v.* Meigh, 7 Cox C. C. 401; Reg. *v.* Gooden, 11 Cox C. C. 672; Reg. *v.* Fitch, Leigh & C. 159, 9 Cox C. C. 160.

any thing has been received which is to be accounted for."[1] Said Martin, B., in an English case: "The forged document, if genuine, would have been evidence that the bank had received the money, and were to be accountable for it. Then why is it not an accountable receipt?"[2] The meaning of the term would seem to be, that a thing has been received for which the person receiving it is liable to account to some other person. Therefore one who utters a forged pawnbroker's duplicate may be indicted for uttering a forged accountable receipt for goods.[3]

§ 565. "**Acquittance.**" — There seems to be little difference, in legal contemplation, between a "receipt" and an "acquittance."[4] Where the custom of bankers was to give, on the deposit of money, receipts in the following form: "Received of A. B. eighty pounds to his credit — this receipt not transferable;" and, on its being returned with A. B.'s name written on it, to repay the money with interest; the judges held, that forging the name of A. B., and getting the money on return of the writing, was forging and uttering an acquittance.[5] And where, to a bill of parcels, — "Mr. John Ladd bought of Eveleth & Child, &c. &c. the above charged to George Carpenter," the defendant added, "by order, Eveleth & Child," — this addition was held by the court to be an acquittance. "It purports to be an acknowledgment by Eveleth & Child, that the goods delivered to the defendant were charged to Carpenter by his order; and this amounts in law to an acquittance or discharge of the defendant."[6] But an instrument professing to be a scrip certificate of the London and South-western Railway Company is neither a receipt and acquittance, nor simply a receipt, nor an undertaking for the payment of money, within Stat. 11 Geo. 4 & 1 Will. 4, c. 66.[7] In like manner, an ordinary railway ticket is neither a receipt nor an acquittance within 24 & 25 Vict. c. 98, § 23.[8] So

[1] Commonwealth *v.* Lawless, 101 Mass. 32. The learned judge refers to Reg. *v.* Moody, Leigh & C. 173; Commonwealth *v.* Talbot, 2 Allen, 161.

[2] Reg. *v.* Moody, supra. And see Stat. Crimes, § 341, note.

[3] Reg. *v.* Fitchie, Dears. & B. 175, 7 Cox C. C. 257, 40 Eng. L. & Eq. 598. See also Reg. *v.* Johnston, 5 Cox C. C. 133; Reg. *v.* Pries, 6 Cox C. C. 165.

[4] See Stat. Crimes, § 343; Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483; Hammond on Forgery, parl. ed. p. 86, pl. 317 et seq.

[5] Reg. *v.* Atkinson, 2 Moody, 215.

[6] Commonwealth *v.* Ladd, 15 Mass. 526.

[7] Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496. Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131.

[8] Reg. *v.* Gooden, 11 Cox C. C. 672.

a "clearance," as it is called, from a friendly society, is neither an acquittance nor a receipt. "It purports," said Cockburn, C. J., "to be a certificate that the member receiving it has been a member of the branch granting it, and has paid all dues and demands up to a certain date. The document then goes on: 'We, therefore, hereby authorize any court of the order to accept the said brother as a clearance member, subject to the conditions,' &c. &c. This, therefore, is simply a certificate, and not an acquittance or receipt for money."[1]

§ 566. "**Obligation**" — "**Bill Obligatory.**" — These words require a sealed instrument. Such, at least, is the doctrine under the before-mentioned[2] statute of 5 Eliz. c. 14.[3] Lord Coke says, that "obligation" is a word "of a large extent; but it is commonly taken, in the common law, for a bond containing a penalty, with condition."[4]

§ 567. "**Deed.**" — A deed is a writing under seal, from one party to another, intended to affect some legal interest. The instrument must not only be written and sealed, but also, according to the ordinary doctrine, delivered.[5] And a power of attorney, signed, sealed, and delivered, to transfer government stock, is held in England to be a deed, within the statutes against forgery.[6] But a letter of orders under the seal of the bishop is not.[7] As to the delivery, we may doubt, whether, in the peculiar offence of forgery, an instrument may not, without it, be a deed; like a promissory note, bill of exchange, or order, not delivered.[8]

§ 568. "**Contract.**" — An indorsement of a promissory note has been held, in Ohio, to be a "contract," within the statute of that State.[9]

§ 569. "**Instrument or Writing.**" — One of the meanings of the word "instrument," other than that now under consideration, was given in the work on Statutory Crimes.[10] The Missouri statute

[1] Reg. *v.* French, Law Rep. 1 C. C. 217, 220.

[2] Ante, § 550.

[3] Hammond on Forgery, parl. ed. p. 79, pl. 296; 3 Inst. 170; 1 Hale P. C. 685. And see Newman *v.* Shyriff, 3 Leon. 170. See Fogg *v.* The State, 9 Yerg. 392.

[4] Co. Lit. 171 *b*.

[5] Co. Lit. 171 *b*; Goddard's Case, 2 Co. 4 *b*, 5 *a*.

[6] Rex *v.* Fauntleroy, 1 Moody, 52, 2 Bing. 413, 1 Car. & P. 421.

[7] Reg. *v.* Morton, Law Rep. 2 C. C. 22, 12 Cox C. C. 456.

[8] And see Reg. *v.* Davies, 2 Moody, 177.

[9] Poage *v.* The State, 3 Ohio State, 229.

[10] Stat. Crimes, § 314, 319.

against forgery has the clause, — "any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or purport to be, transferred, created, increased, discharged, or diminished; or by which any right of property whatsoever shall be or purport to be transferred, conveyed, discharged, increased, or in any manner affected." And a county warrant was adjudged to be within the statute.[1]

§ 570. "**Enrolment, Registry, or Record.**" — These statutory words were held, in Pennsylvania, to include the public records of the surveyor-general's office. They "are not confined to records of courts of justice. Every registry or enrolment, directed by law and preserved for the use of the public, is embraced by this act of assembly."[2] In Ohio, a tax duplicate is not a "record," within the statutes against forgery.[3]

§ 570 *a*. "**Indorse**" — "**Indorsement.**" — To indorse is to write upon; and a bill of exchange or promissory note is indorsed by writing the matter, whatever it is, across the face or back of it.[4] But it is plain that, within the doctrine of our last sub-title, the indorsement, to be the subject of forgery, must be of something which, if it were genuine, would be of legal efficacy.

§ 570 *b*. "**Security.**" — A "security for the payment of money" is something else than money.[5] But an "I. O. U." is such a security.[6]

§ 571. **Foreign Securities.** — These statutes apply as well to instruments issued under the laws of foreign States as to domestic ones.[7] And in foreign instruments, it seems, not so exact a technical accuracy will be required as in our own.[8] Moreover, a statute of New York against forging "any deed or writing sealed, with intent to defraud any person," was held to embrace

[1] The State *v.* Fenly, 18 Misso. 445.
[2] Ream *v.* Commonwealth, 3 S. & R. 207.
[3] Smith *v.* The State, 18 Ohio State, 420.
[4] Commonwealth *v.* Butterick, 100 Mass. 12, 16; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* Winterbottom, 1 Den. C. C. 41, 2 Car. & K. 37, 1 Cox C. C. 164; Rex *v.* Bigg, 1 Stra. 18, 2 East P. C. 882, 3 P. Wms. 419.
[5] Stat. Crimes, § 217. For authorities as to what is a "security," see Ib § 340.
[6] Reg. *v.* Chambers, Law Rep. 1 C. C. 341, 12 Cox C. C. 109.
[7] Stat. Crimes, § 326. See People *v.* Wilson, 6 Johns. 320.
[8] Rex *v.* Goldstein, 7 Moore, 1, 3 Brod. & B. 201, 10 Price, 88, Russ. & Ry. 473.

the case of a forgery, within the State, of a deed of lands lying without the State.[1]

V. *The Act by which Forgery is committed.*

§ 572. **Writing or Printing Entire Instrument.** — The most obvious way of forging is to write or print, as the case may be,[2] the whole imitation of a real or imaginary original.

Photography. — A forgery may likewise be committed by the use of the photographic art.[3]

Signature — Mark. — To write a signature is the same in law as to write the entire instrument.[4] And the signature, in forgery, may be made by a mark, precisely as in civil jurisprudence.[5]

§ 573. *Alteration of a Genuine Instrument:* —

To alter is to forge. — Any alteration of a written instrument whereby its legal effect is in any degree varied,[6] is an act sufficient in forgery.[7] The indictment in such a case may, if the pleader chooses, lay the offence as a forgery of the entire instrument; for in law it is such.[8] And this is so even where the indictment is drawn upon a statute which makes it penal to "forge or alter."[9] Plainly, in the last-mentioned instance, the word "alter" may be used equally well; and, even in an indictment at the common law, the same word may probably be employed instead of the usual and better word forge.[10]

§ 574. **Illustrations.** — The following are illustrations of changing the effect of an instrument by altering it, so as to constitute forgery; the addition of the words "in full of all demands," in a receipt;[11] the substitution of these words for the words "in

[1] People *v.* Flanders, 18 Johns. 164. It is the same of a domestic indorsement of a bill of exchange drawn abroad. Reg. *v.* Roberts, 7 Cox C. C. 422. And see Vol. I. § 143.
[2] Ante, § 525.
[3] Reg. *v.* Rinaldi, Leigh & C. 330, 9 Cox C. C. 391. And see Ex parte Holcomb, 2 Dillon, 392.
[4] Powell *v.* Commonwealth, 11 Grat. 822; Pennsylvania *v.* Misner, Addison, 44; Rex *v.* Fitzgerald, 1 Leach, 4th ed. 20, 2 East P. C. 953; The State *v.* Davis, 69 N. C. 313.
[5] Rex *v.* Dunn, 1 Leach, 4th ed. 57, 2 East P. C. 962. And see Rex *v.* Fitzgerald, 1 Leach, 4th ed. 20, 2 East P. C. 953.
[6] Archb. Pl. & Ev. 358; Hammond on Forgery, part. ed. p. 120, pl. 411.
[7] Rex *v.* Bigg, 1 Stra. 18; Anonymous, 1 Anderson, 101, 102; The State *v.* Wooderd, 20 Iowa, 541; Reg. *v.* Griffiths, Dears. & B. 548, 7 Cox C. C. 501.
[8] Rex *v.* Dawson, 2 East P. C. 978, 1 Stra. 19; Commonwealth *v.* Woods, 10 Gray, 477.
[9] Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979.
[10] See 1 Stark. Crim. Pl. 2d ed. 98, 99, Am. ed. 107, 108.
[11] Upfold *v.* Leit, 5 Esp. 100.

part;"[1] the changing of one figure or word into another in a bank-note, bond, or other like instrument, whereby it appears to be of a higher denomination,[2] even though its language becomes thereby ungrammatical, as if it reads "ten *pound*," instead of ten *pounds*;[3] making an indorsement upon negotiable paper general instead of special;[4] putting a seal to a genuine signature to a document which, to be valid, required a seal;[5] inserting in an indictment the name of a person against whom it was not found;[6] making a lease of the manor of Dale appear, by changing D into S, to be of the manor of Sale;[7] altering the date of an accepted bill, so as to show an earlier day of payment.[8] But, as to the date, —

§ 575. **Changing Date.** — There may be circumstances in which the date of a written instrument is both really and apparently immaterial, when, therefore, an alteration in it will not be indictable, however fraudulently intended;[9] but generally the date is in some way material, and then the other consequence follows.[10] And where the prisoner, a pay-sergeant, having obtained from the pay-master a receipt for a sum of money as part subsistence of the company for the month of May, changed the word "May" to "June," and so got a customary advance from a tradesman, an indictment describing the instrument as a receipt was held to be good.[11]

§ 576. **Altering to give Currency.** — If negotiable paper is so altered as to give it greater currency, though not to place new parties under absolute obligation to pay it, this seems to have been deemed forgery. Thus, —

Changing Place of Payment. — Where a note, made in the body

[1] The State v. Floyd, 5 Strob. 58.

[2] Rex v. Dawson, 1 Stra. 19, 2 East P. C. 978; The State v. Waters, 3 Brev. 507, 2 Tread. 669; Rex v. Teague, Russ. & Ry. 33, 2 East P. C. 979; Blake v. Allen, Sir F. Moore, 619; Rex v. Elsworth, 2 East P. C. 986; Rex v. Post, Russ. & Ry. 101; Goodman v. Eastman, 4 N. H. 455; Haynes v. The State, 15 Ohio State, 455. See Rex v. Wilcox, Russ. & Ry. 50; Reg. v. Sargent, 10 Cox C. C. 161; The State v. Monnier, 8 Minn. 212

[3] Rex v. Post, Russ. & Ry. 101.

[4] Rex v. Birkett, Russ. & Ry. 251.

[5] Reg. v. Collins, 1 Cox C. C. 57.

[6] Rex v. Marsh, 3 Mod. 66.

[7] 3 Inst. 169.

[8] Master v. Miller, 4 T. R. 320.

[9] See Griffith v. Cox, 1 Tenn. 210; Howe v. Thompson, 2 Fairf. 152.

[10] The State v. Kattleman, 35 Misso. 105, 107. And see Bowers v. Jewell, 2 N. H. 543; Stephens v. Graham, 7 S. & R. 505; United States Bank v. Russel, 3 Yeates, 391; Pankey v. Mitchell, Breese, 301; Mitchell v. Ringgold, 3 Har. & J. 159.

[11] Rex v. Hope, 1 Moody, 414.

of it payable at a banker's who had failed, was so altered as to be payable at a solvent banker's, the majority of the English judges sustained an indictment for forgery.[1] And the Alabama judges held, in a civil suit, that the erasure of the place at which a note is made payable is such an alteration of it as renders it void.[2] And, —

Address of Party. — It is forgery to put an address to the name of a drawee of a bill of exchange, in the course of completion, with intent to make the acceptance appear to be that of a different person.[3] Again, —

Two Banks of same Name. — If, in two different cities there are banks of the same name, the one solvent and the other insolvent, a substitution on the bills of the latter bank of the name of the city, whereby they appear to be of the former bank, is a forgery.[4] In the two last cases new liabilities are created. In like manner, —

Adding Name. — To forge a name to a valid check, with a view to getting it cashed on the strength of the name, is forgery.[5]

§ 577. **Legal Effect.** — The alteration, to be sufficient, must be material. Therefore, —

"Beautiful." — If a conveyance of the manor of Dale is made to read "the beautiful manor of Dale," this will not be forgery.[6] So, —

Subscribing Witness. — If there is a bond, not required by law to be attested by a subscribing witness, no forgery is committed by falsely adding to it a witness's name.[7]

In General. — It is not forgery to add to a written instrument any word which the law would supply.[8] Such alterations do not change in any degree the legal effect of the instrument. Therefore they are not forgery.[9]

§ 578. **Destroy Instrument — In full — In part.** — To destroy an

[1] Rex v. Treble, Russ. & Ry. 164, 2 Leach, 4th ed. 1040, 2 Taunt. 328.

[2] White v. Hass, 32 Ala. 430.

[3] Reg. v. Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531. And see Reg. v. Epps, 4 Fost. & F. 81; Reg. v. Mitchell, 1 Den. C. C. 282, note; Reg. v. Mahony, 6 Cox C. C. 487.

[4] The State v. Robinson, 1 Harrison, 507.

[5] Reg. v. Wardell, 3 Fost. & F. 82.

[6] Rex v. Treble, 2 Leach, 4th ed. 1040, 1042.

[7] The State v. Gherkin, 7 Ire. 206.

[8] The State v. Cilley, cited 1 N. H. 97; Hunt v. Adams, 6 Mass. 519.

[9] See also Burkholder v. Lapp, 7 Casey, 322.

instrument is not to forge it. Therefore, if, on the back of a bond, there is written an acquittance of the bond, it is not forgery to obliterate the acquittance;[1] it being, the reader perceives, in legal effect a separate instrument, though written on the same piece of paper as the bond. But the offence may be committed by taking out a part of a writing, if thereby a different operation is given to what is left.[2] Severing the indorsement from a promissory note, leaving the note entire, is not forgery within the Vermont statute; but the court said, it is a misdemeanor at the common law, "as great a crime against the public justice and the public peace as those forgeries that are clearly within the statute."[3] In Iowa it was well adjudged that, where a party detached from a written instrument a condition originally annexed thereto, and forming with it one entire contract, the effect of which was to render the instrument apparently negotiable while before it was not, the transaction constituted a forgery.[4]

§ 579. *Executing Instrument as Agent:* —

Not Forgery in Agent authorized. — If a man writes another's name by his authority, it is not forgery.[5]

Erroneous Belief of Authority. — And according to principles laid down in the preceding volume,[6] if in fact he has not authority, but, acting on a fair ground of reason, without fault or carelessness, believes himself authorized, he does not commit the offence.[7] Suppose, for instance, a person has on three or four occasions made the acceptance of another to bills of exchange, the other having always paid them without remark or remonstrance, he may infer from this course of business that he is, on a subsequent occasion, authorized.[8]

Authority erroneously admitted. — It seems to have been laid down that, if the person whose name is alleged to be forged, on being notified directly afterward of the use of his name, does not at once repudiate it, there can be no conviction of the

[1] The State *v.* Thornburg, 6 Ire. 79. And See Commonwealth *v.* Hayward, 10 Mass. 34.

[2] Combe's Case, Sir F. Moore, 759, Noy, 101; Hammond on Forgery, parl. ed. p. 125.

[3] The State *v.* McLeran, 1 Aikens, 311. See The State *v.* Norton, 3 Zab. 33.

[4] The State *v.* Stratton, 27 Iowa, 420.

[5] Shanks *v.* The State, 25 Texas, Supp. 326.

[6] Vol. I. § 303.

[7] Rex *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224; Reg. *v.* Clifford, 2 Car. & K. 202; Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Rogers, 8 Car. & P. 629.

[8] Reg. *v.* Beard, 8 Car. & P. 143.

offender.[1] Now, in principle, such matter ought to constitute, before the jury, a considerable obstacle to a conviction; because, if such was the conduct of the person alleged to be injured, a strong presumption of fact would arise that the accused person acted with the tacit connivance, if not the open consent, of the other. But that is all. If the forger acted wholly without authority, and knew he did, he committed the offence of forgery; and, when it was committed, a pardon could proceed only from the executive authority of the State. Persons offended against by the criminal laws have no pardoning power. The rule prevailing in the civil suit, on forged paper of this sort, is not, in reason, applicable in the criminal.

§ 580. **Agent disobeying Instructions.** — Obviously a specific authority to do a particular thing does not involve the authority to do another and different thing. And this principle has been carried in England to the extent, that, —

Wrongly filling Blank. — If a person gives to his clerk a blank check on a bank,[2] or a blank bill of exchange,[3] signed by himself, with direction to fill the blank with a sum named, and the clerk fraudulently fills it with a larger sum, the latter commits a forgery.[4] And there is American authority to the like effect.[5]

Omitting Bequest from Will. — Upon the same principle rests an old case in which it was held, that, if one employed to draw a will omits a bequest, and thereby gives to another bequest a different operation from what it was intended to have, he commits this offence.[6]

§ 581. **Wrongly filling Blank, continued.** — On the other hand it was held in Massachusetts, in a civil suit brought by an innocent indorsee, that, where the defendant, a merchant, had written his name on blank pieces of paper, and intrusted them to his clerk, who was to fill out promissory notes; but a third person got by

[1] Reg. *v.* Smith, 3 Fost. & F. 504, at the assizes before Byles, J.

[2] Rex *v.* Wilson, 2 Car. & K. 527, 1 Den. C. C. 284; Reg. *v.* Bateman, 1 Cox C. C. 186.

[3] Rex *v.* Hart, 1 Moody, 486, 7 Car. & P. 652.

[4] See also Rex *v.* Atkinson, 7 Car. & P. 669. See The State *v.* Flanders, 38 N. H. 324; Reg. *v.* Richardson, 2 Fost. & F. 343.

[5] The State *v.* Kroeger, 47 Misso. 552; Commonwealth *v.* Work, 3 Pittsb. 493; Van Duzer *v.* Howe, 21 N. Y. 531, 537.

[6] Combe's Case, Sir F. Moore, 759, Noy, 101. See Marvin's Case, 3 Dy. 288, pl. 52.

false pretences possession of them from the clerk, and filled the note in suit to his own use; this act of the third person was not forgery. Consequently the plaintiff was permitted to recover.[1]

§ 582. **"Per Procuration" — Not authorized.** — But the English courts seem to have laid down the further doctrine, that, if the instrument appears on its face to have been executed by an agent authorized, while in truth he was not so, this apparent agent is not guilty of forgery. Thus, where one asked to have a bill discounted on behalf of Thomas Tomlinson, and, the bill not being indorsed, said he had power from Tomlinson to indorse it; whereupon the prosecutor wrote on it the words, "Per procuration, Thomas Tomlinson," under which the prisoner subscribed his own name; the judges held, that he was wrongly convicted of forging it; "and that indorsing a bill of exchange, under a false assumption of authority to indorse it per procuration, is not forgery, there being no false making." In the course of the argument, Parke, B., put the question to the prisoner's counsel, how it would stand if the prisoner had said, "I am authorized by Mr. Tomlinson to write his name," and had written it in the presence of the other. The counsel replied, that, he would submit, this would be no forgery.[2]

§ 583. **Personating another and writing his Name.** — Of course, if a man personates another, and fraudulently writes such other's

[1] Putnam *v.* Sullivan, 4 Mass. 45. "The objection," said Parsons, C. J., "would have great weight, if, when the indorsers (the defendants in the civil suit) put the name on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretences had obtained it, the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements (although his discretion was confined) as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his directions. For the limitation imposed on his discretion was not known to any but to himself and to his principals." See Van Duzer *v.* Howe, 21 N. Y. 531; The State *v.* Flanders, 38 N. H. 324.

[2] Reg. *v.* White, 2 Car. & K. 404, 1 Den. C. C. 208. And see Rex *v.* Maddocks, 2 Russ. Crimes, 3d Eng. ed. 499; Rex *v.* Arscott, 6 Car. & P. 408.

name, it is forgery;[1] for this is the common case, and it requires no illustration.

Assuming Fictitious Name. — The same follows if he assumes a mere fictitious name;[2] and it makes no difference that his real name would do as well.[3] In these cases there must be clear proof that the name is not the prisoner's; and, if he has before gone by the one assumed, or, it would even seem, if the name was not taken for this particular instance of fraud, there is no forgery.[4] When a man in words calls himself by another's name, but writes his own, he does not commit forgery.[5]

§ 584. *Making in one's own Name a false Writing to defraud:* — **How in England.** — Lord Coke says that forgery "is properly taken when the act is done in the name of another person." Yet there is a doctrine, stated also by Coke,[6] which seems to rest on ancient adjudication, and is sustained by the English commissioners in their report of 1840, namely, that, to use their own language, "an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic, when it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land. Here the instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution."[7]

[1] Dixon's Case, 2 Lewin, 178.

[2] Ante, § 543; Rex *v.* Francis, Russ. & Ry. 209; Rex *v.* Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992.

[3] Rex *v.* Whiley, Russ. & Ry. 90; Rex *v.* Marshall, Russ. & Ry. 75; Rex *v.* Taft, 1 Leach, 4th ed. 172, 2 East P. C. 959.

[4] Rex *v.* Bontien, Russ. & Ry. 260; Rex *v.* Peacock, Russ. & Ry. 278; Rex *v.* Watts, Russ. & Ry. 436, 3 Brod. & B. 197; Rex *v.* Aickles, 1 Leach, 4th ed. 438, 2 East P. C. 968; Rex *v.* Shepherd, 2 East P. C. 967, 1 Leach, 4th ed. 226; Reg. *v.* Whyte, 5 Cox C. C. 290.

[5] Rex *v.* Story, Russ. & Ry. 81. And see Rex *v.* Hevey, Russ. & Ry. 407, note, 2 East P. C. 856, 1 Leach, 4th ed. 229. It has been held, that, where a man with intent to defraud writes the name of a fictitious firm, of which he represents himself to be a member (in a case wherein the name of the firm included his own name), he does not commit a forgery. "As a general rule," said Thomas, J., "to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime." Commonwealth *v.* Baldwin, 11 Gray, 197, 198.

[6] 3 Inst. 169.

[7] 5th Rep. Eng. Crim. Law Com. A. D.

Fraudulently antedating own Deed. — A case exactly confirmatory of this old doctrine passed to final judgment in 1859. After a man who was the owner of some lands had parted with them by deeds duly executed, and his grantee had taken possession, he made to his son, by indenture signed by both, a conveyance in due form of the greater part of the lands, antedating it to make it appear to have been executed before the real sale took place. Thereupon the son brought against the tenant a suit to eject him, and the latter caused the father and son to be jointly indicted and convicted for forgery. It was argued, on behalf of the prisoners, that "the deed in this case was not forged; because it was really made and executed by the persons by whom it purported to be executed. . . . The date of the deed was false, but a false statement in a deed will not render the deed a forgery." This view of the doctrine, however, did not prevail with the judges, who unanimously held that the defendants were rightly convicted.[1]

§ 585. **How in United States.** — Is this English doctrine law in our States? The writer has before him nothing on this question, from any American source, subsequent to the English case just stated. The Massachusetts commissioners, in their report of 1844, discard the doctrine, not even conceding it to be the better

1840, p. 66; s. p. Act of Crimes and Punishments, A. D. 1844, p. 205. The same doctrine is laid down in Pulton de Pace, 46 *b*; 1 Hale P. C. 683; 1 Hawk. P. C. Curw. ed. p. 263, 264, § 2; 2 East P. C. 855; 1 Gab. Crim. Law, 352.

[1] Reg. *v.* Ritson, Law Rep. 1 C. C. 200. Not only was there no dissent in this case, but the opinions of the judges, which were separately delivered, were harmonious in form and reasoning. I will copy the principal part of what was said by Kelly, C. B. After observing that all the authorities on the point are ancient, he proceeds: "When, however, we look to all these authorities, and to the text writers of the highest reputation, such as Comyns (Dig. Forgery, A I), Bacon (Abr. Forgery, A), and Coke (3 Inst. 169), we find there is no conflict of authority. Sir M. Foster (Foster Crown Cas. 116), Russell on Crimes (Vol. II. p. 709, 4th ed.), and other writers, also all agree. The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name; or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. I adopt this definition. It is impossible to distinguish this case in principle from those in which deeds made in a false name are held to be forgeries. There is no definition of forgery in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors, and we think this case falls within their definitions." p. 203.

doctrine in authority; and they deem it contrary to sound principle.[1] We have also some judicial intimations of the like sort.[2] But, of American authority, there is nothing of which the author is aware, on either side of the question.

How in Principle. — To the writer it appears plain, that the limits of the offence of forgery depend, in the nature of it, not much on general reasoning, but mainly on technical rule, — in other words, as the question should be viewed by us, on what is laid down in the old books on the English law. For no solid reason can be suggested why, on this question, we should not accept the English doctrine, as it existed when this country was settled, the same as we do on most other questions. When we look into these books, we find that authority is all one way. Said Blackburn, J., in the English case just cited: "There is no definition of 'forge' in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig. tit. Forgery, A, I), is 'Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another,' — not making an instrument containing that which is false, which, I agree with Mr. Torr, would not be forgery, but making an instrument which purports to be that which it is not. Bacon's Abr. (tit. Forgery, A), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: 'The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal . . . but in the endeavoring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have.' The material words, as applicable to the facts of the present case, are,

[1] Rep. of Pen. Code, tit. Forgery, p. 5 and note.

[2] Thus, in Commonwealth *v.* Baldwin, 11 Gray, 197, 198, Thomas, J., speaking of this old doctrine, as laid down by Lord Coke, 3 Inst. 169, says: "We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin, — the entry of the feoffor upon the land with the charter, and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed, — it is not easy to see how the date could be material."

'to make a man's own act appear to have been done at a time when it was not done.' When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at the common law. . . . All the text-books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that gives it all the greater weight."[1] Plainly the broad doctrine is not maintainable, that it is incompetent for a man to commit forgery of an instrument executed by himself. If, for example, after he had signed, sealed, and delivered a deed, he should surreptitiously, getting it into his temporary possession, alter it to accomplish some fraud, this would be forgery.[2] And if one alters a document which he has previously forged, he commits a new offence.[3]

§ 586. **Books of Account.** — We have seen,[4] that books of account may be the subject of forgery. They are admissible in court as evidences of debt, and are otherwise of legal validity. Therefore, —

Altering. — If the confidential clerk in a mercantile house makes in its books, even in the journal, an alteration of a figure, representing the cash received to be less than in fact it was, to enable him to abstract the difference between the real and false sum, this is forgery.[5] There could not be imagined any case more completely within the definition and legal understanding of forgery than this. Yet the line is not so distinct as we might desire, separating it from cases of a like kind which are not forgery. Thus, —

False Books. — It is plain in reason, that not every false entry in a book of accounts, made for purposes of fraud, is forgery. Consequently a New Hampshire case holds, that a man does not commit this offence who makes a false charge in his own book of account. Sargent, J., said: "To forge a writing necessarily implies that a writing be made which shall appear and purport to be

[1] Reg. v. Ritson, Law Rep. 1 C. C. 200, 203, 204.

[2] And see Commonwealth v. Mycall, 2 Mass. 136; The State v. Greenlee, 1 Dev. 523; People v. Fitch, 1 Wend. 198; The State v. Young, 46 N. H. 266.

[3] Rex v. Kinder, 2 East P. C. 856.

[4] Ante, § 529.

[5] Biles v. Commonwealth, 8 Casey, 529.

something which it is not in fact, or that a writing be so changed or altered that it shall not be or purport to be what it was designed to be. But in making a false account, the writing is what it was designed to be."[1] And the Court of Queen's Bench in England, in an extradition case, laid down the doctrine, that, by the common law prevailing both in England and generally in the United States, this sort of act is not forgery. The particular instance was, that the paying teller of a bank, falsely and with intent to defraud, entered in the proof book of the bank kept by him a certain sum as assets of the bank, whereas the assets did not amount to that sum; and this was held not to be forgery by the common law, though it was by the statutes of New York.[2]

How in Principle. — The question as to the true distinction between the altering of a book of accounts, and the making of a false original entry, may be stated thus: In order to render a false entry or alteration in such a book forgery, it must purport to be what it is not, and to be of legal validity. If one fraudulently alters a book of accounts, whether originally kept by himself or by another, it ceases to be what it purports; namely, the actual record of transactions made when they occurred. Therefore he commits forgery. But if he simply enters a false charge against one, he does not thereby substitute a false record for the true original, he merely creates an original record which is not true in fact. To do this is not forgery. But, suppose he makes a false charge which he antedates, falsely appearing to have been made at the time of the transaction, with the fraudulent intent to pass it off as an original entry, then the question is the same as where a man antedates his own deed for fraud. Still, in all these circumstances, the book of accounts, like any other writing of which forgery may be committed, must be of some real or apparent legal validity. Now, the effect of books of accounts differs in different States; and thus we come to a complication of the question not best to be further discussed in this connection.

§ 587. *Different Persons of one Name or Address:* —

Signing one's own Name as that of another. — But there are many

[1] The State v. Young, 46 N. H. 266, 270. The court, in this case, did not question the correctness of the Pennsylvania decision.

[2] In re Windsor, 6 B. & S. 522, 10 Cox C. C. 118. That this sort of act is forgery in New York, see also People v. Phelps, 49 How. Pr. 462.

persons of one name; and so, if a man forges the name of another, real or fictitious,[1] he cannot excuse himself on the ground that it happens to be identical with his own.[2] For example, when certain goods, consigned to P., of New York, arrived, another P., the exact name, knowing they were not for him, obtained an advance on them by signing over the permit for their delivery, in his own proper handwriting; and this was held to be a forgery.[3] And the same was held, where a bill of exchange, payable to the order of a person, fell into the hands of another of the same name, who indorsed it fraudulently, knowing he was not the one meant.[4] Again, if one gets another to accept a bill in his true name, intending to defraud by representing the name to be another's, this is forgery.[5] And a man may commit the offence by using his own name, though there is no other person than himself of that name; because, as we have seen,[6] there may be a forgery where the person is a mere fiction; and, if the name is understood not to be his own, the case is only the common one of forging a fictitious name.

§ 588. **Wrong Address.** — Though merely adopting a false description is not necessarily a forgery,[7] yet putting an address to the name of the drawee of a bill of exchange, in the course of completion, with the intent to make the acceptance appear to be that of a different existing individual, is such.[8] And if one fraudulently passes off an acceptance as that of a particular person, knowing it to be another's of the same name, he commits forgery.[9] But cases of this general aspect may occur, not within the principles on which these proceed, wherein there should be no conviction.[10]

§ 589. *Procuring one by Stratagem to execute a Writing different from what he intends:* —

Altering Draft. — "Consistently with the principles which govern the offence of forgery," say the English commissioners,

[1] Rex v. Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992.

[2] Barfield v. The State, 29 Ga. 127.

[3] People v. Peacock, 6 Cow. 72.

[4] Mead v. Young, 4 T. R. 28. And see Reg. v. Rogers, 8 Car. & P. 629.

[5] Reg. v. Mitchell, 1 Den. C. C. 282, note. See Reg. v. Epps, 4 Fost. & F. 81.

[6] Ante, § 543.

[7] Rex v. Webb, Russ. & Ry. 405, 3 Brod. & B. 228, cited 6 Moore, 447.

[8] Rex v. Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531.

[9] Reg. v. Epps, 4 Fost. & F. 81.

[10] See Rex v. Watts, Russ. & Ry. 436; Rex v. Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992; Reg. v. Rogers, 8 Car. & P. 629.

"an instrument may be falsely made, although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made in the writing without his knowledge; for, in such case, although the signature be genuine, the instrument is false, because it does not truly indicate the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is."[1]

Misreading. — And in a Maine case, where one who had bargained for an acre of land procured a draft of a deed correctly describing the acre, and had it examined by the grantor; then, the execution of it being deferred, procured another draft, in which was included the whole farm of the grantor, and got the latter to sign it, without examination, under the idea of its being the first draft, — he was held to have committed forgery.[2]

§ 590. **Misreading, continued — False Pretence.** — For these doctrines there appears to be ancient authority;[3] but a modern opinion, perhaps the better one, is, that such an act is only obtaining a signature by a false pretence or token, which may indeed be indictable, yet it is not forgery.[4] Thus in a Pennsylvania case the proof was, that the defendant wrote a promissory note for $141.26, and read it as for $41.26, to another, who, being unable to read, was induced by the false reading to put his name to it as maker, and the court held, that an indictment for forgery could not be sustained.[5]

§ 591. **Altering Unexecuted Instrument.** — And this doctrine leads to another; namely, that, as a general proposition, the alteration

[1] 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 65; s. p. Act of Crimes and Punishments, A. D. 1844, p. 205.

[2] The State v. Shurtliff, 18 Maine, 368, the court observing: "The instrument was false. It purported to be the solemn and voluntary act of the grantor in making a conveyance to which he had never assented. The whole was done by the hand or by the procurement of the defendant. It does not lessen the turpitude of the offence, that the party whom he sought to defraud was made in part his involuntary agent, in effecting his purpose. If he had employed any other hand, he would have been responsible for the act." **Any Fraud.** — In broad terms, it has been laid down, that this offence may be committed by procuring the signature of a party to an instrument of which he had no knowledge, or which he did not intend to sign. Clay v. Schwab, 1 Mich. N. P. 168.

[3] Combe's Case, Sir F. Moore, 759, Noy, 101. And see Marvin's Case, 3 Dy. 288, pl. 52.

[4] Vol. I. § 584, and the cases there cited. And see ante, § 153; The State v. Flanders, 38 N. H. 324.

[5] Commonwealth v. Sankey, 10 Harris, Pa. 390.

of an unexecuted instrument, or one in the course of preparation, but not so far finished as to charge any person, is not forgery.[1]

§ 592. *The Question of Similitude:* —

General Doctrine. — We have seen,[2] that, to constitute the offence of counterfeiting the coin, the counterfeit must be in the similitude of the genuine. This is only an illustration of the principle of the law of criminal attempt, that the act done must have some aptitude to accomplish the thing intended;[3] for, as every man knows the genuine coin, a spurious piece, having no likeness to the genuine, could deceive no one. The same rule applies to the forgery of bank-bills,[4] and of other instruments falling within the like reason.[5] The resemblance need not be exact, but the instrument must be, *prima facie*, fitted to pass for true.[6]

§ 593. **Limit of the Doctrine.** — Among the subjects of forgery, however, are many writings not of a nature to be familiar to the public, or to the particular individuals to be defrauded. The rule of similitude cannot prevail as to them.[7] An illustration of this proposition is where the forgery is of a fictitious name,[8] in which case there can be no similitude, there being no original. The Massachusetts court has held, that a man may be convicted of forging a check on a bank, though the similitude is not such as would be likely to deceive the officers of the bank.[9] And, in reason, if the indictment charged the intent to be to defraud, not the bank, but some third person, there need be no resemblance whatever to the real signature, because the fraud could be as well effected without such resemblance as with.[10]

[1] See and compare Marvin's Case, 8 Dy. 288, pl. 52; Reg. *v.* Cooke, 8 Car. & P. 582; Rex *v.* Wicks, Russ. & Ry. 149; Reg. *v.* Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531; Reg. *v.* Illidge, 1 Den. C. C. 404, Temp. & M. 127; Powell *v.* Commonwealth, 11 Grat. 822; Reg. *v.* Turpin, 2 Car. & K. 820; 1 Gab. Crim. Law, 351.

[2] Ante, § 291.

[3] Vol. I. § 738.

[4] Rex *v.* Elliot, 1 Leach, 4th ed. 175, 179; s. c. nom. Rex *v.* Elliott, 2 East P. C. 951; The State *v.* McKenzie, 42 Maine, 392; Dement *v.* The State, 2 Head, 505.

[5] Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300, 2 Leach, 4th ed. 1048.

[6] Rex *v.* Elliot, supra; Rex *v.* Collicott, supra; Reg. *v.* Mahony, 6 Cox C. C. 487. And see The State *v.* Carr, 5 N. H. 367; 1 Gab. Crim. Law, 354. See The State *v.* Robinson, 1 Harrison, 507, where it was held to be a forgery (ante, § 576) to alter the bills of a broken bank into those of a solvent one of the same name, by pasting the name of the city in which the latter was located over that in which the former was located.

[7] People *v.* Peacock, 6 Cow. 72; ante, § 249.

[8] Ante, § 543.

[9] Commonwealth *v.* Stephenson, 11 Cush. 481. See also Wilkinson *v.* The State, 10 Ind. 372.

[10] See ante, § 587.

§ 594. **How under Statutes.** — Sometimes where the offence is statutory, this question of similitude may be affected by the words of the statute. In New Hampshire, the words being, "any bank-bill or note, in imitation of, or purporting to be, a bank-bill or note which has been or may hereafter be issued by any corporation," &c., — it was held, that the forgery is sufficient though the bank never issued any bill for the same sum;[1] a proposition, however, which probably would not be different at the common law.[2] And under the United States statute of 1816, it was held indictable to issue bills signed by the names of persons, as president and cashier, who never held those offices.[3]

§ 595. **Adapted to cheat.** — The subject of similitude depends on so many considerations, that no general direction concerning it can meet every possible case. But this one suggestion will aid the practitioner; namely, that the instrument must have an adaptation to accomplish some legal wrong,[4] and, failing in this, the false making is not forgery. If, without this similitude, it has this adaptation to perpetrate the fraud, the same as with it, the similitude cannot be regarded as important.

VI. *The Intent.*

§ 596. **Must be evil.** — In forgery, as in all other offences, the act, to be indictable, must proceed from some evil intention.[5]

Public. — Where the forgery is of a public record or the like, in which the injury to the public is the ground of the offence,[6] we are left without specific adjudications concerning the particular nature of the intent required; and so we can only refer to the general doctrines stated in the preceding volume.[7]

Private. — But most forgeries are attempts to cheat individuals; and, concerning these, some points are established, to be explained in succeeding sections.

[1] The State *v.* Carr, 5 N. H. 367; s. P. Commonwealth *v.* Smith, 7 Pick. 137.

[2] But see, as to this, ante, § 541 and note.

[3] United States *v.* Turner, 7 Pet. 132; United States *v.* Brewster, 7 Pet. 164. See as to the word "purporting," Rex *v.* Jones, 1 Leach, 4th ed. 204, 2 East P. C. 883, 1 Doug. 300; The State *v.* Harris, 5 Ire. 287. See also The State *v.* Calvin, R. M. Charl. 151; Commonwealth *v.* Boynton, 2 Mass. 77; Ex parte Holcomb, 2 Dillon, 392.

[4] See ante, § 592.

[5] See Hammond on Forgery, parl. ed. p. 114, pl. 376 et seq.; Reg. *v.* Hodgson, Dears. & B. 3, 7 Cox C. C. 122, 36 Eng. L. & Eq. 626; Flint *v.* Craig, 59 Barb. 319

[6] Ante, § 531, 532.

[7] Vol. I. § 205, 206, 285 et seq.

§ 597. **Specific Intent.** — We have seen [1] that forgery is a species of attempt to cheat. From this doctrine, compared with the doctrine of Attempt as stated in the preceding volume,[2] it might not unnaturally be inferred, that, to constitute forgery, there must exist in the mind of the wrong-doer a specific intent to effect the particular fraud which the false writing is adapted to accomplish. But we are about to see that the adjudged law is not exactly so.

§ 598. *Private Forgeries:* —

Intend a Fraud. — As to this larger and principal class of forgeries, there must be, in the mind of the individual committing the act, what is termed, in the language of the law, an intent to defraud a particular person or persons;[3] though no one need in fact be cheated.[4] Yet the intent is not necessarily, in truth, exactly this; but it must be an intent that the instrument forged shall be used as good. Consequently, —

Illustrations. — (**Take up — Pay — Enforce Payment — Just Claim — Intent inferred**). — If the man means to take up, for instance, the bill of exchange or promissory note when it becomes due, or even if he does take it up, so as to prevent any injury falling upon any person;[5] or, if one, while knowingly passing a forged bank-note, agrees to receive it again should it prove not to be genuine;[6] or, if a creditor executes a forgery of the debtor's name, to get from the proceeds payment of a sum of money due him;[7] or, if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim;[8] he commits the offence, the law inferring conclusively the intent to defraud. And, *a fortiori*, where no actual intent not to wrong any one absolutely exists, the law draws the conclusion of the intent to defraud whatever person may be defrauded, from the intent to pass as good.[9]

[1] Ante, § 521.

[2] Vol. I. § 729.

[3] Rex v. Jones, 2 East P. C. 991; United States v. Moses, 4 Wash. C. C. 726; The State v. Odel, 3 Brev. 552; Grafton Bank v. Flanders, 4 N. H. 239, 242; Rex v. Crocker, Russ. & Ry. 97; Reg. v. Tylney, 1 Den. C. C. 319; People v. Flanders, 18 Johns. 164; Rex v. Holden, 2 Taunt. 334; Brown v. Commonwealth, 2 Leigh, 769; Reg. v. Hodgson, 36 Eng. L. & Eq. 626, Dears. & B. 3.

[4] The State v. Pierce, 8 Iowa, 231.

[5] Reg. v. Geach, 9 Car. & P. 499; Reg. v. Hill, 2 Moody, 30; Reg. v. Beard, 8 Car. & P. 143; Reg. v. Forbes, 7 Car. & P. 224; Reg. v. Birkett, Russ. & Ry. 86; Reg. v. Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626.

[6] Perdue v. The State, 2 Humph. 494. And see Vol. I. § 341; Rex v. Cushlan, Jebb, 113.

[7] Reg. v. Wilson, 2 Car. & K. 527, 1 Den. C. C. 284.

[8] The State v. Kimball, 50 Maine, 409.

[9] Reg. v. Beard, 8 Car. & P. 143, 148; Reg. v. Cooke, 8 Car. & P. 582; Reg. v. Hill, 8 Car. & P. 274; The State v. Woodard, 20 Iowa, 541.

Either or both of two Persons. — Generally there are two persons who, legally, may be defrauded; the one whose name is forged, and the one to whom the forged instrument is to be passed; and so the indictment may lay the intent to defraud either of these, and proof of an actual intent to pass as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation.[1]

§ 599. **Intent inferred, continued.** — The inference of intent to defraud cannot be drawn where, upon the proofs, the person named in the indictment could by no possibility in law be defrauded.[2] Thus, —

Security for Existing Debt. — If a forged deed is delivered to a person to secure a pre-existing debt, with no fresh consideration no fraud is in matter of law practised on this person, and an indictment cannot be maintained for uttering it with the intent to defraud him. "He was," said Perkins, J., "in no worse situation after taking the deed than before."[3]

No Person to be defrauded. — The English judges were divided upon the question, whether, in the absence of evidence of some one existing on whom the fraud could operate, in the case of a forged will, a count charging an intent to defraud a person unknown could be supported.[4] And under Stat. 14 & 15 Vict. c. 100, § 8, which provided, that, "it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and, on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged, with an intent to defraud,"[5] — the opinion of the judges seemed to be, that the offence might be committed though there were no person in ex-

[1] Reg. v. Cooke, 8 Car. & P. 582; Rex v. Mazagora, Russ. & Ry. 291; Rex v. Hanson, 2 Moody, 245, Car. & M. 334; Rex v. Carter, 7 Car. & P. 134; Harris v. People, 9 Barb. 664; Brown v. Commonwealth, 2 Leigh, 769; The State v. Cleaveland, 6 Nev. 181; ante, § 543.

[2] Reg. v. Marcus, 2 Car. & K. 356 361; ante, § 543.

[3] Colvin v. The State, 11 Ind. 361 362, 363.

[4] Reg. v. Tylney, 1 Den. C. C. 319.

[5] Re-enacted, in slightly changed terms 24 & 25 Vict. c. 98, § 44.

istence on whom the fraud could operate.[1] But afterward, on full consideration, they decided that this statute concerns only the form of the indictment, not the law relating to the offence, which stands now as it stood before; there being, it seems, a necessity for some person to exist who can be defrauded.[2]

§ 600. **Reducing Sum due, &c.** — Hence if one is the owner of a bond or other like instrument on which money is payable to him, he does not commit forgery by altering it to reduce the sum, where no benefit results to himself or prejudice to another.[3] The offence was, however, committed, where one, having received another's accommodation acceptance for £1,000 at three months, brought it back, saying he could not get so large a bill discounted, and proposed a substitution of smaller bills; upon taking which he pretended to destroy the larger, in the presence of the other; but instead thereof altered it to a bill at twelve months.[4]

§ 601. **No Intent to put in Circulation.** — And if an engraving of a forged note is given to a person as a pattern or specimen of skill, without any intention of having it put in circulation, there is no uttering of forged paper.[5] So one does not become guilty of crime who writes another's name at his request.[6]

No Benefit or Injury meant. — And forging a letter, falsely representing persons to be partners, is not an offence either at the common law, or within the Kentucky statute, the words of which are, "any writing whatever whereby fraudulently to obtain the possession of, or to cause any person to be deprived of, any property whatever," — where the intent is not to have it used in a court of justice, or to get any pecuniary gain, or to inflict any injury.[7]

VII. *The Progress toward effecting the Fraud.*

§ 602. **Making alone.** — Forgery, though a substantive crime, partakes, as already observed, of the nature of attempt; and so

[1] Reg. v. Nash, 2 Den. C. C. 493, 12 Eng. L. & Eq. 578.

[2] Reg. v. Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626; Vol. I. § 748.

[3] Blake v. Allen, Sir F. Moore, 619; Hammond on Forgery, parl. ed. p. 114, 115; 1 Hawk. P. C. Curw. ed. p. 264, § 4.

[4] Rex v. Atkinson, 7 Car. & P. 669.

[5] Rex v. Harris, 7 Car. & P. 426.

[6] Rex v. Parish, 8 Car. & P. 94; Rex v. Forbes, 7 Car. & P. 224; ante, § 572, 579.

[7] Jackson v. Weisiger, 2 B. Monr. 214. See Reg. v. Hodgson, 36 Eng. L. & Eq. 626, Dears. & B. 3.

the bare making of the false writing, with the evil intent, is alone sufficient.[1]

No Fraud accomplished. — No fraud need be actually perpetrated,[2] and there need be no uttering.[3]

§ 603. **No Credit gained.** — Upon this principle rests the doctrine already mentioned,[4] that it is immaterial whether any additional credit be gained by the forgery or not.[5] Also, —

Testator living. — It is no objection to holding a defendant criminally responsible for forging a will, that the supposed testator is living.[6]

Deed uncertain. — And a forgery with intent, &c., is sufficient within Stat. 5 Eliz. c. 14,[7] though of a deed of land in which the description of the premises is so uncertain that it could convey nothing if genuine.[8] This last-mentioned doctrine, however, runs close to the one already stated,[9] that there can be no forgery of an instrument legally invalid on its face; and at the present day it should not be received without a fresh examination.

Note without Indorsement. — Forging a note purporting to be payable to A or order is a complete offence, though there is no indorsement on it in A's name.[10]

VIII. *Offences depending on and growing out of Forgery.*

§ 604. **General View.** — We have considered, under another title, the general doctrine of cheats and attempts to cheat, at the common law.[11] And we have seen, that forgery is only a particular branch of the more comprehensive crime of cheat, actual or attempted.[12] In like manner, there are other branches in the na-

[1] Vol. I. § 572 and note; The State v. Holly, 2 Bay, 262; Commonwealth v. Ward, 2 Mass. 397.

[2] People v. Fitch, 1 Wend. 198; The State v. Humphreys, 10 Humph. 442; Rex v. Ward, 2 East P. C. 861; The State v. Washington, 1 Bay, 120.

[3] Commonwealth v. Ladd, 15 Mass. 526; Rex v. Crocker, 2 Leach, 4th ed. 987, 2 New Rep. 87, Russ. & Ry. 97; Rex v. Ward, 2 Ld. Raym. 1461.

[4] Ante, § 576, 583.

[5] Rex v. Marshall, Russ. & Ry. 75; Rex v. Taft, 1 Leach, 4th ed. 172, 2 East P. C. 959.

[6] Rex v. Sterling, 1 Leach, 4th ed. 99, 2 East P. C. 950; Rex v. Coogan, 1 Leach, 4th ed. 448, 2 East P. C. 948.

[7] Ante, § 550.

[8] Rex v. Crooke, 2 Stra. 901.

[9] Ante, § 538 et seq.

[10] Rex v. Hough, Bayley Bills, 6th ed. 586; Rex v. Birkett, Bayley Bills, 6th ed. 586. Compare with Williams v. The State, 51 Ga. 535.

[11] Ante, § 141 et seq.

[12] Vol. I. § 572; ante, § 148.

ture of forgery, but not forgery itself; and these other branches we are about to contemplate.

§ 605. **Uttering.** — According to principles before discussed in this volume, a cheat effected by a forged instrument is indictable at the common law as a substantive offence;[1] therefore an attempt to cheat by means of such an instrument is an indictable attempt.[2] This attempt is called in law an uttering.[3] Plainly, therefore, the offence of uttering is complete when the forged instrument is offered; it need not be accepted.[4] If a forged deed is put upon record as genuine, that is an uttering of it;[5] and so is the bringing of a suit upon a forged paper.[6] Of course, if the forged instrument is accepted by the person to whom it is offered, the offence is committed the same as though it were declined.[7] It is not necessary, as a foundation for the indictable uttering, that there should have been a previous forgery; as, if a person picks up a paper purporting to be a promissory note, which was in fact not meant to be a forgery, but was written by a boy as a trial of his skill at imitation, and passes it as good, believing it not to be, this is an indictable uttering.[8] But it is always an essential element in this offence that the person should know the instrument not to be genuine.[9]

Having. — For the reason that to constitute any crime there must be an act, as well as an intent, the mere *having* of a forged instrument, meaning to cheat therewith, does not suffice; but a receiving of it with the design so to use it, without actually using it, does.[10] And there are statutes, English and American, under which the having alone, with the intent to pass as good, is a crime.[11]

[1] Ante, § 148, 149.

[2] Ante, § 168, 441; Vol. I. § 437.

[3] Reg. *v.* Sharman, Dears. 285, 18 Jur. 157, 6 Cox C. C. 312, 24 Eng. L. & Eq. 586, overruling Reg. *v.* Boult, 2 Car. & K. 604. The American doctrine is the same. Commonwealth *v.* Searle, 2 Binn. 332. See Stat. Crimes, § 306.

[4] United States *v.* Nelson, 1 Abb. U. S 135; People *v.* Caton, 25 Mich. 388, 392; Reg. *v.* Welch, 4 Cox C. C. 430; The State *v.* Horner, 48 Misso. 520.

[5] Paige *v.* People, 3 Abb. App. Dec. 439, 446; Perkins *v.* People, 27 Mich. 386.

[6] Chahoon *v.* Commonwealth, 20 Grat. 733.

[7] Reg. *v.* ———, 1 Cox C. C. 250; Reg. *v.* Nisbett, 6 Cox C. C. 320.

[8] Reg. *v.* Dunlop, 15 U. C. Q. B. 118

[9] Wash *v.* Commonwealth, 16 Grat. 530; People *v.* Sloper, 1 Idaho Ter. 183; Chahoon *v.* Commonwealth, supra.

[10] Vol. I. § 204.

[11] See Vol. I. § 204; The State *v.* Benham, 7 Conn. 414; Commonwealth *v.* Cone, 2 Mass. 132; Commonwealth *v.* Whitmarsh, 4 Pick. 233; Sasser *v.* The State, 18 Ohio, 453, 483, 484; Spence *v.* The State, 8 Blackf. 281; Commonwealth *v.* Morse, 2 Mass. 128; Commonwealth *v.* Houghton, 8 Mass. 107; Rex *v.* Rowley, Russ. & Ry. 110; Hopkins *v.* Commonwealth, 3 Met. 460; Stone *v.* The State, Spencer, 404; People *v.* Ah Sam, 41 Cal. 645; People *v.* White, 34 Cal. 183; Hutchins *v.* The State, 13 Ohio, 198; Commonwealth *v.* Price, 10 Gray, 472.

§ 606. **Having, to render Current.** — Under the Massachusetts statute, which provides a punishment if any person shall have in his possession any counterfeit bank-bill "for the purpose of rendering the same current as true, or with intent to pass the same," the court held it sufficient to show an intent merely to pass the bill, without the further design to pass it as genuine, or for value. "One object of the statute may have been to prevent one dealer in forged paper from passing counterfeit notes to another, as false notes, to enable and assist him in defrauding others."[1]

§ 607. **Uttering, again.** — So there are statutes against uttering forged instruments. The legal meaning of the word "utter" was stated in "Statutory Crimes;" it is, in substance, "to offer."[2] And the intent must be such as has been already explained in this chapter.[3] Therefore, —

Giving in Charity. — The giving of a piece of counterfeit money in charity is not within Stat. 2 Will. 4, c. 34, § 7, though with knowledge of its being counterfeit; because there is no intent to defraud. For "although in the statute," said Lord Abinger, C. B., "there are no words with respect to defrauding, yet in the proof it is necessary, in my opinion, to go beyond the mere words of the statute, and to show an intention to defraud some person."[4]

Appearance of Wealth. — And the exhibiting to a man of a forged instrument, not to obtain his money, but merely to create in him false ideas of the wealth of the exhibitor, is not within the statute.[5]

[1] Hopkins *v.* Commonwealth, 3 Met. 460; s. p. The State *v.* Harris, 5 Ire. 287. See Reg. *v.* Heywood, 2 Car. & K. 352; Bevington *v.* The State, 2 Ohio State, 160; Rex *v.* Giles, 1 Moody, 166; Hooper *v.* The State, 8 Humph. 93.

[2] Stat. Crimes, § 306. And see ante, § 605.

[3] Ante, § 596–601, 605. See also Hooper *v.* The State, 8 Humph. 93.

[4] Reg. *v.* Page, 8 Car. & P. 122. And see Stat. Crimes, § 232 et seq. See, however, Reg. *v.* Heywood, 2 Car. & K. 352; Reg. *v.* ———, 1 Cox C. C. 250. The words of Stat. 2 Will. 4, c. 34, § 7, are, "tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit," &c.

[5] Rex *v.* Shukard, Russ. & Ry. 200. And see further, as to the intent, Reg. *v.* Heywood, 2 Car. & K. 352; ante, § 596 et seq.

§ 608. **Putting off — Passing, &c.** — We have also statutes against "putting off,"[1] "passing,"[2] "showing forth in evidence,"[3] "selling and bartering,"[4] and the like.

IX. *Remaining and Connected Questions.*

§ 609. **Misdemeanor — Felony.** — At the common law, forgery is a misdemeanor; but most of the English statutes of forgery make the offence under them felony.[5] The rules by which we are to determine, whether or not a legislative act elevates to felony a crime which was misdemeanor, have been already sufficiently unfolded.[6] And the practitioner cannot fail to discern the importance of this question in each particular case; and of applying, in each case, those doctrines concerning principal, accessory, and the like, which were explained in the preceding volume.[7]

§ 610. **Punishment.** — The question of the punishment has been sufficiently considered.[8]

§ 611. **United States and States.** — Forgery is one of those crimes which, like counterfeiting the coin,[9] may be against the

[1] Stat. Crimes, § 307; Rex v. Giles, 1 Moody, 166; Bevington v. The State, 2 Ohio State, 160; Rex v. Palmer, Russ. & Ry. 72, 2 New Rep. 96, 2 Leach, 4th ed. 978.

[2] Stat. Crimes, § 308; Gentry v. The State, 3 Yerg. 451; The State v. Harris, 5 Ire. 287; Hooper v. The State, 8 Humph. 93; The State v. Fuller, 1 Bay, 245; Perdue v. The State, 2 Humph. 494.

[3] Stat. Crimes, § 309; The State v. Stanton, 1 Ire. 424; The State v. Britt, 3 Dev. 122.

[4] Bevington v. The State, 2 Ohio State, 160; Vanvalkenburg v. The State, 11 Ohio, 404; The State v. Fitzsimmons, 30 Misso. 236.

[5] 2 East P. C. 973, 1003; The State v. Cheek, 13 Ire. 114. And see Perdue v. The State, 2 Humph. 494; Hess v. The State, 5 Ohio, 5; The State v. Rowe, 8 Rich, 17; Lewis v. Commonwealth, 2 S. & R. 551; Commonwealth v. Ray, 3 Gray, 441.

[6] Vol. I. § 622.

[7] Vol. I. § 646–708. And see, for cases relating to forgery and counterfeiting, Rex v. Soares, Russ. & Ry. 25, 2 East P. C. 974; Rex v. Davis, Russ. & Ry. 113; Rex v. Badcock, Russ. & Ry. 249; Rex v. Bingley, Russ. & Ry. 446; Rex v. Kirkwood, 1 Moody, 304; Rex v. Dade, 1 Moody, 307; Rex v. Giles, 1 Moody, 166; Rex v. Stewart, Russ. & Ry. 363; Rex v. Hurse, 2 Moody & R. 360; Reg. v. Bannen, 2 Moody, 309, 1 Car. & K. 295; Reg. v. Clifford, 2 Car. & K. 202; Commonwealth v. Stevens, 10 Mass. 181; Reg. v. Barber, 1 Car. & K. 442; Reg. v. Harris, 7 Car. & P. 416; Rex v. Palmer, Russ. & Ry. 72, 2 New Rep. 96, 2 Leach, 4th ed. 978; The State v. Cheek, 13 Ire. 114; Rex v. Collicott, Russ. & Ry. 212, 4 Taunt. 300; Reg. v. Mazeau, 9 Car. & P. 676; Bothe's Case, Sir F. Moore, 666.

[8] Vol. I. § 927 et seq.; ante, § 55. And see as to forgery, The State v. Rowe, 8 Rich. 17; Lewis v. Commonwealth, 2 S. & R. 551.

[9] Ante, § 280–287.

government of the State, the government of the United States, or both.[1]

§ 612. **Forged Instrument as False Token.** — The reader has likewise been directed to the general doctrine, with its reasons and qualifications, that, if a forged instrument is used as a false pretence or false token, whereby a fraud is actually accomplished, the guilty person may be proceeded against, either for the cheat effected, or for the forgery, at the election of the prosecutor, when both offences are of one grade of crime, but not when one is a felony and the other a misdemeanor.[2]

[1] See United States v. Britton, 2 Mason, 464; The State v. Pitman, 1 Brev. 32; In re Truman, 44 Misso. 181; The State v. Brown, 2 Oregon, 221.

[2] Vol. I. § 787–789, 815; ante, § 165. And see Rex v. Evans, 5 Car. & P. 553; Reg. v. Button, 11 Q. B. 929; People v. Peacock, 6 Cow. 72; Hales's Case, 17 Howell St. Tr. 161, 209; Reg. v. Inder, 1 Den. C. C. 325; Reg. v. Anderson, 2 Moody & R. 469; Reg. v. Thorn, Car. & M. 206; Watson v. People, 64 Barb. 130.

For FORNICATION, see Stat. Crimes.
GAMING, see Stat. Crimes.
GAMING-HOUSE, see Vol. I. § 1135 et seq.
HAWKERS AND PEDDLERS, see Stat. Crimes.
HIGHWAY, see WAY.

CHAPTER XXIII.

HOMICIDE, FELONIOUS.[1]

§ 613–615. Introduction.
616–628. Historical View.
629–671. What Homicides are indictable.
672–722. What are Murder and what are Manslaughter.
723–730. What Murders are in First Degree and what in Second.
731. Degrees in Manslaughter.
732–738. Leading Doctrines of Indictable Homicide epitomized.
739–743. Attempts to commit Murder and Manslaughter.
744, 745. Remaining and Connected Questions.

§ 613. **Nature of the Subject — How treated of in the Books.** — The subject of the present chapter is one of great importance and wide extent in the criminal law. In the books it is not treated of so clearly as one might suppose it would be, considering how much the professional mind has had occasion to dwell upon it. But its proper treatment is attended with great difficulties; indeed, there are connected with it many questions, vital in their nature, upon which judicial opinion is not well settled, if indeed any opinion upon them has ever been pronounced.

§ 614. **How in this Chapter.** — The author, in this chapter, will endeavor to clear the subject of its difficulties, as far as the present condition of the law, which on some points is not quite settled, will permit. And, to do this, he will adopt methods which, at some places in the discussion, will differ more or less from those employed by preceding authors. In the first volume is a chapter entitled "Defence of Person and Property,"[2] wherein

[1] For matter relating to this title, see Vol. I. § 112–116, 131–134, 143, 148, 217, 227, 259, 305, 314, 316, 321, 328, 332, 334, 346, 348, 358, 361, 364, 401, 410, 414, 415, 429, 510, 511, 547, 557, 558, 562, 564, 635, 639, 640, 642, 652, 654, 666, 676, 678, 693, 698, 736, 781, 788, 792, 795, 797, 808, 811, 968, 1059. And see this volume, DUELLING; SELF-MURDER. For the pleading, practice, and evidence, see Crim. Proced. II. § 495 et seq. Also, as to both law and procedure, Stat. Crimes, § 181, 185, note. 242, 371, 872, 465–477, 488, 502–508, 742, 743, 759, 761, note.

[2] Vol. I. § 886 et seq.

is inserted some matter which, but for that chapter, would be given here; and the reader should consult it in connection with the following elucidations.

§ 615. **How the Chapter divided.** — We shall consider, I. The History of the Doctrine of Indictable Homicide; II. What Homicides are indictable; III. What Indictable Homicides are Murder and what are Manslaughter; IV. What Murders are in the First Degree and what in the Second; V. Degrees in Manslaughter; VI. The Leading Doctrines of Indictable Homicide epitomized; VII. Attempts to commit Murder and Manslaughter with Various Forms of Felonious Assault; VIII. Remaining and Connected Questions.

I. *History of the Doctrine of Indictable Homicide.*

§ 616. **Obsolete Law.** — Connected with the history of the law of indictable homicide, there is much of mere curious learning, now obsolete, and of no value even for purposes of illustration. Of other obsolete law, it is important to know something. Thus, —

§ 617. *Old Homicides not Felonious:* —

Justifiable and Excusable. — In modern law, all homicides which are cognizable by the criminal courts are felonies. But anciently the law took jurisdiction of certain others as well as these. The homicide "which amounts not to felony," says Hawkins, "is either justifiable, and causes no forfeiture; or excusable, and causes the forfeiture of the party's goods."[1] But we saw, in the first volume,[2] that forfeitures of this sort are unknown in our States. Whence it has followed, that any homicide which, under the old law, was less than felony, is simply regarded as no offence with us.

§ 618. **Three kinds.** — Blackstone says: "Homicide is of three kinds, — justifiable, excusable, and felonious. The first has no share of guilt at all; the second, very little; but the third is the highest crime against the law of nature that man is capable of committing."

§ 619. **Justifiable Homicide explained.** — And he divides justifiable homicide into two classes: "1. Such as is owing to some

[1] 1 Hawk. P. C. Curw. ed. p. 79.

[2] Vol. I. § 970

unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing; and, therefore, without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. . . . But the law must *require* it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.[1] . . . 2. Homicide committed for the advancement of *public justice*," [2] in cases where the act is not commanded, but permitted. And here he mentions, by way of illustration, such homicides as are committed in the prevention of a felony; [3] in the arrest of persons guilty, or accused, of crime; [4] in preventing escapes, or retaking the criminal; [5] in the suppression of breaches of the peace.[6]

§ 620. **Excusable Homicide explained — Misadventure.** — Excusable homicide he divides as follows: "1. Homicide *per infortunium*, or *misadventure*, where a man, doing a lawful act, without an intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal [of course this must be in a case where the officer has this right, as probably no officer in this country has, except keepers of prisons and the like], and happens to occasion his death, it is only misadventure: for the act of correction is lawful: but, if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. . . . A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing and sword-playing, the succeeding amusement of their posterity; and, therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony,

[1] And see post, § 630, 644.
[2] 4 Bl. Com. 178, 179.
[3] Vol. I. § 849.
[4] Post, § 647.
[5] Post, § 647–651.
[6] Post, § 647 et seq., 653, 654.

or manslaughter. But if the knight command or permit such diversion, it is said to be only misadventure; for then the act is lawful. . . . Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts." [1]

§ 621. **Continued — Self-defence.** — The second species of excusable homicide, mentioned by Blackstone, is "homicide in self-defence, or *se defendendo*," — the same which was somewhat treated of in the first volume.[2] He says: "The self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*,[3] or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide or misadventure; whereas it appears by the Statute 24 Hen. 8, c. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter." [4]

§ 622. **How punished.** — The two species of excusable homicide appear to stand on equal ground together, as concerns the only material thing which distinguishes excusable from justifiable homicide in the ancient law of England. The excusable was subject to punishment, as explained by Blackstone in the following words: "The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death; which, however, is with reason denied by later and more accurate writers. It seems rather to have consisted in a forfeiture, some say of all the goods

[1] 4 Bl. Com. 182, 183.
[2] Vol. I. § 836 et seq.
[3] See, for various views of *chance-medley*, Foster, 258. And see 3 Inst. 57; 1 Hale, P. C. 471 et seq.
[4] 4 Bl. Com. 183, 184.

and chattels, others of only part of them, by way of fine or *weregild;* which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had, as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same. And, indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal."[1]

Present Law. — Since Blackstone wrote, the law of England has quite done away with this forfeiture, even if we should admit that it was not practically abrogated before. And there is no remnant of this barbarous superstition clinging to the jurisprudence of our own country.[2]

§ 623. *Division of Felonious Homicides into the Two Degrees now known as Murder and Manslaughter:* —

Ancient Idea of Murder — Voluntary Homicide — Charging the Hundred. — In Britton we have the following: "Murder is the felonious killing of a person unknown, whereof it cannot be known by whom it was done. And our will is, that for every murder the hundred in which it shall be committed be amerced; and, if the fact is found to have been done in two hundreds, let both the hundreds be amerced in proportion to the extent of each hundred. And it shall not be adjudged murder where any of the kin of the deceased can be found, who can prove that he was an Englishman, and thus make presentment of Englishery;[3] nor, although the person killed was a foreigner, if he lived long enough to accuse the felons himself; nor where any felon shall be apprehended for the fact; nor in case of accident or mischance; nor where any man shall have taken sanctuary for the felony; nor in any case where the felon shall be known, so that the felony may be punished by outlawry, or otherwise attainted;

[1] 4 Bl. Com. 188. And see Foster, 279 et seq.; 3 Inst. 57.

[2] See ante, § 617.

[3] Spelled in the old books, *Engleshery, Englescherie, Englecery*, &c.

nor where two or more persons have feloniously killed each other, although they be unknown, or aliens."[1] This old law, by which the hundred was to be amerced in certain cases of secret killing, was "introduced," says Hawkins, "by King Canute for the preservation of his Danes, . . . unless they could prove that the person slain were an Englishman (which proof was called Englishery), or could produce the offender, &c. And in those days the open wilful killing of a man through anger or malice, &c., was not called murder, but voluntary homicide."[2]

§ 624. **Responsibility of the Hundred abolished.** — But, in the year 1340, this responsibility of the hundred was taken away by a statute which provided, "that from henceforth no justice errant shall put in any article, opposition, presentment of Englishery, against the commons of the counties, nor against any of them, but that Englishery, and the presentment of the same, be wholly out and void for ever, so that no person by this cause may be from henceforth impeached."[3] It is seen, therefore, that, at this time, there ceased to be, in the law, any offence to which the term murder could be applied.

Altered Meaning of "Murder" — Statutes. — Consequently, as Hawkins observes, "the killing of any Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Rich. 2 [stat. 2], c. 1, which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicides as shall not be pardoned without special words; and,

[1] Brit. b. 1, c. 7; Nichols's Translation, Vol. I. p. 38.

[2] 1 Hawk. P. C. Curw. ed. p. 91, § 1. Blackstone explains as follows: "The name of murder (as a crime) was anciently applied only to the secret killing of another (which the word *moerda* signifies in the Teutonic language); and it was defined *homicidium quod nullo vidente, nullo sciente, clam perpetratur;* for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighborhood, unless they produced the murderer, to have perpetrated, or, at least, connived at, the murder; and, according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans. **Englishery.** — And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie*), the country seems to have been excused from this burden." 4 Bl. Com. 194, 195. See, also, Lord Coke in Calvin's Case, 7 Co. 1, 16.

[3] Stat. 14 Edw. 3, stat. 1, c. 4.

in the body of the act, expresses the same by 'murder, or killing by await, assault, or malice prepensed?' And doubtless the makers of 23 Hen. 8, c. 1, which excluded all wilful murder of malice prepense from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder."[1]

§ 625. **Taking away Clergy.** — From what was said in the first volume[2] respecting the benefit of clergy, the reader perceives, that a felony, where clergy was allowed, was practically almost no offence whatever. Therefore, —

"Malice Aforethought" — Present Meaning of "Murder" — Manslaughter. — When the latter of the two statutes mentioned by Hawkins, namely, 23 Hen. 8, c. 1, § 3, provided, "that no person or persons which hereafter shall happen to be found guilty, &c., for any wilful murder of malice prepensed, &c., shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and shall suffer death," &c., it created, in substance, a new offence. And as the term murder was before of uncertain meaning, it was thereafter applied to what was thus excluded from clergy, signifying neither more nor less. And the term manslaughter, or sometimes chance-medley, was used to designate all other kinds of felonious homicide.

§ 626. **New Meanings, continued — Course of the Law's Development.** — Yet Mr. Reeves has shown, that, even after the passage of this statute, the terms of the law, and the law itself, were practically somewhat slow in assuming their present shape.[3] It is not necessary to trace the history here; the reader will find it sufficiently stated elsewhere.[4]

§ 627. **Felonious Killing.** — The reader perceives, therefore, that we come to the following result: To ascertain what is a felonious homicide, this expression including both murder and manslaughter, we look to the common law of England and this country, substantially as unaffected by statutory provisions, English or American. But, —

Murder distinguished from Manslaughter. — When we inquire what is murder as distinguished from manslaughter, we find the

[1] 1 Hawk. P. C. Curw. ed. p. 91, § 2.
[2] Vol. I. § 936 et seq.
[3] 4 Reeves Hist. Eng. Law, 393, 534 et seq.
[4] See, also, for a discussion of this subject, Crim. Proced. II. § 498–501, 544–546, 548.

whole in Stat. 23 Hen. 8, c. 1, § 3; the words being "wilful murder [that is, remembering what the word murder meant at the time when this statute was framed, wilful felonious killing] of malice prepensed."

§ 628. **Modern Doctrine of Murder.** — But the phrase "wilful felonious killing of malice prepensed" is, in its nature, one which requires judicial exposition to be understood. And out of such exposition has grown the modern doctrine of murder. The author, in the preceding volume,[1] stated what is the general meaning of the two words "wilful" and "malice;" but, in what follows, will be shown the results to which judicial interpretation has conducted the law of murder; leading it, if the expression may be understood, *out of* the three words "wilful," "malice," and "prepensed," rather than *into* any meaning which any one of these words has within itself. But, before this exposition will be in order, we shall, in the next sub-title, inquire, —

II. *What Homicides are indictable.*

§ 629. **General View.** — The topic of this sub-title does not admit of condensation into one comprehensive statement, which shall include the whole doctrine. The law has always cherished the life of the subject, and has visited with punishment every act by which it has been taken away, provided the act was of a certain standard of culpability. But there is no one rule by which the culpability can be measured. We shall, therefore, travel through the facts of cases to see to what point, under the various circumstances of life-taking, the law's standard reaches. But as preliminary to this, we must inquire as to —

§ 630. *The Being on whom the Homicide is committed:* —

Every Human Being. — The doctrine is, that every human being who is, according to the old English phrase, in the peace of the king, by which is meant, in the enjoyment of the right of existence at the particular time and place, may be the subject of felonious homicide;[2] "as," says Lord Coke, "man, woman, child, subject born, or alien, persons outlawed, or otherwise attainted

[1] Vol. I. § 427–429.
[2] Vol. I. § 134; 1 Hawk. P. C. Curw. ed. p. 94, § 15; 1 Hale P. C. 433; 4 Bl. Com. 198; Rex *v.* Depardo, 1 Taunt. 26, Russ. & Ry. 134; Rex *v.* Helsham, 4 Car. & P. 394.

of treason, felony, or premunire, Christian, Jew, Heathen, Turk, or other Infidel, being under the king's peace." [1]

§ 631. **Enemy in Battle.** — But we have seen,[2] that a homicide committed in the actual heat of battle in time of war is not criminal;[3] for the person killed had not, at the moment and in the place, a right to his life, if the other could take it away.

Unlawful Execution. — Even where the right of life does not exist, this fact is no justification to one extinguishing it otherwise than according to law. Therefore, says Lord Hale, "if a person be condemned to be hanged, and the sheriff behead him, this is murder." [4] And the same is true if any person not authorized executes the sentence of death.[5]

Enemy not in Battle. — So if one maliciously kills an alien enemy, not in the exercise of war, it is murder.[6]

§ 632. **Child Unborn — Fully Born.** — But a child within its mother's womb is not a being on whom a felonious homicide can be committed; it must be born,[7] every part of it must have come from the mother.[8] Yet the umbilical cord, which attaches it to her, need not be separated;[9] neither need the child have breathed, if otherwise it had life and an independent circulation;[10] while, on the other hand, supposing it to have breathed before being fully born, and then death to have ensued by natural means before the delivery was complete, it could not be the subject of this offence.[11]

§ 633. **Premature Birth.** — If the child is born alive, it is of no consequence that the full period of gestation had not elapsed. Therefore, —

Death following Abortion. — Where a person intending to procure an abortion does an act which causes the child to be born before the natural time, and consequently less capable of living, whereby

[1] 3 Inst. 50. And see Pennsylvania v. Robertson, Addison, 246.
[2] Vol. I. § 131, 134.
[3] 1 Hale P. C. 433.
[4] 1 Hale P. C. 433.
[5] 1 Hawk. P. C. Curw. ed. p. 80, § 9. And see post, § 644.
[6] Vol. I. § 134; The State v. Gut, 13 Minn. 341.
[7] Rex v. Brain, 6 Car. & P. 349.
[8] Rex v. Brain, supra; Rex v. Crutchley, 7 Car. & P. 814; Rex v. Sellis, 7 Car. & P. 850; Rex v. Poulton, 5 Car. & P. 329.
[9] Rex v. Reeves, 9 Car. & P. 25; Reg. v. Trilloe, Car. & M. 650, 2 Moody, 260. And see Rex v. Crutchley, 7 Car. & P. 814.
[10] Rex v. Brain, supra.
[11] Rex v. Sellis, 7 Car. & P. 850; Rex v. Enoch, 5 Car. & P. 539; Rex v. Poulton, 5 Car. & P. 329. See also 8 Greenl. Ev. § 136.

it dies after birth from this premature exposure, he is guilty of murder.[1] But, —

Life taken before Birth. — Where a woman sunders the head from her infant's body before the birth is complete, she escapes the condemnation of the law for this aggravated crime.[2] Lord Coke says: "If a woman be quick with child; and by a potion or otherwise killeth it in her womb; or, if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but, —

Death after from Injury before. — "If the child be born alive, and dieth of the potion, battery, or other cause, this is murder." [3]

§ 634. **Counselling Mother before Birth.** — And if one counsels, before birth, a mother to kill her infant after birth, and she does it, he becomes thereby an accessory before the fact to her act of murder.[4]

§ 635. *The Killing:* —

What it is to Kill another. — Hawkins puts the question, "in what cases a man may be said to kill another," and proceeds: "Not only he who by a wound or blow, or by poisoning, strangling, or famishing, &c., directly causes another's death; but also, in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death; shall be adjudged to kill him. And such was the case of him who carried his sick father, against his will, in a cold, frosty season, from one town to another, by reason whereof he died. Such also was the case of the harlot, who, being delivered of a child, left it in an orchard, covered only with leaves, in which condition it was struck by a kite, and died thereof. And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress or imprisonment compels a man to accuse an innocent person, who on his evidence is condemned and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof. Also he who wilfully neglects to prevent a mischief,

[1] Reg. v. West, 2 Car. & K. 784. And see Rex v. Senior, 1 Moody, 346.
[2] Rex v. Sellis, 7 Car. & P. 850.
[3] 3 Inst. 50; s. p. 1 Hale P. C. 433.
[4] Parker's Case, 2 Dy. 186, pl. 2; 3 Inst. 51; 1 Hale P. C. 433; Vol. I. § 676. See post, § 744.

which he may and ought to provide against, is, as some have said in judgment of the law, the actual cause of the damage which ensues; and, therefore, if a man have an ox or a horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions the owner may be indicted as having himself feloniously killed him; and this is agreeable to the Mosaical law. However, as it is agreed by all, such a person is certainly guilty of a very gross misdemeanor."[1]

§ 636. **In Short — Foregoing Illustrations.** — This extract from Hawkins shows, that, as a general proposition, he whose act causes, in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. Yet there may be doubt concerning one or two of the instances mentioned by Hawkins in illustration of the proposition. Thus it is doubtful, as we saw in the first volume,[2] whether, in law, it is a killing, or, at least, whether the killing is felonious, where one, by perjury before the grand jury, or before the petit jury, causes another to be capitally convicted, by reason of which the latter is executed in a legal way.

§ 637. **Offender's Conduct and other things combining.** — It is a general rule both of law and reason, that, when a man's will contributes to impel a physical force, whether such force proceed directly from another, or from another and himself, he is to be held responsible for the result, the same as if his own unaided hand had produced it.[3] The contribution, however, must be of such magnitude, and so near the result, that, sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance.[4] Now these propositions conduct us to the doctrine, that, whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow

[1] 1 Hawk. P. C. Curw. ed. p. 92, § 4–8.

[2] Vol. I. § 564.

[3] See Vol. I. § 628 et seq.; Reg. v. Haines, 2 Car. & K. 368; 1 Hale P. C. 428.

[4] See Vol. I. § 212 et seq., 406, 630–633; ante, § 433; post, § 668.

really contributed either mediately or immediately to the death, in a degree sufficient for the law's notice.[1] Thus, —

§ 638. **Wounded Person's own Neglect.** — In an old case "it was resolved, that, if one gives wounds to another, who neglects the cure of them, or is disorderly and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according as the case is; . . . because, if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them."[2] And the doctrine is established, that, if the blow caused the death, it is sufficient, though the individual might have recovered had he used proper care himself;[3] or submitted to a surgical operation, to which he refused submission;[4] or had the surgeons treated the wound properly.[5] So, also, —

Prior Cause. — If the person would have died from some other cause already operating, yet if the wound hastened the termination of life, this is enough;[6] as, for example, if he had already been mortally wounded by another.[7] And if the person attacked was enfeebled by disease, and what was done would not have been mortal to a well person, still, if the assaulting person knew his condition and did what was mortal to him, the offence is committed.[8]

§ 639. **Wound not Mortal.** — But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise.[9] And it is the same if the wounded person becomes sick

[1] And see post, § 641; Commonwealth v. Fox, 7 Gray, 585; Williams v. The State, 2 Texas Ap. 271; Kee v. The State, 28 Ark. 155; Kelley v. The State, 58 Ind. 311.

[2] Rex v. Row, J. Kel. 26; Bowles v. The State, 58 Ala. 335.

[3] 1 Hawk. P. C. Curw. ed. p. 93, § 10; McAllister v. The State, 17 Ala. 434; The State v. Bantley, 44 Conn. 587.

[4] Reg. v. Holland, 2 Moody & R. 351. And see Reg. v. West, 2 Car. & K. 784.

[5] The State v. Baker, 1 Jones, N. C. 267; Commonwealth v. Hackett, 2 Allen, 136; Brown v. The State, 38 Texas, 482; People v. Cook, 39 Mich. 236. And see Reg. v. Haines, 2 Car. & K. 368.

[6] 1 Hale P. C. 428; The State v. Morea, 2 Ala. 275.

[7] People v. Ah Fat, 48 Cal. 61.

[8] Commonwealth v. Fox, 7 Gray, 585.

[9] 3 Greenl. Ev. § 139; 1 Hale P. C. 428; Reg. v. Connor, 2 Car. & K. 518; Parsons v. The State, 21 Ala. 300. In this last case the distinction is stated, perhaps in part too favorably to defendants, to be that "ordinarily," if the wound is "not dangerous in itself, and the death was evidently occasioned by the grossly erroneous treatment, the original author will not be accountable. . . . If the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment."

and dies of an independent disease, not connected with the wound, which was not mortal.[1]

Not alone Mortal, but a Part Cause. — But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death.[2] And the wound need not even be a concurrent cause; much less need it be the next proximate one; for, if it is the cause of the cause, no more is required.[3]

[1] Livingston *v.* Commonwealth, 14 Grat. 592; Daniel, J., observing: "The blow is neither the proximate cause of the death, nor is it, though made by extraneous circumstances to accelerate it, linked with it in the regular chain of causes and consequences. A new and wholly independent instrumentality is interposed in the shape of the disease; and, in contemplation of law, the death-stroke is inflicted by the hand of Providence, and not by the hand of violence." p. 602.

[2] Ante, § 637.

[3] Lord Hale says: "If a man receives a wound which is not in itself mortal, but, either for want of helpful applications, or [from] neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound though it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*." 1 Hale P. C. 428. And see Commonwealth *v.* McPike, 3 Cush. 181; Reg. *v.* Minnock, 1 Crawf. & Dix C. C. 45. In a Massachusetts case the court held, that, where the wound is feloniously inflicted, and the unskilfulness of the surgeon contributes to the death which follows, the person inflicting the wound is, nevertheless, guilty of murder or manslaughter, as the case may be. And Bigelow, C. J., after reviewing the authorities, which he considered to be all one way, said: "The well-established rule of the common law would seem to be, that, if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound." Commonwealth *v.* Hackett, 2 Allen, 136, 141. According to a Louisiana case, the jury, to justify a conviction, must be satisfied that the deceased died of the wounds, and from no other cause. The fact that he had no surgeon, or an unskilful one, or a nurse whose ill appliances aggravated the original wounds, cannot mitigate the crime. To do that, it must plainly appear that the death was caused, not by the wound, but only by misconduct, malpractice, or ill-treatment, on the part of other persons than the accused. The State *v.* Scott, 12 La. An. 274. Where, in North Carolina, the judge charged the jury, that, if one inflicts a mortal wound, and, while the wounded person is languishing, another kills him by an independent act, the former is guilty of murder, this was held to be error. "We cannot imagine," said Battle, J., "how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice." The State *v.* Scates, 5 Jones, N. C. 420, 423.

§ 640. **The Time of Death.** — The death must take place within a year and a day from the time when the wound or other injury was inflicted.[1] "In the computation whereof," says Hawkins, "the whole day on which the hurt was done shall be reckoned the first;[2] so that, if the stroke is on the first day of January, and the death is on the first day of the January next following, the offence is committed; but not, if the death is on the second day of the second January. Fractions of a day are not regarded;[3] consequently it makes no difference whether the stroke or death is in the morning or afternoon.[4]

§ 641. **The Kinds of Force producing Death.** — We have seen,[5] in general, that it is immaterial as respects responsibility for the killing, by what sort of force death is produced; as, whether it proceeds from the action of the mind or the body;[6] whether it operated solely, or concurrently with other things;[7] whether it was consented to by the person on whom it operated, or not;[8] whether it was a blow,[9] or a drug,[10] or an instrument or other thing used to procure abortion,[11] or a command addressed to an inferior under obligation to obey,[12] or an unlawful confinement,[13] or a leaving of a dependent person in a place of exposure,[14] or any omission of a duty which the law enjoins,[15] or a ball discharged from a gun;[16] whether it was accompanied by acts of other persons concurring in what was done, or operated alone;[17] or was of any other nature.[18] How a false charge of a crime punishable with death, supported by a false oath, is to be regarded, was considered in the first volume,[19] and mentioned in a preceding section.[20]

[1] The State *v.* Orrell, 1 Dev. 139.

[2] 1 Hawk. P. C. Curw. ed. p. 93, § 9.

[3] Stat. Crimes, § 28, 29.

[4] 3 Inst. 53.

[5] Ante, § 635, 636.

[6] See, on this point, Vol. I. § 560, 564; Reg. *v.* Pitts, Car. & M. 284; 1 East P. C. 225; 3 Greenl. Ev. § 142.

[7] See Vol. I. § 337, 339, 630; ante, § 637, 638.

[8] Vol. I. § 257-268; Commonwealth *v.* Parker, 9 Met. 263, 265.

[9] Shorter *v.* People, 2 Comst. 193; Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666.

[10] Rex *v.* Martin, 3 Car. & P. 211; Gore's Case, 9 Co. 81 *a*; Ann *v.* The State, 11 Humph. 159.

[11] Commonwealth *v.* Keeper of the Prison, 2 Ashm. 227; Reg. *v.* West, 2 Car. & K. 784; Commonwealth *v.* Parker, 9 Met. 263, 265; post, § 657, 691.

[12] Vol. I. § 562; United States *v.* Freeman, 4 Mason, 505.

[13] Reg. *v.* Marriott, 8 Car. & P. 425.

[14] Beal's Case, 1 Leon. 327.

[15] Vol. I. § 314; Reg. *v.* Shepherd, Leigh & C. 147; Reg. *v.* Dant, Leigh & C. 567; Reg. *v.* Smith, Leigh & C. 607.

[16] The State *v.* Sisson, 3 Brev. 58.

[17] Vol. I. § 630.

[18] And see Chichester's Case, Aleyn, 12.

[19] Vol. I. § 564.

[20] Ante, § 635.

§ 642. *General Considerations to show whether a Particular Homicide is indictable or not:* —

Lawful Force. — It is a plain proposition, that, if death ensues from the employment of a force in no way unlawful, this does not subject to indictment the person causing the death.

Unlawful. — The force must be unlawful; but, in what sense and to what extent unlawful, it is impossible to state by any single rule. The reader should here trace the line of the law through numerous cases, and various principles interspersed among the sections of our first volume. Yet a reference to some cases in this connection may be helpful, both as placing before him certain landmarks of doctrine, and indicating in a general way how the lines run. As in conspiracy[1] the "unlawful" thing contemplated to be done need not be "indictable" on other grounds, so here it is believed that what is done may be sufficient though of a nature not punishable as crime when no injury follows the doing. Doubtless, in most cases, if death does not occur where the homicide would be indictable if it did, yet the person suffers an injury, the wrong-doer is liable for an assault and battery; still it is believed that this proposition does not constitute a universal rule.

§ 643. **Illustrations of "Unlawful"** — As showing that there must be something unlawful, —

Neglect to employ Midwife. — Where a girl eighteen years old was taken in labor at the house of her stepfather during his absence, and the mother omitted to procure for her the services of a midwife, yet there was no evidence of the mother's having the means to pay for the services, but from the want of them the girl died, the court held that this mother was not legally bound, under the circumstances, to procure a midwife; and, therefore, she could not be convicted of manslaughter.[2] Yet, in

[1] Ante, § 178, 181.

[2] Reg. *v.* Shepherd, Leigh & C. 147. Erle, C. J., in delivering the opinion of the judges, said: "It is important that the boundaries of crime should be well defined. They are not so definite as they might be in cases of negligence; and our duty is to consider and see, whether there are any facts here to bring this case within the principle of any of the cases where the omission of a duty resulting in death has been held to be manslaughter. The facts of the case are, that the prisoner did not procure the aid of a midwife for her daughter during child-birth. In consequence of her omitting to do so, a difficulty occurred, and death ensued. Was there a breach of duty for which she would be responsible in a criminal court in not obtaining that aid? We must take it, that, if she had used ordinary care, she would have procured the attendance of a midwife; that she knew where a midwife could be found; and that, if the midwife had been summoned, she would have attended. Of course, her skill must have been paid for; and there is no evidence that the woman had the means at her command of paying for that skill. The midwife would probably have attended without being paid. Yet the prisoner cannot be criminally responsible for not asking for that aid, which, perhaps, might have been given without compensation. Aid of this kind is not always required in child-birth; and sometimes no ill consequences result from its absence. Here, however, it was wanted, and was not applied. These facts do not seem to me to fall within the principle of any of the cases that have been cited. The cases where the person, whose death is caused, has been brought into circumstances where he cannot help himself, as by imprisonment by the act of the party charged, are clearly distinguishable. There the persons imprisoned are helpless, and their custodians, by the fact of their being so, have charged themselves with the support of their prisoners. The case of parent and child of tender years is also distinguishable, as are the other cases where such a duty is imposed by law or contract, as in the case of master and apprentice. Here the girl was beyond the age of childhood, and was entirely emancipated. Then, being in the prisoner's house, she is brought to bed, and the mother omits to procure her a midwife. I cannot find any authority for saying, that that was such a breach of duty as renders her, in the event which ensued, liable to the consequences of manslaughter." And Williams, J., observed: "No doubt, the prisoner is morally guilty; but legally she is not punishable." p. 154–156. **Neglect to supply Food to Servant.** — In a later case it was held, that a mistress is not criminally responsible for the death of her servant, caused by neglecting to supply the servant with proper food and clothing, unless the latter is helpless and unable to take care of herself, or so under the control of the former as to be unable to withdraw herself therefrom. Said Erle, C. J.: "The law clearly is, that, if a person has the custody and charge of another, and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody; but it is also equally clear, that, when a person having the free control of her actions, and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue." Reg. *v.* Smith, Leigh & C. 607, 624, 625. I do not propose to question the correctness of this decision, but the latter half of the sentence quoted from the learned Chief Justice may convey an erroneous idea to a reader not on his guard. If a girl wishing to end her life, should go to a mistress accustomed to starve and ill-lodge her servants, and the mistress should employ the girl knowing of this wish, and should rigorously carry out her usual course with an express view to fatal consequences, every lawyer would hold her to be guilty of murder, the same as though she had stabbed the servant at the servant's request. Now, assuming the above real case to be decided correctly, where is the line dividing it from the one just supposed?

this case, if the law had cast on the mother a duty, and she had possessed the ability to perform it, she would have been adjudged guilty of an indictable homicide.[1] In the eye of morality, the duty was upon her, and practically she had the means of discharging it, therefore we hold her to be morally guilty. But if, in morals, as in law, she had been under no duty and possessed no means, she would be deemed not to be even morally respon-

[1] See the last note.

sible. This question of neglect is discussed in our first volume,[1] and in various places in the present chapter.[2]

§ 644. **Official Duty.** — There are circumstances in which the taking of human life is one of the high duties cast upon official persons in respect of their offices. And though the duty is not to be sought, yet its performance, like that of all other duties, is truly commendable; it should never be made ground of reproach.[3] Of course, in all these circumstances, the force which caused the death was not unlawful.

§ 645. **Resisting Felony.** — Again, it is lawful to resist to death one who is attempting to commit a felony; therefore a person making such lawful resistance — in other words, doing nothing unlawful — is not punishable though he takes the felon's life.[4]

Self-defence. — And the same is true when one causes death in the lawful exercise of his right of self-defence.[5]

§ 646. **Making Arrests.** — In "Criminal Procedure," the right and duty of private persons and officers to make arrests were discussed.[6] Now, if one, whether an officer or private person, is making an arrest, and he keeps within the bounds of the law, he does nothing unlawful, consequently he commits no crime though he causes the death of him whom he is attempting to arrest.[7] But a minuter explanation of this subject is desirable.

§ 647. *Further of Homicides in making Arrests and suppressing Disturbances:* —

Killing at and after Arrest. — When, as a general proposition, one refuses to submit to arrest, after he has been touched by the officer, or endeavors to break away after the arrest is effected,[8] he may be lawfully killed, provided this extreme measure is necessary.[9]

[1] Vol. I. § 313 et seq.

[2] And see, particularly, post, § 669 et seq.

[3] See on this subject, Foster, 267; 1 Hale P. C. 496–502; 1 Hawk. P. C. Curw. ed. p. 80, § 4 et seq.; ante, § 630.

[4] Vol. I. § 843, 849, 853–855, 867, 874.

[5] Vol. I. § 849, 850, 863, 865 et seq.

[6] Crim. Proced. I. § 155 et seq.

[7] See, also, Vol. I. § 836 et seq.

[8] As to what constitutes an arrest, see Jones *v.* Jones, 13 Ire. 448; ante, § 26; Crim. Proced. I. § 156 et seq.

[9] 1 Hale P. C. 481, 494–496; 1 Hawk. P. C. Curw. ed. p. 81, 82. Russell says: "In all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." 1 Russ. Crimes, 3d Eng. ed. 665. See also p. 666, 667. And see The State *v.* Anderson, 1 Hill, S. C. 327; Reg. *v.* Dadson, 2 Den. C. C. 35, Temp. & M. 385, 14 Jur. 1051, 1 Eng. L. & Eq. 566, commented on Vol. I. § 441; The State *v.* Roane, 2 Dev. 58; United States *v.* Jailer of Fayette, 2 Abb. U. S. 265, 280; Calfielde's Case, 1 Rol. 189; Mackalley's Case, 9 Co. 65 *a*.

Before Arrest, to effect it. — And, in cases of felony, the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken.[1]

Expositions by Gabbett. — Gabbett has stated the law, with apparent correctness, as follows:[2] —

§ 648. **Killing a flying Felon.** — "In cases of felony, if the felon fly from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and, if, in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not."[3]

§ 649. **Killing one flying from Misdemeanor.** — "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused, for flying from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended.[4] In some instances, however, of flight in cases of flagrant misdemeanors, such as that of a dangerous wound given, the killing may be justified, if the party cannot be otherwise overtaken; but this is founded upon a presumption that the offence may turn out to be a felony."[5]

[1] 1 Hale P. C. 481; Rex *v.* Finnerty, 1 Crawf. & Dix C. C. 167, note. Hawkins says: "If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them." 1 Hawk. P. C. Curw. ed. p. 81, § 11. And an officer may kill an innocent person who will not give himself up on a warrant for felony. Ib. § 12; 1 Russ. Crimes, 3d Eng. ed. 666. See Duperrier *v.* Dautrive, 12 La. An. 664.

[2] 1 Gab. Crim. Law, 482, 484–487. See ante, § 506, note.

[3] 1 East P. C. 298; 1 Gab. Crim. Law, 482.

[4] 1 Hale P. C. 481; Foster, 271.

[5] 1 East P. C. 302; 1 Gab. Crim. Law, 484.

§ 650. **Killing one resisting Arrest for Misdemeanor.** — "But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified.[1] . . .

Jailer, &c., killing, being resisted. — "Jailers and their officers are under the same special protection that other ministers of justice are; and, therefore, if, in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or others in behalf of such prisoners, they are not obliged to retreat so far as they can with safety; but may freely, and without retreating, repel force by force. And if the party so resisting happens to be killed, this, on the part of the jailer or his officer, or any person coming in aid of him, will be justifiable homicide.[2] But an assault upon a jailer which would warrant him (apart from any personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent; for jailers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; and accordingly the law upon this subject, as laid down by Sergeant Hawkins, is, that, if a criminal, *endeavoring to break the jail*, assaults the jailer, the latter may lawfully kill him in the affray."[3]

§ 651. **Killing to effect Arrest in Civil Suit.** — "As to arrests in civil suits, if the party against whom the process has issued fly from the officer, and be killed by him in the pursuit, this, according to Lord Hale, is murder; there being no assault or rescue which would make it a case of homicide *se defendendo*: but it rather seems that Lord Hale intended only to speak of the officer's intentionally killing the defendant in his flight; and Mr. Justice Foster says, it will be murder or manslaughter as circumstances may vary the case; for, if the officer in the heat of the pursuit and merely in order to overtake the defendant should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter; the blood being heated in the pursuit, and no signal mischief intended; though, if he should make use of a deadly weapon, it will amount to murder.[1] The case of a defendant flying after an arrest actually made, or out of custody in execution for debt, seems to be governed by the same rules as where the party flies to avoid an arrest; but certainly, notwithstanding the case reported by Rolle to the contrary, if resistance be made, the person having authority to arrest or retake may repel force with force, and need not give back; and, if death unavoidably ensue in the struggle, he will be justified."[2]

[1] 2 Hale P. C. 117; 1 East P. C. 302, 303; 1 Gab. Crim. Law, 484.

[2] Foster, 321.

[3] 1 Hawk. P. C. Curw. ed. p. 81, § 13; 1 Hale P. C. 496; 1 East P. C. 331; 1 Gab. Crim. Law, 485.

§ 652. **Killing the Person making Arrest.** — If an officer or a private person is proceeding according to law to arrest an offender, the latter has no more right to kill him as an act of resisting the arrest than to kill any other person; and, if he does commit the homicide, it is murder.[3] Even where the arresting person is proceeding unlawfully, — as where, he being an officer, the process is so defective as to be null, or he exceeds his authority,[4] or undertakes to arrest for a misdemeanor without any warrant,[5] — if he kills the arresting person, he commits the less grave felonious homicide of manslaughter.[6]

§ 653. **Killing in Interference in Breaches of Peace.** — When there is a quarrel between persons who have come to blows, or a riot, or other public breach of the peace, the duty is imposed on every one not an officer, especially therefore on every officer, to interfere in a proper manner, and separate the combatants, or suppress the disturbance. And if, after an individual under this duty gives notice of his object in interfering, those persons fall on and kill him, they commit a felonious homicide of the higher kind called murder; while, if he does not give notice, the killing is a felonious homicide of the lower kind called manslaughter.[7] And a

[1] 1 Hale P. C. 481; Foster, 271.

[2] 1 Hale P. C. 494; Calfielde's Case, 1 Rol. 189; 1 East P. C. 307; 1 Gab. Crim. Law, 486, 487.

[3] See Vol. I. § 868 et seq.; 1 Hawk. P. C. Curw. ed. p. 81, § 14; Rex *v.* Edmeads, 3 Car. & P. 390; Tom *v.* The State, 8 Humph. 86; Rex *v.* Woolmer, 1 Moody, 334; Rex *v.* Whithorne, 3 Car. & P. 394; Rex *v.* Baker, 1 Leach, 4th ed. 112, 1 East P. C. 323; Rex *v.* Ball, 1 Moody, 330; Rex *v.* Ball, 1 Moody, 333; Mackaley's Case, Cro. Jac. 279; s. c. nom. Mackalley's Case, 9 Co. 65 *a*; Pew's Case, Cro. Car. 183; Rex *v.* Ford, Russ. & Ry. 329; People *v.* Pool, 27 Cal. 572; Reg. *v.* Porter, 12 Cox C. C. 444, 5 Eng. Rep. 497. And see Reg. *v.* Price, 8 Car. & P. 282.

[4] Rafferty *v.* People, 12 Cox C. C. 617; Reg. *v.* Lockley, 4 Fost. & F. 155.

[5] Reg. *v.* Chapman, 12 Cox C. C. 4, 2 Eng. Rep. 160.

[6] Vol. I. § 868; Crim. Proced. I. § 162; Lyon *v.* The State, 22 Ga. 399.

[7] Rex *v.* Tomson, J. Kel. 66; Ashton's Case, 12 Mod. 256; Rex *v.* Keat, 5 Mod. 288, 292; Reg. *v.* Hagan, 8 Car. &

mere private person, thus interfering, may even justify the killing of a rioter, if it was inevitable.[1]

§ 654. **Notice of Official Character.** — The books appear to be not quite distinct on the question, whether or not an officer, interfering with disturbers of the peace, must give notice of his official character.[2] On principle, this seems to be unnecessary, because his official character is presumed to be known.[3] Yet there is authority for holding, that, in order to render the killing of an officer of justice, acting either by right of his office or under a warrant, murder, when he interferes in an affray, he must have given some notice of his being an officer, and of his object in interfering. "But, in these cases, a small matter will amount to a due notification."[4] On the other hand, in an old case we read: "It was held, *per totam curiam*, that, if, upon an affray, the constable and others in his assistance come to suppress the affray, and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden; because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm. So, if the sheriff or any of his bailiffs or other officers is killed in executing the process of the law, or in doing his duty, it is murder; the same law of a watchman, who is killed in the execution of his office."[5]

§ 655. **Manner of the Interference.** — Persons undertaking to separate those who are engaged in a fight, or otherwise to preserve the peace, are required themselves to abstain from undue measures. Thus, —

P. 167; The State *v.* Ferguson, 2 Hill, S. C. 619. And see Reg. *v.* Mabel, 9 Car. & P. 474; Commonwealth *v.* Mitchell, 1 Va. Cas. 116; Reg. *v.* Lockley, 4 Fost. & F. 155; 1 Hawk. P. C. Curw. ed. p. 81, § 14, p. 101, § 48-50; Crim. Proced. I. § 183.

[1] Pond *v.* People, 8 Mich. 150; post, § 655.

[2] See Crim. Proced. I. § 189-192.

[3] See, as furnishing an explanation possibly a little different, Stanley's Case, J. Kel. 86. The doctrine concerning ignorance of fact, stated Vol. I. § 305, should not, however, be overlooked, as it bears upon this question. And see Foster, 310, 311; 1 Hawk. P. C. Curw. ed. p. 101, § 50.

[4] Rex *v.* Gordon, 1 East P. C. 315, 352; and see ib. p. 316, 318.

[5] Yong's Case, 4 Co. 40 *a*.

Killing with Club. — Two men coming to blows, a third dismounted from his horse, armed himself with a club, interposed between them, and killed one of them; and he was held not to be within the protection cast over those who prevent breaches of the peace, but to be guilty of murder.[1] And, —

Officer needlessly knocking down. — A policeman, who may lay his hand gently on one playing music in a public street, attracting a crowd, and request him to move along, or may slightly push him if necessary to give effect to the request, has no right therefore to inflict on him a blow, and knock him down.[2] Still, —

Killing necessary. — If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, they who do it are justified.[3]

§ 656. *Some Comprehensive Views:* —

Rule to determine what Killing indictable. — If a man in doing what the law neither requires nor forbids, or in strictly performing a legal duty, and exercising such care as the circumstances demand, causes the death of another, he commits no offence; but, if he is doing something which the law does not command, of a sort endangering life, — or if in the performance of a legal duty he is grossly careless, in a way to put life in jeopardy, — or if he is committing some breach of the criminal laws which is *malum in se*, — or if he is neglecting a legal duty, where the neglect endangers life, — he then becomes guilty of a felonious homicide should death, however unintended, result within a year and a day to a human being. Of course, also, if he means death, under circumstances affording no legal excuse for the killing, the consequence is the same. Some illustrations of this rule have already been given: let us proceed with others.

Lawful Force to unlawful Extreme. — Where it is lawful to use force, there may still be an extreme which is unlawful; then, if one goes to this extreme, he is indictable should death follow. Thus, —

Chastisement. — A parent is authorized to inflict correction on his child, but never death; consequently he must not employ a

[1] Johnston's Case, 5 Grat. 660. And see Conner *v.* The State, 4 Yerg. 137; People *v.* Cole, 4 Parker C. C. 35.

[2] Reg. *v.* Hagan, 8 Car. & P. 167. And see Reg. *v.* Jones, 9 Car. & P. 258.

[3] 1 Hawk. P. C. Curw. ed. p. 81, § 14; ante, § 648 et seq., 653.

force calculated to produce death. If he does, and death actually follows, he is indictable for the homicide.[1] Again, —

Defence of Property. — A man may defend his property, not speaking now of his castle,[2] by a certain degree of force, not to the taking of an aggressor's life.[3] If, therefore, he does take life in such defence, he is punishable for the homicide.[4] Whence we may infer that, —

Attempt. — If, in defending mere property, he exhibits loaded fire-arms or other like weapons, intending to use them should the emergency arise, he thereby incurs the guilt of attempting to commit a felonious homicide, when, through fear, the aggressor desists. This proposition is suggested to the thoughtful reader as probably sound; but it seems to be neither sustained nor overthrown by direct adjudication.[5]

§ 656 *a*. **Unlawful Force.** — If a lawful force carried to an unlawful extreme will render the party employing it indictable for a felonious homicide should death accidentally follow, much more will it be so when the force is wholly unlawful. And, as already explained,[6] "unlawful" does not mean, in this connection, "indictable." Thus, —

Injury to Girl with her Consent. — If a man, to render practicable an unlawful commerce with a girl, employs artificial means with her consent, inflicting unintentionally a wound which causes her death, he, and those assisting him, are together guilty of manslaughter.[7]

§ 656 *b*. **Carelessness.** — Into the case last put, something of the element of carelessness entered. We saw, in the first volume,[8] some illustrations of the carelessness which, if death accidentally results from it, will render the party guilty of a felonious homicide. Thus, —

Indiscriminate use of Fire-arms. — In an old case, "the defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman;" this was held to be

[1] Grey's Case, J. Kel. 64. The same principle applies to other persons standing *in loco parentis*. Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666.

[2] Vol. I. § 858, 859.

[3] Vol. I. § 861, 862, 875.

[4] Vol. I. § 876.

[5] See People *v.* Honshell, 10 Cal. 83; Pond *v.* People, 8 Mich. 150; People *v.* Payne, 8 Cal. 341.

[6] Ante, § 642.

[7] The State *v.* Center, 35 Vt. 378.

[8] Vol. I. § 314, 317, 321.

manslaughter.[1] All acts of this general sort, from which death unintended proceeds, subject the doer to punishment for felonious homicide;[2] as, "if a man take a gun, not knowing whether it is loaded or unloaded, and using no means to ascertain, and fire it in the direction of any other person, and death ensues, he is guilty of manslaughter."[3] If, however, a man has a duty to discharge, as in military drill, the same consequence will not always follow when death accidentally results from the use of a fire-arm.[4] Again, —

Careless driving. — The law is the same where one carelessly drives over another, and thus unintentionally causes death.[5]

§ 657. **Summary.** — The doctrine in brief is this, that any employment of unlawful force, whereby the death of a human being is produced, whether intended or not, will subject the doer to indictment for a felonious homicide.[6] If the force is of a kind not lawful under the circumstances,[7] it comes within the condemnation, however accidental the death may be. If, being of the lawful sort, it is employed to an extent unlawful, it is the same as if it were unlawful in kind. Therefore a full discussion of this question would reach into every department of legal science, and exhaust the whole. But, to repeat in part, firing a loaded gun into a travelled way,[8] or at a person supposed to be too far distant to be reached by it,[9] or discharging loaded fire-arms in any careless manner for the purpose of frightening another,[10] or performing an operation meant merely to procure an abortion,[11] or administering a deleterious drug,[12] or correcting with an improper instrument one under subjection,[13] or correcting such a one by too severe a punishment,[14] or forcing a person to perform

[1] Rex *v.* Burton, 1 Stra. 481.

[2] Sparks *v.* Commonwealth, 3 Bush, 111; Golliher *v.* Commonwealth, 2 Duvall, 163; Reg. *v.* Jones, 12 Cox C. C. 628, 10 Eng. Rep. 510.

[3] Keating, J., in Reg. *v.* Campbell, 11 Cox C. C. 323, 324.

[4] Reg. *v.* Hutchinson, 9 Cox C. C. 555.

[5] Lee *v.* The State, 1 Coldw. 62; Reg. *v.* Dalloway, 2 Cox C. C. 273.

[6] See ante, § 620.

[7] Ante, § 656.

[8] People *v.* Fuller, 2 Parker C. C. 16.

[9] Studstill *v.* The State, 7 Ga. 2.

[10] The State *v.* Roane, 2 Dev. 58; Collier *v.* The State, 39 Ga. 81. And see Pennsylvania *v.* Lewis, Addison, 279; Errington's Case, 2 Lewin, 217; Rex *v.* Sullivan, 7 Car. & P. 641; Rex *v.* Conner, 7 Car. & P. 438.

[11] See cases cited ante, § 641; post, § 691; Yundt *v.* People, 65 Ill. 372; The State *v.* Moore, 25 Iowa, 128.

[12] Cases cited ante, § 641.

[13] Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666; ante, § 656.

[14] Post, § 663, 683–685.

any act dangerous to life,[1] or entering in anger into a struggle by fighting or otherwise,[2] or an affray,[3] or committing any other breach of the peace,[4] or doing any other thing not warranted by the law,[5] — is such a wrongful exhibition of elements unlawful as subjects the party putting them in motion to the charge of felonious homicide, if death however unintended follows.

§ 658. **Continued.** — Or we may sum up the doctrine thus: Whenever a man commits any offence, where the act is *malum in se*, and not merely *malum prohibitum*;[6] or distinctly violates or neglects to do a plain duty, imposed either by law or by contract;[7] or does an injurious act in mere wanton sport,[8] — if death follows as a consequence not too remote, and if the act itself, or the omission,[9] is not too insignificant,[10] — the party causing the death will be guilty of either murder or manslaughter, according to the circumstances of the case. It will be useful, however, to follow these more general views with some which are more specific.

§ 659. *Neglects:*[11] —

General Doctrine. — The doctrine, in general terms, is, that, wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting is guilty of a felonious homicide. But if the duty is only a moral one, and the dereliction is merely an omission to do, in distinction from an actual doing, there is no legal responsibility.[12] Yet, —

Positive Act. — The responsibility appears to be the same in

[1] Reg. v. Pitts, Car. & M. 284; United States v. Freeman, 4 Mason, 505. And see Reg. v. Marriott, 8 Car. & P. 425.

[2] Reg. v. Canniff, 9 Car. & P. 359; The State v. Underwood, 57 Misso. 40; Reg. v. Caton, 12 Cox C. C. 624, 10 Eng. Rep. 506.

[3] The State v. Hudson, 59 Misso. 135.

[4] Reg. v. Harrington, 5 Cox C. C. 231; Reg. v. Young, 10 Cox C. C. 371.

[5] Chichester's Case, Aleyn, 12; Reg. v. Murton, 3 Fost. & F. 492; Reg. v. Turner, 4 Fost. & F. 339; Reg. v. Towers, 12 Cox C. C. 530, 8 Eng. Rep. 585; Reg. v. Horsey, 3 Fost. & F. 287; Reg. v. Gardner, 1 Fost. & F. 669; Reg. v. Lee, 4 Fost. & F. 63.

[6] Vol. I. § 331, 333.

[7] Chichester's Case, Aleyn, 12; ante, § 643; post, § 659 et seq.

[8] Pennsylvania v. Lewis, Addison, 279; Rex v. Sullivan, 7 Car. & P. 641; Errington's Case, 2 Lewin, 217; The State v. Roane, 2 Dev. 58.

[9] Ante, § 642; post, § 659 et seq.; Reg. v. Packard, Car. & M. 236; Gore's Case, 9 Co. 81 *a*.

[10] Vol. I. § 212 et seq., 334; post, § 668.

[11] For more on this subject, see Vol. I. § 313 et seq.; ante, § 643.

[12] Vol. I. § 217, 314, 321; Reg. v. Hughes, Dears. & B. 248, 7 Cox C. C. 301; Reg. v. Lowe, 3 Car. & K. 123, and Mr. Bennett's note in 1 Ben. & H. Lead. Cas. 49; Reg. v. Haines, 2 Car. & K. 368; ante, § 643 and note.

the one case as in the other, if a positive act, instead of a mere omission, is the cause of the death. This distinction is not perhaps mentioned in words in any of the cases; but it is clearly deducible from principles, and from facts and conclusions, already in the books.

§ 660. **Illustrations.** — The doctrine may be illustrated thus: —

Neglect of Dependent Person. — If a man neglects to supply his legitimate child with suitable food and clothing,[1] or suitably to provide for his apprentice, whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of a felonious homicide.[2] But his wife, if she does the same thing, even toward her own offspring, does not incur this guilt; because the law casts the duty of maintenance on him alone, not at all on her, who stands in this respect in no other relation to him than a mere servant.[3] If one has abiding in his house an idiot brother, who, by his neglect, perishes from want, this is not an omission which casts on him a criminal liability; because he is under no obligation in law to maintain his brother; and "omission, without a duty, will not create an indictable offence."[4] But this refers to a case in which no obligation was assumed; for, if one has voluntarily taken upon himself the obligation, he is responsible if death follows from his gross neglect of it, amounting to a wicked mind.[5]

§ 661. **Continued, as to Principal in Second Degree.** — But, in the case of the wife, there seems, in legal reason, to be no difficulty in holding her liable, when she acts without compulsion, express or implied, from her husband,[6] who is also liable. For, if she is present aiding and abetting him, she becomes thereby a principal of the second degree.[7] And, —

Apply for Relief. — It has been even laid down that parents,

[1] Vol. I. § 883, 884.

[2] Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 490; Reg. v. Crumpton, Car. & M. 597; Rex v. Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Reg. v. Bubb, 4 Cox C. C. 455; Reg. v. Conde, 10 Cox C. C. 547. See Reg. v. Waters, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. N. S. M. C. 53; Reg. v. Renshaw, 11 Jur. 615, 616; Reg. v. Marriott, 8 Car. & P. 425; post, § 686.

[3] Rex v. Saunders, 7 Car. & P. 277; Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 19; Reg. v. Edwards, 8 Car. & P. 611; Vol. I. § 364.

[4] Rex v. Smith, 2 Car. & P. 449. This was not a case of murder, but it establishes the principle stated in the text. And see Vol. I. § 217.

[5] Reg. v. Nicholls, 13 Cox C. C. 75. And see Reg. v. Finney, 12 Cox C. C. 625, 10 Eng. Rep. 507; Reg. v. Porter, Leigh & C. 394, 9 Cox C. C. 449; Reg. v. S———, 5 Cox C. C. 279.

[6] See Vol. I. § 356 et seq.

[7] Vol. I. § 648.

both father and mother, who are without the means of providing sufficient food and clothing for their helpless children, should apply for public assistance under the poor laws; and, if a child dies in consequence of a neglect to make such application, they are guilty of manslaughter.[1]

§ 662. **Married Persons living Apart.** — In a case before Gurney, B., the doctrine seemed to be received, that, where husband and wife live apart by mutual consent, and he gives her a fixed allowance for her maintenance, he is still under obligation to see that she does not suffer in sickness. If, therefore, she is sick, and her days are shortened from the want of shelter, he may be charged criminally with her death, provided he has notice of her condition, and refuses to supply her; though, *prima facie*, he is under no obligation.[2]

§ 662 *a*. **Running Public Conveyances.** — If persons who have the charge of the running of steamboats,[3] railway trains,[4] and other public conveyances,[5] neglect their duties, and death results from the neglect, they are, under many circumstances, not all, answerable for manslaughter. It will depend upon no one consideration alone, but upon many considerations set down in this chapter and in others of these volumes, whether, in the particular instance, the indictment can be maintained. A criminal case of this sort is governed by principles differing in some measure from a civil one. Hence, —

Contributory Negligence. — For reasons appearing in our first volume,[6] the doctrine of contributory negligence is not applicable in these cases of criminal homicide. "Who," asked Byles, J., in a case where a child had been run over and killed, "is the plaintiff here? The Queen, as representing the nation; and, if they were all negligent together, I think their negligence would be no defence even if they had been adults."[7]

[1] Reg. *v.* Mabbett, 5 Cox C. C. 339.

[2] Reg. *v.* Plummer, 1 Car. & K. 600; post, § 686. See 2 Bishop Mar. & Div. § 401. And see generally, on the subject of separations without divorce, 1 Ib. § 650–656.

[3] Post, § 669; Reg. *v.* Gregory, 2 Fost. & F. 153; United States *v.* Taylor, 5 McLean, 242; United States *v.* Farnham, 2 Blatch. 528; Gerke *v.* California Steam Navigation Co., 9 Cal. 251.

[4] Reg. *v.* Ledger, 2 Fost. & F. 857; Reg. *v.* Pargeter, 3 Cox C. C. 191; Reg. *v.* Trainer, 4 Fost. & F. 105; Reg. *v.* Gray, 4 Fost. & F. 1098; Reg. *v.* Pardenton, 6 Cox C. C. 247; The State *v.* O'Brien, 3 Vroom, 169; Reg. *v.* Smith, 11 Cox C. C. 210; Reg. *v.* Benge, 4 Fost. & F. 504; Reg. *v.* Birchall, 4 Fost. & F. 1087.

[5] Reg. *v.* Jones, 11 Cox C. C. 544.

[6] Vol. I. § 255–263.

[7] Reg. *v.* Kew, 12 Cox C. C. 355, 356, 4 Eng. Rep. 605. And see Reg. *v.* Jones, 11 Cox C. C. 544; Reg. *v.* Birchall, 4 Fost. & F. 1087, 1088.

§ 663. *Some Relations in Life:*[1] —

Chastisement — (Parent and Child — Master and Servant, &c.). — East observes: "Parents, masters, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care; and, if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances."[2] Where a father, to correct his son for theft, having repeatedly punished him ineffectually, beat him so severely with a rope that he died, he was adjudged guilty of manslaughter only.[3] But where a master, having authority to chastise his servant, broke the servant's skull with an iron bar, he was held to have committed the higher form of felonious homicide called murder.[4] One *in loco parentis*, compelling a child, as a punishment, to work beyond its strength an unreasonable number of hours, and thus hastening its death of consumption, has been deemed guilty only of manslaughter; though the punishment was cruel, and accompanied by violent language; if he believed the child to be shamming sickness, and able to perform all that was demanded.[5] And, in the language of Martin, B., speaking in a case where a father was on trial for the manslaughter of his child two and a half years old: "The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner."[6]

[1] For more as to husband and wife, parent and child, master and servant, &c., see Vol. I. § 878 et seq.; ante, § 660–662. Concerning coverture as excusing criminal acts, see Vol. I. § 356.

[2] 1 East P. C. 261; s. p. Foster, 262; ante, § 620.

[3] Anonymous, 1 East P. C. 261.

[4] Rex *v.* Grey, J. Kel. 64, 65. See also Rex *v.* Conner, 7 Car. & P. 438, for a case wherein a mother, angry with a child, threw at it a small iron poker, which accidentally hit another child and killed it; she was held guilty of manslaughter.

[5] Rex *v.* Cheeseman, 7 Car. & P. 455. And see Reg. *v.* Walters, Car. & M. 164.

[6] Reg. *v.* Griffin, 11 Cox C. C. 402, 403.

§ 664. **Physician and Patient**[1] — **(Ignorant practitioner).** — The doctrine as to physician and patient is not quite the same in England and the United States. And possibly it is not entirely harmonious among our States. According to English adjudication, whenever one undertakes to cure another of disease, or to perform on him a surgical operation, he renders himself thereby liable to the criminal law, if he does not carry to this duty some degree of skill, though what degree may not be clear; consequently, if the patient dies through his ill-treatment, he is indictable for manslaughter.[2] Still, in an English case, Willes, J., once put the doctrine in a more reasonable way; thus, — "If a man *knew that he was using medicines beyond his knowledge*, and was meddling with things above his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicine was guilty of gross negligence."[3] Now, in the facts of human life, the less a man understands of any thing occult, like the unseen workings of medicine, the more confident he is that his knowledge of the thing is perfect. Therefore some of our American courts have laid down the doctrine, not altogether inharmoniously with this utterance of the learned English judge, in substance, that, since it is lawful and commendable for one to cure another, if he undertakes this office in good faith, and adopts the treatment he deems best, he is not liable to be adjudged a felon; though the treatment should be erroneous, and, in the eyes of those who assume to know all about this subject, which, in truth, is understood by no mortal,

[1] Vol. I. § 896 and the places there referred to.

[2] Rex v. Spiller, 5 Car. & P. 333; Ferguson's Case, 1 Lewin, 181; Rex v. Senior, 1 Moody, 346; Rex v. Webb, 1 Moody & R. 405, 2 Lewin, 196; Reg. v. Spilling, 2 Moody & R. 107; Rex v. Long, 4 Car. & P. 398; Rex v. Williamson, 3 Car. & P. 635; Reg. v. Markuss, 4 Fost. & F. 356; Reg. v. Macleod, 12 Cox C. C. 534, 8 Eng. Rep. 589; Reg. v. Chamberlain, 10 Cox C. C. 486; Reg. v. Spencer, 10 Cox C. C. 525. In Simpson's Case, 1 Lewin, 172, Bayley, J., observed: "I am clear, that, if a person not having a medical education, and in a place where persons of a medical education might be obtained, takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter. The party may not mean to cause death; on the contrary, he may mean to produce beneficial effects; but he has no right to hazard medicine of a dangerous tendency when medical assistance can be obtained. If he does, he does it at his peril."

[3] Reg. v. Markuss, 4 Fost. & F. 356, 359. And see Reg. v. Crook, 1 Fost. & F. 521; Reg. v. Crick, 1 Fost. & F. 519.

grossly wrong; and though he is a person called, by those who deem themselves wise, grossly ignorant of medicine and surgery.[1]

Careless Practitioner. — As to the mere carelessness of medical practitioners, and persons not practitioners dealing with medicine in the particular instance, there is probably no difference between the English and American law. Any person undertaking a cure, but being grossly careless, and thus producing death, is liable to a charge of manslaughter, whether he is a licensed practitioner or not.[2] For example, a nurse who, knowing that laudanum is poison, gives it to an infant in a quantity to produce death, is guilty of a felonious homicide; and it has even been said, that, in the absence of qualifying evidence, the degree of the offence will be murder.[3] Not every mistake, from which death follows, will subject a medical practitioner, or one who puts up medicines, to punishment if fatal results ensue;[4] but the negligence must be gross, traceable, Willes, J., said in one case, "to an evil mind."[5]

§ 665. **Duty assumed by Contract.** — In general, a breach of mere contract is not an indictable offence.[6] But if death follows from the breach of a contract, the party is liable as for crime.[7] Thus, —

Cannon Bursting. — Where an iron founder, employed to make some cannon for use on a day of public rejoicing, having furnished one piece, which burst and was returned to him, sent it back in so imperfect a state that it burst a second time, killing three men, he was held to be guilty of manslaughter.[8] But, —

[1] Commonwealth v. Thompson, 6 Mass. 134; Rice v. The State, 8 Misso. 561; Vol. I. § 314, note.

[2] Rex v. Van Butchell, 3 Car. & P. 629; Rice v. The State, 8 Misso. 561; Rex v. Long, 4 Car. & P. 423; Rex v. Spiller, 5 Car. & P. 333; Reg. v. Bull, 2 Fost. & F. 201; Reg. v. Chamberlain, 10 Cox C. C. 486; Reg. v. Macleod, 12 Cox C. C. 534, 8 Eng. Rep. 589.

[3] The State v. Leak, Phillips, 450. See Reg. v. Bull, supra.

[4] Reg. v. Noakes, 4 Fost. & F. 920; Reg. v. Macleod, supra; Vol. I, § 217.

[5] Reg. v. Spencer, 10 Cox C. C. 525.

[6] Vol. I. § 582. The reason is because, in the facts of cases, it does not generally create a duty to the public, or any other duty of the indictable sort. But in the language of a learned Alabama judge, "When a party owes the public a duty, although resulting from a contract, he is indictable for a breach of that duty." A. J. Walker, C. J., in Stein v. The State, 37 Ala. 123, 130. **Nuisance in supplying Bad Water.** — Therefore in the case in which this observation occurs, the defendant, who had contracted to supply a city with wholesome water, was held to be indictable for a nuisance when the supply which he furnished was unwholesome.

[7] Ante, § 660.

[8] Rex v. Carr, 8 Car. & P. 153. And see post, § 696.

Allegation in Indictment. — There must, as we have seen,[1] be a duty; and, if the indictment does not allege a duty, the defendant cannot be convicted.[2]

§ 666. **Jailer and Prisoner.** — If a jailer confines his prisoner in an unwholesome room, and neglects to give him necessaries for cleanliness, whereby the prisoner contracts a disease of which he dies, this jailer commits thereby the crime of murder.[3] His neglect is a gross violation of duty.

§ 667. **Public Duty without Contract. — (Way).** — If one is using a public way, whether of land or water, and by carelessness in its use destroys unintentionally a human life, he is guilty of felonious homicide;[4] for, although he was under no contract, yet he was under an obligation, which the law recognizes, to use the way with care.

Non-feasance. — There are, indeed, suggestions in the books, that a mere non-feasance in such a case is not sufficient.[5] But reasons have been already given why such a distinction cannot be deemed good in legal doctrine, in cases where the law imposes a duty.[6]

§ 668. *Proximity of the Wrongful Thing to the Death:* —

Sufficiently proximate. — In these cases the wrongful thing must be sufficiently proximate to the death. Thus, —

Neglect to contract — (Employing Incompetent Servant). — In England, trustees appointed under a local act to repair roads, with power to contract for the making of the repairs, were held not to be chargeable with manslaughter, if, neglecting to contract, a road becomes out of repair, and a man who uses it is therefore accidentally killed. "No doubt," said Lord Campbell, C. J., "the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine, are good law. I myself tried a prisoner for not taking

[1] Ante, § 660.

[2] Reg. v. Barrett, 2 Car. & K. 343.

[3] Rex v. Huggins, 2 Stra. 882, 2 Ld. Raym. 1574; Vol. I. § 328; post, § 687, 689. And See Castell v. Bambridge, 2 Stra. 854, 856.

[4] Reg. v. Taylor, 9 Car. & P. 672; Rex v. Swindall, 2 Car. & K. 230; United States v. Warner, 4 McLean, 463; United States v. Collyer, Whart. Hom. 483; Rex v. Walker, 1 Car. & P. 320; Rex v. Timmins, 7 Car. & P. 499; Rex v. Grout, 6 Car. & P. 629; Rex v. Mastin, 6 Car. & P. 396.

[5] Rex v. Green, 7 Car. & P. 156. And see Rex v. Allen, 7 Car. & P. 153.

[6] Vol. I. § 217, 420; ante, § 659 and authorities cited in the note.

proper care in managing the shaft of a mine. He intrusted the management of it to an incompetent person, who said at the time that he was incompetent. The prisoner was convicted; and I did not hesitate to inflict a severe sentence. But how can the principle I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said, that, where the inhabitants generally are bound to repair, and a death is caused as in the present case, all the inhabitants are indictable for manslaughter."[1]

§ 669. **Furnishing Opportunity to another.** — And where one, having the charge of a steam-engine, stopped it and went away; but another came and set it in motion, causing a person to be killed; the former one was held not to be guilty of manslaughter.[2]

No one on look-out. — A case of the captain and pilot of a steamboat, in England, turned possibly on this distinction; though the judges seemed not to put it on any particular ground. The fact was, that the steamer had run down a smack, killing one on board the latter. The running down was attributed, by the prosecutor, to improper steerage of the steamboat, owing to there being no man at the bow on look-out. The proof showed a look-out to have been kept there when the boat started, an hour before. According to one witness, both the captain and pilot were at the time of the accident on the bridge between the paddle-boxes; according to another witness, the pilot alone was there. The time was night, dark, rainy; the steamer had lights, but the smack had not. An acquittal was directed. Park, J., observed, among other things, that the question involved was, whether there was "gross negligence."[3]

§ 670. *Views of the Intent:* —

Specific Intent Unnecessary. — The intent need not be to kill;[4] while yet the law, neither under this title nor under any other, would tolerate the conviction of one for crime unless his mind

[1] Reg. v. Pocock, 17 Q. B. 34, 38, 24 Eng. L. & Eq. 190. See Vol. I. § 223–227.

[2] Hilton's Case, 2 Lewin, 214.

[3] Rex v. Allen, 7 Car. & P. 153. See Reg. v. Marriott, 8 Car. & P. 425.

[4] Vol. I. § 217, 314, 318, 321, 328, 332, 334, 736; post, § 679.

were criminal.[1] Perhaps the full discussion of the question of the intent necessary to constitute a crime, contained in the preceding volume,[2] will better guide the reader in cases of homicide than any thing which can be said here.

§ 671. **Drunkenness.** — In the first volume, also, was considered the effect of drunkenness in homicide,[3] as well as in other crimes. No further discussion of the question is needed here.

III. *What Indictable Homicides are Murder and what are Manslaughter.*

§ 672. **Murder is of "Malice aforethought."** — We saw, in the historical subdivision of this chapter, that, according to the terms of the old statutes which have separated indictable homicides into the two degrees now known as murder and manslaughter, the former are distinguished from the latter by being committed of "malice aforethought," or perhaps, to speak more exactly, "wilfully and of malice aforethought."[4] The word "wilfully," however, does not appear to add any thing to the meaning of the expression; while, for still other reasons appearing in the work on Criminal Procedure, there is more than doubt whether it ought to have place in the definition of murder.[5] To ascertain, therefore, whether a felonious killing is murder or manslaughter, we have simply to inquire whether it was committed of "malice aforethought" or not.

§ 673. **Difficulties and their Source.** — But this inquiry is not a simple one. In former times, when in felony prisoners were compelled to appear without counsel, and the judge was in a measure counsel for them, and when the distinction between the functions of judge and jury was not well defined, and judges undertook to assist jurors as to the facts more than they do now, many things were laid down from the bench and transferred to our law books, of which no one can say whether they were meant to be opinions on the law or on particular facts in evidence. And, particularly in homicide, it was customary[6] for the

[1] Vol. I. § 287.

[2] Vol. I. § 205, 206, 285 et seq.

[3] Vol. I. § 397 et seq.; People *v.* Hammill, 2 Parker C. C. 223; People *v.* Robinson, 2 Parker C. C. 235; Pennsylvania *v.* McFall, Addison, 255, 257; Pennsylvania *v.* Lewis, Addison, 279, 282; People *v.* Fuller, 2 Parker C. C. 16.

[4] Ante, § 623–628; Crim. Proced. II. § 498–500.

[5] Crim. Proced. II. § 545, 546.

[6] Vol. I. § 848.

jury to find the special facts, and submit them to the court to determine whether the grade of the crime was murder or manslaughter. But the form of the finding was largely such as compelled the judges to draw inferences of fact from facts found; these inferences have been transmitted to us in the books as though they were inferences of law; they have been subsequently followed; and so a system of things has grown up, contrary to true principle and true law. Is it, then, a question of law, whether, under the particular circumstances of a case, the killing is to be deemed of "malice aforethought," or is it a mere question of fact whether or not the prisoner's mind was in a state described by the words "malice aforethought"? Now, according to what we read in the books generally, this question is a mixed one, wherein law and fact are so blended as to leave the partition line at places uncertain, and at others variable and jagged.

§ 673 *a*. **The Presumptions.** — It is plain, therefore, that the difficulties attending our present inquiry relate to the presumptions, whether of law or fact, to be drawn from acts, as constituting or not the "malice aforethought" which distinguishes murder from manslaughter. But this doctrine of presumptions[1] is unsettled and uncertain in all the departments of our law, while it is specially so in the law of our present sub-title. What was reasonably clear once is dim now; for time, in this matter, has brought mists, not sunshine. Thus, in 1727, at the close of the reign of Geo. I., Raymond, C. J., delivering the unanimous opinion of the twelve judges of England, said: "The judges are to determine what is malice, or what is a reasonable time to cool; and they must do it upon the circumstances of the case; the jury are judges only of the fact, and we must determine whether it be deliberate or not. Hence it is, that, in summing up an evidence, the judges direct the jury, if you believe such a fact, it is so; if not, it is otherwise; and they find either a general or a special verdict upon it. There is no instance where the jury ever find that the fact was done of malice, or that the party had or had not time to cool; but that must be left to the judges upon the circumstances of the case."[2] Now, according

[1] Crim. Proced. I. § 1096–1131; in case of homicide, Ib. II. § 598–608.

[2] Rex *v.* Oneby, 2 Stra. 766, 773.

to the modern cases, as well as the ancient, it is a question of law, not of fact, whether or not a particular interval amounts to a sufficient cooling time;[1] but it is not the doctrine of all the courts of the present day, that, upon certain facts being established, it is exclusively for the court to draw the inference of malice.[2] Still, after an examination of the cases, one is surprised to find how uncertain and unsettled this sort of question is in those of modern date.

§ 673 *b*. **In Principle.** — According to the analogies of the modern law of evidence, and the better procedure before juries, the judge, in charging a jury, should tell them that the homicide, to be murder, must be committed of what the law terms malice aforethought, which is a technical term in legal language, with a defined legal meaning. He should then explain its meaning, as viewed in connection with the facts in evidence; and explain the presumptions which may be deduced from the facts; adding, that it is for them to look at the evidence, and the reasonableness of the presumptions suggested, and decide, as a question of fact, whether or not the law's malice aforethought existed in the present instance.

§ 674. **Further Course of this Sub-title, and how divided.** — It is perceived that the difference is, whether these presumptions are of law or of fact. The difference, therefore, will not embarrass our future discussions. If one court deems a presumption to be of law, it can give direction to a cause on that basis; if another deems it to be of fact, it can instruct the jury on that basis; and the elucidations of this sub-title will be equally serviceable to both. We shall consider, First, The intent; Secondly, The act viewed apart from what may be the real intent; Thirdly, The act viewed in combination with the intent; Fourthly, The act viewed in connection with the conduct of the person killed, as exciting the passions, or otherwise; Fifthly, Such act contemplated in reference to the conduct of third persons; Sixthly, The distinction between murder and manslaughter under the statutes of some of our States.

[1] Post, § 713.

[2] Dukes *v.* The State, 14 Fla. 499; People *v.* Campbell, Edm. Sel. Cas. 307; The State *v.* Tachanatah, 64 N. C. 614; Flanagan *v.* The State, 46 Ala. 703; Reg. *v.* Eagle, 2 Post. & F. 827 See People *v.* Aro, 6 Cal. 207.

§ 675. First. *The Intent distinguishing Murder from Manslaughter:* —

"Malice aforethought" interpreted. — According to ordinary modern methods of dealing with statutes, the term "malice aforethought" would be accepted as merely referring to the intent with which a homicide is committed. But, at a time when courts took more liberties with legislative words than they do now, it received a more liberal construction, which became a part of the law itself, and remains to the present day. It may, therefore, be deemed to signify, not actual "malice," or actual "aforethought," or any other actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter. Still the books generally define malice aforethought to be such a depraved condition of mind as shows a total disregard of social duty, and a heart bent wholly on evil.[1] Of course, if a man, without any justification, deliberately resolves to take a human life and takes it, this is murder. Hence, —

Malice express or implied. — It is common in the books to speak of the malice in murder as being either express or implied,[2] — a distinction of no practical value.

§ 676. **Intent to kill.** — An actual intent to take life is not a necessary ingredient in murder,[3] any more than it is in manslaughter. Still, if, in a particular instance, this actual intent exists, it may make that murder which otherwise would not be criminal, or would be only manslaughter.[4] On the other hand, the intent to take life may exist while there is no crime committed in taking it. It is so when an officer executes sentence of death under a lawful warrant, or one in self-defence intentionally takes the aggressor's life to save his own, as well as in vari-

[1] The State *v.* Jarrott, 1 Ire. 76; United States *v.* Cornell, 2 Mason, 60, 91; The State *v.* Smith, 2 Strob. 77. And see Beauchamp *v.* The State, 6 Blackf. 299; Vol. I. § 427, 429. See also People *v.* Divine, Edm. Sel. Cas. 591; Reg. *v.* Noon, 6 Cox C. C. 137; Wellar *v.* People, 30 Mich. 16; Commonwealth *v.* Drum, 8 Smith, Pa. 9; McAdams *v.* The State, 25 Ark. 405; The State *v.* Decklotts, 19 Iowa, 447; The State *v.* Gillick, 7 Iowa, 287; Nye *v.* People, 35 Mich. 16; Farris *v.* Commonwealth, 14 Bush, 362.

[2] Rex *v.* Oneby, 2 Stra. 766, 770; Warren *v.* The State, 4 Coldw. 130; Perry *v.* The State, 43 Ala. 21; People *v.* Hann, 44 Cal. 96; Read *v.* Commonwealth, 22 Grat. 924.

[3] Post, § 679 et seq.; Scott *v.* The State, 37 Ala. 117; People *v.* Freel, 48 Cal. 436; The State *v.* Decklotts, 19 Iowa, 447.

[4] Post, § 692–694.

ous other circumstances.[1] And in some circumstances, when one intends to take life and does it, his offence is manslaughter, but not murder.[2] Thus, in the language of Redfield, C. J., sitting in the Vermont court, "if the jury should regard this as a *bona fide* case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, — that is, of taking life, — or what would be that intent if he had been in such a state as properly to comprehend the nature of his act, still it is but manslaughter."[3]

§ 677. **"Aforethought."** — The word "aforethought,"[4] in the definition of murder, has been construed by the courts to mean almost, if not quite, nothing. There is no particular period during which it is necessary the "malice" should have existed, or the prisoner should have contemplated the homicide.[5] If, for example, the intent to kill, or to do other great bodily harm, is executed the instant it springs into the mind, the offence is as truly murder as if it had dwelt there for a longer period.[6] Still premeditation may be an element showing malice when otherwise it would not sufficiently appear.[7] Therefore, —

"Malice." — The "malice" of the old statute is the principal thing; it must always exist in murder.[8]

§ 678. **Drunkenness.** — In considering the effect of drunkenness as an excuse for criminal acts, the writer brought to view many things relating to the intent in homicide. To that discussion, therefore, the reader is referred.[9]

[1] Post, § 695; People *v.* Barry, 31 Cal. 357.

[2] Maher *v.* People, 10 Mich. 212, 219; Erwin *v.* The State, 29 Ohio State, 186; Nye *v.* People, 35 Mich. 16.

[3] The State *v.* McDonnell, 32 Vt. 491, 541. To the like effect is Dennison *v.* The State, 13 Ind. 510.

[4] The word in the English statute, from which the distinction between murder and manslaughter has come to us, is "prepensed." See ante, § 624–628.

[5] Post, § 695, 728.

[6] Post, § 695; People *v.* Clark, 3 Seld. 385; Mitchum *v.* The State, 11 Ga. 615; Green *v.* The State, 13 Misso. 382; Rex *v.* Legg, J. Kel. 27, 128; Beauchamp *v.* The State, 6 Blackf. 299; United States *v.* Cornell, 2 Mason, 60, 91; McAdams *v.* The State, 25 Ark. 405; McKenzie *v.* The State, 26 Ark. 334; The State *v.* Decklotts, 19 Iowa, 447; Nichols *v.* Commonwealth, 11 Bush, Ky. 575.

[7] Dennison *v.* The State, 13 Ind. 510; Lanergan *v.* People, 50 Barb. 266.

[8] McMillan *v.* The State, 35 Ga. 54; Warren *v.* The State, 4 Coldw. 130; Perry *v.* The State, 43 Ala. 21; Ex parte Moore, 30 Ind. 197; Murphy *v.* The State, 31 Ind. 511; People *v.* Freel, 48 Cal. 436; Read *v.* Commonwealth, 22 Grat. 924.

[9] Vol. I. § 397 et seq.

§ 679. Secondly. *The Act viewed apart from what may be the Real Intent:* —

Concerning Technical Rules — (Intent). — In the criminal law, all acts, strictly, are referred to the intent; for, according to a doctrine already explained,[1] crime exists only in the mind. Yet the law, in many departments, has established rules to determine the mental condition; and, as applied in some circumstances, has given them an arbitrary force; so that sometimes a man who intentionally does a thing is estopped to deny the intent legally attached to the doing.[2] For various purposes, the real intent may generally, perhaps always, on a charge of crime, be inquired into; yet, in the cases to which we are now referring, the party is still precluded from denying the existence of the intent in law. And so, when a man means to do certain things, which he does, and the death of another follows, he is adjudged guilty of murder or manslaughter, whatever may be his real motive. It is to things thus intentionally done, as they concern this result, that we are now to direct our attention.

§ 680. **Using Deadly Weapons.** — As general doctrine, subject, we shall see, to some qualifications, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death.[3]

Defined. — A deadly weapon is one likely to produce death or great bodily injury.[4] And it has been held, and it is probably the general doctrine, that the question of what is a deadly weapon is one of law for the court, not of fact for the jury.[5]

§ 681. **Whether Rule as to, is of Law or Fact.** — If there is to be a rigid rule of law on the subject, it is reasonable to hold, that, where one uses a deadly weapon without justification, he evinces

[1] Vol. I. § 287.

[2] Vol. I. § 370, 734, 735; The State *v.* Smith, 2 Strob. 77; 1 East P. C. 371; Short *v.* The State, 7 Yerg. 510.

[3] The State *v.* Smith, 2 Strob. 77; Rex *v.* Thomas, 7 Car. & P. 817; Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666; Rex *v.* Hazel, 1 Leach, 4th ed. 368, 383; ante, § 628; United States *v.* McGlue, 1 Curt. C. C. 1; Green *v.* The State, 28 Missis. 687; Gladden *v.* The State, 12 Fla. 562; The State *v.* Mullen, 14 La. An. 570; Clem *v.* The State, 31 Ind. 480; Murphy *v.* The State, 31 Ind. 511; Head *v.* The State, 44 Missis. 731; Evans *v.* The State, 44 Missis. 762. And see Jones *v.* The State, 29 Ga. 594; The State *v.* Ferguson, 2 Hill, S. C. 619; United States *v.* Wiltberger, 3 Wash. C. C. 515; The State *v.* Sisson, 3 Brev. 58; Kriel *v.* Commonwealth, 5 Bush, 362.

[4] Stat. Crimes, § 320.

[5] Stat. Crimes, § 320; The State *v.* West, 6 Jones, N. C. 505; Commonwealth *v.* O'Brien, 119 Mass. 342; The State *v.* Rigg, 10 Nev. 284, 290. But see The State *v.* Harper, 69 Misso. 425.

a disregard for human life and safety amounting to "malice." In matter of principle, the doubt is, whether the rule should not be one of mere advice to the jury, rather than of inflexible law.[1] The author, were it for him to decide, would commit all questions of this sort to the mere advisory list; for he cannot discover by what principle either of policy or right a judge is permitted, when the law requires "malice aforethought" to constitute murder, to tell the jury that, whatever their actual belief may be, they must find the prisoner guilty of this particular "malice," provided they believe he produced death with a particular kind of weapon. And, contrary to what seems to be the doctrine of most of the cases cited to the last section, there are others which either submit to the jury[2] the question of malice, or in matter of law hold that the killing was no more than manslaughter, though a deadly weapon was used without justification.[3] Thus, —

Not used as Deadly. — If the deadly weapon is employed neither with direct aim nor in a manner likely to be deadly in the particular instance, it is not to be legally regarded in the particular instance as deadly.[4] This proposition may be viewed as resulting rather from the general course of decision than as being established directly by any express adjudication. Again, —

Careless Use. — If a person kills another by the mere careless use of a deadly weapon, he commits only manslaughter.[5]

§ 682. **Illustrations of Death from Deadly Weapon.** — Let us look at some specific instances: —

Shooting to frighten Horse. — Where the prisoner fired a pistol at a person on horseback, and the ball caused the death of another, the offence was held to be murder; though his motive was merely to frighten the horse, and cause it to throw the rider. The judge observed: "If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used

[1] See Crim. Proced. I. § 1096 et seq.; II. § 601.

[2] Ante, § 673 *a*; post, § 684.

[3] Reg. *v.* Selten, 11 Cox C. C. 674; Commonwealth *v.* Drum, 8 Smith, Pa. 9; The State *v.* Harrison, 5 Jones, N. C. 115; Philips *v.* Commonwealth, 2 Duvall, 328; Anderson *v.* The State, 8 Heisk. 86; Miller *v.* The State, 37 Ind. 432; Hurd *v.* People, 25 Mich. 405; Donnellan *v.* Commonwealth, 7 Bush, 676; Reg. *v.* Welsh, 11 Cox C. C. 336; Ex parte Wray, 30 Missis. 673.

[4] The State *v.* Roane, 2 Dev. 58; The State *v.* West, 6 Jones, N. C. 505.

[5] Reg. *v.* Noon, 6 Cox C. C. 137; The State *v.* Roane, 2 Dev. 58. Where the carelessness is insignificant in degree, his act is not indictable. Foster, 262 265. See Vol. I. § 216

such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction,[1] that, where the intent was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter."[2]

§ 683. **Gabbett's Illustrations.** — Gabbett has collected several cases, which he states as follows. Speaking of the right to inflict —

Chastisement.[3] — He says:[4] "If the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances.[5] As where, upon a chiding between man and wife,[6] the husband struck the wife with a pestle, so that she died, it was held to be murder[7] [a case, the reader perceives, of a deadly weapon employed]; so where a woman kicked and stamped on the belly of her child [a case, in principle, of the use of a deadly weapon]; and, in another case, where a smith, upon some cross answer given by his servant, and having a piece of hot iron in his hand, ran it into the servant's belly.[8] And in Hazel's Case, where the prisoner, having employed her step-daughter, a child ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the temple, and caused her death soon afterwards, it was specially found by the jury that the stool was of sufficient size and weight to give a mortal blow; but it being also found, that the prisoner did not intend, at the time

[1] Post, § 694.

[2] The State *v.* Smith, 2 Strob. 77, opinion by Evans, J.

[3] Ante, § 663.

[4] 1 Gab. Crim. Law, 470, 471.

[5] 1 Hale P. C. 454; Foster, 262; ante, § 620.

[6] **Chastise Wife.** — The right of a man to inflict physical chastisement on his wife is not recognized in the United States, as it was formerly in England. Vol. I. § 891; 1 Bishop Mar. & Div. § 754–757.

[7] Dalton Just. p. 345, c. 145, § 6.

[8] Anonymous, stated J. Kel. 64. **Deadly Weapon in Chastisement.** — In Grey's Case, J. Kel. 64, the defendant, a blacksmith, had broken with a rod of iron, the skull of his servant, whom he did not mean to kill; and this was held to be murder. The judges observed: "If a father, master, or schoolmaster will correct his child, servant, or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them. For otherwise, under pretence of correction, a parent might kill his child, or a master his servant, or a schoolmaster his scholar; and a bar of iron is no instrument for correction. It is all one as if he had run him through with a sword. . . . And therefore, where a master strikes his servant willingly with such things as those are, if death ensue, the law shall judge it malice prepense."

she threw it, to kill the child, it was considered to be a doubtful case, and no opinion was ever delivered by the judges." [1]

§ 684. **Weapon for Chastisement, continued.** — "And in judging of the measure and manner of the punishment, it is not only to be considered whether the weapon be a dangerous one, or likely to kill or maim, but due regard is also to be had to the age and strength of the party. As in Wigg's Case, the facts of which were, that a shepherd boy having suffered some of the sheep which he was employed in tending to escape through the hurdles of the pen, the boy's master (the prisoner) seeing the sheep get through, ran towards the boy, and, taking up a stake that was lying on the ground, threw it at him, which hit the boy, and fractured his skull, of which fracture he soon afterwards died; the jury, under the direction of Nares, J., found the prisoner guilty of manslaughter; this learned judge having in substance told them, that, if they thought the instrument so improper as to be dangerous and likely to kill or maim (the age and strength of the party killed being duly considered), the crime would amount to murder, as the law would in such case supply or presume the malicious intent; but that, if they thought the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill." [2]

§ 685. **Deadly or not, in Chastisement.** — The offence, where correction is inflicted with an instrument not deadly, but improper for correction, or with a proper instrument to an improper degree, whereby death unexpectedly ensues, is manslaughter; [3] and this proposition, compared with the doctrines of the last three sections, illustrates clearly one of the distinctions between these two classes of felonious homicide.

Malpractice of Physician. — The case of a medical man attempting to cure one, yet killing him through unskilfulness or gross carelessness, illustrates also the same distinction. If the person

[1] Rex *v.* Hazel, 1 Leach, 4th ed. 368, 1 East P. C. 236; 1 Gab. Crim. Law, 470.

[2] There was another point in the case, which might have induced the jury to return a verdict of manslaughter, rather than of murder. Rex *v.* Wiggs, 1 Leach, 4th ed. 378, note; 1 Gab. Crim. Law, 471. See also Rex *v.* Conner, 7 Car. & P. 438.

[3] Ante, § 620, 663, 682; Rex *v.* Cheeseman, 7 Car. & P. 455; Anonymous, 1 East P. C. 261; 1 Hawk. P. C. Curw. ed. p. 85, § 5.

causing death is responsible at all to the criminal law, his offence is manslaughter only; [1] because he neither intended death, nor used with the patient means which he knew were likely to put the life in peril.

§ 686. **Exposure of Dependent Persons — (Infants).** — Another illustration may be found in cases of the exposure or neglect of infants and other dependent persons; [2] if the act is one of mere negligence, not clearly showing danger to the life, yet, if death follows, the offence is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder. [3] For example, if there is an infant of tender years, and the person under obligation to supply food withholds it, whereby the child dies, this is murder. [4]

Withholding Necessaries — (Wife — Child — Servant). — But ordinarily, if a husband should deny necessaries to his wife, and she should die, — since this act is not so immediately dangerous to the life as the other, — he would be guilty only of manslaughter; [5] and perhaps a parent withholding food and the like needful things from a grown-up and competent child, might under similar circumstances be guilty to the same degree. [6] But the case of a servant-girl, sixteen years old, and not under duress, was held to be different; she being capable of making complaint and taking care of herself, those who deny her proper food are not answerable to the criminal law. [7]

Assaulting Helpless Person. — The old case of a son carrying, in a frosty and cold time, his sick father from place to place, against his will, whereby the father died, illustrates the same point, this homicide having been held to be murder. [8]

§ 687. **Other Dangerous Acts.** — And there are other acts, di-

[1] Ante, § 664, and cases there cited.

[2] Ante, § 660–662.

[3] Reg. *v.* Plummer, 1 Car. & K. 600; Reg. *v.* Crumpton, Car. & M. 597; Rex *v.* Saunders, 7 Car. & P. 277; Rex *v.* Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Reg. *v.* Renshaw, 11 Jur. 615, 616, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Reg. *v.* Waters, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. n. s. M. C. 53; Reg. *v.* Marriott, 8 Car. & P. 425; United States *v.* Freeman, 4 Mason, 505; Reg. *v.* Walters, Car. & M. 164. See Reg. *v.* Middleship, 5 Cox C. C. 275.

[4] Rex *v.* Squire, 1 Russ. Crimes, 3d Eng. ed. 490; Rex *v.* Saunders, 7 Car. & P. 277.

[5] Reg. *v.* Plummer, 1 Car. & K. 600. See ante, § 662.

[6] Reg. *v.* Edwards, 8 Car. & P. 611. See Reg. *v.* Conde, 10 Cox C. C. 547.

[7] Reg. *v.* S———, 5 Cox C. C. 279.

[8] Dalton Just. c. 145, § 4. See and compare Reg. *v.* Middleship, 5 Cox C. C. 275; Reg. *v.* Knights, 2 Fost. & F. 46; Albricht *v.* The State, 6 Wis. 74; Reg. *v.* Wagstaffe, 10 Cox C. C. 530; Reg. *v.* Downes, 1 Q. B. D. 25.

rectly tending to take life, the doing of which, if death follows, is murder. Indeed, all acts having this direct tendency, and not required by any duty, appear to be of this sort; while, if their liability to cause death is more remote, the doing of them with fatal results will be only manslaughter. Therefore, —

Exposure to Small-pox. — If one confines another, even a prisoner, who has not had the small-pox, with an infected person, whereby the one confined takes it and dies, he is chargeable with murder.[1] Also, —

Necessaries for Prisoner. — It is the same if a jailer puts his prisoner in an unwholesome room, and denies him necessaries for cleanliness, whereby death is produced; he, too, is guilty of murder.[2]

§ 688. **Further Illustrations of Dangerous Acts — (Horse used to Strike — Discharging Gun — Stones from House-top).** — And Hawkins observes, that he is guilty of murder "who kills another in doing such a wilful act as shows him to be as dangerous as a wild beast, and an enemy to mankind in general; as, by going deliberately with a horse used to strike,[3] or discharging a gun among a multitude of people, or throwing a great stone or a piece of timber from a house into a street, through which he knows that many are passing;[4] and it is no excuse, that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c."[5] In these cases, it is perceived, the act which takes away the life is both unlawful and of a directly dangerous nature.

§ 689. **Formula of Doctrine.** — The doctrine may be stated as follows: If an act is unlawful, or is such as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder. But if the act, though dangerous, is not directly so, yet sufficiently dangerous to come under the condemnation of the law, and death unintended results from it, the offence is manslaughter; or, if it is one of a nature to be lawful, properly performed, and it is performed improperly, and death comes from it unexpectedly,

[1] Castell *v.* Bambridge, 2 Stra. 854, 856; ante, § 666.

[2] Rex *v.* Huggins, 2 Stra. 882, 2 Ld. Raym. 1574.

[3] See 3 Greenl. Ev. § 147.

[4] See Foster, 262, 264. And see Vol. I. § 314, 734; 1 Hawk. P. C. Curw. ed. p. 86, § 4; Foster, 262–264.

[5] 1 Hawk. P. C. Curw. ed. p. 86, § 12.

the offence still is manslaughter. To continue our illustrations: —

§ 690. **Chastisement, again.** — The correction of a child by the rod is a lawful act when properly done; consequently, if the correction is excessive, the offence, when death follows, is only manslaughter, as we have already seen.[1] But a correction with a deadly weapon is never lawful, and, as we have seen,[2] it subjects to the charge of murder if death follows. So, —

Beating not in Chastisement. — "Whenever," says Hawkins, speaking of cases other than of parents and the like, "a person, in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far;"[3] because here, the reader perceives, there is no right of correction, even with a proper instrument. Yet this doctrine of Hawkins is stated a little too broadly; for, if the beating, however wrongful, was neither with a deadly weapon, nor carried to a degree evidently dangerous, and there was no intent to kill, but unfortunately death followed, the offence would amount only to manslaughter.[4]

Careless Use of Way. — Where a man uses a public highway so carelessly as to cause the death of a human being, he is guilty of manslaughter only;[5] because he had the right to make use of the way properly and carefully.[6]

§ 691. **Death from Misdemeanor.** — If one is committing a mere criminal misdemeanor, of a sort endangering human life, so that the element of danger concurs with the element of the unlawfulness of the act, the accidental causing of death is murder.[7] Therefore, —

Deadly Missiles in Riot. — Where death is unintentionally inflicted by rioters who use deadly missiles, — as where one of them

[1] Ante, § 685.

[2] Ante, § 680, 683.

[3] 1 Hawk. P. C. Curw. ed. p. 99, § 41. And see Pennsylvania *v.* Lewis, Addison, 279.

[4] The State *v.* Jarrott, 1 Ire. 76.

[5] Ante, § 667; Rex *v.* Grout, 6 Car. & P. 629; Rex *v.* Timmins, 7 Car. & P. 499; Rex *v.* Walker, 1 Car. & P. 320; Rex *v.* Swindall, 2 Car. & K. 230; Rex *v.* Green, 7 Car. & P. 156; Rex *v.* Mastin, 6 Car. & P. 396.

[6] And see Shields *v.* Yonge, 15 Ga. 349; Chrystal *v.* Commonwealth, 9 Bush, 669.

[7] Rex *v.* Plummer, J. Kel. 109, 12 Mod. 627, 631; Rex *v.* Sullivan, 7 Car. & P. 641; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Reg. *v.* West, 2 Car. & K. 784; People *v.* Enoch, 13 Wend. 159, 174; Ann *v.* The State, 11 Humph. 159, 163. And see Reg. *v.* Walters, Car. & M. 164; Reg. *v.* Howell, 9 Car. & P. 437.

throws a stone at random, whereby a man is killed, — all are guilty of murder.[1] And —

Abortion. — If one administers a drug to a pregnant woman, or does to her any criminal act, the object of which is merely to produce an abortion; yet, if, in consequence of this act, dangerous in its tendency, the mother dies,[2] or the child is prematurely born, and dies from the too early exposure to the external world;[3] he is guilty of murder.

Other Dangerous Misdemeanors. — Hawkins says: "If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other, — as by committing a riot, robbing a park, &c., he shall be adjudged guilty of murder."[4]

§ 692. **Death from other Misdemeanors — Civil Trespass.** — The doctrine of these cases does not wholly exclude considerations of the intent. And if the act were not directly dangerous, yet done with the motive of committing a misdemeanor, the offence would be manslaughter;[5] but, if, still not being dangerous, the motive were merely the commission of a civil trespass, the unintended death would not be indictable under all circumstances, though under some it would be manslaughter. To lay down, as to this, an exact rule, sustained by authorities, seems impossible. But, to illustrate, —

[1] Rex *v.* Plummer, supra. See Rex *v.* Hodgson, 1 Leach, 4th ed. 6; Rex *v.* Hubson, 1 East P. C. 258, being s. c.; Rex *v.* Rankin, Russ. & Ry. 43; Reg. *v.* Wallis, 1 Salk. 334, 335; Mansell's Case, 2 Dy. 128 *b*., pl. 60; The State *v.* Jenkins, 14 Rich. 215; Friery *v.* People, 2 Abb. Ap. Dec. 215. Hawkins says: "It seems clear, that, regularly, where divers persons resolve to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, &c.; and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation." 1 Hawk. P. C. Curw. ed. p. 101, § 51.

[2] 1 East P. C. 264; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; ante, § 641, 657. And see Commonwealth *v.* Parker, 9 Met. 263, 265.

[3] Reg. *v.* West, 2 Car. & K. 784.

[4] 1 Hawk. P. C. Curw. ed. p. 86, § 10.

[5] Post, § 694; The State *v.* Smith, 32 Maine, 369; Reg. *v.* Packard, Car. & M. 236. And see Chichester's Case, Aleyn, 12. In these cases the act done must be *malum in se*. Vol. I. § 332. See also Rex *v.* Murphy, 6 Car. & P. 103; ante, § 620.

Discharging Gun. — When a man discharges a gun at another's fowls, in mere wanton sport, he commits, if he accidentally kills a human being, the offence of manslaughter, while his intended act is only a civil trespass;[1] and the same is the result when the firing of the gun, which produces death, is with intent simply to frighten another;[2] or when one carelessly discharges the contents of fire-arms into the street.[3]

Dangerous Act in Frolic. — And where a lad in a frolic, without meaning harm to any one, took the trap-stick out of the forepart of a cart; in consequence of which it was upset, and the carman, who was in it, putting in a sack of potatoes, was thrown backward on some stones and killed; the lad was held to be guilty of manslaughter.[4]

§ 693. **Frolic Dangerous or not — Misdemeanor or not.** — In the cases mentioned in the last section, the thing done was of dangerous tendency, but not directly dangerous. And so it has been laid down, that, where a fatal blow is "inflicted in sport, under circumstances not of themselves calculated to produce personal injury;" if death follows accidentally, the thing is not indictable even as manslaughter.[5] Yet this doctrine must be qualified to the extent, that an assault and battery, or other criminal misdemeanor, was not intended; because, if such was the intent, the killing will be either murder or manslaughter, according to the circumstances.[6] But, —

Physic in Sport. — Giving one physic in sport, if it kills him, is manslaughter.[7]

[1] Vol. I. § 334; 1 East P. C. 255. **Shooting Game.** — But ordinarily, if one, shooting at game, accidentally kills a man, he is not indictable. Says East: "If an act, not unlawful in itself, as shooting at game, be prohibited to be done unless by persons of a certain description, the case of a person not coming under that description, offending against such statute and in so doing unfortunately killing another, will fall under the same rule as that of a qualified man, and must equally be attributed to misadventure." 1 East P. C. 260. And see Vol. I. § 330-332.

[2] The State *v.* Roane, 2 Dev. 58.

[3] People *v.* Fuller, 2 Parker C. C. 16.

[4] Rex *v.* Sullivan, 7 Car. & P. 641. And see, as to where one covers another with straw, and sets fire to it; if the intent is to do a serious bodily harm, and death follows, the offence is murder; if merely to frighten, it is manslaughter. Errington's Case, 2 Lewin, 217.

[5] Reg. *v.* Conrahy, 2 Crawf. & Dix C. C. 86. And see Rex *v.* Waters, 6 Car. & P. 328.

[6] And see Reg. *v.* Packard, Car. & M. 236; Gore's Case, 9 Co. 81 *a*. In the latter of these cases it is said: **Poison laid for Vermin.** — "If one prepares ratsbane to kill rats and mice, or other vermin, and leaves it in certain places, to that purpose, and with no ill intent, and one finding it eats it, it is not felony, because he who prepares the poison has no ill or felonious intent."

[7] 1 East P. C. 264.

By Servant contrary to Command. — And in the time of slavery the same was held where a slave administered to a child, "contrary to a general command not to give the child any thing whatever," a dose of laudanum resulting in death, while the intent of the slave was to produce a mere harmless sleep.[1]

Whip Horse. — One who whips a horse on which another is riding, so that the animal springs out and runs over a child whom it kills, is guilty of manslaughter; but the person on the horse, not having done wrong intentionally, escapes punishment.[2]

§ 694. Thirdly. *The Act which distinguishes Murder from Manslaughter viewed in Combination with the Intent:* —

Some other Offence Meant. — Though the intent of the wrongdoer is not to take human life, and the thing which he does is not of the dangerous sort contemplated in the last few paragraphs, still, by accident, it may result in death. And if it does, and if the thing intended was *malum in se* and indictable, whether as felony or misdemeanor, a discussion in our first volume shows that a felonious homicide is committed.[3] As to whether the homicide is murder or manslaughter, —

Felony Meant. — It is a common and plain rule, that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder.[4] In the application of this rule, statutory felonies are the same as felonies at the common law.[5]

Misdemeanor Meant. — On the other hand, still supposing the thing done not to be of dangerous tendency, the offence, when death accidentally follows the commission of a misdemeanor, is, as we have seen,[6] manslaughter.

§ 695. **The Killing intended.** — Where the killing is intended, and is not lawful, it is generally murder;[8] but, under circum

[1] Ann *v.* The State, 11 Humph. 159. And see Rex *v.* Martin, 3 Car. & P. 211; Sarah *v.* The State, 28 Missis. 267.

[2] 1 Hawk. P. C. Curw. ed. p. 85, § 8; 1 Hale P. C. 486; ante, § 620.

[3] Vol. I. § 323–336.

[4] Vol. I. § 332; 1 Hawk. P. C. Curw. ed. p. 86, § 11, p. 100, § 44; 1 East P. C. 255; Gore's Case, 9 Co. 81 *a*; Rex *v.* Plummer, J. Kel. 109, 12 Mod. 627, 631; The State *v.* Shelledy, 8 Iowa, 477. See Commonwealth *v.* Hanlon, 3 Brews. 461 Reg. *v.* Greenwood, 7 Cox C. C. 464, Alfred *v.* The State, 33 Ga. 303; post, § 721.

[5] The State *v.* Smith, 32 Maine, 369; The State *v.* McNab, 20 N. H. 160. And see Stat. Crimes, § 139.

[6] Ante, § 691–693.

[7] Ante, § 670.

[8] Commonwealth *v.* Drew, 4 Mass. 391; The State *v.* Anderson, 2 Tenn. 6

stances of provocation, or of mutual combat, it may be reduced to manslaughter.[1] If the law authorizes or permits it, there is no crime. To render an intentional killing murder, there is no need that the intent to take life should have existed any particular time before the act is performed.[2]

§ 696. **Unlawful Act, for Mischief — Heedless.** — Foster states a distinction as follows: "If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particulars; or of mischief indiscriminately, fall it where it may; and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter; not accidental death, because the act upon which death ensued was unlawful."[3] A heedless, unlawful omission of duty is the following: —

Neglect at Colliery. — One who was walling the inside of a shaft in a colliery, under the duty to place a stage on the mouth of the shaft, neglected to do it, and a life was lost. This was held to be manslaughter. Lord Campbell, C. J., observed: "If the prisoner, of malice aforethought and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. . . . It has never been doubted, that, if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter. . . . The general doctrine seems well established, that what constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence."[4]

The State *v.* Hildreth, 9 Ire. 429; The State *v.* Johnson, 1 Ire. 354; Ex parte Wray, 30 Missis. 673.

[1] Ante, § 676. And see The State *v.* Hill, 4 Dev. & Bat. 491, 496; post, § 697.

[2] Mitchum *v.* The State, 11 Ga. 615; People *v.* Clark, 3 Seld. 385; Green *v.* The State, 13 Misso. 382; United States *v.* Cornell, 2 Mason, 60, 91; Shoemaker *v.* The State, 12 Ohio, 43; Rex *v.* Legg, J. Kel. 27; ante, § 677; post, § 728; Donnelly *v.* The State, 2 Dutcher, 601; The State *v.* Shoultz, 25 Misso. 128 People *v.* Moore, 8 Cal. 90.

[3] Foster, 261. See ante, § 685, 686.

[4] Reg. *v.* Hughes, Dears. & B. 248, 7 Cox C. C. 301. And see ante, § 659–669, 692, 693.

§ 697. Fourthly. *The Act which distinguishes Murder from Manslaughter viewed in Connection with the Conduct of the Person killed, as exciting the Passions, or otherwise:* —

Passion and Malice distinguished. — The "malice aforethought" of the law implies a mind under the sway of reason. "Passion" and "malice" are deemed to be inconsistent motive powers; so that, if an act proceeds from the one, it does not also proceed from the other.[1]

Killing in Passion. — If an act of killing, prompted by malice, would be murder, it is only manslaughter when it springs from passion, because there is no "malice aforethought."[2]

How intense the Passion. — The sufficiency of the passion to take away malice, and reduce what would be murder to manslaughter, is so much a question of law, that it is difficult to say, on the authorities, how intense, in fact, it must be. Said Gaston, J., in a North Carolina case: "We nowhere find, that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis*, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity."[3] The passion must be such as is sometimes called irresistible;[4] yet it is too strong to say, that "the reason of the party should be dethroned," or he should act "in a whirlwind of passion." There must be sudden passion, upon reasonable provocation, to negative the idea of malice.[5]

Cause for Passion. — And, to reduce to manslaughter, it must proceed from what the law deems adequate cause.[6]

§ 698. **Manslaughter without Passion.** — There are cases, not of excited passion, wherein the conduct of the person slain has been such as to make the killing, though in cool blood, manslaughter when otherwise it would be murder. Thus, —

[1] Post, § 718, note.

[2] Preston *v.* The State, 25 Missis. 383; Murphy *v.* The State, 31 Ind. 511; Stokes *v.* The State, 18 Ga. 17; Commonwealth *v.* Whitler, 2 Brews. 388; People *v.* Milgate, 5 Cal. 127; The State *v.* Johnson, 3 Jones, N. C. 266.

[3] The State *v.* Hill, 4 Dev. & Bat. 491, 496. And see Haile *v.* The State, 1 Swan, Tenn. 248.

[4] People *v.* Freeland, 6 Cal. 96.

[5] Young *v.* The State, 11 Humph. 200.

[6] Smith *v.* The State, 49 Ga. 482.

Self-defence. — Considerations of passion aside, one assaulted may, we have seen,[1] strike back in self-defence; yet may not[2] take the assailant's life. Still, as he had the right to strike, principles already unfolded[3] show, that, if by too great severity or other accident the blow produces death unintended, he commits only manslaughter, unless the weapon is deadly or there is some other like circumstance. Now, —

§ 699. **More exactly.** — The books are not quite clear how much further the leniency of the law extends. In the facts of most cases, the passion of the asaulted person is excited; then, his mind being thus clouded, if he kills his adversary though with a deadly weapon, his offence is only manslaughter.[4] Yet, should his resistance with a deadly weapon be made in a very cruel manner, not at all justified by the nature of the assault, the inference will be more or less stringent according to the circumstances that malice, not passion, impelled the blow, making his crime murder.[5] If it really sprang from passion, the offence will still be manslaughter.[6] Again, —

Illegal Arrest. — One who, excited in resisting the outrage of an illegal arrest, kills the aggressor with a deadly weapon, commits only manslaughter,[7] unless acting from express malice.[8]

[1] Vol. I. § 850, 863–867; ante, § 41.

[2] Vol. I. § 867.

[3] Ante, § 681, 685, 686, 689, 690.

[4] Rex *v.* Thomas, 7 Car. & P. 817; Rex *v.* Snow, 1 East P. C. 244, 1 Leach, 4th ed. 151; Holly *v.* The State, 10 Humph. 141; The State *v.* Curry, 1 Jones, N. C. 280; Yates *v.* People, 32 N. Y. 509; Underwood *v.* The State, 25 Texas, Supp. 389; Judge *v.* The State, 58 Ala. 406. See Roberts *v.* The State, 14 Misso. 138; Jones *v.* The State, 14 Misso. 409; Rex *v.* Ayes, Russ. & Ry. 166.

[5] Rex *v.* Lynch, 5 Car. & P. 324; The State *v.* Craton, 6 Ire. 164; The State *v.* Curry, 1 Jones, N. C. 280. And see Rex *v.* Thomas, 7 Car. & P. 817; Rex *v.* Willoughby, 1 East P. C. 288; Rex *v.* Shaw, 6 Car. & P. 372; Rex *v.* Thomas, 1 Russ. Crimes, 3d Eng. ed. 614; The State *v.* Scott, 4 Ire. 409; Rex *v.* Hayward, 6 Car. & P. 157; Rex *v.* Mason, 1 East P. C. 239; Rex *v.* Longden, Russ. & Ry. 228; King *v.* Commonwealth, 2 Va. Cas. 78; Holland *v.* The State, 12 Fla. 117; The State *v.* Hargett, 65 N. C. 669; The State *v.* Boon, 82 N. C. 637; People *v.* Perdue, 49 Cal. 425. But see Patterson *v.* The State, 66 Ind. 185.

[6] Judge *v.* The State, supra. See The State *v.* White, 30 La. An. 364. In the former case, the court below had charged the jury in the very words of a sentence taken from the old 3d ed. of this work, and they were held to be too broad. In the book, they were restricted by their connection; and, in later editions, not before the court, I had added in terms the exact limitation which the judge said they needed. I regret the ambiguity. I am not aware, nor do I believe, that, in any other case, any court has been misled by an error or ambiguity of mine, though doubtless I have committed many.

[7] Ante, § 852; Rex *v.* Davis, 7 Car. & P. 785; Reg. *v.* Tooley, 11 Mod. 242; Rex *v.* Thompson, 1 Moody, 80; Rex *v.* Doleany, Jebb. 88; Roberts *v.* The State, 14 Misso. 138; Jones *v.* The State, 14 Misso. 409; Reg. *v.* Carey, 14 Cox C. C. 214; Rafferty *v.* People, 69 Ill. 111.

[8] Rafferty *v.* People, supra.

Passions not excited. — But how is it if the passions are not excited by the outrage? The books lay down the doctrine in the very broad terms, that a homicide in resisting an unlawful arrest is manslaughter and not murder,[1] even though committed by the use of a deadly weapon,[2] — a proposition possibly admitting some qualification on the authorities.[3] The true view of the law, in reason, is, that, where the mere fact of an illegal arrest attempted or consummated appears, if the one suffering it kills the officer or other arresting person whether with a deadly weapon or by any other means, he may rely on the presumption that his mind was clouded by passion, reducing the homicide to manslaughter. But, in these cases, as in others to be considered further on, if actual malice is affirmatively proved, the homicide will be murder. The doctrines of this section and the last should be studied in connection with what is said in the first volume on the "Defence of Person and Property,"[4] and in the work on Criminal Procedure on "The Arrest."[5]

§ 700. **Excited Passion, again.** — Returning to those cases in which the passion is excited, we should bear in mind that the mere excitement will not necessarily reduce the killing to manslaughter; the cause of the excitement must be one which the law deems adequate, and the killing must in fact proceed from it, not from independent malice.

How the Topic divided. — We shall, therefore, inquire, 1. Under what circumstances the excitement of the passions will be deemed to have proceeded from an adequate cause, to reduce the killing to manslaughter; 2. Under what circumstances, though the passions were excited, the killing will be regarded as originating in independent malice, rendering it murder.

§ 701. 1. *Adequacy of the Cause of Excitement:* —

How the Rule ascertained. — Under this head, it is best that we begin with illustrations, and derive the rule, if any can be found, as we proceed.

[1] Vol. I. § 868; Rex *v.* Withers, 1 East P. C. 296; Hoye *v.* Bush, 2 Scott, N. R. 86, 1 Man. & G. 775; Rex *v.* Curvan, 1 Moody, 132; Rex *v.* Gordon, 1 East P. C. 315; Commonwealth *v.* McLaughlin, 12 Cush. 615.

[2] Rex *v.* Hood, 1 Moody, 281; Rex *v.* Davis, 7 Car. & P. 785; Rex *v.* Patience, 7 Car. & P. 775; Rex *v.* Thompson, 1 Moody, 80; The State *v.* Oliver, 2 Houston, 585.

[3] Galvin *v.* The State, 6 Coldw. 283; Brooks *v.* Commonwealth, 11 Smith, Pa. 352.

[4] Vol. I. § 836 et seq.

[5] Crim. Proced. I. § 155 et seq. See, also, post, § 703–705.

Sudden Quarrel. — A common case is where two persons, upon a sudden quarrel, engage in mutual combat; then, if either one, in the heat of it, kills the other, though with a deadly weapon, the offence is, in most circumstances, only manslaughter.[1] But if there is special atrocity in the killing, or if otherwise it appears to be the result of deliberative malice rather than passion, it is murder.[2] When the combat has become mutual, it ordinarily ceases to be of importance by which party the first blow was given.[3] And, as we have seen,[4] it makes no difference though the blow which proved fatal was, while prompted by the heat of the fight, inflicted with the intent to take life.[5]

§ 702. **Quarrel, continued.** — Still, in the facts of a particular case, it may be of importance to inquire by which party the fight was begun, and whether or not the fatal blow was meant to take

[1] Rex *v.* Snow, 1 Leach, 4th ed. 151, 1 East P. C. 244; Commonwealth *v.* Biron, 4 Dall. 125; Allen *v.* The State, 5 Yerg. 453; The State *v.* Roberts, 1 Hawks, 849; Rex *v.* Ayes, Russ. & Ry. 166; Rex *v.* Rankin, Russ. & Ry. 43; United States *v.* Mingo, 2 Curt. C. C. 1; The State *v.* Massage, 65 N. C. 480; Cotton *v.* The State, 31 Missis. 504. See post, § 703 and note.

[2] Thus, if two persons fight, and one overpowers the other and knocks him down, and puts a rope round his neck and strangles him, this is murder. "The act is so wilful and deliberate that nothing can justify it." Rex *v.* Shaw, 6 Car. & P. 372. See Commonwealth *v.* Crane, 1 Va. Cas. 10; King *v.* Commonwealth, 2 Va. Cas. 78; The State *v.* Scott, 4 Ire. 409; Shorter *v.* People, 2 Comst. 193; ante, § 662. Hawkins says: "It hath been adjudged, that, even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another as to make a push at him with a sword, or strike at him with any such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended, not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation than if there had been none at all. But it is said, that, if he who draws upon another in a sudden quarrel make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, before he was on his guard, and in a condition to defend himself with a like hazard to both, he showed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honor, which prevailing over reason during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting that it shall not be adjudged to be of malice prepense. And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only; because he did it in the heat of blood." 1 Hawk. P. C. Curw. ed. p. 97, § 27–29.

[3] The State *v.* Floyd, 6 Jones, N. C. 392. But see post, § 702.

[4] Ante, § 676.

[5] And see Quarles *v.* The State, 1 Sneed, 407; Rex *v.* Taylor, 5 Bur. 2793; Rex *v.* Snow, 1 Leach, 4th ed. 151.

life. The one, for example, who begins a quarrel stands throughout on a somewhat different ground from the other, unless the latter puts himself equally in the wrong by a defence which he has no right to make. Indeed, in some cases of this sort, the beginner occupies only the position of an assailant throughout the combat, however long continued. Thus, —

Assault by the Deceased. — If, without provocation, a man draws his sword upon another, who draws in defence; whereupon they fight, and the first slays his adversary; his crime is murder.[1] For he who seeks and brings on a quarrel cannot, in general, avail himself of his own wrong in defence.[2] But where an assault, which is neither calculated nor intended to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and, if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter.[3]

§ 703. **Continued.** — Though the passion excited by an assault may reduce to manslaughter the killing of the assailant;[4] yet it may be so trivial, or inflicted under such circumstances, that the taking of life, in resistance of it, will be murder.[5] Thus, —

Slight Blow — Wife on Husband. — A learned judge observed, that, "if a man should kill a woman or a child for a slight blow, the provocation would be no justification;[6] and," he added, a

[1] Hugget's Case, J. Kel. 59, 61; Anonymous, J. Kel. 58; The State *v.* Hill, 4 Dev. & Bat. 491; Reg. *v.* Mawgridge, J. Kel. 119, 125, 126; 1 Hawk. P. C. Curw. ed. p. 87, § 18. See Williams *v.* People, 54 Ill. 422.

[2] The State *v.* Linney, 52 Misso. 40; The State *v.* Underwood, 57 Misso. 40; The State *v.* Starr, 38 Misso. 270; People *v.* Lamb, 17 Cal. 323.

[3] The State *v.* Hill, 4 Dev. & Bat. 491. And see The State *v.* Curry, 1 Jones, N. C. 280; post, § 704 and note.

[4] Ante, § 699. And compare with § 698.

[5] 1 East P. C. 234; Commonwealth *v.* Mosler, 4 Barr, 264; Reg. *v.* Sherwood, 1 Car. & K. 556; Rex *v.* Lynch, 5 Car. & P. 324. And see Shorter *v.* People, 2 Comst. 193. In Selfridge's Case, Whart. Hom. 417, 418, Parsons, C. J., said, in charging the grand jury: "Any assault, made not lightly, but with violence, or with circumstances of indignity, upon a man's person, if it be resented immediately, and in the heat of blood by killing the party with a deadly weapon, is a provocation which will reduce the crime to manslaughter; unless the assault was sought by the party killing, and induced by his own act, to afford him a pretence for wreaking his malice." See also Foster, 291.

[6] In Stedman's Case, cited Foster, 292, Holt, C. J., was of opinion, that a box on a soldier's ear from a woman would not reduce to manslaughter his act of killing her by a blow with the pommel of his sword; but otherwise, when she struck him in the face with an iron patten, drawing a great deal of blood.

doubt might be entertained "whether any blow, inflicted by a wife on a husband, would bring the killing of her below murder."[1]

Assault without Battery. — But there are cases in which an assault, without a battery, will suffice.[2] If one merely intends to commit an assault, but abandons his purpose before coming sufficiently near his adversary to perpetrate it, the latter, by inflicting death, becomes guilty of murder.[3]

Battery. — A battery need not, to reduce the killing in defence to manslaughter, be such as endangers life.[4]

§ 704. **Words — Threat.** — But no words, however provoking or insulting, or mere verbal threat, will so far justify a blow returned, though in actual passion, as to reduce the killing to the lower degree.[5] It is plain, however, that words may give character to acts;[6] and, in matter of evidence, are admissible to explain them.[7] Hence if there is a present demonstration of impending violence, which alone would be insufficient, accompanying words, added to the physical acts, may create such peril as will justify the killing of the aggressor, or reduce it to manslaughter.[8] Again, it appears to be a doctrine of the courts, that, if parties become excited by words, and one of them attempts to chastise the other with a weapon not deadly, he will

[1] Commonwealth *v.* Mosler, supra, Gibson, C. J.

[2] Vol. I. § 872, 873. And see Ray *v.* The State, 15 Ga. 223.

[3] Copeland *v.* The State, 7 Humph. 479. And see Pritchett *v.* The State, 22 Ala. 39; Vol. I. § 843, 844, 873.

[4] The State *v.* Sizemore, 7 Jones, N. C. 206.

[5] Vol. I. § 872; 1 Hawk. P. C. Curw. ed. p. 98, § 33; Beauchamp *v.* The State, 6 Blackf. 299; The State *v.* Barfield, 8 Ire. 344; The State *v.* Scott, 4 Ire. 409; Felix *v.* The State, 18 Ala. 720; Morely's Case, J. Kel. 53, 55, 65; s. c. nom. Morley's Case, 6 Howell St. Tr. 769, 771; Rex *v.* Keate, Comb. 406, 407; Keat's Case, Holt, 481, Skin. 666; The State *v.* Merrill, 2 Dev. 269; Mawgridge's Case, 17 Howell St. Tr. 57, 66; Hawkins *v.* The State, 25 Ga. 207; Rapp *v.* Commonwealth, 14 B. Monr. 614; Taylor *v.* The State, 48 Ala. 180; Reg. *v.* Rothwell, 12 Cox C. C. 145, 2 Eng. Rep. 201; Dawson *v.* The State, 33 Texas, 491; Myers *v.* The State, 33 Texas, 525; The State *v.* Hall, 9 Nev. 58; The State *v.* Ferguson, 9 Nev. 166; The State *v.* Stewart, 9 Nev. 120; Malone *v.* The State, 49 Ga. 210; Evans *v.* The State, 44 Missis. 762; Hughey *v.* The State, 47 Ala. 97; Harris *v.* The State, 47 Missis. 318; Edwards *v.* The State, 47 Missis. 581; Stoneman *v.* Commonwealth, 25 Grat. 887. See United States *v.* Wiltberger, 3 Wash. C. C. 515; Jackson *v.* The State, 45 Ga. 198.

[6] Ante, § 34, 40.

[7] The State *v.* Keene, 50 Misso. 357; Pridgen *v.* The State, 31 Texas, 420.

[8] Williams *v.* The State, 3 Heisk. 376; Reg. *v.* Sherwood, 1 Car. & K. 556; The State *v.* Bonds, 2 Nev. 265; Myers *v.* The State, 33 Texas, 525; Coker *v.* The State, 20 Ark. 53; Reg. *v.* Smith, 4 Fost. & F. 1066; Reg. *v.* Rothwell, 12 Cox C. C. 145, 2 Eng. Rep. 201; Hurd *v.* People, 25 Mich. 405; Mitchell *v.* The State, 41 Ga. 527.

be held only for manslaughter, though death is unintentionally inflicted.[1] Hale even says, it was held in Morley's Case, "that words of menace of bodily harm would come within the reason of such a provocation as would make the offence to be but manslaughter;"[2] but this proposition, while contrary to modern cases cited to this section, is hardly reconcilable with some other established doctrines.[3]

§ 705. **Difficult to find and state an exact Rule.** — The reader perceives that the foregoing discussions, if such they may be called, contain but little of *doctrine;* being in the main enunciations of what the courts have found, sitting, almost like jurors, in determination upon particular facts. If, below this outward seeming, there lies a science, harmonizing, in the nature of a rule, these several determinations, it would be pleasant to uncover the rule, and present it, in words, to the reader. Perhaps it would be, that, when the facts evince a certain degree of culpa-

[1] 3 Greenl. Ev. § 124; Foster, 290, 291; J. Kel. 131; Watts *v.* Brains, Cro. Eliz. 778; Mawgridge's Case, 17 Howell St. Tr. 57, 62. This doctrine may probably be accepted; but, in the facts of cases of this kind, words usually terminate in a mutual combat, reducing the killing to manslaughter on grounds already mentioned. In The State *v.* Hill, 4 Dev. & Bat. 491, 497, Gaston, J., observed: "The general rule of law is, that words of reproach, or contemptuous gestures, or the like offences against decorum, are not a sufficient provocation to free the party killing from the guilt of murder, when he useth a deadly weapon, or manifests an intention to do great bodily harm. This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated, and engage immediately in mortal combat, fighting upon equal terms." And Lord Hale says, that, in Morley's Case, 1 Hale P. C. 456, 6 Howell St. Tr. 769; s. c. nom. Morely's Case, J. Kel. 53, "many who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that, if A gives indecent language to B, and B thereupon strikes A, but not mortally; and then A strikes B again, and then B kills A; this is but manslaughter. For the second stroke made a new provocation, and so it was but a sudden falling out; and, though B gave the first stroke, and after a blow received from A, B gives him a mortal stroke, this is but manslaughter, according to the proverb, *the second blow makes the affray.* And this was the opinion of myself and some others." So in this case of Morely, as see J. Kel. 53, 55; s. c. nom. Morley's case, 6 Howell St. Tr. 769, 771, it was agreed, that, "if upon ill words both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." In Felix *v.* The State, 18 Ala. 720, the doctrine seems to be laid down broadly, that "provocation by words will never reduce the killing to manslaughter." And see Ray *v.* The State, 15 Ga. 223; Rex *v.* Snow, 1 East P. C. 244, 1 Leach, 4th ed. 151; Rex *v.* Thomas, 7 Car. & P. 817; Holly *v.* The State, 10 Humph. 141; Commonwealth *v.* Crane, 1 Va. Cas. 10; The State *v.* Scott, 4 Ire. 409.

[2] Morley's Case, 1 Hale P. C. 456. A doctrine analogous prevails in the matrimonial law. 1 Bishop Mar. & Div. § 729.

[3] Vol. I. § 872, 873.

bility, they constitute the "malice aforethought" of the old statute, and the killing is murder; while, when they come short, it is manslaughter. But there are no words, other than these obscure ones of the old statute, to express the degree; therefore it can be shown to the reader only by such illustrations as are set down in these pages.

§ 706. **Defence of Property.**[1] — The books appear to lay down the doctrine, that, though the passions become excited in the mere defence of property, other than the dwelling-house, a killing with a deadly weapon used in such defence, or other like dangerous means, is murder,[2] — a doctrine, however, which demands further judicial consideration. When, in the defence of property, the weapon is not deadly, the accidental killing will not exceed manslaughter.[3]

§ 707. **Defence of the Castle.** — The defence of the dwelling-house stands on a different ground. And though the question has at some periods of our law been in part under a cloud, it may now be deemed to be reasonably clear, that, to prevent an unlawful entrance into a dwelling-house, the occupant may make defence to the taking of life, without being liable even for manslaughter.[4] Of course, a defence may be of a sort which will constitute manslaughter, or even murder.[5]

[1] Vol. I. § 836 et seq.

[2] See cases cited Vol. I. § 857, 861, 862, 875, 876; and particularly Commonwealth *v.* Drew, 4 Mass. 391; The State *v.* Zellers, 2 Halst. 220; Carroll *v.* The State, 23 Ala. 28; Commonwealth *v.* Green, 1 Ashm. 289, 297; McDaniel *v.* The State, 8 Sm. & M. 401; Roberts *v.* The State, 14 Misso. 138; The State *v.* Morgan, 3 Ire. 186; Kunkle *v.* The State, 32 Ind. 220; 1 Hawk. P. C. Curw. ed. 98, § 33, 34, 36. The doctrine that passion excited by a trespass to mere property can never reduce the killing with a deadly weapon to manslaughter, is too hard for human nature; and, though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination. For surely, although a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not on precisely the same foundation, yet, since he has the right to defend his property by all means short of such as produce death, if, in the heat of passion arising during a lawful defence, he seizes a deadly weapon, and with it unfortunately takes the aggressor's life, every principle which in other cases dictates the reduction of the crime to the mitigated form, requires the same in this case. When a *felony* against the property is attempted, — as see Vol. I. § 849, and the other sections there referred to, — the defender of it may take life, if he is in passion, or even, when necessary, in cool blood; without, according to all the cases, being holden for murder; without, according to the true doctrine, being at all responsible.

[3] 1 Hale P. C. 473; Foster, 291; ante, § 689, 690; Reg. *v.* Archer, 1 Fost. & F. 351, Reg. *v.* Wesley, 1 Fost. & F. 528. See The State *v.* Burwell, 63 N. C. 661.

[4] Vol. I. § 858, 859.

[5] See the authorities cited in the last

§ 708. **Other Classes of Cases.** — There are other cases in which, where the passion becomes excited by the conduct of the person killed, the law regards tenderly a homicide committed by the excited one, and makes it only manslaughter. Thus, —

Wife caught in Adultery — Son, in Sodomy. — If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life, or the adulterer's;[1] or, if a father detects one in the commission of the crime against nature with his son, and immediately avenges the wrong by the death of the wrong-doer;[2] the homicide is only manslaughter. But if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder.[3] The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions: and, if a husband is not actually witnessing the wife's adultery, but knows it is transpiring; and, in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer; the offence is reduced to manslaughter.[4] A man

section. And see Vol. I. § 858, 859. In an Alabama case, this question was considered; and, though the result does not appear to me either so clear or so satisfactory as the general course of the decisions of that tribunal might lead us to anticipate, I presume the reader will like to see it stated in the words of the judge. He said: "Our conclusion is, that a mere civil trespass upon a man's house, unaccompanied by such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespass with force it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary, to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm. If he kills when there is not a reasonable ground of apprehension of immediate danger to his person, or property, it is manslaughter; and, if done with malice express or implied, it is then murder." Carroll *v.* The State, 23 Ala. 28, 36. And see Greschia *v.* People, 53 Ill. 295; Temple *v.* People, 4 La. s. 119; Cook's Case, Cro. Car. 537.

[1] 1 Hawk. P. C. Curw. ed. p. 98, § 36; Foster, 298; Reg. *v.* Kelly, 2 Car. & K. 814; Pearson's Case, 2 Lewin, 216; The State *v.* John, 8 Ire. 330; The State *v.* Samuel, 3 Jones, N. C. 74; Commonwealth *v.* Whitter, 2 Brews. 388.

[2] Reg. *v.* Fisher, 8 Car. & P. 182.

[3] The State *v.* Neville, 6 Jones, N. C. 423; Sawyer *v.* The State, 35 Ind. 80. In one case of this kind, where the facts were undisputed, and the judge distinctly told the jury that the killing was murder, they returned a verdict of manslaughter; thereby illustrating the truth, that the hard places of the law are practically softened by the humanity of jurors. Reg. *v.* Fisher, 8 Car. & P. 182. And see, as to the text, McWhirt's Case, 3 Grat. 594. In Maher *v.* People, 10 Mich. 212, the doctrine is less severe against defendants than as stated in the

[4] The State *v.* Holme, 54 Misso. 153, 166. See Biggs *v.* The State, 29 Ga. 723; Cheek *v.* The State, 35 Ind. 492.

who is only the husband's agent to detect the wife's adultery, commits murder when he kills her or the paramour whom he has caught in the act.[1] And equally does the husband, if the killing is from prior malice, not the engendered passion.[2]

§ 709. **Avenging Crime.** — Where one, having his pocket picked, seized the thief, and being encouraged by a concourse of people threw him into an adjoining pond to avenge the theft by ducking him; whereupon, contrary to expectation, he was unfortunately drowned; the homicide was held to be manslaughter only.[3]

§ 710. **Test as to Sufficiency of Provocation.** — To determine whether or not the conduct of the person killed was a provocation reducing the killing to manslaughter, the test is, not whether what he did is indictable, but whether the law deems it calculated to excite passions beyond control.[4] Said a learned judge: "A libel is not only a civil injury, but a public offence; yet the law will not consider it a provocation extenuating the slaying of the libeller into manslaughter, although the deed may have been committed in the *first* gust of passion. Adultery is not an indictable offence;[5] yet, of all the provocations which can excite man to madness, the law recognizes it as the highest and strongest."[6]

§ 711. **Passion subsided.** — If, in a particular case, there has been passion, but it was ended when the homicide occurred, it cannot reduce the killing to a lower degree.[7] Beyond this, —

Cooling Time. — If the passion had time to cool, the offence is not reduced to the lower degree, though in fact it had not cooled.[8] For "when anger, provoked by a cause sufficient to mitigate an instantaneous homicide, has been continued beyond the time

text. Again, a man suspecting adultery followed his wife, and found her talking with her paramour; she ran off, but the latter remained. He fell on him with a stone and knife, inflicting wounds which produced death; and it was held that the offence was murder. The State *v.* Avery, 64 N. C. 608.

[1] People *v.* Horton, 4 Mich. 67.

[2] Shufflin *v.* People, 62 N. Y. 229.

[3] Rex *v.* Fray, 1 East P. C. 236; 1 Hawk. P. C. Curw. ed. p. 99, § 38. **Provocation by Children, Servants, &c.** — As to passion created by the acts of children, servants, and the like, see Keat's Case, Holt, 481, Skin. 666; Rex *v.* Hazel, 1 East P. C. 236, 1 Leach, 4th ed. 368; Rex *v.* Wiggs, 1 Leach, 4th ed. 378, note.

[4] See Preston *v.* The State, 25 Missis. 383.

[5] See Vol. I. § 38.

[6] Gaston, J., in The State *v.* Will, 1 Dev. & Bat. 121, 169.

[7] And see post, § 718.

[8] The State *v.* McCants, 1 Speers, 384; Anonymous, J. Kel. 56; Reg. *v.* Young, 8 Car. & P. 644; Rex *v.* Hayward, 6 Car. & P. 157; Commonwealth *v.* Green, 1 Ashm. 289, 298; McWhirt's Case, 3 Grat. 594; and the other cases cited to this section; 1 Hawk. P. C. Curw. ed. p. 99, § 40.

which, in view of all the circumstances of the case, may be deemed reasonable, the evidence is found of that depraved spirit in which malice resides."[1]

§ 712. **Continued.** — The length of time necessary for cooling has never been made absolute by rule;[2] it must, in the nature of things, depend much on what is special to the particular case. The time in which an ordinary man, under like circumstances, would cool, is generally a reasonable time.[3] "If two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder; for there was time to allay the heat, and their after-meeting is of malice."[4] And an hour seems to have been deemed sufficient.[5] Three hours have been.[6] Where a witness testified that the prisoner was "absent no time," though there was a pause in the fight, this was adjudged not sufficient.[7] Hawkins states the doctrine thus: "If two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or such a considerable time after by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder."[8]

§ 713. **Continued — Provocation — (Questions of Law).** — The sufficiency of the cooling time, and the sufficiency of the provocation, are respectively questions of law, not of fact.[9]

§ 714. 2. *Killing of Malice independent of the Passions:* —

Is Murder. — Whatever may be the provocation in a particular case, if, in fact, the person inflicting the homicide was impelled, not by the passion it excited, but by prior malice, his offence is murder.[10] Thus, —

§ 715. **Seeking Quarrel.** — If a man determines to kill another

[1] Wardlaw, J., in The State *v.* McCants, supra, p. 390.

[2] Maher *v.* People, 10 Mich. 212, 223.

[3] Kilpatrick *v.* Commonwealth, 7 Casey, 198.

[4] Rex *v.* Legg, J. Kel. 27.

[5] Rex *v.* Oneby, 2 Stra. 766, 2 Ld. Raym. 1485.

[6] Johnson *v.* The State, 30 Texas, 748.

[7] The State *v.* Moore, 69 N. C. 267. And see Hurd *v.* People, 25 Mich. 405.

[8] 1 Hawk. P. C. Curw. ed. p. 96, § 22. But see Maher *v.* People, 10 Mich. 212.

[9] The State *v.* McCants, 1 Speers, 384; The State *v.* Craton, 6 Ire. 164; The State *v.* Dunn, 18 Misso. 419; Reg. *v.* Fisher, 8 Car. & P. 182; Beauchamp *v.* The State, 6 Blackf. 299; Felix *v.* The State, 18 Ala. 720; Rex *v.* Beeson, 7 Car. & P. 142; The State *v.* Jones, 20 Misso. 58; The State *v.* Sizemore, 7 Jones, N. C. 206.

[10] The State *v.* Green, 37 Misso. 466; Riggs *v.* The State, 30 Missis. 635. See People *v.* Lewis, 3 Abb. Ap. Dec. 535; Commonwealth *v.* Drum, 8 Smith, Pa. 9

or to do him great bodily harm, and seeks a quarrel, he cannot avail himself of the passion it excites; because he acts from an impulse which his mind received in its cool moments.[1]

§ 716. **Predetermination and Sudden Quarrel.** — And where the quarrel is not sought, if two persons, one of whom intends to kill the other, meet and come to blows; and the former inflicts an injury from which death follows; he is guilty of murder or manslaughter, according as the killing was in consequence of the prior malice or of the sudden provocation.[2] And if a man unprovoked resolves to use a deadly weapon against any one who may assail him, a fatal blow on being assailed is deemed rather to spring from the malice than the passion. "None but a bad man, of a wicked and evil disposition, would really determine beforehand to resent a blow with such an instrument."[3] Still it was once said by a learned judge, that, "whenever the circumstances of the killing would not amount to murder, the proof even of express malice will not make it so." Therefore it was held, that, where a killing is really necessary in self-defence, it will not be murder, though the slayer had express malice. He may rely on the fact that he did only what he had the right to do.[4] Such a killing, the reader perceives, would not be even manslaughter.

§ 717. **Unfair Fighting.** — So when a man enters a contest dangerously armed, and fights at unfair advantage, his offence, if death follows, is murder.[5] Here malice appears from what he did before his passion was heated.

[1] Stewart *v.* The State, 1 Ohio State, 66; People *v.* McLeod, 1 Hill, N. Y. 377; Slaughter *v.* Commonwealth, 11 Leigh, 681; The State *v.* Martin, 2 Ire. 101; The State *v.* Hildreth, 9 Ire. 429; The State *v.* Lane, 4 Ire. 113; Reg. *v.* Smith, 8 Car. & P. 160; Rex *v.* Thomas, 7 Car. & P. 817; The State *v.* Johnson, 1 Ire. 354; The State *v.* Tilly, 3 Ire. 424; Rex *v.* Mason, 1 East P. C. 239; Felix *v.* The State, 18 Ala. 720; Rex *v.* Wormall, 2 Rol. 120; Murphy *v.* The State, 37 Ala. 142.

[2] Reg. *v.* Kirkham, 8 Car. & P. 115. See Rex *v.* Mason, 1 East P. C. 239; Reg. *v.* Smith, 8 Car. & P. 160; The State *v.* Johnson, 1 Ire. 354; The State *v.* Tilly, 3 Ire. 424; Copeland *v.* The State, 7 Humph. 479.

[3] Rex *v.* Thomas, 7 Car. & P. 817. See Selfridge's Case, Whart. Hom. 417; Reg. *v.* Smith, 8 Car. & P. 160; Slaughter *v.* Commonwealth, 11 Leigh, 681; The State *v.* Ferguson, 2 Hill, S. C. 619; The State *v.* Hogue, 6 Jones, N. C. 381; Atkins *v.* The State, 16 Ark. 568.

[4] Golden *v.* The State, 25 Ga. 527, opinion by Lumpkin, J. He even added: "One may harbor the most intense hatred toward another; he may court an opportunity to take his life; he may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account." p. 532.

[5] The State *v.* Hildreth, 9 Ire. 429; Rex *v.* Whiteley, 1 Lewin, 173; People *v.* Sanchez, 24 Cal. 17. And see Ex parte

§ 718. **Blood actually cool.** — Says Hawkins: "Whenever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder: as, if, after the quarrel, he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting, or that if he should fight at present he should have the disadvantage by reason of his shoes, &c."[1] In other words, if the actual furor of mind does not exist, or does not impel the arm which inflicts the fatal blow, there is no excuse from passion to reduce the offence to manslaughter.[2]

§ 719. Fifthly. *The Act which distinguishes Murder from Manslaughter, as connected with the Conduct of Third Persons:* —

In first Volume. — The right to interfere in quarrels in behalf of others,[3] and whether one may take the life of an innocent person to save his own,[4] were considered in the first volume.

Conduct of one, not justify killing another. — From those discussions help may possibly be derived in deciding the question, whether the conduct of one person may justify the killing of another. We appear to have no direct decisions to guide us; but there is the strong dictate of reason and justice, that resentment for an injury which one person has inflicted, if wreaked on another who is innocent, could receive no palliation on the ground of any sudden excitement. It is held that —

Blow killing wrong Person. — If, on a sudden quarrel between two persons, a blow intended for one of them accidentally falls on a third, whom it kills, the homicide will be only manslaughter, the same as if the blow had taken the life of the person for whom it was meant.[5]

Wray, 30 Missis. 673; Pierson *v.* The State, 12 Ala. 149; Floyd *v.* The State, 3 Heisk. 342.

[1] 1 Hawk. P. C. Curw. ed. p. 96, § 23. Said an American judge: "There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist." Gaston, J., in The State *v.* Johnson, 1 Ire. 354. And see Commonwealth *v.* Green, 1 Ashm. 289, 298.

[2] See The State *v.* McCants, 1 Speers, 384; Rex *v.* Hayward, 6 Car. & P. 157; Monroe *v.* The State, 5 Ga. 85.

[3] Vol. I. § 877.

[4] Vol. I. § 348 and note, 845.

[5] Rex *v.* Brown, 1 Leach, 4th ed. 148, 1 East P. C. 231, 245, 274.

§ 720. Sixthly. *The Distinction between Murder and Manslaughter under the Statutes of some of the States:* —

In general. — The line which separates murder from manslaughter, as it comes to us from England, and is drawn in the foregoing sections of this sub-title, remains unaltered in most of our States.[1] But there are States, notably New York, in which legislation has interfered, and, in particulars not very important, drawn it somewhat differently.[2] As every reader will have before him the statutes of his own State, there is no need for these pages to be encumbered with their provisions.

§ 721. **New York.** — New York being a large and in some respects a pattern State, the reader may like to see something of the effect of its statutes on this subject. If one, while committing a misdemeanor,[3] unintentionally kills another, the homicide is, under the statute, manslaughter of the first degree.[4] Another provision makes the killing murder, when, not being manslaughter, it is "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;" and such an act is in many cases a misdemeanor. Still, the majority of the court has held, that a death unintentionally caused by cruelly beating a person is not murder within this clause; and the opinion is expressed, that, in the language of Selden, J., "this subdivision was designed to provide for that class of cases, and no others, where the acts resulting in death are calculated to put the lives of *many persons* in jeopardy, without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequence."[5] The killing of a human being by a person engaged in the commission

[1] See Bivens *v.* The State, 6 Eng. 455.

[2] As to Mississippi, Boles *v.* The State, 9 Sm. & M. 284.

[3] Ante, § 691–694.

[4] People *v.* Rector, 19 Wend. 569; People *v.* Johnson, 1 Parker C. C. 291; People *v.* Enoch, 13 Wend. 159, 174; People *v.* Austin, 1 Parker C. C. 154.

[5] Darry *v.* People, 2 Parker C. C. 606, 648, 6 Seld. 120. Parker, J., said, in accordance with this view, that he deemed the subdivision designed to cover such cases, "as where death is caused by firing a loaded gun into a crowd; by poisoning a well from which people are accustomed to draw water; or by opening the draw of a bridge just as a train of cars is about to pass over it. In such and like cases, the imminently dangerous act, the extreme depravity of mind, and the regardlessness of human life, properly place the crime upon the same level as the taking of life by premeditated design." p. 632 of the report in Parker.

of a felony[1] is murder within the first subdivision, though done without any intent to kill.[2]

§ 722. **Other States.** — There are other States in which the distinction between murder and manslaughter is regulated more or less by statutes.[3]

IV. *What Murders are in the First Degree and what in the Second.*[4]

§ 723. **Historical.** — In 1794, the legislature of Pennsylvania, following the example of the British parliament in dividing felonious homicide into the two degrees since known as murder and manslaughter,[5] separated murder into two degrees; naming the one murder in the first degree, and the other murder in the second degree. More recently the distinction has been adopted in one after another of the other States, till now it prevails quite generally. A few of the illustrative statutes are —

Pennsylvania Statute. — "All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate, and premeditated killing; or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary; shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree."[6]

Michigan, &c. — In Michigan, the Pennsylvania statute has been enacted in exact words. And, in some other States, forms of expression have been employed so nearly like these as not to require the application of different principles of interpretation.[7] But —

[1] See ante, § 694.

[2] People *v.* Van Steenburgh, 1 Parker C. C. 39. See also, under this statute, Sullivan *v.* People, 1 Parker C. C. 347; People *v.* Clark, 3 Seld. 385; People *v.* Westchester, 1 Parker C. C. 659; Wilson *v.* People, 4 Parker C. C. 619; People *v.* Tannan, 4 Parker C. C. 514; Evans *v.* People, 49 N. Y. 86; ante, § 676.

[3] Hinch *v.* The State, 25 Ga. 699; Hinton *v.* The State, 24 Texas, 454; Jennings *v.* The State, 7 Texas Ap. 350; Shrivers *v.* The State, 7 Texas Ap. 450; Hill *v.* The State, 5 Texas Ap. 2; The State *v.* Shelledy, 8 Iowa, 477; People *v.* Olmstead, 30 Mich. 431; Rufer *v.* The State, 25 Ohio State, 464.

[4] Consult, in connection with this subtitle, the corresponding one in Crim. Proced. II. § 562 et seq., of the 2d ed., or the chapter of the 3d ed. beginning at § 560.

[5] Ante, § 623–628.

[6] Act of April 22, 1794, § 2.

[7] See Dale *v.* The State, 10 Yerg. 551; Riley *v.* The State, 9 Humph. 646; Bratton *v.* The State, 10 Humph. 103; Whiteford *v.* Commonwealth, 6 Rand. 721; The State *v.* Dunn, 18 Misso. 419; Bivens *v.* The State, 6 Eng. 455; Commonwealth *v.* Jones, 1 Leigh, 598; Wall *v.* The State, 18 Texas, 682; The State *v.* Hoyt, 13 Minn. 132; The State *v.* Lessing, 16 Minn. 75; The State *v.* Stokely, 16 Minn. 282; People *v.* Long, 39 Cal. 694; The State *v.* Pike, 49 N. H. 399; Cotton *v.* The State, 32 Texas, 614, 641; Anderson *v.* The State, 31 Texas, 440; Ake *v.* The State, 30 Texas, 466; Moore *v.* The State, 31 Texas, 572.

§ 724. **Indiana.** — The expression is different in Indiana, thus: "If any person of sound memory and discretion shall, purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any reasonable creature in being and under the peace of the State, such person shall be deemed guilty of murder in the first degree." Killing "purposely and maliciously, but without deliberation and premeditation," is murder in the second degree.[1] And —

Ohio. — The statute of Ohio is essentially the same as this Indiana one.[2]

New York. — "The killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder in the first degree, murder in the second degree, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. Such killing, unless it be manslaughter or excusable or justifiable homicide, . . . shall be murder in the first degree in the following cases: 1. When perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by an act immediately dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated by a person engaged in the commission of any felony. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, . . . shall be murder in the second degree when perpetrated intentionally but without deliberation and premeditation."[3]

[1] Finn *v.* The State, 5 Ind. 400.

[2] Act of March 7, 1835, § 1, 2, 1 Swan Stats. 269. Slight changes in mere words occur in later revisions of the Indiana Laws. And see Stat. Crimes, § 473. Also, The State *v.* Turner, Wright, 20.

[3] Act of April 12, 1862, 2 Edm. Stats. 677, as amended by Laws of 1873, c. 644, and 1876, c. 333. Shufflin *v.* People, 62 N. Y. 229, 236; Buel *v.* People, 78 N. Y. 492, in which case see a history of the statutes. Other provisions follow regarding murder and manslaughter, among them: "The killing of one human being by the act, procurement, or omission of another, in cases where such killing shall

§ 725. **Massachusetts.** — The Massachusetts statute differs somewhat from the others. It is: "Sect. 1. Murder committed with deliberately premeditated malice aforethought; or in the commission of, or attempt to commit, any crime punishable with death or imprisonment for life;[1] or committed with extreme atrocity or cruelty; is murder in the first degree. Sect. 2. Murder not appearing to be in the first degree is murder in the second degree. Sect. 3. The degree of murder shall be found by the jury. Sect. 4. Whoever is guilty of murder in the first degree shall suffer the punishment of death. Sect. 5. Whoever is guilty of murder in the second degree shall be punished by imprisonment in the State prison for life. Sect. 6. Nothing herein shall be construed to require any modification of the existing forms of indictment."[2]

§ 725 *a*. **What from Diversities of Statutes.** — The statutes are not in their terms so diverse as to render all general consideration of them unprofitable. Nor, on the other hand, are they so absolutely alike as to make the interpretation of one a necessary guide in all particulars to that of the rest. Hence, —

Here. — We shall in this sub-title consider general doctrines, and their applications in some particulars, not all; adding reasonably full citations of the authorities, and leaving the rest to the reader. For no judicious practitioner will omit, on this subject, carefully to consult the statutes and decisions of his own State, in connection with these more general elucidations.

§ 726. *Interpretations of these Statutes:* —

No New Murder — The Old. — These statutes do not change the former bounds of murder; but what, and only what, was murder before is such still.[3] Yet, —

"Divide" — "Degrees." — In language sometimes employed by judges, they "divide" — a word not commonly found in the statutes — the prior offence of murder into "degrees." The use

not be murder according to the provisions of the first title of this chapter, is either justifiable or excusable homicide, or manslaughter." Ib. 679.

[1] This expression is interpreted to include all crimes which may be so punished, though the court has a discretion to impose a lighter sentence. Commonwealth *v.* Pemberton, 118 Mass. 36, 42, 43.

[2] Mass. Gen. Stats. c. 160, § 1-6. And see Commonwealth *v.* Gardner, 11 Gray, 438.

[3] The State *v.* Jones, 1 Houst. Crim. 21; Nye *v.* People, 35 Mich. 16; The State *v.* Hudson, 59 Misso. 135; The State *v.* Curtis, 70 Misso. 594; The State *v.* Raymond, 11 Nev. 98; Baker *v.* People, 40 Mich. 411; The State *v.* Stoeckli, 71 Misso. 559; Gray *v.* The State, 4 Baxter, 331; Petty *v.* The State, 6 Baxter, 610.

of these words, and of the sort of expression embodied in the sixth section of the Massachusetts statute, are among the chief causes of very great mistakes in some of our courts, not all, concerning the form of indictment demanded by the principles of pleading and our constitutional guaranties for murder in the first degree, — a question explained in other connections.[1] The interpretations of the law itself are not particularly objectionable. Now, —

In Principle, — the leading doctrines both of the law and the pleading are plain. Neither the word "divide," were it in the statute, nor "degrees," which is in it, can have any just force to overturn fundamental principles of our jurisprudence. Nor can any legislative permission, however explicit, concerning the form of the indictment, prevail against constitutional guaranties. When the law terms a particular sort of killing murder in the first degree and fixes its punishment, and another sort murder in the second degree and provides a different punishment, the consequence is not different from what it would be if the one were called life-taking and the other extinguishment of the vital flame. Prior to the statute, every killing of "malice prepensed" was murder. Since the statute, when to this another degree of malice is added, the particular killing becomes murder in the first degree; but, when there is no such addition made, it is murder in the second degree.[2] And no one can be convicted of murder in the first degree unless the fact which in the individual instance makes it such is alleged in the indictment. Moreover, we have, as authority for this, the entire adjudged law on the statute of 23 Hen. 8, c. 1, § 3.[3] While there was no distinction in felonious homicides, and malice was not essential to any, this statute declared such homicides to be murder, excluding the benefit of clergy, whenever committed of "malice prepensed."[4] Thereupon the courts set themselves to interpreting the words "malice prepensed," or "malice aforethought," and out of such interpretations built up the modern law of murder. And they required every indictment for murder to contain these words; in default of which, they would give judgment only for the lower

[1] Crim. Proced. II. § 560–596. See also Stat. Crimes, § 371, 372, 471–475; Bishop First Book, § 401 and note, 455.

[2] Nye *v.* People, 35 Mich. 16.

[3] Ante, § 625–628.

[4] And see Crim. Proced. II. § 497–500.

degree known as manslaughter. If we were not instructed in the adjudged law, we might suppose that "malice *aforethought*" means "*deliberately premeditated* malice;" but in the last subtitle we saw, that the word "aforethought" has received no such interpretation; it does not necessarily require either deliberation or premeditation. Hence, when a killing with "malice aforethought" is murder, and then it is enacted that, for example, murders which are "deliberately premeditated" shall be in the first degree, we know that something of malice must be added to what is required in ordinary murders to make a killing murder in the first degree. Indeed, we shall see that adjudication has reached to this point; but it did so only after travelling through mists.

§ 727. **Two Classes in First Degree.** — The Pennsylvania statute, and those of the other States which are like it, create two classes of murder in the first degree: —

First. **In committing another offence, &c.** — Murder perpetrated by poison, by lying in wait, or by attempting to commit or committing one of the enumerated other offences, is in the first degree. Deliberate premeditation is not essential in this class, nor is the intent to take life; but any killing which is murder at the common law, and of a sort thus mentioned in the statute, will be in the first degree.[1]

[1] Howell *v.* Commonwealth, 26 Grat. 995; Moynihan *v.* The State, 70 Ind. 126; Singleton *v.* The State, 1 Texas Ap. 501; Cox *v.* People, 19 Hun, 430; Buel *v.* People, 78 N. Y. 492; The State *v.* Brown, 7 Oregon, 186; Commonwealth *v.* Pemberton, 118 Mass. 36; Pharr *v.* The State, 7 Texas Ap. 472; Tooney *v.* The State, 5 Texas Ap. 183; Daley's Case, Whart. Hom. 466, 474, charge of King, J.; Commonwealth *v.* Jones, 1 Leigh, 598, 610; People *v.* Vasquez, 49 Cal. 560; People *v.* Long, 39 Cal. 694; Keefe *v.* People, 40 N. Y. 348, 7 Abb. Pr. N. s. 76; The State *v.* Pike, 49 N. H. 399; Riley *v.* The State, 9 Humph. 646; the court, in the last case, observing, "In cases of murder by ordinary means, the circumstances of the transaction must show that it was done wilfully, deliberately, maliciously, and premeditatedly, or it is not murder in the first degree; but, if murder be perpetrated by poison, or lying in wait, it shall be murder in the first degree, . . . if it be proved that the killing was of such a character, that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist; that fact will make it a case of murder in the first degree under the statute." Green, J. Opinions adverse to the doctrine stated in this quotation have been expressed in Pennsylvania and Connecticut; but the cases are not of a conclusive nature. The State *v.* Dowd, 19 Conn. 388, 391; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227. See further on the question, Souther *v.* Commonwealth, 7 Grat. 673; The State *v.* Hoyt, 13 Minn. 132; Kelly *v.* Commonwealth, 1 Grant, Pa. 484; People *v.* Haun, 44 Cal. 96; Commonwealth *v.* Haulon, 8 Philad. 401; Commonwealth *v.* Max, 8 Philad. 422; Rowan *v.* The State, 30 Wis. 129; The State *v.* Shock, 68 Misso. 552. This

§ 728. Secondly. **"Deliberate and Premeditated."** — Much the greater number of the cases which have arisen for adjudication have been upon the clause of the statute making it murder in the first degree, where the malice aforethought was "deliberate and premeditated," or the like. Plainly, in reason, no exact period of time during which there must be deliberation and premeditation could, as matter of law, be laid down. And nothing of this sort has been attempted.[1] Still these statutory words are not without effect: the consequence of which is, that there must be deliberation and premeditation, but they need not be for an appreciable space of time.[2] As already seen, there may be an intent to kill where still the killing will be only manslaughter.[3] So likewise, in a part if not all of the States, there may be a killing with the intent to take life, which will be murder in the second degree only.[4] But except in the classes of cases thus disclosed, wherein the intent comes through a cloud of passion, or otherwise deliberate premeditation is excluded,[5] or where the killing is done through a belief of its necessity in self-defence,[6] or the like, the doctrine to which the courts in most of the States have arrived is, that the intent to take the life is the distinguishing

class of murders appears not to be in the first degree under the Delaware statute, which is in different terms. "Our statute," said Wootten, J., "has divided the crime into two degrees, the first and second, and the killing of a human being unlawfully and with *express* malice is murder of the first degree, and where there is no express malice aforethought, and the fact of killing is done under such circumstances as to make it a case of implied or constructive malice, the crime is murder of the second degree." If the prisoner "did intend to kill" the deceased, "he is guilty of murder of the first degree. But if he did not intend to deprive him of life, and was engaged in any other felonious and unlawful act, such as an attempt to rob him, or the like, he is guilty of murder of the second degree." The State *v.* Boice, 1 Houst. Crim. 355, 358, 360.

[1] The State *v.* Rhodes, 1 Houst. Crim. 476.

[2] Binns *v.* The State, 66 Ind. 428; The State *v.* Curtis, 70 Misso. 594; Milton *v.* The State, 6 Neb. 136, 148; Schlencker *v.* The State, 9 Neb. 300; McQueen *v.* The State, 1 Lea, 285; The State *v.* Hill, 69 Misso. 451; Halbert *v.* The State, 3 Texas Ap. 656; The State *v.* Sharp, 71 Misso. 218; The State *v.* Miller, 67 Misso. 604; Miller *v.* The State, 54 Ala. 155; Quigley *v.* Commonwealth, 3 Norris, Pa. 18; Lanahan *v.* Commonwealth, 3 Norris, Pa. 80; Pistorius *v.* Commonwealth, 3 Norris, Pa. 158; The State *v.* Ah Mook, 12 Nev. 369; The State *v.* Harris, 12 Nev. 414; Palmore *v.* The State, 29 Ark. 248; The State *v.* Garrand, 5 Oregon, 216; The State *v.* Foster, 61 Misso. 549. Compare with ante, § 677. And see the cases cited in a later note to this section.

[3] Ante, § 678.

[4] The State *v.* Wieners, 66 Misso. 13; The State *v.* Hudson, 59 Misso. 135; The State *v.* Cooper, 71 Misso. 436; The State *v.* Williams, 69 Misso. 110.

[5] Green *v.* Commonwealth, 2 Norris, Pa. 75.

[6] Pistorius *v.* Commonwealth, 3 Norris, Pa. 158.

feature of murder in the first degree under the clause now in contemplation; so that, where it exists, the murder is in this degree, and in the second where it does not exist.[1] Nor, as just said, need the purpose to extinguish life have been in the mind an appreciable space of time before its execution for the murder to be of the first degree; the rule even, in a considerable part of the States, being apparently the same as at the common law.[2] Still, —

[1] The State *v.* Wieners, 66 Misso. 13; The State *v.* Jones, 64 Misso. 391; Duebbe *v.* The State, 1 Texas Ap. 159; The State *v.* Kilgore, 70 Misso. 546; Swan *v.* The State, 4 Humph. 136; Dains *v.* The State, 2 Humph. 439; Clark *v.* The State, 8 Humph. 671; Commonwealth *v.* Murray, 2 Ashm. 41; Commonwealth *v.* Williams, 2 Ashm. 69; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Dale *v.* The State, 10 Yerg. 551; Pirtle *v.* The State, 9 Humph. 663; Whiteford *v.* Commonwealth, 6 Rand. 721; Bivens *v.* The State, 6 Eng. 455; Mitchell *v.* The State, 5 Yerg. 340, 8 Yerg. 514; Hill *v.* Commonwealth, 2 Grat. 594; Hagan *v.* The State, 10 Ohio State, 459; Loeffner *v.* The State, 10 Ohio State, 598; The State *v.* Phillips, 24 Misso. 475; The State *v.* Shoultz, 25 Misso. 128; Warren *v.* Commonwealth, 1 Wright, Pa. 45; Kelly *v.* Commonwealth, 1 Grant, Pa. 484; People *v.* Doyell, 48 Cal. 85; People *v.* Long, 39 Cal. 694; Jones *v.* Commonwealth, 25 Smith, Pa. 403; The State *v.* Hammond, 35 Wis. 315; Shelton *v.* The State, 34 Texas, 662; The State *v.* Starr, 38 Misso. 270. See The State *v.* Nueslein, 25 Misso. 111; Respublica *v.* Bob, 4 Dall. 145; Bennett *v.* Commonwealth, 8 Leigh, 745; The State *v.* Smith, 32 Maine, 369; The State *v.* Hicks, 27 Misso. 588; The State *v.* Johnson, 8 Iowa, 525; People *v.* Foren, 25 Cal. 361; Kilpatrick *v.* Commonwealth, 7 Casey, Pa. 198; Robbins *v.* The State, 8 Ohio State, 131; Fouts *v.* The State, 8 Ohio State, 98; Beaudien *v.* The State, 8 Ohio State, 634. In a Pennsylvania case, Lowrie, C. J., observed: "Our statute adopts the common-law definition of murder, and then distinguishes it of two degrees; defining the first degree *specially* by certain enumerated cases, and *generally* by the words 'another kind of wilful, deliberate, and premeditated killing.' . . . Our reported jurisprudence is very uniform in holding, that the true criterion of the first degree is the intent to take life. . . . An intent distinctly formed, even 'for a moment' before it is carried into act, is enough." Keenan *v.* Commonwealth, 8 Wright, Pa. 55, 56, 57.

[2] Ante, § 677, 695; Shoemaker *v.* The State, 12 Ohio, 43; Jordan *v.* The State, 10 Texas, 479; Anthony *v.* The State, Meigs, 265; Swan *v.* The State, 4 Humph. 136; The State *v.* Dunn, 18 Misso. 419; The State *v.* Jennings, 18 Misso. 435; People *v.* Clark, 3 Seld. 385; Donnelly *v.* The State, 2 Dutcher, 463, 601; Atkinson *v.* The State, 20 Texas, 522; People *v.* Bealoba, 17 Cal. 389; Lewis *v.* The State, 3 Head, 127; Kilpatrick *v.* Commonwealth, 7 Casey, Pa. 198; People *v.* Long, 39 Cal. 694; Keenan *v.* Commonwealth, 8 Wright, Pa. 55; Lewis *v.* The State, 3 Head, 127; People *v.* Cotta, 49 Cal. 166; Hogan *v.* The State, 36 Wis. 226; Ake *v.* The State, 31 Texas, 416; Ake *v.* The State, 30 Texas, 466; Herrin *v.* The State, 33 Texas, 638; Johnson *v.* The State, 30 Texas, 748; The State *v.* Millain, 3 Nev. 409; The State *v.* Hoyt, 13 Minn. 132; The State *v.* Holme, 54 Misso. 153. Contra, Bivens *v.* The State, 6 Eng. 455. As to the Indiana statute, see Finn *v.* The State, 5 Ind. 400. And the Indiana court seems perhaps to require something more of deliberation than do some others, to constitute murder of the first degree. Said Elliott, J., "The *principle* involved, by which murder in the first degree is distinguished from murder in the second degree, is this, — in the former, premeditated malice requires that there should be time and opportunity for deliberate thought; and that, after the mind conceives the thought of taking the life, the conception is meditated upon, and a deliberate determination formed to do the act: that being done, then, no difference how soon afterward the fatal resolve is carried into execution, it is murder in the first degree." Fahnestock *v.* The State, 23 Ind. 231, 263. And perhaps the Missouri tribunal may be classed with the Indiana; as see the Missouri cases before cited to this section. And see The State *v.* Mahly, 68 Misso. 315; The State *v.* Gassert, 65 Misso. 352. In the Pennsylvania case of Keenan *v.* Commonwealth, supra, Lowrie, C. J., said: "The deliberation and premeditation required by the statutes are, not upon the *intent*, but upon the *killing*. It is deliberation and premeditation enough *to form* the intent to kill, and not *upon* the intent after it has been formed." p. 56. Again: "Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the cases in other States, where the terms 'deliberate' and 'premeditated' are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act." p. 57. Of the like sort is the Kansas doctrine. Craft *v.* The State, 3 Kan. 450.

Differences. — There are, relating to this question, differences in the terms of the statutes and the interpretations put upon them by the courts, in the several States, into which it will not be profitable here to enter. And the caution is repeated, that the practitioner should consider carefully the exact words of his own statutes, and the adjudications upon them of the courts of his own State. Even —

Express Statutory Terms — (Alabama). — There are States in which the express terms of the statute exclude the interpretation above given. For example, in Alabama, "Every homicide perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree," — words which render the intent to take life a non-essential in this higher degree of murder.[1] So that, if, for illustration, one wrongfully places upon a railroad track an obstruction by which a train of cars is thrown off and a person is killed, his offence of murder is in the first degree.[2]

[1] Washington *v.* The State, 60 Ala. 10.

[2] Presley *v.* The State, 59 Ala. 98. Compare with The State *v.* Brown, 1 Houst. Crim. 539. And see the Alabama cases of Miller *v.* The State, 54 Ala. 155, and Fields *v.* The State, 52 Ala. 348. **Other States.** — As to Delaware, see ante, § 727, note; The State *v.* Jones, 1 Houst. Crim. 21; The State *v.* Buchanan, 1 Houst. Crim. 79; The State *v.* Bowen, 1 Houst. Crim. 91; The State *v.* Hamilton, 1 Houst. Crim. 101; The State *v.* Green, 1 Houst. Crim. 217; The State *v.* Till, 1 Houst. Crim. 233; The State *v.* Draper, 1 Houst. Crim. 291; The State *v.* O'Neil, 1 Houst. Crim. 468; The State *v.* Rhodes, 1 Houst. Crim. 476; The State *v.* Thomas, 1 Houst. Crim. 511, 523. As to Texas, where, as in Delaware, not speaking now of the other clause of the statute (ante, § 727), murder of "express malice" is in the first degree (Tooney *v.* The State, 5 Texas Ap. 163, 188; Primus

Killing One not meant. — In Tennessee, if one meaning to kill a particular person accidentally executes the purpose on another, his offence of murder is held to be only in the second degree;[1] and herein the court expressly overrules some *nisi prius* opinions to the contrary in Pennsylvania.[2]

Resisting Arrest. — One designedly killing another to resist a lawful arrest commits murder in the first degree.[3]

§ 729. **"Extreme Atrocity."** — The murder of a girl eight years old, to conceal a rape perpetrated with severe lacerations, is "committed with extreme atrocity or cruelty" within the Massachusetts statute,[4] therefore is in the first degree.[5] And where a husband killed his wife by repeatedly stamping on and kicking her while prostrate on the floor, whereby was created a prolonged agony terminating in the death alleged, the jury was held to be justified in finding this degree of murder. "Such cruelty," said Colt, J., "must be considered extreme, although it be possible to devise means of producing death which shall manifest a higher degree of criminality. It is enough if the means used were extreme as compared with ordinary means of producing death."[6]

§ 730. **Doctrine of Attempt.** — Connected with a part of the definition of murder in the first degree is an allusion to the law of attempt. As to which the doctrine of attempt, unfolded in our first volume, becomes important. If, there being no intent to

v. The State, 2 Texas Ap. 369, 375). See also Burnham *v.* The State, 43 Texas, 322; Duebbe *v.* The State, 1 Texas Ap. 159; Washington *v.* The State, 1 Texas Ap. 647; Singleton *v.* The State, 1 Texas Ap. 501; Jones *v.* The State, 3 Texas Ap. 150, 155; Taylor *v.* The State, 3 Texas Ap. 387; Halbert *v.* The State, 3 Texas Ap. 656; McCarty *v.* The State, 4 Texas Ap. 461; Richarte *v.* The State, 5 Texas Ap. 359; Summers *v.* The State, 5 Texas Ap. 365; Cox *v.* The State, 5 Texas Ap. 493; Gardenhire *v.* The State, 6 Texas Ap. 147; Evans *v.* The State, 6 Texas Ap. 513; Walker *v.* The State, 6 Texas Ap. 576; Lanham *v.* The State, 7 Texas Ap. 126; Smith *v.* The State, 7 Texas Ap. 414; Shrivers *v.* The State, 7 Texas Ap. 460; Wallace *v.* The State, 7 Texas Ap. 570; Rye *v.* The State, 8 Texas Ap. 163; Guffee *v.* The State, 8 Texas Ap. 187.

[1] Bratton *v.* The State, 10 Humph. 103.

[2] Commonwealth *v.* Dougherty, 7 Smith's Laws, 695. Whart. Hom. 362; Commonwealth *v.* Flavel, Whart. Hom. 363. And see Commonwealth *v.* Green, 1 Ashm. 289; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Taylor *v.* The State, 3 Texas Ap. 387; Halbert *v.* The State, 3 Texas Ap. 656; The State *v.* Raymond, 11 Nev. 98; The State *v.* Edwards, 71 Misso. 312; post, § 741.

[3] Tom *v.* The State, 8 Humph. 86; Ruloff *v.* People, 45 N. Y. 213, 11 Abb. Pr. N. S. 245; The State *v.* Green, 66 Misso. 631. See The State *v.* Alford, 80 N. C. 445.

[4] Ante, § 725.

[5] Commonwealth *v.* Desmarteau, 16 Gray, 1. See People *v.* Skeehan, 49 Barb. 217.

[6] Commonwealth *v.* Devlin, 126 Mass. 253, 255.

kill, the charge is, that the killing came through an unsuccessful "attempt" to perpetrate some one of the other crimes enumerated in the statute, it is necessary the prisoner should have intended, in fact, to commit the particular other crime.[1]

V. *Degrees in Manslaughter.*

§ 731. **General View.** — The statutes of some of the States make different degrees of manslaughter. In New York, there are four degrees.[2] In Georgia,[3] Tennessee,[4] and some of the other States, there are two. But we have not sufficient adjudications to render profitable a discussion of this subject.[5]

VI. *The Leading Doctrines of Indictable Homicide epitomized.*

§ 732. *As to Murder:* —

Old Definition. — The definitions of murder commonly found in the books are well represented by Hawkins's, who defines it to be "the wilful killing of any subject whatsoever, through malice forethought."[6] Now, —

[1] Vol. I. § 729, 731, 735; Kelly *v.* Commonwealth, 1 Grant, Pa. 484.

[2] And see, as to New York, Evans *v.* People, 49 N. Y. 86; Mongeon *v.* People, 55 N. Y. 613.

[3] Thomas *v.* The State, 38 Ga. 117.

[4] Nelson *v.* The State, 6 Baxter, 418.

[5] As to Alabama, see Oliver *v.* The State, 17 Ala. 587; Isham *v.* The State, 38 Ala. 213; Cates *v.* The State, 50 Ala. 166. As to Pennsylvania, see Commonwealth *v.* Gable, 7 S. & R. 423; Commonwealth *v.* Flanigan, 8 Philad. 430; Walters *v.* Commonwealth, 8 Wright, Pa. 135. In Wisconsin, to reduce the offence to manslaughter in the fourth degree under R. S. c. 133, § 20, the involuntary killing must be without a cruel or unusual weapon, and without any cruel or unusual means. Keenan *v.* The State, 8 Wis. 132. In Georgia, the expression "attempt to commit a serious personal injury," in the definition of the crime of voluntary manslaughter, in § 7 of div. 4 of the code, means an attempt to commit an injury greater than a provocation by mere words, and less than a felony. Buchanan *v.* The State, 24 Ga. 282. And see further as to Georgia, Stokes *v.* The State, 18 Ga. 17; Welch *v.* The State, 50 Ga. 128. As to Missouri, see The State *v.* Sloan, 47 Misso. 604; The State *v.* Curtis, 70 Misso. 594; The State *v.* Hill, 69 Misso. 451. As to Wisconsin, The State *v.* Dickinson, 41 Wis. 299. As to Indiana, see Bruner *v.* The State, 58 Ind. 159; Reed *v.* The State, 8 Ind. 200.

[6] 1 Hawk. P. C. Curw. ed. p. 92, § 3. Other definitions are, —

Lord Coke. — "Murder is when a man of sound memory and of the age of discretion unlawfully killeth, within any county of the realm, any reasonable creature, *in rerum natura*, under the king's peace, with malice aforethought either expressed by the party or implied by law, so as the party wounded or hurt, &c., die of the wound or hurt, &c., within a year and a day after the same." 3 Inst. 47.

Lord Mansfield. — "Murder is where a man of sound sense unlawfully killeth another of malice aforethought, either express or implied." He adds: "If the malice be express, the facts remain with

Whence this Definition. — This definition is a mere transcript of Stat. 23 Hen. 8, c. 1, § 3, already explained;[1] for, though Hawkins uses the word "forethought" instead of "prepensed," the meaning is the same.

§ 733. **How far accurate.** — This definition lacks the word "felonious," which is a part of the law's designation of every felony.[2] If added, it would be exact. But —

Means Nothing. — Though, thus amended, it is correct, it is practically without meaning; because, where the question is whether a particular killing is murder or manslaughter, it is only repeating the statutory words to say that it is murder if of "malice aforethought."

How it should be. — What a definition should do is to define "malice aforethought." It is a truism, not a definition, to say, that when a felonious killing is of malice aforethought it is murder, and when not it is manslaughter. Therefore —

§ 734. **Proposed Definition.** — Let us see if we cannot discover a definition which, however imperfect, will still furnish some practical help. It must necessarily embody an epitomization[3] of the judicial interpretations which have been given to the words "malice aforethought." Murder, then, is that species of felonious killing, technically known by the phrase "wilful and of malice aforethought," which proceeds from an intent to take life without excuse, or the intended commission of some other felony, or of some misdemeanor of a sort to endanger life, or the inexcusable use of a dangerous weapon, or some other purpose equal in malignity.[4] Still, —

§ 735. **Complete defining impossible.** — While this definition will in some degree assist the reader, one in all respects neat, complete, and exact is, in the nature of the subject, impossible. The idea itself is complex and artificial; and, if it were not so, the language has no words in which it could, in a single sentence, be conveyed. Again, —

the jury. If the malice is to arise from implication, it is a matter of law, the entire consideration of which resides with the court; and, in the present case, the finding that there was no intent to kill does not in any degree vary the question." Rex *v.* Hazel, 1 Leach, 4th ed. 368, 383.

[1] Ante, § 625.

[2] Crim. Proced. I. § 534; II. § 542.

[3] 1 Bishop Mar. & Div. 6th ed. § 4.

[4] **New York Commissioners.** — The New York commissioners propose: "Homicide is murder in the following cases, — 1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being; 2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony." This definition seems to have been drawn in some degree from the Revised Statutes of the State. Draft of a Penal Code, 1864, p. 82.

Old and Inadequate Phrases. — Some of the phrases, found in our books treating of this subject of murder, are so technical and even meaningless as greatly to embarrass the student. Of this sort are the terms "malice," "depraved heart," "mind fully bent on evil," and other similar ones. They are often employed by judges and text-writers seemingly without its occurring to them that, in truth, they convey no such exact idea as is essential in legal disquisition, and sometimes no idea whatever.[1] Specially unfortunate is the employment, by courts, of language like this in giving directions to juries unread in the law.[2] It mystifies and misleads; yet, practically, if the trial judge addresses them in words plain and comprehensible to their understandings, there is danger that the case may be reversed for error of law; if he mystifies them with what is meaningless yet legally correct, the danger is still greater that the verdict will be irreversibly wrong on the facts.

§ 736. *As to Manslaughter:* —

Old Definitions. — Most of the old definitions of manslaughter have even less of meaning than those of murder. Generally they declare it to be any felonious killing which is not done of "malice aforethought," or "malice prepense."[3] Hawkins expands the idea thus: "Homicide against the life of another, amounting to felony, is either with or without malice. That which is without malice is called manslaughter, or sometimes chance-medley; by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all."[4] But —

[1] And see Vol. I. § 427 et seq.

[2] Crim. Proced. I. § 980 *a*.

[3] 1 Hale P. C. 449.

[4] 1 Hawk. P. C. Curw. ed. p. 89, § 1. **Other Definitions.** — In Rex *v.* Taylor, 2 Lewin, 215, Taunton, J., said: "Manslaughter is homicide, not under the influence of malice, but when the blood is heated by provocation, and before it has time to cool." In South Carolina, on a trial for homicide effected by a deadly weapon, the judge defined manslaughter to be "homicide committed in sudden heat and passion and on sufficient legal provocation;" and again he said, "it is not every killing in passion that the law mitigates down to manslaughter; it must be passion justly excited by legal provocation." The verdict was, guilty of manslaughter, and on appeal it was held that

Unsatisfactory. — This sort of definition is unsatisfactory; both because, as just explained, the words "malice" and "malice aforethought" convey, in themselves, no clear idea of the thing which in law is signified by them, and particularly because it does not adequately draw the line between the indictable and unindictable forms of homicide. Therefore, —

§ 737. **Proposed New Definition.** — Though the subject does not admit of a defining so exact and short as to satisfy equally the demands of the law and of literary taste, the following is proposed: manslaughter is any such unlawful or dangerous act, done contrary to one's duty, as results in the death of a human being within a year and a day from the time of its commission. Now, —

Includes Murder. — This definition includes murder, and properly; because an indictment for manslaughter may be sustained while the proof is of murder.[1]

§ 738. **Further of the Definition.** — This definition is not very enlightening to one who has no previous knowledge of the law. For while it requires, for example, that the unlawful act which produces death shall have been done contrary to the duty of the doer,[2] such duty is matter of legal learning. It cannot be stated in the short terms of a definition. Therefore nothing greatly better in the way of defining is possible. And, proceeding to trace the line between the unindictable and the indictable homicide, we find it long and wavy, the same as between murder and manslaughter.[3] Hence, —

How ascertain the Law. — If we would learn the law of this subject, we must proceed beyond definition to its details. We must look into the cases, see on what principles they severally proceed; and, in their light, determine, step by step, the boundary line between the indictable and the unindictable homicide.

the terms used to characterize it were correct. The State *v.* Smith, 10 Rich. 341. For explanations of the definition in the statutory law of Texas, see Boyett *v.* The State, 2 Texas Ap. 93, 100; Richardson *v.* The State, 9 Texas Ap. 612; Reed *v.* The State, 9 Texas Ap. 817.

[1] Vol. I. § 792. As to manslaughter under the Ohio statute, see Montgomery *v.* The State, 11 Ohio, 424.

[2] Reg. *v.* Salmon, 6 Q. B. D. 79, 14 Cox C. C. 494; Davison *v.* People, 90 Ill. 221; Reg. *v.* Towers, 12 Cox C. C. 530; Reg. *v.* Finney, 12 Cox C. C. 625; Reg. *v.* French, 14 Cox C. C. 328; Reg. *v.* Bradshaw, 14 Cox C. C. 83; The State *v.* Hardie, 47 Iowa, 647; United States *v.* Knowles, 4 Saw. 517.

[3] Ante, § 734.

VII. *Attempts to commit Murder and Manslaughter, with Various Forms of Felonious Assault.*

§ 739. **Elsewhere.** — In the first volume, criminal attempts are discussed at large.[1] And in this volume, among assaults, are considered the aggravated forms,[2] including something of what is useful in the present connection. So that —

Here. — We shall have no need to enter into any special developments of principles here; but, for the convenience of practitioners, we shall refer to numerous cases, and in some degree connect them by threads of doctrine.

§ 740. **Statutory Assaults with Intent.** — In affirmance of the common law, and in some degree for increasing its penalties, we have statutes providing special punishments for assaults accompanied with a specific ulterior intent,[3] — being statutory attempts. Thus, —

Assault with Intent to take Life, &c. — There are various forms of statutory assault with intent to take life; as, assaulting one with intent to kill, to commit murder,[4] administering poison[5] with the like intent, attempting to drown with intent to murder,[6] and others of this general sort.[7]

[1] Vol. I. § 723 et seq.

[2] Ante, § 42 et seq.

[3] Ante, § 52.

[4] Vol. I. § 413, note, 730, 736, 750, 751, 756, 758, 768 *a*; Davidson *v.* The State, 9 Humph. 455; Evans *v.* The State, 1 Humph. 394; Humphries *v.* The State, 5 Misso. 203; Wright *v.* The State, 9 Yerg. 342; The State *v.* Fee, 19 Wis. 562; Logan *v.* The State, 2 Lea, 222; Black *v.* The State, 8 Texas Ap. 329; Shinn *v.* The State, 68 Ind. 423; Lancaster *v.* The State, 2 Lea, 575; Hogan *v.* The State, 61 Ga. 43; Meredith *v.* The State, 60 Ala. 441; Pontius *v.* People, 21 Hun, 328; The State *v.* Graham, 51 Iowa, 72; The The State *v.* Painter, 67 Misso. 84; People *v.* Fine, 53 Cal. 263; The State *v.* Trocknorton, 53 Ind. 354; The State *v.* Schele, 52 Iowa, 608; The State *v.* Davis, 14 Nev. 407.

[5] Rex *v.* Harley, 4 Car. & P. 369; Rex *v.* Powles, 4 Car. & P. 571; Reg. *v.* Cluderay, 1 Den. C. C. 514, Temp. & M. 219, 14 Jur. 71, 19 Law J. n. s. M. C. 119; s. c. nom. Reg. *v.* Cluderoy, 2 Car. & K. 907; Rex *v.* Cadman, 1 Moody, 114; Rex *v.* Lewis, 6 Car. & P. 161; Reg. *v.* Michael, 9 Car. & P. 356, 2 Moody, 120; Reg. *v.* Williams, 1 Den. C. C. 39; Lohman *v.* People, 1 Comst. 379; Anthony *v.* The State, 29 Ala. 27; People *v.* Carmichael, 5 Mich. 10; People *v.* Adwards, 5 Mich. 22; Commonwealth *v.* Anthony, 2 Met. Ky. 399; Sumpter *v.* The State, 11 Fla. 247; Reg. *v.* Council, 6 Cox C. C. 178; Reg. *v.* Dale, 6 Cox C. C. 14; Collins *v.* The State, 3 Heisk. 14.

[6] Sinclair's Case, 2 Lewin, 49.

[7] Tyra *v.* Commonwealth, 2 Met. Ky. 1; Monday *v.* The State, 32 Ga. 672; O'Leary *v.* People, 4 Parker C. C. 187; Weaver *v.* The State, 24 Texas, 387; Reg. *v.* Pearce, 9 Car. & P. 667; Wilson *v.* The State, 25 Texas, 169; Long *v.* The State, 34 Texas, 566; Long *v.* The State, 46 Ind. 582; Reg. *v.* Lallement, 6 Cox C. C. 204; Fulford *v.* The State, 50

§ 741. **Nature of the Act.** — It is general doctrine in the law of attempt, that, to sustain an indictment, the thing done must have some real or apparent adaptability to accomplish the ulterior wrong meant.[1] And this rule applies to these statutes; as, if the allegation is, that the defendant made an assault with intent to murder, it will not be supported where the killing would have been only manslaughter had death taken place.[2] But, as one may commit murder without employing a deadly weapon, it is not necessary that the assault with intent to murder should be with an instrument likely to produce death.[3]

Nature of Intent. — With the act thus described, the necessary intent must blend. The wrong-doer must specifically contemplate taking life; and, though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of attempt to commit murder.[4] Again, —

Intent proved as laid. — The proof must show that the intent was, in fact, the same which is laid in the indictment.[5] If, for example, the allegation is that it was to maim, proof of an intent to frighten will not justify a conviction.[6]

Assault taking effect on one not meant. — If, then, the assault terminates in a battery of a person not meant, is the offence of assault with intent to kill or murder committed?[7] In legal reason, and in the absence of special terms in the statute, it is; because, in such a case, both the statutory act and the statutory

Ga. 591; Slatterly v. People, 58 N. Y. 354; People v. Keefer, 18 Cal. 636; People v. Murat, 45 Cal. 281; The State v. Moore, 82 N. C. 659; The State v. Hooper, 82 N. C. 663; The State v. Benthall, 82 N. C. 664; People v. Kerrains, 1 Thomp. & C. 333; The State v. Williams, 5 Baxter, 655; People v. Aubrey, 53 Cal. 427; Brown v. The State, 58 Ga. 212.

[1] Vol. I. § 738.

[2] Vol. I. § 736, note; Elliott v. The State, 46 Ga. 159; Read v. Commonwealth, 22 Grat. 924; Sciborn v. The State, 51 Ga. 164; Jackson v. The State, 51 Ga. 402; Smith v. The State, 52 Ga. 88.

[3] Monday v. The State, 32 Ga. 672. And see Williams v. The State, 47 Ind. 568; Montalvo v. The State, 31 Texas, 63; The State v. Nations, 31 Texas, 561; Crane v. The State, 41 Texas, 494; McCroskey v. The State, 2 Coldw. 178.

[4] Vol. I. § 728–730, 736; The State v. Jefferson, 3 Harring. Del. 571; Davidson v. The State, 9 Humph. 455; Ogletree v. The State, 28 Ala. 693. See Dains v. The State, 2 Humph. 439; The State v. Clarissa, 11 Ala. 57; Sharp v. The State, 19 Ohio, 379; Rex v. Coe, 6 Car. & P. 403; Nancy v. The State, 6 Ala. 483; People v. Shaw, 1 Parker C. C. 327; Maher v. People, 10 Mich. 212, 217. But see The State v. Bullock, 13 Ala. 413; Moore v. The State, 18 Ala. 532; Rex v. Howlett, 7 Car. & P. 274; Dave v. The State, 22 Ala. 23; The State v. Nichols, 8 Conn. 496; People v. Vinegar, 2 Parker C. C. 24. Vol I. § 736, note.

[5] Ogletree v. The State, 28 Ala. 693.

[6] Reg. v. Abraham, 1 Cox C. C. 208 And see Filkins v. People, 69 N. Y. 101.

[7] And see ante, § 728, "Killing One not meant." And see Vol. I. § 328, 736.

intent have transpired, — the words of the enactment are covered, and the wrong done is completely within the spirit of its prohibition. The indictment might even charge, that the assault was made on one named, mistaken by the accused for another one named, with intent to take the latter's life; for here the thing done would be *apparently* adapted to accomplish the end meant, which was the death of the latter person, bringing the case within the general rule of the law of attempt. What has been held the reader will see in the note.[1]

Proof of Intent. — Though the law is as above stated, yet, in matter of evidence, the tendency of the thing done may be looked into to determine the intent from which it proceeded.[2] Still this tendency raises merely a presumption of fact, not of law; the jury must, in each case, be satisfied that the specific intent existed as fact in the mind of the prisoner.[3]

§ 742. **Particular Terms of Statute.** — While the reader carries these general doctrines in his mind, he should not fail to note carefully the exact words of the statute on which a question in controversy arises. A suggestive one is the following: —

Degree of Intended Murder. — In Michigan, on an indictment for assault with intent to commit murder, it is immaterial whether

[1] In Mississippi, under a statute which provides a punishment for "every person who shall be convicted of shooting at another with intent to kill," it has been held that the proof must show a special intent to kill the one named in the indictment; an intent to kill any other, or a general malicious intent, not being sufficient. Morgan v. The State, 13 Sm. & M. 242. In England, a prisoner was indicted under 7 Will. 4 & 1 Vict. c. 85, § 3 for shooting at and wounding A, with intent to murder him. The proof was that he supposed the person he shot at to be B, whom he intended to murder; and this was held to sustain the indictment. Said Parke, B.: "The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot." Reg. v. Smith, Dears. 559. The like has been adjudged in California. People v. Torres, 38 Cal. 141. Also in Ohio, Callahan v. The State, 21 Ohio State, 306. See Hollywood v. People, 2 Abb. Ap. Dec. 376. If a person shoots at two, intending to kill one, entirely regardless which, he may, it is held in Massachusetts, be convicted upon an indictment charging assault on the two, with intent to murder both. Commonwealth v. McLaughlin, 12 Cush. 615.

[2] Crim. Proced. I. § 1109; Reg. v. Jones, 9 Car. & P. 258. See Reg. v. Renshaw, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Vol. I. § 735.

[3] Morgan v. The State, 33 Ala. 413. Here the court held, that the presenting in an angry manner of a pistol loaded and cocked, within carrying distance, with the finger on the trigger, does not raise a legal presumption of intent to murder, where in fact an assault only was committed. Said Stone, J.: The jury "could alone judge of the intent, and the court erred in withdrawing that inquiry from their consideration." p. 415, 416. And see Jeff v. The State, 37 Missis. 821; The State v. Beaver, 5 Harring. Del. 508; Rumsey v. People, 19 N. Y. 41; Vol. I. § 735, 736. But see People v. Vinegar, 2 Parker C. C. 24.

the murder would have been, if committed, in the first or second degree.[1] But from the consideration that a specific intent to produce death is required in this aggravated assault,[2] it would follow, that, in States and circumstances wherein the purpose to take life is the distinguishing element of murder in the first degree, and a murder consummated without such purpose is, as of course, in the second degree,[3] this doctrine, thus held doubtless correctly in Michigan, cannot prevail. Accordingly it is laid down in Minnesota, that, to constitute an assault with intent to commit murder, the murder, were the assault effectual, must be in the first degree; because only in the case of a "premeditated design" (the words describing murder in the first degree) to effect death, can there be the intent to take life.[4]

§ 743. **Misdemeanor or Felony.** — All indictable attempts are, at common law, misdemeanor.[5] So, also, are all assaults, however aggravated.[6] Therefore the attempts now in contemplation are misdemeanor; except where the statute makes, as in some instances it does, the particular attempt a felony.[7]

VIII. *Remaining and Connected Questions.*

§ 744. **Felony.** — Murder and manslaughter are both felony at the common law.[8]

Principal in Second Degree — Accessory. — The consequences of this doctrine, as respects principals, and accessories before and after the fact, are such as were explained in the preceding volume.[9]

[1] People *v.* Scott, 6 Mich. 287. And see, as to Indiana, Erolich *v.* The State, 11 Ind. 213. See also Hopkinson *v.* People, 18 Ill. 264; Wilson *v.* People, 24 Mich. 410.

[2] Ante, § 741.

[3] Ante, § 728.

[4] Bonfanti *v.* The State, 2 Minn. 123.

[5] Vol. I. § 772.

[6] Ante, § 55.

[7] The State *v.* Boyden, 13 Ire. 505; Commonwealth *v.* Barlow, 4 Mass. 439; The State *v.* Danforth, 3 Conn. 112; Southworth *v.* The State, 5 Conn. 325; Phillips *v.* Kelly, 29 Ala. 628; O'Leary *v.* People, 4 Parker C. C. 187; Commonwealth *v.* Yancy, 2 Duvall, 375; People *v.* Swenson, 49 Cal. 388; Wilson *v.* People, 24 Mich. 410.

[8] Foster, 302; The State *v.* Ben, 1 Har. & J. 99; The State *v.* Henderson, 2 Dev. & Bat. 543. In Pennsylvania, under Stat. April 22, 1794, § 8, voluntary manslaughter is only misdemeanor.

[9] Vol. I. § 607 et seq. And see, as concerns murder and manslaughter particularly, Vol. I. § 635, 639, 642, 652, 666, 676, 678, 693, 698; The State *v.* McCarn, 11 Humph. 494; Reg. *v.* Good, 1 Car. & K. 185; United States *v.* Ross, 1 Gallis. 624; The State *v.* Simmons, 1 Brev. 6; Reg. *v.* Cuddy, 1 Car. & K. 210; Reg. *v.* Young, 8 Car. & P. 644; Reg. *v.* Whithorne, 3 Car. & P. 394; Rex *v.* Edmeads, 3 Car. & P. 390; Rex *v.* Hodgson, 1 Leach, 4th ed. 6; Rex *v.* Hubson, 1 East P. C. 258, being s. c.; Rex *v.* Mastin, 6 Car. & P. 396; The State *v.* Hildreth, 9 Ire. 440; Reg. *v.* Howell, 9 Car. & P. 437; Goose's Case, Sir F. Moore, 461; Rex *v.* Murphy, 6 Car. & P. 103; Vaux's Case, 4 Co. 44; Reg. *v.* Alison, 8 Car. & P. 418; Reg. *v.* Tyler, 8 Car. & P. 616; The State *v.* Coleman, 5 Port. 32; Reg. *v.* Williams, 1 Den. C. C. 39; Reg. *v.* Wallis, 1 Salk. 334, 335; Mansell's Case, 2 Dy. 128 *b*, pl. 60; Nuthill *v.* The State, 11 Humph. 247; Mohun's Case, 12 Howell St. Tr. 949, 1022; Cornwallis's Case, 7 Howell St. Tr. 143, 157; The State *v.* Cockman, Winston, II. 95; Goff *v.* Prime, 26 Ind. 196; Harrel *v.* The State, 39 Missis. 702; Mickey *v.* Commonwealth, 9 Bush, 593; United States *v.* Ramsay, Hemp. 481; Commonwealth *v.* Anthony, 2 Met. Ky. 399; Raiford *v.* The State, 59 Ala. 106; The State *v.* Sales, 30 La. An. 916; Reg. *v.* Taylor, Law Rep. 2 C. C. 147, 13 Cox C. C. 68; Reg. *v.* Richardson, 2 Q. B. D. 311; Campbell *v.* Commonwealth, 3 Norris, Pa. 187.

§ 745. **Former Jeopardy — Punishment.** — In that volume, likewise, was considered the question of the effect of a conviction or jeopardy for one instance of offending, on a subsequent indictment for the same or another instance;[1] also, the question of the punishment.[2] Moreover, —

Conviction for Part. — There was a sufficient discussion of the authority to convict for a different offence in degree from the one charged or the one proved.[3]

[1] Vol. I. § 978 et seq. And see, as to questions of homicide, Vol. I. § 1059; Reg. *v.* Gould, 9 Car. & P. 364; The State *v.* Cooper, 1 Green, N. J. 361; Lohman *v.* People, 1 Comst. 379; Rex *v.* Clark, 1 Brod. & B. 473; The State *v.* Byrd, 31 La. An. 419; The State *v.* Dennison, 31 La. An. 847; The State *v.* Stephens, 13 S. C. 285; Byrd *v.* The State, 1 How. Missis. 163; Fields *v.* The State, 52 Ala. 348; Peri *v.* People, 65 Ill. 17; Lewis *v.* The State, 1 Texas Ap. 323; The State *v.* Elder, 65 Ind. 282; The State *v.* Bell, 81 N. C. 591; Cheek *v.* The State, 4 Texas Ap. 444; The State *v.* Littlefield, 70 Maine, 452; Teat *v.* The State, 53 Missis. 439.

[2] Vol. I. § 927 et seq. And see, as to questions of homicide, Nuthill *v.* The State, 11 Humph. 247; The State *v.* Henderson, 2 Dev. & Bat. 543; White *v.* Commonwealth, 1 S. & R. 139; Cockrum *v.* The State, 24 Texas, 394; The State *v.* Looper, 14 Rich. 92; Opinion of Justices, 11 Cush. 604; Marshall *v.* The State, 33 Texas, 664; Mingia *v.* People, 54 Ill. 274; Thomas *v.* People, 67 N. Y. 218; McGinnis *v.* The State, 31 Ga. 236; The State *v.* Abbott, 8 W. Va. 741; Long *v.* The State, 38 Ga. 491; Green *v.* The State, 55 Missis. 454.

[3] Vol. I. § 791 et seq. And see, as to questions of homicide, Vol. I. § 788, 792, 795, 797, 808, 809, 811; 1 East P. C. 371; The State *v.* Coleman, 5 Port. 32; Kirby *v.* The State, 7 Yerg. 259; Johnson *v.* The State, 17 Ala. 618; McGee *v.* The State, 8 Misso. 495; The State *v.* Arden, 1 Bay, 487; People *v.* Doe, 1 Mich. 451; Reynolds *v.* The State, 1 Kelly, 222; Commonwealth *v.* Gable, 7 S. & R. 423; Green *v.* The State, 8 Texas Ap. 71; Buckner *v.* Commonwealth, 14 Bush, 601; The State *v.* O'Kane, 23 Kan. 244.

For HORSE-RACING, see Stat. Crimes.
HORSE STEALING, see Stat. Crimes; also LARCENY.
HOUSE-BREAKING, see BURGLARY AND OTHER BREAKINGS.
HOUSE, DISORDERLY, see Vol. I. § 1106 et seq.

HOUSE OF ILL-FAME, see Vol. I. § 1083 et seq.
IDLENESS, see Vol. I. § 515, 516.
ILLEGAL MEETING, see Unlawful Assembly.
ILL-FAME, HOUSE, see Vol. I. § 1083 et seq.
IMPRISONMENT, FALSE, see Kidnapping and False Imprisonment.
INCEST, see Stat. Crimes.
INDECENT EXPOSURE, see Vol. I. § 1125 et seq.
INNKEEPERS, see Vol. I. § 532, 1110, 1118.
INTOXICATING LIQUOR, Selling, &c., see Stat. Crimes.

CHAPTER XXIV.

KIDNAPPING AND FALSE IMPRISONMENT.[1]

§ 746. Introduction.
747–749. False Imprisonment.
750–756. Kidnapping.

§ 746. **Meaning of the Terms — Course of this Chapter.** — Between the terms "Kidnapping" and "False Imprisonment" there is no wide difference in meaning, and sometimes they are employed almost interchangeably. Still, the better use so far distinguishes them that we should do unwisely to regard them as indicating but one offence, to be treated of under a single title. We shall, therefore, in this chapter, consider I. False Imprisonment; II. Kidnapping. In the broadest sense, either term includes various wrongful acts which in the present volumes are discussed under still other titles.[2]

[1] For matter relating to this title, see Vol. I. § 306, 553, 686. Also ante, § 26. For the pleading, practice, and evidence, see Crim. Proced. II. § 385 et seq., 688 et seq. And see Stat. Crimes, § 205, 209, 236, 619.

[2] **Proposed in New York.** — The New York commissioners, under the title Kidnapping, propose the following: "Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, with intent, either: 1. To cause such other person to be secretly confined or imprisoned in this State against his will; or, 2. To cause such other person to be sent out of this State against his will; or, 3. To cause such person to be sold as a slave, or in any way held to service against his will, — is punishable by imprisonment in a State prison not exceeding ten years." And they observe: "The above section embraces substantially the provisions of 2 Rev. Stat. 664, § 30, and is somewhat broader than the term 'kidnapping,' in the caption of the chapter, would imply. **Meaning of Kidnapping.** — That term is, by earlier writers, used to denote the abduction of children only; and this seems its etymological meaning. See Philip's World of Words; Webst. Dict.; Johns. Dict. Many accurate authorities employ it without respect to the age of the subject; but confine it to an abduction committed with intent to export the person injured out from his own home, State, or country, to another. See Bell's Dict. Law of Scot.; Bouvier's Law Dict.; Jacob's Law Dict. Thus the Revised Statutes of Illinois, Vol. I. p. 336, § 54 & 55, make false imprisonment to consist in a confinement or detention without legal authority, and confine kidnapping to the offence of abducting and sending to another country. The existing provisions of our own Revised Statutes draw no such distinction. . . . Particular offences analogous to kidnapping — for example, abduction of females, and

I. *False Imprisonment.*

§ 747. **Related to Assault — to Battery.** — False imprisonment, employing the term in its better legal meaning, is a species of aggravated[1] assault. Perhaps it does not technically include in every possible case an assault, doubtless it does not always a battery; but generally it includes, at least, an assault.[2]

§ 748. **How defined.** — It is any unlawful restraint of one's liberty, whether in a place used for imprisonment generally, or used only on the particular occasion; or, by words and an array of force, without bolts or bars, in any locality whatever.[3]

Obstruction in one Direction. — In a civil case, the English court held, Lord Denman, C. J., dissenting, that to obstruct a person from going in a particular direction, while he is left free to go in any other, is not a false imprisonment. "In general," said Patteson, J., "if one man compels another to stay in any given place, against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree also, that the compelling a man to go in a given direction against his will may amount to an imprisonment. But I cannot bring my mind to the conclusion, that, if one man merely obstructs the passage of another in a particular direction, whether by threat or personal violence or otherwise, leaving him at liberty to stay where he is or go in any other direction if he pleases, he can be said thereby to imprison him." The ground of Lord Denman's dissent was, that an imprisonment "means any restraint of the person by force."[4]

Manual Touch — Force. — It follows, that, as in arrest there

child-stealing — are the subject of some special provisions in other chapters of this code." Draft of a Penal Code, A. D. 1864, p. 93.

[1] See ante, § 43.

[2] Ante, § 26; Pike *v.* Hanson, 9 N. H. 491; Smith *v.* The State, 7 Humph. 43; Emmett *v.* Lyne, 1 New Rep. 255; Click *v.* The State, 3 Texas, 282; 1 Russ. Crimes, 3d Eng. ed. 754; The State *v.* Edge, 1 Strob. 91, as to which see post, § 748, note.

[3] Pike *v.* Hanson, 9. N. H. 491; Smith *v.* The State, 7 Humph. 43; Rex *v.* Webb, 1 W. Bl. 19; Floyd *v.* The State, 7 Eng. 48; Bird *v.* Jones, 7 Q. B. 742; The State *v.* Rollins, 8 N. H. 550; Mitchell *v.* The State, 7 Eng. 50; Ogleshy *v.* The State, 39 Texas, 53; Searls *v.* Viets, 2 Thomp. & C. 224; Jones *v.* Commonwealth, 1 Rob. Va. 748; Herring *v.* The State, 3 Texas Ap. 108; Maner *v.* The State, 8 Texas Ap. 361; ante, § 26.

[4] Bird *v.* Jones, 7 Q. B. 742. And see The State *v.* Guest, 6 Ala. 778; Woods *v.* The State, 3 Texas Ap. 204; Harkins *v.* The State, 6 Texas Ap. 452.

need be no manual touch,[1] so none is required in false imprisonment;[2] for, without it, the person may be restrained. "But," said a learned judge, "force of some sort must be used, and it must be a detention against the will, and it is indispensable that these two circumstances should unite."[3]

§ 749. **Misdemeanor, &c.** — False imprisonment is misdemeanor, not felony.[4] The consequences of this doctrine appear in the first volume.[5]

II. *Kidnapping.*

§ 750. **How defined.** — There is some uncertainty as to the exact limits of this offence;[6] but, according to what is believed to be the better view, kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person imprisoned to some other place.[7] Possibly a mere intent to carry away, without an actual carrying, may aggravate a false imprisonment to kidnapping.

Whether to another State or Country. — Blackstone and some other English writers define kidnapping to be, "the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another."[8] But the New Hampshire court, more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offence.[9]

§ 751. **Consent — Child.** — Of course, the consent of a person of mature years and sane mind, on whom no fraud was practised, would prevent any act from being kidnapping. But it is otherwise of the consent of a young child. At what age the child becomes capable of consenting, or whether the question depends upon age alone, or upon a combination of years and actual capacity shown, we may not find it easy exactly to determine. Chil-

[1] Crim. Proced. I. § 157.

[2] Searls *v.* Viets, 2 Thomp. & C. 224.

[3] Moses *v.* Dubois, Dudley, S. C. 209, 211, opinion by Earle, J. See The State *v.* Edge, 1 Strob. 91, 93. **Illinois.** — As to false imprisonment under the Illinois statute, see Slomer *v.* People, 25 Ill. 70.

[4] 4 Bl. Com. 218; People *v.* Ebner, 23 Cal. 158.

[5] As to Texas, see Redfield *v.* The State, 24 Texas, 133.

[6] See ante, § 746 and note.

[7] Vol. I. § 553; Click *v.* The State, 3 Texas, 282.

[8] 4 Bl. Com. 219. And see 1 Russ. Crimes, 3d Eng. ed. 716; The State *v.* Whaley, 2 Harring. Del. 538; Click *v.* The State, 3 Texas, 282.

[9] The State *v.* Rollins, 8 N. H. 550. And see 1 East P. C. 429.

dren of four,[1] five,[2] six,[3] and nine[4] years respectively have been held to be too young to render their consent available in the defence.[5]

§ 752. **Under Statutes.** — The Illinois statute defines kidnapping to be, as stated by the court, "the forcible abduction or stealing away of a man, woman, or child from his or her country, and sending or taking him or her into another." And it was held, that, to constitute the statutory offence, there need be no application of actual physical force to the person kidnapped; but the exciting of such person's fears, the employment of fraud, and the like, amounting in substance to a coercion of the will, is sufficient. And Walker, J., observed: "While the letter of the statute requires the employment of force to complete the crime, it will undoubtedly be admitted by all that physical force and violence are not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence."[6] Even, —

Making drunk. — Under the New York statute it is held, that procuring the intoxication of a sailor, as a means of getting him on shipboard without his consent, and then taking him there in this condition, is kidnapping.[7]

§ 753. **Other Statutes.** — We have some other statutes against kidnapping, but a mere reference to adjudications under them will suffice.[8]

[1] The State *v.* Farrar, 41 N. H. 53.

[2] Commonwealth *v.* Robinson, Thacher Crim. Cas. 488.

[3] The State *v.* Rollins, 8 N. H. 550.

[4] Commonwealth *v.* Nickerson, 5 Allen, 518, 527.

[5] And see, as illustrative, Vol. I. § 261; ante, § 36; post, § 1133. The New York commissioners propose to fix the age below which the consent shall not avail the defendant, at twelve years. Draft of a Penal Code, p. 94.

[6] Moody *v.* People, 20 Ill. 315, 318. **Condition of Kidnapped Person, &c.** — It was moreover laid down in this case, that, in determining the guilt or innocence of the accused, the jury should take into consideration the condition of the person kidnapped, her age, education, and state of mind, the object of the defendants in removing her from the State, and all the circumstances surrounding the case as detailed in the evidence. **Threats other than of Force.** — In Massachusetts, an action to recover damages for an abduction and false imprisonment was held not to be maintainable on proof that the defendant, by misrepresentations, threats of a criminal prosecution, and payment of money for expenses, but without either employing or threatening actual force, induced the plaintiff to go to another place, and remain a while in concealment. Payson *v.* Macomber, 3 Allen, 69. And see ante, § 36.

[7] Hadden *v.* People, 25 N. Y. 373.

[8] Commonwealth *v.* Blodgett, 12 Met. 56; People *v.* Merrill, 2 Parker, C. C. 590; Davenport *v.* Commonwealth, 1 Leigh, 588; Thomas *v.* Commonwealth, 2 Leigh, 741; Commonwealth *v.* Nickerson, 5 Allen, 518.

§ 754. **Taking Child from Custody under Divorce.** — Where, on a decree for divorce, the custody of a child is assigned to one of the parents, the other who seizes and carries it off — though actually consenting, if too young to give a legal consent — commits the offence of kidnapping.[1] And the offence is the same in a third person who, by request of the parent not having the custody, seizes and carries away the child, though such child is not in the actual possession of the parent in custody, but is at a school to which the latter has sent it for education.[2]

§ 755. **Misdemeanor.** — Common-law kidnapping is misdemeanor.[3]

§ 756. **Locality.** — In Delaware, an indictment for aiding to kidnap a negro and carry him from the State was held to be properly laid in Kent county; the proof being, that he was seized in Kent, and conveyed through Sussex into Maryland. "This," said the court, "is not like any cases cited, where the offence had its inception in one county and its consummation in another. The consummation . . . was not in Sussex county, but in the State of Maryland. The aiding and assisting, for which the prisoner was indicted, occurred entirely in Kent."[4]

[1] The State *v.* Farrar, 41 N. H. 53.

[2] Commonwealth *v.* Nickerson, 5 Allen, 518.

[3] 1 East P. C. 430; Rex *v.* Baily, Comb. 10.

[4] The State *v.* Whaley, 2 Harring. Del. 538, opinion by Clayton, C. J.

CHAPTER XXV.

LARCENY.[1]

757–760. Introduction.
761–781. The Property at Common Law.
782–787. The Property under Statutes.
788–793. Ownership.
794–798. Asportation.
799–839. Trespass.
840–852. Intent.
853–883. Particular Things and Classes of Persons.
884–891. Remaining and Connected Questions.

§ 757. **The Kinds of Larceny.** — We have seen,[2] that, in England, at the time when we received thence our common law, larceny was divided into —

Grand and Petit. — And we have seen what are the nature and effect of that division. Enough is said of petit larceny in our first volume. Another division of larcenies is into —

Simple and Compound. — A compound larceny is larceny aggravated by some special circumstance. Robbery is a familiar form of compound larceny. Other forms are treated of in our next chapter.[3]

Meaning of "Larceny" — Scope of this Chapter. — The term larceny, in its widest meaning, covers all the foregoing forms; but, when we would be precise, and exclude the compound larcenies, we use the phrase "simple larceny,"[4] which includes both grand and petit; and, descending further toward the minute, we say "grand larceny" or "petit larceny." Petit larcenies, however, having ceased to exist in England and in a large part of our

[1] For matter relating to this title, see Vol. I. § 137–142, 207, 232, 260–263, 297, 320, 342, 349, 411, 434, 440, 506, 566, 567, 578–583, 585, 654, 676, 679, 680, 743, 757, 767, 792, 794–801, 811, 935, 942, 947, 974, 1061. See this volume, LARCENY, COMPOUND; RECEIVING STOLEN GOODS; ROBBERY. For the pleading, practice, and evidence, see Crim. Proced. II. § 696 et seq. And see, as to both law and procedure, Stat. Crimes, § 127, 140, 211, note, 222, 232–234, 246–248, 325–344, 360, 363, 881, 410–429, 506, 509, 685.

[2] Vol. I. § 679, 680.

[3] And see Vol. I. § 567.

[4] And see Pitcher v. People, 16 Mich. 142.

States, the single word larceny means grand larceny not of the compound sort. But, having no "simple" larcenies, we have no occasion for the correlative "grand;" so we drop it. The present chapter, therefore, treats "simply" of "larceny," — not aggravated to any thing more, or diminished to any thing less.

§ 758. **How defined.** — Larceny is already defined in these pages to be the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.[1]

[1] 1. Vol. I. § 566. **Other Definitions.** — Some of the definitions of larceny are the following: —

2. **Lord Coke.** — "Larceny, by the common law, is the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another." 3 Inst. 107.

3. **Hawkins.** — "A felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another." 1 Hawk. P. C. Curw. ed. p. 142.

4. **Blackstone.** — "The felonious taking and carrying away of the personal goods of another." 4 Bl. Com. 229.

5. **East.** — "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 East P. C. 553.

6. **Grose, J.** — "The felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." Rex v. Hammon, 2 Leach, 4th ed. 1083, 1089.

7. **Eyre, B.** — "The wrongful taking of goods, with intent to spoil the owner of them, *causa lucri*." 2 East P. C. 553.

8. **Parke, B.** In substance, — the wrongful or fraudulent taking and carrying away by any person of the mere personal chattels of another, from any place, with the intent without excuse or color of right to deprive the owner, not temporarily, but permanently, of his property, and convert it to the taker's use and make it his, without consent of the owner. Reg. v. Holloway, 1 Den. C. C. 370, 2 Car. & K. 942.

9. **Proposed by the English Commissioners, A. D. 1844.** — "A taking and removing of some thing, being the property of some other person and of some value, without such consent as is hereinafter mentioned, with intent to despoil the owner, and fraudulently appropriate the thing taken and removed." Act of Crimes and Punishments, A. D. 1844, p. 168.

10. **Proposed by the English Commissioners, A. D. 1847.** — "Theft is the wrongfully obtaining possession of any movable thing which is the property of some other person and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than the owner." 3d Rep. Eng. Crim. Law Com. of 1845, A. D. 1847, p. 7.

11. **Proposed by the Massachusetts Commissioners, A. D. 1844.** (Majority Report.) — "The fraudulently taking any thing of marketable, salable, assignable, or available value, belonging to or being the property of another, with the intent, on the part of the person so taking the same, fraudulently and without right to appropriate the same to, or dispose of, conceal, or destroy the same for his own use and benefit, or the use and benefit of any other person than the owner of, or

§ 759. **How the Chapter divided.** — Keeping in mind the terms of this definition, and adding something for practical convenience, we have the following heads into which the discussions of this chapter will be divided: I. The Property of which Larceny at the Common Law may be committed; II. The Property of which Larceny under Statutes may be committed; III. The

person interested in, the same, or entitled to the possession thereof, and to deprive, defraud, or despoil the owner thereof, or person interested therein, or entitled to possession thereof, of the same, or of the value thereof, or of his property or interest therein, or of the benefit he might derive therefrom, against the will of such owner or person interested, and without, at the time of taking, having an intention then or thereafter *bona fide* to make compensation or indemnity therefor, or a restoration thereof, to such owner thereof, or person interested therein, or entitled to possession thereof." Tit. Larceny, p. 2. (Minority Report.) — "Whoever by a trespass, with an intent to steal, takes and carries away the property of another, of some value, against his will; or his own property, of some value, in either the custody, use, or possession of another, against his will, to make him chargeable for the same or to deprive any person of some interest therein, or claim thereupon; is guilty of larceny." Report of one of the Commissioners, p. 2. And see, for a definition, The State *v.* Gray, 37 Misso. 463.

12. **Proposed by the New York Commissioners.** — "Larceny is the taking of personal property, accompanied by fraud or stealth, and with intent to deprive another thereof." Draft of a Penal Code, A. D. 1864, p. 210.

13. **Definition in the text, considered.** — It is not my purpose to enter into an extended defence of my own definition, which differs from the rest; but a few suggestions will be useful. A definition which requires itself to be defined is but in a slight degree helpful, whether in the law, or in any other science or art. Now, most of the definitions above quoted require to be defined before they can be understood, and this is the fatal objection to this class. Where, in the other class, the objection is attempted to be obviated, there is, it seems to me, either a too cumbersome form of expression, or a want of accuracy. My own definition is too long and wordy to satisfy the critical taste, yet I have not been able both to make it more compact and preserve the needful accuracy and fulness. The definition proposed by the New York commissioners is neat, and it is not in any of the old forms; but it needs defining almost as much as does the thing which itself assumes to define. The reader can test the accuracy of any of these definitions, by comparing them with the adjudged law as he travels through this chapter.

14. **The Several Parts.** — As sustaining the several parts of my own definition, the following cases are referred to: —

15. "*Larceny is the taking and removing by trespass.*" Rex *v.* Raven, J. Kel. 24; Rex *v.* Walsh, 1 Moody, 14; Reg. *v.* Hall, 1 Den. C. C. 381, Temp. & M. 47; Reg. *v.* Hogan, 1 Crawf. & Dix C. C. 366; The State *v.* Hawkins, 8 Port. 461; Reg. *v.* Rosenberg, 1 Car. & K. 233; Reg. *v.* Gruncell, 9 Car. & P. 365; Reg. *v.* Sutton, 8 Car. & P. 291, 2 Moody, 29, 272; Reg. *v.* Thompson, 1 Den. C. C. 549, 1 Eng. L. & Eq. 542; The State *v.* Braden, 2 Tenn. 68; The State *v.* Wisdom, 8 Port. 511; The State *v.* Seagler, 1 Rich. 30; Rex *v.* Abrahat, 2 Leach, 4th ed. 824, 2 East P. C. 569; Reg. *v.* Hall, 2 Car. & K. 947, 1 Den. C. C. 381; Hite *v.* The State, 9 Yerg. 198; Wright *v.* The State, 5 Yerg. 154; Wright *v.* Lindsay, 20 Ala. 428; Rex *v.* Sharpless, 1 Leach, 4th ed. 92, 2 East P. C. 675; Rex *v.* Harvey, 1 Leach, 4th ed. 467, 2 East P. C. 669; Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618; Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556; Anonymous, 1 Leach, 4th ed. 321, note; Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557; Rex *v.* Waite, 1 Leach, 4th ed. 28, 2 East P. C. 570; The State *v.* Whyte, 2 Nott & McC. 174, 177; The State *v.* Wilson, Coxe, 439; The State *v.* Martin, 12 Ire. 157; Pennsylvania *v.* Campbell, Addison, 232; Reg. *v.* White, 20 Eng. L. & Eq. 585; Williams *v.* The State, 34 Texas, 558.

16. "*Of personal property.*" The State *v.* Moore, 11 Ire. 70; Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144; Hoskins *v.* Tarrence, 5 Blackf. 417; Reg. *v.* Gooch, 8 Car. & P. 293; Rex *v.* Walker, 1 Moody, 155; Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12, 2 East P. C. 596; Haynes's Case, 12 Co. 113; People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Williams, 1 Moody, 107; The State *v.* Murphy, 8 Blackf. 498; The State *v.* Burrows, 11 Ire. 477, 483; Commonwealth *v.* Chace, 9 Pick. 15; Wonson *v.* Sayward, 13 Pick. 402; Norton *v.* Ladd, 5 N. H. 203; Warren *v.* The State, 1 Greene, Iowa, 106; Emmerson *v.* Annison, 1 Mod. 89; Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 2 Den. C. C. 361; Rex *v.* Rough, 2 East P. C. 607; Hundson's Case, 2 East P. C. 611; Rex *v.* Hedges, 1 Leach, 4th ed. 201, 2 East P. C. 590, note.

17. "*Which the trespasser knows.*" Vol. I. § 303, 311; Merry *v.* Green, 7 M. & W. 623; The State *v.* Homes, 17 Misso. 379. **Lost Goods.** — On this question of knowledge, the distinction between cases in which the finder of lost goods can commit larceny of them and those in which he cannot, in part rests. If, when he takes possession of them, Vol. I. § 207, he knows, or has reasonable cause to believe, that there is an owner to whom he can deliver them; and if, so knowing, he intends to appropriate them to his own use, he is guilty; otherwise not. The following authorities relate to this proposition: The State *v.* Weston, 9 Conn. 527; Reg. *v.* Peters, 1 Car. & K. 245; Reg. *v.* Mole, 1 Car. & K. 417; Reg. *v.* Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; Reg. *v.* Wood, 3 New Sess. Cas. 581, 3 Cox C. C. 453; Reg. *v.* Breen, 3 Crawf. & Dix C. C. 30; The State *v.* Ferguson, 2 McMullan, 502; People *v.* Cogdell, 1 Hill, N. Y. 94; People *v.* Anderson, 14 Johns. 294; Reg. *v.* Preston, 8 Eng. L. & Eq. 589, 2 Den. C. C. 353; Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; Murray *v.* The State, 18 Ala. 757; Commonwealth *v.* Hays, 1 Va. Cas. 122; Morehead *v.* The State, 9 Humph. 635; Cash *v.* The State, 10 Humph. 111; Porter *v.* The State, Mart. & Yerg. 226; Lawrence *v.* The State, 1 Humph. 228; Rex *v.* Beard, Jebb, 9; Reg. *v.* York, 12 Jur. 1078; Tyler *v.* People, Breese, 227; Pennsylvania *v.* Becomb, Addison, 386; The State *v.* Williams, 9 Ire. 140; Reg. *v.* Reed, Car. & M. 306; The State *v.* Jenkins, 2 Tyler, 377; Lane *v.* People, 5 Gilman, 305; Ransom *v.* The State, 22 Conn. 153; The State *v.* Conway, 18 Misso. 321; The State *v.* McCann, 19 Misso. 249; Pritchett *v.* The State, 2 Sneed, 285.

18. "*To belong, either generally.*" Reg. *v.* Hayward, 1 Car. & K. 518; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532.

19. "*Or specially.*" Palmer *v.* People, 10 Wend. 165; Rex *v.* Bramley, Russ. & Ry. 478; Commonwealth *v.* Morse, 14 Mass. 217; Jones *v.* The State, 13 Ala. 153; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14; Reg. *v.* Bird, 9 Car. & P. 44; Rex *v.* Wilkinson, Russ. & Ry. 470; The State *v.* Somerville, 21 Maine, 14; Langford *v.* The State, 8 Texas, 115.

20. "*To another, with the intent of depriving such owner of his ownership therein.*" Reg. *v.* Privett, 1 Den. C. C. 193; Reg. *v.* Holloway, 1 Den. C. C. 370, 2 Car. & K. 942; Rex *v.* Dickinson, Russ. & Ry. 420; Rex *v.* Crump, 1 Car. & P. 658; Rex *v.* Philipps, 2 East P. C. 662; Cartwright *v.* Green, 2 Leach, 4th ed. 952, 8 Ves. 405; Merry *v.* Green, 7 M. & W. 623; The State *v.* Self, 1 Bay, 242; Williams *v.* The State, 34 Texas, 558.

21. Thus far, through the definition, the law is clear and uniform. But what shall an author do when he finds differences of judicial opinion on a matter which ought to be covered by the definition? The draftsman of a code puts such a thing in the way he thinks it ought to be; but a text-writer on the law has no such permission. He must state both sides. Therefore I present the two sides in my definition, as follows: —

22. "*And perhaps it should be added,*

Ownership of the Property; IV. The Asportation; V. The Trespass; VI. The Intent; VII. Larcenies of Particular Things and by Particular Classes of Persons; VIII. Remaining and Connected Questions.

§ 760. **The Subject technical.** — We shall find, as we proceed with this subject, our way incumbered by many technical rules; more, indeed, than exist under any other title in the criminal law. The cause of this lies partly in the necessities of the subject itself; and partly in some peculiar notions which prevailed in our mother land, at the time when this branch of our jurisprudence was receiving its early growth. Yet the rules which have been most objected to as unreasonable have stood so long as to be immovable except by legislation; while still a candid consideration of them will leave in our minds the conviction, that, however they may come short of perfect wisdom, they were not adopted without some support from reason.

I. *The Property of which Larceny at the Common Law may be committed.*

§ 761. **Common-law Larcenies — Statutory.** — Under the technical rules of the ancient common law, prevailing still except as expanded by statutes, larceny was restricted, as to the property of which it could be committed, as well as in some other respects, within limits too narrow to meet the requirements of a more refined and commercial age. Consequently statutes, in England and the United States, have greatly enlarged the common-law doctrines. But it is essential, for several purposes, to distinguish

for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious." Reg. *v.* Jones, 1 Den. C. C. 188, 2 Cox C. C. 6; Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Rex *v.* Morfit, Russ. & Ry. 307; Reg. *v.* Careswell, 5 Jur. 251; Reg. *v.* Usborne, 5 Jur. 200; Reg. *v.* Cole, 5 Jur. 200, note; Reg. *v.* Richards, 1 Car. & K. 532; Reg. *v.* Handley, Car. & M. 547; Rex *v.* Curling, Russ. & Ry. 128; Smith *v.* Schultz, 1 Scam. 490; Rex *v.* Cabbage, Russ. & Ry 292; Reg. *v.* White, 9 Car. & P. 344; The State *v.* Ware, 10 Ala. 814; Witt *v.* The State, 9 Misso. 671; Reg. *v.* Wynn, 1 Den. C. C. 365, 2 Car. & K. 859, Temp. & M. 32; The State *v.* Hawkins, 8 Port. 461; McDaniel *v.* The State, 8 Sm. & M. 401, 418; Reg. *v.* Godfrey, 8 Car. & P. 563; Alexander *v.* The State, 12 Texas, 540; Jordan *v.* Commonwealth, 25 Grat. 943, 948; post, § 842-846.

23. **Still other Definitions.**—For other definitions, not necessary to be copied here, see Reg. *v.* Holloway, 1 Den. C. C. 370, 375, 2 Car. & K. 942; Witt *v.* The State, 9 Misso. 663; The State *v.* Gray, 37 Misso. 463; Fields *v.* The State, 6 Coldw. 524; 2 Russ. Crimes, 3d Eng. ed. 2.

between what is larceny at the common law and what is such under the statutes. We have seen,[1] that embezzlement is, in most of the statutes relating to it, declared to be larceny, yet by construction the courts have made it a separate offence. But the statutes which simply provide, that the stealing of such and such things, which were not subjects of larceny at the common law, shall be deemed larceny, are not construed, like those, to create an offence distinct from other larcenies.

§ 762. **Real Estate.** — We have seen,[2] that, in consequence of the stable nature of real estate, the common law does not ordinarily hold any injury to it indictable. Therefore the stealing of it is not larceny.[3]

§ 763. **Things adhering to the Soil — (Apples — Trees — Grass — Chattels Real, &c.).** — And this rule extends to every thing adhering to the soil;[4] so that, if, with felonious intent, a man severs and carries away apples from a tree, or the tree itself, or grass or grain standing,[5] or copper or lead or other thing attached to a church or to a private building,[6] or any chattel real,[7] he does not commit this offence.

Gold in Mine. — It is the same of gold-bearing quartz in a mine.[8] Even a nugget of gold, found on a loose pile of rocks, has been held not to be the subject of larceny, if it was separated from the mine, not by man, but by natural causes.[9] But, —

Things not attached — (Window-sashes — Key, &c.). — If there are window-sashes, neither hung nor beaded in the frames, and only fastened by laths nailed across the frames to prevent their shaking out, they are not deemed attached to the soil, and so are the subject of larceny.[10] The same also has been held of a key, although in the lock of a door.[11] And, generally, whatever is not attached is property of which this offence may be committed.[12]

[1] Ante, § 327-329.

[2] Vol. I. § 567.

[3] The State *v.* Burrows, 11 Ire. 477, 483.

[4] Hammond on Larceny, parl. ed. p. 41, pl. 93; 2 East P. C. 588; The State *v.* Hall, 5 Harring. Del. 492; Jackson *v.* The State, 11 Ohio State, 104. But see Ex parte Wilke, 34 Texas, 155; post, § 765, note.

[5] 3 Inst. 109; Pulton de Pace, 127 *b*; Dalton Just. c. 156, § 8; Comfort *v.* Fulton, 39 Barb. 56.

[6] 1 Hawk. P. C. Curw. ed. p. 148, § 34; Dalton Just. c. 156, § 8; 1 Hale P. C. 510. And see Rex *v.* Richards, Russ. & Ry. 28; Reg. *v.* Gooch, 8 Car. & P. 293.

[7] 1 Hale P. C. 510.

[8] People *v.* Williams, 35 Cal. 671.

[9] The State *v.* Burt, 64 N. C. 619.

[10] Rex *v.* Hedges, 1 Leach, 4th ed. 201, 2 East P. C. 590, note.

[11] Hoskins *v.* Tarrence, 5 Blackf. 417.

[12] Reg. *v.* Wortley, 1 Den. C. C. 162; Rex *v.* Nixon, 7 Car. & P 442; Smith *v.* Commonwealth, 14 Bush, 31.

§ 764. **Fixtures.** — The general rule is, that fixtures — things adhering to the soil — are not the subjects of larceny.[1] There are things of which there may be doubt, whether or not they are to be deemed fixtures within this rule.

Leathern Belt. — In Ohio, it was held to be larceny to steal a leathern belt, connecting certain wheels in a saw-mill.[2]

§ 765. **Severed from Soil.** — When the thing has been severed from the soil, whether by the owner,[3] or by a third person,[4] or even on a previous occasion by the thief himself,[5] it has thus become personal property, the stealing whereof is larceny.[6]

Turpentine in Boxes. — The North Carolina court held, that turpentine, which has flowed down the trees into boxes[7] made in them by the owners to catch it, in a state to be dipped out, is within this rule; though, in the particular case, the indictment being for stealing two barrels of turpentine, and the proof being that it had been dipped from the boxes at different times until nearly two barrels in all were taken, there was held to be a fatal variation of form between the allegation and proof. "A barrel of turpentine or flour is one thing, constituted by both the cask and its contents; and it is known so to be by that description."[8]

[1] Jackson *v.* The State, 11 Ohio State, 104; The State *v.* Davis, 22 La. An. 77.

[2] Jackson *v.* The State, supra.

[3] The State *v.* Moore, 11 Ire. 70.

[4] Dalton Just. c. 156, § 8.

[5] Emmerson *v.* Annison, 1 Mod. 89.

[6] 1 Hawk. P. C. Curw. ed. p. 148, § 34. In Jackson *v.* The State, 11 Ohio State, 104, cited to the last section, Peck, J., observed of this rule: "The rule that things savoring of the realty cannot be the subject of larceny, where the severance and asportation are continuous acts, is, to say the least of it, very subtle and unsatisfactory. The wrongful severance does not destroy the title nor the constructive possession of the owner; it is still his property *in its altered condition:* and its felonious asportation, though immediate, would seem to be as much a felonious taking of the personal property of another from his possession and without his consent as if the wrong-doer had severed it one day and removed it the next. In every case there is necessarily a point of time between its severance and its asportation; and, upon principle, we can see no difference between one instant of time and a period of twenty-four hours; for, in that interval, brief as it may be, the property lodgeth in the right owner as a chattel; and a felonious taking thereof should be larceny." p. 111, 112. The Texas court refused to follow the distinction; and held that, if doors are with felonious intent taken from their hinges and carried away in one transaction, it is larceny. Said Ogden, J.: "It is not the duty or province of the court to invoke a presumption of a refined technicality, in order to save an acknowledged criminal and thief from certain, speedy, and condign punishment." Ex parte Wilke, 34 Texas, 155, 159. And see The State *v.* Berryman, 8 Nev. 262; The State *v.* Parker, 34 Ark. 158.

[7] "An excavation, commonly called a box, is made in the body of the tree near the ground, into which the turpentine runs from the tree above."

[8] The State *v.* Moore, 11 Ire. 70.

Ice. — So ice, put into an ice-house for private use, is a subject of larceny; while, before being gathered, it was not such, because it constituted merely a part of a river or pond.[1]

§ 766. **Severing and Stealing in two Transactions or one.** — When the thief severs, and afterward steals, there seems to have been an opinion, that, for this to constitute two transactions, and therefore a larceny, the time intervening must at least amount to a day, because in law a day is not divisible.[2] The better doctrine, however, is, that no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction.[3]

Severing and Removing, then Stealing. — An examination of the cases will show, that, where the party has been holden for the larceny of an article originally adhering to the land, by reason of having severed it therefrom on a previous occasion, he left it, when he severed it, on the premises. Now, on principle, suppose he is shown to have carried it off when he severed it; and to have afterward, as a separate transaction, committed a further trespass and carrying away of it, with intent to steal, — is not the latter carrying away a larceny?[4]

[1] Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144. And see The State *v.* Pottmeyer, 33 Ind. 402.

[2] Hammond on Larceny, parl. ed. p. 44, pl. 102; Higgins *v.* Andrewes, 2 Rol. 55. As to the doctrine that a day is not divisible, see Stat. Crimes, § 28–31.

[3] Hammond on Larceny, parl. ed. p. 44, pl. 103, citing Udal *v.* Udal, Aleyn, 81–83; Emmerson *v.* Annison, 1 Mod. 89, 2 Keb. 874, 875; Bradcat *v.* Tower, 1 Mod. 89; 1 Hawk. P. C. c. 33, § 21; Lee *v.* Risdon, 7 Taunt. 188; The State *v.* Berryman, 8 Nev. 262. In a Delaware case the attorney-general contended, that, if the article has been laid down by the person severing it, though only for a moment, the person may then commit larceny of it, by taking it up immediately. The court, however, declined to yield to this doctrine; but said, "that the question whether this was or was not a larceny, did not depend on the prisoner laying down the pipes and taking them up again, but whether the severing and carrying away was *one continuous transaction.*" The State *v.* Hall, 5 Harring. Del. 492. Where three hours had elapsed after the article was severed and laid away on the premises, and then it was carried off in pursuance of one continuous plan and purpose, with no fresh impulse to steal it, this was held to be one transaction, which therefore did not permit the taking to be larceny. Reg. *v.* Townley, Law Rep. 1 C. C. 315, 12 Cox C. C. 59.

[4] See Vol. I. § 137–142. The California court, while adhering to the doctrine of this and the accompanying sections, because so the authorities are, observe: "We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas, if he had taken them from the ground after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich, gold bearing rock with felonious intent should only be a trespass if the rock be immediately carried off;

§ 767. **Personal Property.** — All larcenies, therefore, at the common law, are of goods and chattels.[1]

Value. — And they must be of some value.[2] Unless they are, they are not property, and no wrong is committed in taking them. But no particular value is required; even, for reasons already seen,[3] the article may be worth less than the smallest coin known to the law.[4]

§ 768. **Paper written on.** — Consequently there may be larceny of a piece of paper, however slight its value, since it has some value. And if the paper is written on, still its value is not utterly destroyed. But, as we shall by and by see,[5] there can be no larceny at the common law of a *chose in action*. The distinction in England therefore is, that, if a *chose in action* is so defective as to be void, or if a promissory note has been paid, an indictment may be maintained for stealing the piece of paper on which it was written.[6] But if the instrument is valid and subsisting, there can be no conviction for stealing it, even though the indictment describes it as a piece of paper; because its character as paper has been absorbed in its higher character as a *chose in action*.[7] There are American cases going to the extent of the English, and perhaps even denying that larceny can be committed of such writings as

but, if left on the ground and taken off by the thief a few hours later, it becomes larceny. The more sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and, if he then removed it with a felonious intent, he would be guilty of a larceny, whatever despatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions; and we have adverted to the question mainly for the purpose of directing the attention of the legislature to a subject which appears to demand a remedial statute." People *v.* Williams, 35 Cal. 671, 676, 677, opinion by Crockett, J.

[1] 2 East P. C. 587; The State *v.* Burrows, 11 Ire. 477, 483.

[2] Hammond on Larceny, parl. ed. p. 23, pl. 37 et seq.; Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; People *v.* Wiley, 3 Hill, N. Y. 194; The State *v.* Smart, 4 Rich. 356; The State *v.* Dobson, 3 Harring. Del. 563; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Allen, R. M. Charl. 518. But see Moore *v.* Commonwealth, 8 Barr, 260; Payne *v.* People, 6 Johns. 103.

[3] Vol. I. § 224.

[4] Reg. *v.* Morris, 9 Car. & P. 349; Rex *v.* Bingley, 5 Car. & P. 602. And see, as illustrating this doctrine, Bishop First Book, § 177–180.

[5] Post, § 769.

[6] Reg. *v.* Perry, 1 Den. C. C. 69, 1 Car. & K. 725; Rex *v.* Clark, Russ. & Ry. 181; s. c. nom. Rex *v.* Clarke, 2 Leach, 4th ed. 1036; Rex *v.* Vyse, 1 Moody, 218. And see People *v.* Wiley, 3 Hill, N. Y. 194.

[7] Reg. *v.* Green, Dears. 323, 6 Cox C. C. 296, 18 Jur. 158, 24 Eng. L. & Eq. 555. And see 1 Hawk. P. C. Curw. ed. p. 148, § 35; 2 East P. C. 597. **Stamp.** — Though a writing is not stamped, still it is a subsisting *chose in action* within the rule stated in the text. Reg. *v.* Watts, Dears. 326, 6 Cox C. C. 304.

come short of being subsisting *choses in action*.[1] But the topic has not been sufficiently discussed in our courts to establish any distinctive doctrine upon it. In principle, if the indictment charges the larceny as of a *chose in action*, or of a thing which appears on the face of the whole allegation to be such and nothing else, there can be no conviction; because the thing thus described is not the subject of larceny. But, in all cases, if the indictment describes it as a piece of paper of a given value, then there may be a conviction for stealing this piece of paper, viewed, not as a *chose in action*, but as mere paper. The reason is, that, as we saw in the preceding volume,[2] defendants are not to elect how they shall be prosecuted, but the power which prosecutes elects; and they cannot, on any principle of reason, set up in defence, that the thing stolen is of *a value above what it is alleged to be, therefore it is of no value*.[3]

§ 769. **Chose in Action.** — But, it is thus seen, for the larceny of a *chose in action* as such, an indictment at the common law cannot be maintained; it being considered a mere evidence of value, or of a right, without intrinsic worth.[4]

Bank-note. — And this principle goes so far as to include even a bank-note, which practically passes current as money.[5]

§ 770. **Muniments of Title — (Deeds — Leases, &c. — Box containing them).** — Writings under which a man holds title to his real

[1] In Payne *v.* People, 6 Johns. 103, the subject of the larceny was described as "a piece of paper on which a certain letter of information was written, of the value of twelve dollars and fifty cents;" and the stealing of it was held not to be criminal. The court said: "A bond, bill, or note was not the subject of larceny at the common law; and they certainly had as much worth in themselves as this letter." So the Pennsylvania court held, that a receipt, obtained in discharge of a debt which was paid with the worthless notes of a broken bank, is not a "valuable thing," within the statute. Moore *v.* Commonwealth, 8 Barr, 260. See also Wilson *v.* The State, 1 Port. 118; and compare it with People *v.* Wiley, 3 Hill, N. Y. 194, 211, and cases cited to the next two sections.

[2] Vol. I. § 791.

[3] **Records.** — Stealing rolls of parchment is a common-law larceny, though they are the records of a court of justice; unless they concern the realty. Rex *v.* Walker, 1 Moody, 155. And, in principle, this seems consistent with what is suggested above; but inconsistent with the idea, that an indictment for larceny cannot be maintained for stealing a *chose in action* described as a piece of paper or parchment.

[4] Vol. I. § 578; Culp *v.* The State, 1 Port. 33; 4 Bl. Com. 234; Reg. *v.* Green Dears. 323, 18 Jur. 128, 24 Eng. L. & Eq 555; People *v.* Cook, 2 Parker C. C. 12.

[5] Rex *v.* Pearson, 1 Moody, 313, 5 Car. & P. 121; Ratcliffe's Case, 2 Lewin, 57; Reg. *v.* Murtagh, 1 Crawf. & Dix C. C. 355; Rex *v.* Johnson, 3 M. & S. 539, 551. See Boyd *v.* Commonwealth, 1 Rob. Va. 691; Pyland *v.* The State, 4 Sneed, 357; Thomasson *v.* The State, 22 Ga. 499.

estate are *choses in action*, therefore not subjects of larceny; but, for this, the English books assign also the further reason, that they savor of the realty.[1] Within this rule is included a commission to settle the boundaries of a manor;[2] likewise a lease for a term of years.[3] And if a box contains writings of this kind, and is sealed up, the books say there can be no larceny of it; because, being sealed, it is of the same nature with its contents;[4] but, if it is unsealed, "it seemeth that the taking of the box feloniously is larceny."[5]

§ 771. **Wild Animals.** — From the doctrine of value, it further results that, at common law, there can be no larceny of animals *feræ naturæ*, or wild animals, unreclaimed. When reclaimed, they become the subjects of this offence; provided they are fit for food, not otherwise.[6]

Honey-bees. — Reclaimed honey-bees are an exception; because, though not fit for food themselves, their honey is.[7]

Hawks. — Likewise tamed hawks have received the distinction of being subjects of larceny, while yet they are not eaten by man; on account "of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons, to make them fitter for great employments,"[8] — a reason better appreciated by the ancient gentry of England than by our poultry-raising farmers. Hawkins mentions, as the ground of this exception, the "very high value which was formerly set upon that bird."[9]

§ 772. **Hide of wild Animal.** — When an animal of which there can be no larceny is killed, and labor is expended on it or its hide, the product pretty clearly becomes a subject for this offence, by reason of the labor.[10]

§ 773. **Wild and Reclaimed — Fit for Food or not — (Animals enumerated — Fish).** — Of animals of which, when reclaimed, larceny may be committed, within the foregoing rules, are pigeons

[1] 4 Bl. Com. 234; 2 East P. C. 596; Hammond on Larceny, parl. ed. p. 45, pl. 108; Dalton Just. c. 156, § 8.

[2] Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12, 2 East P. C. 596.

[3] Pulton de Pace, 127 *b*.

[4] Hammond on Larceny, parl. ed. p. 47, pl. 111; 3 Inst. 109; 1 Hale P. C. 510.

[5] Dalton Just. c. 156, § 8.

[6] 4 Bl. Com. 235; The State *v.* House, 65 N. C. 315.

[7] The State *v.* Murphy, 8 Blackf. 498; Harvey *v.* Commonwealth, 23 Grat. 941.

[8] 3 Inst. 109; s. p. 1 Hale P. C. 512.

[9] 1 Hawk. P. C. Curw. ed. p. 149, § 36.

[10] See Reg. *v.* Gallears, 3 New Sess. Cas. 704, 13 Jur. 1010, 1 Den. C. C. 501; Norton *v.* Ladd, 5 N. H. 203.

and doves,[1] hares, conies, deer, swans,[2] wild boars, cranes, pheasants, and partridges;[3] to which may be added fish suitable for food,[4] including undoubtedly oysters.[5] Of those of which there can be no larceny, though reclaimed, are dogs,[6] cats, bears, foxes, apes, monkeys, polecats, ferrets,[7] squirrels, parrots, singing-birds,[8] martins,[9] and coons.[10]

Reclaimed and not fit for Food. — Though animals of the latter class may, when reclaimed, have a recognized value, and the right of property in them be protected in civil jurisprudence,[11] it is otherwise in criminal; on the ground, probably, that anciently they were deemed of no determinate worth, and thus was established a rule which the courts could not afterward change.[12]

§ 774. **Domestic Animals — Fowls — (Enumerated).** — Both the foregoing classes are distinguishable from domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls,[13] turkeys,[14] and the like; which, being tame in their nature, are subjects of larceny on precisely the same grounds as other personal property.[15]

§ 775. **What a Reclaiming.** — Killing a wild animal is reclaiming it, so that, —

[1] Commonwealth *v.* Chace, 9 Pick. 15; Reg. *v.* Cheafor, 2 Den. C. C. 361, 5 Cox C. C. 367, 8 Eng. L. & Eq. 598.

[2] 1 Hawk. P. C. Curw. ed. p. 149, § 41, 42; 4 Bl. Com. 235; 1 Hale P. C. 511, 512.

[3] 3 Inst. 110; Reg. *v.* Shickle, Law Rep. 1 C. C. 158; Reg. *v.* Head, 1 Fost. & F. 350; Reg. *v.* Roe, 11 Cox C. C. 554.

[4] 2 East P. C. 610.

[5] Fleet *v.* Hegeman, 14 Wend. 42. See Reg. *v.* Downing, 11 Cox C. C. 580.

[6] Findlay *v.* Bear, 8 S. & R. 571; Ward *v.* The State, 48 Ala. 161; The State *v.* Holder, 81 N. C. 527; The State *v.* Lymus, 26 Ohio State, 400. Dogs in New York — appear to be deemed subjects of larceny, a statute there making them property. People *v.* Maloney, 1 Parker C. C. 593; People *v.* Campbell, 4 Parker C. C. 386. See also, as perhaps to the like effect, The State *v.* McDuffie, 34 N. H. 523. See a subsequent note to this section.

[7] Hammond on Larceny, parl. ed. p. 34, pl. 65; Rex *v.* Searing, Russ. & Ry. 350, as to ferrets; 3 Inst. 109.

[8] Dalton Just. c. 156, § 7.

[9] Norton *v.* Ladd, 5 N. H. 203.

[10] Warren *v.* The State, 1 Greene, Iowa, 106.

[11] Rex *v.* Searing, Russ. & Ry. 350; Norton *v.* Ladd, 5 N. H. 203; Warren *v.* The State, 1 Greene, Iowa, 166; Dalton Just. c. 156, § 7; 1 Hale P. C. 512. That the owner of a dog, for instance, may maintain against a trespasser an action for his value, is well settled. Wheatley *v.* Harris, 4 Sneed, 468; Parker *v.* Mise, 27 Ala. 480. The latter case holds that a dog is a species of property for an injury to which an action may be maintained, and it is not necessary the dog should be shown to be of any pecuniary value, — the court referring to Dodson *v.* Mock, 4 Dev. & B. 146; Perry *v.* Phipps, 10 Ire. 259; The State *v.* Latham, 13 Ire. 33; Wright *v.* Ramscot, 1 Saund. 84; 2 Bl. Com. 393, 394; Lentz *v.* Stroh, 6 S. & R. 34; King *v.* Kline, 6 Barr, 318. See also Vol. I. § 1080.

[12] Hammond on Larceny, parl. ed. p. 35, pl. 66. And see Vol. I. § 275.

[13] Commonwealth *v.* Beaman, 8 Gray, 497, 499.

[14] The State *v.* Turner, 66 N. C. 618.

[15] Dalton Just. c. 156, § 1; 1 Hale P. C. 511.

Carcass. — The carcass, if fit for food, is the subject of larceny.[1]

Oysters in Bed. — The New York court has held, that oysters planted in a bed, clearly marked out in a bay or arm of the sea, are the property of him who plants them, and trespass lies against one interfering with them, though the spot is the common fishery of all the inhabitants of the town.[2] Therefore, under like circumstances, an indictment for larceny could probably be maintained; indeed, the New Jersey tribunal has held that it can be.[3]

Fish in Tank, &c. — Fish confined in a tank or net are sufficiently secured; but how, in a pond, is a question of doubt,[4] which seems to admit of answers differing with the circumstances of cases.

§ 776. **Manual Capture.** — There are two methods of reclaiming a wild animal; the one, by getting a mere physical control of it, as when it is confined in a cage or by a rope; the other, by obtaining what may be called a mental control, which takes place when it is tamed. As to the former method, —

Chasing Fox. — The majority of the New York court held, in a civil cause, that one who hunts a fox acquires in it no property merely by the pursuit; consequently, if another, in sight of the pursuer, kills and takes it, no action will lie. The doctrine was, that he must bring the animal within his control, manifesting an intention to appropriate it to his own use: as, where, after mortally wounding it, he continues the chase; or where he encompasses it with nets and toils, or otherwise intercepts it, so as to deprive it of its natural liberty, and render escape impossible. Livingston, J., dissenting, held, that "a person who, with his hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal as to have a right of action against another, who, in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away."[1] In another case it was adjudged, that, if, after wounding the animal, and continuing the pursuit until evening, the hunter abandons the ground, though his dogs continue on, he acquires in it no property.[2]

§ 777. **Capturing Bees.** — Marking a tree, which has wild bees in it, is clearly not a reclaiming of them;[3] and the Pennsylvania court held, that even the confining of them in the tree is not enough. They must, at least, be hived and removed before they can be a subject of larceny.[4]

§ 778. **Whale.** — Among whale fishermen, if a whale is killed, anchored, and left with marks of appropriation, it is the property of the captors. And though it should then drag from its first anchorage, and be found by the crew of another vessel, neither by usage nor law is the property of its captors in it divested.[5]

§ 779. **Taming.** — Concerning the other method of reclaiming the animal; if it is made tame, it is sufficiently reclaimed, though under no physical restraint. Thus, —

Pigeons in Dove-cot. — Pigeons kept in an open dove-cot, to which they return every night to roost, are subjects of larceny.[6]

Straying away while Tame. — In civil jurisprudence it has been held, that trover lies for wild geese, which, having been tamed, have strayed away without regaining their natural liberty.[7] On the other hand, the Massachusetts court has denied that larceny

[1] Dalton Just. c. 156, § 7; 3 Inst. 110; 1 Hale P. C. 511.

[2] Fleet *v.* Hegeman, 14 Wend. 42.

[3] The indictment charged the defendant with stealing eighteen bushels of oysters, of the value of eighteen dollars, of the goods and chattels of, &c. On the trial, the jury were instructed, that, if he feloniously took the same oysters which were planted, if they could be easily distinguished from others in the sound, if they were planted in a place where oysters did not naturally grow, if the place was so marked as to enable persons going into the sound for oysters growing there naturally to distinguish these, and know they were planted and held as private property, and were not natural oysters in a natural bed, they were the subject of larceny. This instruction was held to be correct, and Green, C. J., observed: "Oysters, though usually included in that description of animals [*feræ naturæ*], do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things, or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his house or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed and made tame by art, industry, or education, nor to be confined, in order to be within the immediate power of the owner. . . . Under our laws, there may be property in oysters growing naturally upon the land of another person, and which the owner may have acquired by purchase." The State *v.* Taylor, 3 Dutcher, 117, 119, 120.

[4] 2 East P. C. 610; 3 Inst. 110; Dalton Just. c. 156, § 2; Reg. *v.* Steer, 6 Mod. 183; Hundson's Case, 2 East P. C. 611, 612.

[1] Pierson *v.* Post, 3 Caines, 175.

[2] Buster *v.* Newkirk, 20 Johns. 75. **Right of Hunting.** — In this country, the common-law right to hunt for animals *feræ naturæ*, in the uncultivated and unenclosed grounds of another, is recognized. McConico *v.* Singleton, 2 Mill, 244; Broughton *v.* Singleton, 2 Nott & McC. 338.

[3] Gillet *v.* Mason, 7 Johns. 16. And see Ferguson *v.* Miller, 1 Cow. 243; Idol *v.* Jones, 2 Dev. 162.

[4] Wallis *v.* Mease, 3 Binn. 546; ante, § 771.

[5] Taber *v.* Jenny, 1 Sprague, 315.

[6] Rex *v.* Brooks, 4 Car. & P. 131; Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 2 Den. C. C. 361, 5 Cox C. C. 367, 15 Jur. 1065.

[7] Amory *v.* Flyn, 10 Johns. 102.

can be committed of doves, unless found on the owner's premises.[1] The true view probably is: the defendant must have known that the animal was reclaimed, else he could not have had the intent to steal it;[2] the indictment must set forth that it was reclaimed;[3] or that it was tame;[4] but, further than this, in the language of Mr. Hammond, who seems to have given the subject a pretty careful examination, "in animals *feræ naturæ* and fit for food, the ownership, when reclaimed, continues notwithstanding any loss of possession; and these, therefore, notwithstanding the loss, are the subjects of larceny."[5]

The Young. — But the taming of wild animals does not extend to their young, which must, it seems, be in what we have termed the physical possession[6] of the owner, or theft cannot be committed of them.[7] Still, —

Pheasants. — Pheasants reared by hens, and never wild,[8] and young pheasants hatched by a hen and under its care, though in a field at a distance from the dwelling-house,[9] are subjects of larceny.

§ 780. **Dead Bodies.** — There can be no property in a person deceased; consequently larceny cannot be committed of his body.[10] But —

Clothes — Shroud. —It can be of the clothes found upon the body,[11] or of the shroud.[12]

§ 781. **Things obtained by wrong.** — If one steals goods from a thief, he commits larceny;[13] and, generally, whatever is produced by wrong is the subject of this offence, the same as are the products of right. Thus, —

Violations of Liquor Laws. — Money received for intoxicating liquor, sold contrary to the inhibitions of a penal statute, may be

[1] Commonwealth *v.* Chace, 9 Pick. 15. And see 1 Hawk. P. C. Curw. ed. p. 149, § 40, 41.

[2] Hammond on Larceny, parl. ed. p. 36, pl. 70; 3 Inst. 110; 1 Hale P. C. 511.

[3] Rex *v.* Rough, 2 East P. C. 607. And see Reg. *v.* Cox, 1 Car. & K. 494.

[4] Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 5 Cox C. C. 367, 2 Den. C. C. 361.

[5] Hammond on Larceny, parl. ed. p. 36, pl. 69, referring to 3 Inst. 110; Lamb. 271; Crompt. 33 *b*; Fulton de Pace, 131; Dalton Just. 350; 1 Hale P. C. 511.

[6] Ante, § 776, 777.

[7] 1 Hale P. C. 511.

[8] Reg. *v.* Head, 1 Fost. & F. 350.

[9] Reg. *v.* Cory, 10 Cox C. C. 23; Reg. *v.* Garnham, 8 Cox C. C. 451, 2 Fost. & F. 347.

[10] 2 East P. C. 652; 12 Co. 106, Fraser's note.

[11] Wonson *v.* Sayward, 13 Pick. 402.

[12] Haynes's Case, 12 Co. 113; s. c. nom. Hain's Case, 3 Inst. 110; 1 Hale P. C. 515; 1 Hawk. P. C. Curw. ed. p. 150, § 46.

[13] 1 Hale P. C. 507. **Matter not Mailable.** — Larceny from the post-office may be committed of matter not mailable by law. United States *v.* Randall, Deady, 524.

stolen with the same consequence as any other money.[1] And intoxicating liquor purchased in violation of law, and kept to be sold contrary to the inhibition of a statute, falls within the same doctrine.[2]

Gaming Checks. — In like manner, it has been held that larceny can be committed of "checks kept and used for gambling contrary to a statute."[3]

II. *The Property of which Larceny under Statutes may be committed.*

§ 782. **Extending Common Law.** — The statutes now to be considered are those extending the law of larceny to things which were not the subjects of it before.[4]

§ 783. **In General.** — The general idea, which has found expression in various forms of particular words, has been to make every thing of practical value in the community the subject of this offence, thus doing away with the old and technical distinctions of the common law relating to value. Thus, —

Fixtures — Parts of the Realty — Muniments of Title, &c. — We have statutes against the larceny of fixtures, and of lead and other things which have become incorporated into buildings,[5] and of writings relating to real estate.[6]

§ 784. **Growing Grain, &c.** — By the South Carolina Act of 1826, "If any person shall take from any field, not belonging to such person, any cotton, corn, rice, or other grain fraudulently, with an intent secretly to convert the same to the use of such person taking the same, such person so offending shall be guilty of lar-

[1] Commonwealth *v.* Rourke, 10 Cush. 397; The State *v.* May, 20 Iowa, 305, 309.

[2] Commonwealth *v.* Coffee, 9 Gray, 139; The State *v.* May, 20 Iowa, 305.

[3] Bales *v.* The State, 3 W. Va. 685. Said Brown, President: "That they could not have been recovered by action, is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles. And the case of Spalding *v.* Preston, 21 Vt. 9, is directly in point. But still, the question recurs, whether larceny can be committed of such prohibited things. And, to hold that it could not, would be to run the hazard of encouraging larceny by discouraging gaming." p. 687.

[4] Ante, § 761.

[5] Rex *v.* Worrall, 7 Car. & P. 516; Rex *v.* Richards, Russ. & Ry. 28; Reg. *v.* Gooch, 8 Car. & P. 293; Rex *v.* Nixon, 7 Car. & P. 442; The State *v.* Stone, 1 Vroom, 299; Reg. *v.* Jones, Dears. & B. 555, 7 Cox C. C. 498.

[6] Rex *v.* John, 7 Car. & P. 324.

ceny." Whereupon the court has held, that corn growing in the field, not previously severed from the soil, is within the act.[1] Likewise are peas within the words "other grain."[2]

§ 785. **Choses in Action, &c. — (Enumerated).** — The most important of these enactments make *choses in action*, records, receipts, and various similar things the subjects of larceny. In other connections are explained the meanings of such words as "*order*,"[3] "*warrant*,"[4] "*request*,"[5] "*promissory note*,"[6] "*bill of exchange*,"[7] "*bank-bill*" or "*bank-note*,"[8] "*undertaking*,"[9] "*receipt*,"[10] "*acquittance*,"[11] "*goods and chattels*,"[12] "*money*,"[13] "*securities and effects*,"[14] "*deeds*."[15] There are also found in these statutes various other words, such as "*personal goods*,"[16] "*personal property*,"[17] "*valuable security*,"[18] "*security for money*,"[19] "*book*

[1] The State *v.* Stephenson, 2 Bailey, 334. There is a preamble which aids this construction; but the court thought the same result would follow without the preamble.

[2] The State *v.* Williams, 2 Strob. 474.

[3] Stat. Crimes, § 325–331, 335; ante, § 560; Rex *v.* Hart, 6 Car. & P. 106.

[4] Stat. Crimes, § 325, 326, 332, 333, 335; ante, § 560; Reg. *v.* Morrison, Bell C. C. 158, 8 Cox C. C. 194.

[5] Stat. Crimes, § 325, 326, 334, 335; ante, § 560.

[6] Stat. Crimes, § 336; ante, § 561; Culp *v.* The State, 1 Port. 33; Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; Wilson *v.* The State, 1 Port. 118; People *v.* Call, 1 Denio, 120; People *v.* Cook, 2 Parker C. C. 12.

[7] Stat. Crimes, § 338; ante, § 562; Rex *v.* Aickles, 1 Leach, 4th ed. 294, 2 East P. C. 675; Rex *v.* Hart, 6 Car. & P. 106.

[8] Stat. Crimes, § 337; Pomeroy *v.* Commonwealth, 2 Va. Cas. 342; The State *v.* Tillery, 1 Nott & McC. 9; The State *v.* Casados, 1 Nott & McC. 91; Sylvester *v.* Girard, 4 Rawle, 185; Spangler *v.* Commonwealth, 3 Binn. 533; McDonald *v.* The State, 8 Misso. 283; Rex *v.* Mead, 4 Car. & P. 535; Culp *v.* The State, 1 Port. 33; People *v.* Kent, 1 Doug. Mich. 42; The State *v.* Allen, R. M. Charl. 518; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Dobson, 3 Harring. Del. 563; The State *v.* Smart, 4 Rich. 356; People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Vyse, 1 Moody, 218; Rich *v.* The State, 8 Ohio, 111; Cummings *v.* Commonwealth, 2 Va. Cas. 128; Johnson *v.* People, 4 Denio, 364; Low *v.* People, 2 Parker C. C. 37. And see Starkey *v.* The State, 6 Ohio State 266.

[9] Stat. Crimes, § 339; ante, § 563.

[10] Stat. Crimes, § 341, 342; ante, § 564; People *v.* Loomis, 4 Denio, 380; Reg. *v.* Frampton, 2 Car. & K. 47; Reg. *v.* Rodway, 9 Car. & K. 784; Commonwealth *v.* Williams, 9 Met. 273.

[11] Stat. Crimes, § 343; ante, § 565.

[12] Stat. Crimes, § 344, 345; ante, § 358; Rex *v.* Mead, 4 Car. & P. 535; People *v.* Kent, 1 Doug. Mich. 42; Rex *v.* Vyse, 1 Moody, 218.

[13] Stat. Crimes, § 346; ante, § 857, 482.

[14] Stat. Crimes, § 217, 340; ante, § 359; Rex *v.* Aslett, 1 New Rep. 1, 2 Leach, 4th ed. 958, Russ. & Ry. 67.

[15] Stat. Crimes, § 340, note; ante, § 567.

[16] Stat. Crimes, § 344; United States *v.* Moulton, 5 Mason, 535.

[17] People *v.* Loomis, 4 Denio, 380.

[18] Stat. Crimes, § 217, 340; Reg. *v.* Heath, 2 Moody, 33; Rex *v.* Yates, 1 Moody, 170; Rex *v.* Hart, 6 Car. & P. 106; Rex *v.* Vyse, 1 Moody, 218; Reg. *v.* Smith, Dears. 561; Reg. *v.* Lowrie, Law Rep. 1 C. C. 61, 10 Cox C. C. 388.

[19] Reg. *v.* Williams, 6 Cox C. C. 49.

of accounts,"[1] "*draft*,"[2] "*post-letter*,"[3] and "*record*,"[4] which require no extended explanation here.

"Voucher." — A "voucher," within the New Jersey statute, is any instrument which attests, warrants, maintains, bears witness.[5]

§ 786. **Construction of the Statutes.** — In the construction of these statutes, the rules of common-law larceny are to be applied.[6] Thus, —

How Genuine and of Value. — The *chose in action* must be genuine, and of some value as such, or, at least, must pass for value;[7] yet, under some circumstances, it may be one which the law forbids to be issued; being still binding on the parties, and therefore valuable.[8]

§ 787. **Delivery.** — Where a debtor procured his creditor to sign a receipt for the debt, pretending to be about paying him, and then, without paying, took it away fraudulently, he was held, in New York, not to be guilty of a larceny of the receipt; because it had not become of value by delivery.[9] And a promissory note, which has not passed from the hands of its

[1] Commonwealth *v.* Williams, 9 Met. 273.

[2] Rex *v.* Pooley, Russ. & Ry. 12, 3 B. & P. 311; Reg. *v.* West, Dears. & B. 109.

[3] Reg. *v.* Mence, Car. & M. 234, as to the words "shall steal from or out of a post letter, any chattel or money;" Rex *v.* Howatt, 2 East P. C. 604; Reg. *v.* Wynn, 1 Den. C. C. 365, Temp. & M. 32, 3 New Sess. Cas. 414, 13 Jur. 107; Reg. *v.* Shepherd, Dears. 606.

[4] Wilson *v.* The State, 5 Pike, 513.

[5] The State *v.* Hickman, 3 Halst. 299.

[6] Rex *v.* John, 7 Car. & P. 324; The State *v.* Braden, 2 Tenn. 68; The State *v.* Wisdom, 8 Port. 511; Vaughn *v.* Commonwealth, 10 Grat. 758; People *v.* Call, 1 Denio, 120; Stat. Crimes, § 139–141, 146.

[7] Pomeroy *v.* Commonwealth, 2 Va. Cas. 342; The State *v.* Tillery, 1 Nott & McC. 9; The State *v.* Casados, 1 Nott & McC. 91; Rex *v.* Pooley, Russ. & Ry. 12, 3 B. & P. 311; McDonald *v.* The State, 8 Misso. 283; Rex *v.* Mead, 4 Car. & P. 535; Culp *v.* The State, 1 Port. 33; Wilson *v.* The State, 1 Port. 118; The State *v.* Allen, R. M. Charl. 518; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Dobson, 3 Harring. Del. 563; The State *v.* Smart, 4 Rich. 356; People *v.* Miller, 4 Denio, 364; Low *v.* People, 2 Parker C. C. 37.

[8] Ante, § 768; Sylvester *v.* Girard, 4 Rawle, 185; Starkey *v.* The State, 6 Ohio State, 266. See Rex *v.* Yates, 1 Moody, 170; Culp *v.* The State, 1 Port. 33; Rex *v.* Pooley, 3 B. & P. 315, Russ. & Ry. 31; ante, § 538, 539. And see ante, § 781.

[9] People *v.* Loomis, 4 Denio, 380. S. P., perhaps, Reg. *v.* Frampton, 2 Car. & K. 47. Reg. *v.* Rodway, 9 Car. & P. 784, might seem opposed to this doctrine, but for the fact that the indictment was for stealing, not the receipt, but the piece of paper on which it was written. See ante, § 768; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532. And see the observations in Reg. *v.* Frampton, above cited.

maker, is not within statutes against the stealing of promissory notes.[1]

Signature under Duress. — To compel one, by threats and duress, to write and deliver a promissory note is not to steal it.[2]

Redeemed Bank-bills. — But, if bank-bills have been redeemed by the bank, and are in the hands of its agents, it has been held that statutory larceny may be committed of them; for, besides the paper being of value to the bank, "a consideration of more importance is, that, notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would have been bound to him for the payment of them, in the same manner as if they had not been redeemed."[3]

III. *The Ownership of the Property.*

§ 788. **What for "Criminal Procedure."** — The rules to determine in whom the indictment shall lay the ownership of the property stolen are stated in "Criminal Procedure."[4]

Must be Owner. — Yet aside from what is there laid down, things, to be the subjects of larceny, must have an owner in fact;[5] though doubtless he may be unknown to the thief, as he certainly may be to the grand jury who indict him.[6]

§ 789. **Another's.** — According to our definition of larceny, the thing stolen must be "another's."[7] But, —

General or Special Ownership. — The law recognizes in things personal two kinds of ownership, general and special. Therefore an article may be stolen from one who is either the general or special owner of it.[8] For instance, —

[1] Wilson *v.* The State, 1 Port. 118. Yet the maker of a promissory note delivered, is guilty if he steals it from the holder. People *v.* Call, 1 Denio, 120. See, also, People *v.* Mackinley, 9 Cal. 250.

[2] Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599.

[3] Commonwealth *v.* Rand, 7 Met. 475, 476. And see People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Vyse, 1 Moody, 218; Rex *v.* Ransom, Russ. & Ry. 232, 2 Leach, 4th ed. 1090; Reg. *v.* West, Dears. & B. 109.

[4] Crim. Proced. II. § 718–726.

[5] 1 Hale P. C. 512.

[6] 1 Gab. Crim. Law, 602.

[7] Ante, § 758 and note.

[8] Crim. Proced. II. § 720; Ante, § 758, note, par. 19; 1 Hale P. C. 513; 2 East P. C. 652; Langford *v.* The State, 8 Texas, 115; The State *v.* Furlong, 19 Maine, 225; Gatlin *v.* The State, 39 Texas, 130; Moseley *v.* The State, 42 Texas, 78; The State *v.* Mullen, 30 Iowa, 203; Commonwealth *v.* Sullivan, 104 Mass. 552; People *v.* McDonald, 43 N. Y. 61; The State *v.* Stephens, 32 Texas, 155; Turner *v.* The State, 7 Texas Ap. 586; Burt *v.* The State, 7 Texas Ap. 578; The State *v.* Pitts, 12 S. C. 180.

Goods in Hands of Bailee. — Goods in the hands of a bailee may ordinarily be described in the indictment as either the bailee's[1] or bailor's,[2] at the election of him who draws it. And —

Infant's Clothing. — Articles of clothing, worn by an infant, may usually be alleged to belong to the infant[3] or the father,[4] according to such election. So —

Property Stolen. — Goods stolen from a thief may be charged as the goods of either the thief or the true owner.[5]

Illustrative. — Such are illustrations of doctrines which belong as well to the law of "Criminal Procedure" as to the law treated of in these volumes.

§ 790. **Stealing one's own Goods.** — From the foregoing views it follows, that, if goods are in the possession of a special owner, the general owner may commit larceny of them. Thus, —

Cases of Bailment. — "If A," says East, "bail goods to B, and afterwards, *animo furandi*, steal them from him, with design probably to charge him with the value, . . . the felony is complete."[6]

Goods committed to Servant. — East adds, that it is larceny "if A send his servant with money, and afterwards waylay and rob him, with intent to charge the hundred."[7] This proposition is, in principle, not reconcilable with others well established; namely, that, in these cases of larceny of one's own goods, the indictment must lay the ownership in the special owner, yet that, in the law of larceny, a servant entrusted with goods is never regarded as the special owner of them, and an indictment for stealing them cannot allege the ownership to be in him.[8]

§ 791. **Goods attached.** — If goods are attached by an officer,

[1] Reg. *v.* Bird, 9 Car. & P. 44; Jones *v.* The State, 13 Ala. 153; Reg. *v.* Jones, 2 Moody, 293; The State *v.* Wisdom, 8 Port. 511.

[2] Reg. *v.* Vincent, 2 Den. C. C. 464, 9 Eng. L. & Eq. 548.

[3] The State *v.* Koch, 4 Harring. Del. 570.

[4] Reg. *v.* Hughes, Car. & M. 593; 2 East P. C. 654; 1 Gab. Crim. Law, 600.

[5] Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144. See The State *v.* Somerville, 21 Maine, 14.

[6] 2 East P. C. 654; 1 Gab. Crim. Law, 600; 1 Hale P. C. 513; 3 Inst. 110; People *v.* Thompson, 34 Cal. 671. See Commonwealth *v.* Tobin, 2 Brews. 570; Crim. Proced. II. § 720, 721. In Civil Jurisprudence. — So in civil jurisprudence, the person to whom property, subject to a lien, as, for instance, for freight, is committed with directions not to deliver it until the lien is discharged, may maintain an action of trespass against the general owner, who, with knowledge of these facts, takes it without permission, and without discharging the lien. Cowing *v.* Snow, 11 Mass. 415 And see Rue *v.* Perry, 63 Barb. 40.

[7] 2 East P. C. 654. And see the other authorities cited in the last note.

[8] Crim. Proced. II. § 720, 721, and note.

the latter becomes a special owner, and the general owner may commit larceny of them. Consequently, in New York, some articles having been levied on by a constable under an execution against the owner, the latter took them from the constable's possession, accused him of having wrongfully appropriated them, and sued him for their value; when the court sustained against this owner an indictment for larceny, the property being alleged to be the constable's.[1]

Intent to Steal. — In these cases, as in others, to constitute larceny there must not only be the wrongful taking, but the particular wrongful intent which the law of larceny requires.[2] Therefore the English judges were divided on the question, whether a man may be guilty of larceny of his own goods, where the intent and effect of the act are simply to defraud the crown of revenue.[3] In a Massachusetts case, on an indictment of the general owner for larceny of the goods from an attaching officer, he was permitted to show, in his defence, that his object was, not to charge the officer with their value, which would have made the transaction larceny, but to prevent other creditors from placing upon them additional attachments. This, "though unlawful, would not be larceny." Consequently he might prove that he intentionally left with the officer sufficient to satisfy the claims of the creditor whose attachment was already on them.[4]

§ 792. **Part Owner.** — By such methods as we are now considering, a man may make himself guilty of the larceny of property of which he is the part owner, even by taking it from the other part owner; though, in ordinary circumstances, it is not larceny for a part owner to convert the whole of the thing to his individual use, however wrongful may be his intent.[5]

§ 793. **Limit of Doctrine.** — On principle, we must conclude, that the doctrines of the last three sections can apply only to cases in which the person in possession sustains to the owner such a relation as to be legally chargeable with the loss of the goods,

[1] Palmer *v.* People, 10 Wend. 165; s. p. The State *v.* Dewitt, 32 Misso. 571. See, however, The State *v.* Sotherlen, Harper, 414; The State *v.* Mazyck, 3 Rich. 291. And see Brownell *v.* Manchester, 1 Pick. 232; Bond *v.* Padelford, 13 Mass. 394; Inglee *v.* Bosworth, 5 Pick. 498.

[2] People *v.* Thompson, 34 Cal. 671; The State *v.* Dewitt, 32 Misso. 571.

[3] Rex *v.* Wilkinson, Russ. & Ry. 470.

[4] Commonwealth *v.* Greene, 111 Mass. 392.

[5] Kirksey *v.* Fike, 29 Ala. 206; Reg. *v.* Webster, Leigh & C. 77; Reg. *v.* Burgess, Leigh & C. 299.

or at least to have a right of action in his own name against a third person for a trespass upon them.[1]

IV. *The Asportation.*

§ 794. **"Carried Away."** — In the language of the old definitions of larceny, the goods taken must be *carried away*.[2] But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is, that any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient;[3] while nothing short of this will do.[4]

§ 795. **Instantaneous Control — (Illustrations).** — Therefore if the thief has the absolute control of the thing but for an instant, the larceny is complete.[5] Thus, where one lifted a bag, which he meant to steal, from the bottom of the boot of a coach, but, before it was completely above the space it had occupied, he was detected; yet, every part of it having been raised from where the particular part had lain, this asportation was held to be sufficient.[6] And where one, with the felonious intent, seized another's pocket-book, in the vest pocket, and lifted it about three inches from the bottom of the pocket, when his operations were intercepted, this was held to be a complete larceny.[7] But the asportation was adjudged not sufficient, where a person, who was in a wagon, set a long bale upon its end, and cut the wrapper all the way down, yet was apprehended before he had taken any thing out of the bale.[8] And merely to turn over on its side a barrel of turpentine, which stood on its end, is not an adequate asportation of it, to

[1] And see 2 East P. C. 654; 1 Gab. Crim. Law, 600; Rex *v.* Bramley, Russ. & Ry. 478; Reg. *v.* Cain, 2 Moody, 204; Rex *v.* Webb, 1 Moody, 431; McDaniel's Case, 19 Howell St. Tr. 745, 803; Reg. *v.* Watts, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558; Reg. *v.* Webster, Leigh & C. 77; Reg. *v.* Burgess, Leigh & C. 299.

[2] Ante, § 758, note.

[3] Rex *v.* Rawlins, 2 East P. C. 617; The State *v.* Wilson, Coxe, 439; Rex *v.* Walsh, 1 Moody, 14; Reg. *v.* Simpson, 29 Eng. L. & Eq. 530, Dears. 421, 18 Jur. 1030.

[4] Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556; 3 Greenl. Ev. § 154; 1 Hawk. P. C. Curw. ed. p. 147, The State *v.* Jones, 65 N. C. 395.

[5] The State *v.* Jackson, 65 N. C. 305, Garris *v.* The State, 35 Ga. 247; Harrison *v.* People, 50 N. Y. 518; Eckels *v.* The State, 20 Ohio State, 508.

[6] Rex *v.* Walsh, 1 Moody, 14.

[7] Harrison *v.* People, supra.

[8] Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556. But where the prisoner had removed a parcel of goods from the fore part to near the tail of the wagon, the asportation was held to be complete. Rex *v.* Coslet, 1 Leach, 4th ed. 236; s. c. nom. Cozlett's Case, 2 East P. C. 556.

constitute larceny.[1] Again, where goods in a shop were tied to a string, fastened at one end to the counter, a thief who carried them as far away as the string would permit was held not to have committed larceny, because of their being thus attached.[2] The same rule was applied where a purse, fastened in this way to a bunch of keys, was taken from the pocket, while the keys remained in the pocket; there was no asportation, since there was no complete severance from the person.[3] In these cases, the prisoner's control over the thing was not for an instant perfect; if it had been, it would have been sufficient, even though the control had the next instant been lost.[4] So the court held, where a man's watch and chain were forced from his pocket, but the key of the watch immediately caught and fastened itself upon a button: the larceny here was complete.[5]

§ 796. **Giving back the Property.** — A person who takes a thing feloniously does not purge the offence by handing it immediately back to the owner.[6] When, therefore, a robber, on getting the purse he demanded, returned it, saying, "If you value your purse, you will please to take it back, and give me the contents of it," but was apprehended before the money was given, he was held to have committed the crime.[7]

§ 797. **Shooting an Animal.** — Merely to shoot down, with felonious intent, a live animal, is not an asportation sufficient to constitute a larceny of the animal;[8] but, where there is no previous asportation, there must be also, it seems, some slight removal after the killing.[9] On the same principle, —

Compelling Owner to drop a Thing. — Where one stopped another carrying a bed, and told him to put it down or be shot; but, the

[1] The State *v.* Jones, 65 N. C. 395.

[2] Anonymous, 2 East P. C. 556, 1 Leach, 4th ed. 321, note.

[3] Wilkinson's Case, 1 Hale P. C. 508.

[4] And see Commonwealth *v.* Luckis, 99 Mass. 431.

[5] Reg. *v.* Simpson, 29 Eng. L. & Eq. 530, Dears. 421, 18 Jur. 1030. So, to remove an ear-ring from a lady's ear to the curls of her hair, where it lodges, is an asportation; "for it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant." Rex *v.* Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557.

[6] Roscoe Crim. Ev. 588; The State *v.* Scott, 64 N. C. 586; Georgia *v.* Kepford, 45 Iowa, 48, 52. See Rex *v.* Wright, 9 Car. & P. 554, note; Reg. *v.* Phetheon, 9 Car. & P. 552; Reg. *v.* Peters, 1 Car. & K. 245; Vol. I. § 732, 733.

[7] Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557.

[8] The State *v.* Seagler, 1 Rich. 30; People *v.* Murphy, 47 Cal. 103.

[9] See Rex *v.* Hogan, 1 Crawf. & Dix C. C. 366; Rex *v.* Rawlins, 2 East P. C. 617; Rex *v.* Williams, 1 Moody, 107; Rex *v.* Clay, Russ. & Ry. 387; Rex *v.* Sutton, 8 Car. & P. 291; The State *v.* Alexander, 74 N. C. 232; Lundy *v.* The State, 60 Ga. 143.

bed being put down, was arrested before he could take it up; the offence was held not to be committed.[1]

Toling Animal. — "If," said a learned Alabama judge, "one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it, and has it once in his control, the deed is complete; but, if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offence would not be consummated."[2]

Asportation by Agent. — If a thief, at an inn, orders another's horse to be led out, and this is done, the leading out is an asportation.[3]

Wool from Sheep — Milk from Cow. — Pulling wool from a sheep, or milking a cow, is a sufficient asportation, on a charge of stealing the wool or the milk.[4]

§ 798. **Illuminating Gas.** — Illuminating gas may be the subject of larceny.[5] And the asportation is sufficient where the prisoner, receiving gas of a gas company, diverts some of it to his burners without its passing the meter to be measured; the means employed being to use a pipe running directly from the entrance to the exit pipe.[6] While the pipe remains thus connected, there is held to be one continuous taking.[7]

V. *The Trespass.*

§ 799. **Always required.** — It is a rule, rather technical than resting on any clear reason, that there can be no larceny without a trespass.[8]

Complexity of this Rule. — Simple as this rule seems, it is practi-

[1] Farrel's Case, 2 East P. C. 557.

[2] The State *v.* Wisdom, 8 Port. 511. See Mooney *v.* The State, 8 Ala. 328; The State *v.* Martin, 12 Ire. 157; Hite *v.* The State, 9 Yerg. 198; Kemp *v.* The State, 11 Humph. 320; post, § 806.

[3] Rex *v.* Pitman, 2 Car. & P. 423. And see People *v.* Smith, 15 Cal. 408.

[4] Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618.

[5] Commonwealth *v.* Shaw, 4 Allen, 308.

[6] Reg. *v.* White, 20 Eng. L. & Eq. 585, Dears. 203, 3 Car. & K. 363, 22 Law J. N. s. M. C. 123, 17 Jur. 536; Commonwealth *v.* Shaw, supra.

[7] Reg. *v.* Firth, Law Rep. 1 C. C. 172.

[8] 1 Hawk. P. C. Curw. ed. p. 142, § 1; Rex *v.* Raven, J. Kel. 24; Pennsylvania *v.* Campbell, Addison, 232; The State *v.* Braden, 2 Tenn. 68; Hite *v.* The State, 9 Yerg. 198; Wright *v.* The State, 5 Yerg. 154; Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Frampton, 2 Car. & K. 47; Cartwright *v.* Green, 8 Ves. 405, 2 Leach, 4th ed. 952; Morehead *v.* The State, 9 Humph. 635; Robinson *v.* The State, 1 Coldw. 120; The State *v.* Newman, 9 Nev. 48.

cally very complex. Multitudes of questions have arisen upon it, — cases almost without number relating to it have passed to judgment, — and it has become the main topic under the title Larceny. The relations of the parties to each other and to the property are so varying, — they involve so many nice differences and similitudes, — so many cases are on the border line between differing classes, that only by adopting some minor rules of a very technical sort could the courts surmount encompassing difficulties, and open the way to any thing like uniformity of decision.

§ 800. **Other Crime where no Trespass.** — Although, in cases in which there is no trespass, there is no larceny, yet the fraudulent transaction may constitute some other crime. Thus, —

Embezzlement. — It was to make punishable acts of misappropriation where there was no trespass, that the statutes against embezzlement were passed. And as those statutes have been found from time to time defective, they have been amended, and their scope has been enlarged.[1] So, —

Cheats and False Pretences. — To provide for certain other classes of the fraudulent obtaining and appropriating of property, we have the common-law doctrine of cheat, and the statutes against obtaining money or goods by false pretences. And —

Still other Offences. — There are, known to the law, some other offences, the gist of which perhaps is the wrong-doer's getting into his possession, under special circumstances, and misusing, for his own benefit or to another's injury, property to which he is not entitled.

§ 801. **Trespass and Felonious Intent concur in Time.** — Moreover, from the principle according to which an act and intent, concurrent in point of time, are necessary to constitute every common-law offence,[2] comes the doctrine, that, in larceny, the trespass, or rather the asportation by trespass, must be simultaneous with the intent to steal.[3] Thus, —

[1] And see Stat. Crimes, § 417–425.

[2] Vol. I. § 204 et seq.

[3] Vol. I. § 207; Rex *v.* Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689; Rex *v.* Leigh, 2 East P. C. 694, 1 Leach, 4th ed. 411, note; Reg. *v.* Box, 9 Car. & P. 126; The State *v.* Smith, 2 Tyler, 272; People *v.* Reynolds, 2 Mich. 422; Booth *v.* Commonwealth, 4 Grat. 525; Rex *v.* Mucklow, 1 Moody, 160, Car. Crim. Law, 3d ed. 280; Reg. *v.* Riley, 14 Eng. L. & Eq. 544, Dears. 149, 17 Jur. 189; Reg. *v.* Goodbody, 8 Car. & P. 665; Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395; Reg. *v.* Brooks, 8 Car. & P. 295; Blunt *v.* Commonwealth, 4 Leigh, 689;

§ 802. **Intent to Steal subsequent to Taking — (Bank-notes to keep).** — One who took innocently into his possession some bank-notes from another to keep, but afterward denied all knowledge of them, was held — in a case where no subsequent act was shown — not to be guilty of larceny.[1] And —

Post-letter enclosing Money. — Where one innocently received through the post-office a letter, meant for another person of the same name with himself, enclosing a check, and wrongfully appropriated the check to his own use, he was held not to be guilty of this offence,[2] — the intent to steal not having come upon him until after the innocent taking.

§ 803. **How this Sub-title divided.** — To give order to the minuter consideration of the subject of this sub-title, let us inquire into, First, The kind of force requisite; Secondly, The effect of a consent to the taking; Thirdly, The possession of the property which the owner must have, and the thief must not, in order for the trespass to attach. We shall thus gain a general knowledge of doctrines; but further illustrations will appear in the sub-title after the next.

§ 804. First. *The Kind of Force requisite:* —

Physical — (Illustrations). — The taking by trespass ordinarily involves the idea of *physical force*[3] applied to the thing taken; as, where one pulls wool from a sheep, milks a cow,[4] or snatches from another person a parcel.[5]

Secret or Open — Day or Night. — Whether the force be secret or open, in the day or in the night, is immaterial, except as manifesting under particular circumstances the intent.[6]

§ 805. **Perversion of Legal Process.** — The necessary physical

Fulton *v.* The State, 8 Eng. 168; Keely *v.* The State, 14 Ind. 36; Wilson *v.* People, 39 N. Y. 459.

[1] Reg. *v.* Brennan, 1 Crawf. & Dix C. C. 560, Bushe, C. J., observing: "If the prisoner at the time of getting the notes, had the *animus* of keeping them, then there would have been a sufficient taking; but here the evidence is the other way, for the prosecutor voluntarily gave the notes to the prisoner."

[2] Rex *v.* Mucklow, 1 Moody, 160, Car. Crim. Law, 3d ed. 280. And see Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395; Reg. *v.* Brooks, 8 Car. & P. 295; People *v.* McGarren, 17 Wend. 460; Reg. *v.* Davies, Dears. 640, 26 Eng. L. & Eq. 607. See post, § 824, 825.

[3] See Vol. I. § 574 et seq.

[4] Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618; ante, § 797.

[5] Rex *v.* Macauley, 1 Leach, 4th ed. 287; Rex *v.* Robins, 1 Leach, 4th ed. 290, note; Vaughn *v.* Commonwealth, 10 Grat. 758; Johnson *v.* Commonwealth, 24 Grat. 555; The State *v.* Henderson, 66 N. C. 627.

[6] Pennsylvania *v.* Becomb, Addison, 386; McDaniel *v.* The State, 8 Sm. & M. 401, 418; 1 Hale P. C. 509; The State *v.* Fisher, 70 N. C. 78; post, § 842, note.

force may be exercised through a fraudulent perversion of legal process.[1] Says Lord Hale: "A hath a mind to get the goods of B into his possession; privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods; if it were *animo furandi*, it is larceny."[2] And Coke: "If a man, seeing the horse of B in his pasture, and, having a mind to steal him, cometh to the sheriff, and pretending the horse to be his obtaineth the horse to be delivered unto him by replevin, yet this is a felonious and fraudulent taking."[3]

§ 806. **In Larceny of Animals.** — When the larceny is of a domestic animal, like a horse, the trespass is sufficient if the animal is ridden, driven, or led away.[4] And doubtless the same is true, if it is toled away by food, or by the voice, so as to come under the control of the thief.[5] Under former statutes against the larceny of slaves, an effectual enticement only was required;[6] and, on this whole matter, a learned judge has said: "With inanimate subjects of larceny, force may be necessary, and must be used; but is there any thing in reason or common sense which requires it as to those subjects of larceny which possess volition and locomotion? Is not the idea, as to both, the deprivation which the owner of the property sustains? Suppose a horse or a dog to be toled out of the possession of the owner by corn, is not this as much a taking and carrying away as the shouldering of a bale of goods would be? I confess I can see no substantial legal difference."[7]

§ 807. **Mental Force.** — Hence it follows, that, when the thing

[1] Rex *v.* Summers, 3 Salk. 194; Rex *v.* Gardiner, J. Kel. 46; Commonwealth *v.* Low, Thacher Crim. Cas. 477; Farr's Case, J. Kel. 43, 2 East P. C. 660. See Vol. I. § 564.

[2] 1 Hale P. C. 507. In Rex *v.* Summers, 3 Salk. 194, the case was: "Where a man who had no manner of title to a house brought an *ejectment*, and procured an *affidavit* to be filed of the delivery of the declaration to the tenant in possession, and, for want of appearing and pleading, got judgment at his own suit, and then sued out an *habere facias possessionem*, and got a warrant thereon from the high bailiff of Westminster, directed to one of his bailiffs, who, with the plaintiff himself, turned the defendant out of possession, and seized all the goods, and converted them to his own use; this was adjudged felony, for which he was indicted, convicted, and executed, for he made use of the process of the law for a felonious purpose."

[3] 3 Inst. 108.

[4] Baldwin *v.* People, 1 Scam. 304; The State *v.* Gazell, 30 Misso. 92; ante, § 797.

[5] Ante, § 797.

[6] The State *v.* Hawkins, 8 Port. 461; The State *v.* Whyte, 2 Nott & McC. 174. And see The State *v.* Wisdom, 8 Port. 511; Mooney *v.* The State, 8 Ala. 328; The State *v.* Brown, 3 Strob. 508, 516; ante, § 797.

[7] The State *v.* Whyte, 2 Nott & McC. 174, 177, Colcock, J.

to be stolen is an animal, having the power of locomotion and susceptible of enticement, the application of mental force to it is sufficient. And, in some circumstances, the application of the like force to the intelligent owner of a thing will suffice. Thus, —

Moving the Fears. — East, speaking of robbery, which includes larceny,[1] observes, that "a colorable gift, which in truth was extorted by fear, amounts to a taking and trespass in law,"[2] — the thing coming, in such a case, under the control of the person to whom it is given. The doctrine is, that, where one transfers the manual control of the article to another, through fear, the larceny by such other, which constitutes a part of the robbery, is complete.[3] But the reason of this would seem to be, that the consent to the taking was made null by the fear which the thief had excited, and the case was the same as though there had been no consent. And this explains why, when a man laid down a bed through fear,[4] there was no larceny; the thief not taking it into his possession.

§ 808. **Fraud.** — Fraud, like the practices which excite fear, renders the transaction into which it enters void.[5] If, therefore, one meaning to steal an article procures, by fraudulent devices, the owner to deliver it to him, does he commit, in law, the crime of larceny? In reason, and aside from technical rule, he does. But the authorities have established, too firmly to be overthrown by judicial power, the following distinction: —

Property in Goods to pass. — If, by fraud, a person is induced to part with his goods, meaning to relinquish his property in them as well as his possession, he who thus obtains them may be chargeable with a cheat at the common law,[6] or under the statutes against false pretences,[7] but not with larceny; because, it is assumed, the owner having actually consented to part with his ownership, there was no trespass in the taking.[8]

[1] Vol. I. § 566, 1055.

[2] 2 East P. C. 711.

[3] Rex *v.* Taplin, 2 East P. C. 712; Rex *v.* Blackham, 2 East P. C. 711; Reg. *v.* Hazell, 11 Cox C. C. 597; Reg. *v.* McGrath, Law Rep. 1 C. C. 205, 11 Cox C. C. 347. And see Vol. I. § 329, 438, 581, 748.

[4] Ante, § 797.

[5] Bishop First Book, § 66–69, 124, 125.

[6] Ante, § 143 et seq.

[7] Ante, § 409 et seq.

[8] Vol. I. § 581–583; Post, § 811; Smith *v.* People, 53 N. Y. 111; The State *v.* Shoaf, 68 N. C. 375. See, as perhaps bringing to view distinctions of some consequence, Reg. *v.* Morgan, Dears. 395, 29 Eng. L. & Eq. 543. And see People *v.* Jackson, 3 Parker C. C. 590. But the distinctions appearing in these cases are probably sufficiently explained in subsequent sections of the text. And see post, § 815, 816.

§ 809. **Possession, without Property, to pass.** — But, to repeat, the doctrine thus stated refers only to cases in which the ownership of the goods is meant, by the owner, to pass with them.[1] And if one consents to part with merely the possession, and another, who takes the goods, intends a theft, the latter, without reference to the question of fraud, goes beyond the consent, and commits this offence.[2]

§ 810. **Illustrations.** — In illustration of the distinction thus stated, —

False Playing for Money. — If a man plays at hiding under the hat, and so voluntarily stakes his money on the event, meaning to receive the stake if he wins, and pay if he loses; then, if, by a conspiracy, his adversary is falsely made to appear to win, and thereupon takes up the stake, no objection being interposed; this taking of it is not larceny, though the intent should be felonious.[3] But if the man had not consented to play on his own account, and had played only for one of the conspirators; then, if the conspirators had taken his money, under the pretence of his having agreed and their having won, their offence would be larceny;[4] because, although they used fraud, yet not it, but the physical force, got the money.[5]

Further of this Distinction. — This very nice distinction, resting on a plain technical rule, which, on examination, appears not to be sound, has not been applied in a quite uniform way by the courts, and there are some conflicts in the decisions upon it. We shall now proceed, under the second division of our present subtitle, to illustrate it further.

§ 811. Secondly. *Consent to the Taking:* —

No Larceny. — There can be no trespass, consequently no larceny, where there is a consent to the taking.[6]

[1] 2 East P. C. 668; The State *v.* Lindenthall, 5 Rich. 237; Ross *v.* People, 5 Hill, N. Y. 294; Mowrey *v.* Walsh, 8 Cow. 238; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Hench, Russ. & Ry. 163; Rex *v.* Adams, Russ. & Ry. 225.

[2] Post, § 813, 814.

[3] Rex *v.* Nicholson, 2 Leach, 4th ed. 610, 2 East P. C. 669. If he had agreed to part with only the possession, it would have been otherwise. Rex *v.* Robson, Russ. & Ry. 413. See post, § 813.

[4] Rex *v.* Horner, 1 Leach, 4th ed. 270.

[5] **Wager and Conspiracy.** — In like manner, where one was induced by a conspiracy of three fellow passengers in a railroad car to make a wager with one of them, and he deposited his stake with another of them, who, upon his discovering that the opposite stake was only waste paper, refused to give it up, the three were held to be guilty of larceny. Stinson *v.* People, 43 Ill. 397.

[6] Vol. I. § 258–263; 2 East P. C. 665, 666, 816; Witt *v.* The State, 9 Misso. 663; Dodge *v.* Brittain, Meigs, 84; Dodd

Obtained by Fraud. — And, as we have just seen, the further theory on which this branch of the law of larceny proceeds is, that, where the consent is as broad as the taking, going to the relinquishment of the ownership in the property, it is effectual though obtained by fraud; in other words, by reason of the consent, even when procured by fraud, there is still no trespass, therefore no larceny.[1] Thus, —

§ 812. **Making or procuring Change.** — According to the more common doctrine, and in ordinary circumstances, if one takes another's money by the latter's permission or request, to return its value in change (that is, to change it or get it changed), but retains the money and refuses to deliver the change, he does not commit larceny; because, when the owner of the money relinquished his possession, he did not contemplate receiving it back, but parted with his ownership therein.[2] But the facts of cases differ, and perhaps the views of judges are not quite harmonious. Accord-

v. Hamilton, N. C. Term R. 31; The State *v.* Jernagan, N. C. Term R. 44; Reg. *v.* Jones, Car. & M. 611. **Part Consent. — Matches.** — If the owner of a store places on his counter a box of matches to be used by the public in lighting cigars, still a taking of the whole boxful, with felonious intent, is larceny. Mitchum *v.* The State, 45 Ala. 29.

[1] 2 East P. C. 668; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Summers, 3 Salk. 194; Anonymous, J. Kel. 35, 81, 82; ante, § 813; post, § 818.

[2] Rex *v.* Coleman, 2 East P. C. 672; Rex *v.* Sullens, 1 Moody, 129; Reg. *v.* Thomas, 9 Car. & P. 741; Reg. *v.* Reynolds, 2 Cox C. C. 170; Reg. *v.* Bird, 12 Cox C. C. 257, 4 Eng. Rep. 533; Reg. *v.* Jacobs, 12 Cox C. C. 151, 2 Eng. Rep. 204; Reg. *v.* Slingsby, 4 Fost. & F. 61. And see Rex *v.* Walsh, Russ. & Ry. 215, 2 Leach, 4th ed. 1054, 4 Taunt. 258. **Doctrines distinguished.** — The doctrine of these cases runs very close to that of Rex *v.* Aickles, 2 East P. C. 675, 1 Leach, 4th ed. 294; Rex *v.* Oliver, 2 Russ. Crimes, 3d Eng. ed. 43; and other cases cited post, § 817; in which the contrary result was obtained. The test is, whether, when the thing was delivered, the property in it was intended to pass then, or not until something further was done. If the former, it is not larceny; if the latter, it is. In a later English case it appeared, that the prisoner stationed himself near the pay-place at a railroad ticket-office, where there was a crowd, to allure people to trust him with their money to procure tickets, intending to appropriate the money to his own use. A lady asked him to get a ticket for her, the fare being 10s., and she handed him a sovereign, for which she expected to receive the ticket and the change. Instead of getting the ticket, he ran away with the sovereign; and it was held, that he was rightly convicted of the larceny of "one pound in money." At the hearing, Williams, J., said: **Taking from Contribution-box.** — "There was a case tried before Maule, J. [not reported], where the clerk was sent round in church with a plate to collect the sacrament-money. One of the congregation put a half-crown into the plate, which the clerk took out; and it was held that he was rightly convicted of larceny on a count which laid the property in the half-crown in the person who put it into the plate." Reg. *v.* Thompson, Leigh & C. 225, 328. See also Reg. *v.* Robson, Leigh & C. 93; Commonwealth *v.* Barry, 124 Mass. 325.

ing to what seems to be sound in law and in fact, if a man standing by a counter lays down a bank-bill and expects change in return, he parts with the possession of the bill only conditionally; namely, on the condition that change is given for it. In the words of Church, C. J., in a New York case, "the delivery of the bill and the giving change were to be simultaneous acts, and until the latter was paid the delivery was not complete." Then, if the person at the counter feloniously picks up the bill and refuses the change, he commits larceny.[1] Again, —

Money by False Letter — Personating. — If one obtains money by means of a false letter in a third person's name,[2] or by personating such third person,[3] he does not commit larceny, whatever his intent may be; because the person parting with the money meant to relinquish both ownership and possession. So, —

By other False Pretence. — Where a servant, whose duty it was to purchase kitchen stuff for his master in the absence of the clerk, falsely pretended to the clerk that he had bought stuff for a sum which he demanded, and it was paid him out of the master's funds; the court held, that, as the money was voluntarily parted with, and was not to be returned, the transaction was an indictable false pretence under the statute, but it was not larceny.[4] And where one got possession of a hat, which a third person had ordered of the maker, by sending a boy for it in the third person's name, he was held not to be guilty of larceny;[5] the understanding having been, that the property in the hat should pass by this delivery.[6]

Limit of this Doctrine. — But there is a distinction, which seems apparently to limit this doctrine, important to be borne in mind.

[1] Hildebrand *v.* People, 56 N. Y. 394, 396, 3 Thomp. & C. 82; s. c. nom. Hilderbrand *v.* People, 1 Hun, 19; Reg. *v.* McKale, Law Rep. 1 C. C. 125, 11 Cox C. C. 32. And see Reg. *v.* Gemmell, 26 U. C. Q. B. 312; Weyman *v.* People, 6 Thomp. & C. 696, 4 Hun, 511. And see the last note and post, § 817.

[2] Rex *v.* Atkinson, 2 East P. C. 673.

[3] Williams *v.* The State, 49 Ind. 367.

[4] Reg. *v.* Barnes, Temp. & M. 387, 2 Den. C. C. 59, 1 Eng. L. & Eq. 579; s. p. Reg. *v.* Thompson, Leigh & C. 233, 9 Cox C. C. 222. See Reg. *v.* Goodenough, 25 Eng. L. & Eq. 572, Dears. 210; post, § 813.

[5] Rex *v.* Adams, Russ. & Ry. 225. See Rex *v.* Wilkins, 1 Leach, 4th ed. 520, 2 East P. C. 673, which may be deemed to have turned on the want of authority in the apprentice to part with the goods, at the place and to the person he did. See also Reg. *v.* Kay, 7 Cox C. C. 289, Dears. & B. 231.

[6] And see Reg. *v.* Adams, 1 Den. C. C. 38. Rex *v.* Cockwaine, 1 Leach, 4th ed. 498, seems to have turned on the form of the special verdict. See also Reg. *v.* North, 8 Cox C. C. 433.

If the person parting with the goods was not their owner, but was a servant or bailee with no authority to transfer the ownership to the thief, then, as the latter could not become their owner even though he had used no fraud, his taking of them through fraud with a felonious intent is larceny.[1] Thus, —

Watch from Shop of Repairer. — If one, knowing that a watch has been left at a shop for repair, personates the owner and gets the watch, with felonious intent, he commits larceny; because the proprietor of the shop had no authority to transfer the title or even the possession to him.[2] Again, —

Other Delivery to Wrong Person. — If a cart-man, carrier, post-office clerk, or other person of the like sort, delivers an article to the wrong person by mistake, or in consequence of fraud practised by the latter, who converts it to his own use with felonious intent, this taking is a larceny.[3]

§ 813. **Parting with Possession only.** — And, though the person operated on by the fraud should be the owner of the goods, or an agent authorized to transfer the ownership in them, still, if, in fact, the transaction would have constituted, had it not been fraudulent, a transfer of the mere possession, or a mere special property, but not the ownership, the taking through this fraud, and with the intent to steal, will, as we have already seen, be larceny.[4] The reason is, that larceny is committed only when the aim of the thief is to divest the owner of his ownership, in distinction from the mere use or temporary possession;[5] so that a consent which comes short of this necessary intent does not cover the whole ground of the taking, and avails nothing. For example, —

Illustrations — (Hiring Horse — Loan of Chattel — Mail-bags — False Order — Article to Deliver, &c.). — If, with felonious mind,

[1] And see post, § 822.

[2] Commonwealth *v.* Collins, 12 Allen, 181.

[3] Reg. *v.* Little, 10 Cox C. C. 559; Reg. *v.* Gillings, 1 Post. & F. 36; Reg. *v.* Webb, 5 Cox C. C. 154; The State *v.* McCartey, 17 Minn. 76; Bassett *v.* Spofford, 45 N. Y. 387; The State *v.* Brown, 25 Iowa, 561; Commonwealth *v.* Lawless, 103 Mass. 425; Reg. *v.* Simpson, 2 Cox C. C. 235. See Reg. *v.* Brackett, 4 Cox C. C. 274; post, § 822.

[4] Vol. I. § 583; 2 East P. C. 668, 816; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Standley, Russ. & Ry. 305; The State *v.* Watson, 41 N. H. 533; The State *v.* Humphrey, 32 Vt. 569; Welsh *v.* People, 17 Ill. 339; Smith *v.* People, 53 N. Y. 111; Weyman *v.* People, 6 Thomp. & C. 696, 4 Hun, 511; Commonwealth *v.* Smith, 1 Pa. Law Jour. Rep. 400; The State *v.* Jarvis, 63 N. C. 556; Reg. *v.* Wells, 1 Post. & F. 109; Reg. *v.* Waller, 10 Cox C. C. 360.

[5] Vol. I. § 579; post, § 841.

one borrows or hires a horse or carriage, as he pretends, to ride;[1] or gets the loan of any other chattel;[2] or gets from a person in the post-office a delivery of the mail-bags;[3] or obtains an article of merchandise on a false order or other false pretence, where the possession[4] and not the property[5] is to be parted with; or receives an article of clothing to deliver to a washerwoman;[6] or a sum of money with which to pay a bill for the other;[7] his concurrent intent being, let us still remember, to steal the thing;[8] he commits, notwithstanding this consent of the owner, the crime of larceny. So also —

Color of Bet. — If there is a plan to cheat a man of his property under color of a bet, and he parts with only the possession to deposit as a stake with one of the confederates; the taking by such confederate is larceny, and not the less so though afterward the confederates are by fraud made to appear to win.[9]

§ 814. **Exception in Tennessee.** — In Tennessee, the foregoing doctrine is not received; but, by the common law of this State, there is no larceny, though the consent of the owner is to part with only the possession. Therefore if one there, fraudulently and with intent to steal, gets another's property under the pretence of hiring it, he does not commit this offence.[10]

§ 815. **Condition precedent.** — Since the consent to the taking must, to avail an accused person, be as broad as the act it would protect,[11] if, by its terms, it is on a condition precedent, — that is, if something is to be done before the property passes, — the taking, with felonious intent, will be larceny. Thus, —

Goods for Cash. — If, on a sale of goods, no credit is intended by the seller, while the purchaser secretly contemplates appropriating them to himself without paying for them, a delivery will not protect him from the charge of larceny; otherwise, if there is a credit.[1]

§ 816. **Continued.** — The following will illustrate the application of this doctrine. In one case, the prisoner went into a shop, and purchased jewelry to pay in cash on its delivery at a coach-office. The seller made out an invoice, and took the goods to the coach-office; where, being met by the prisoner, the latter said, he had been disappointed in not receiving money expected by letter. Just then a letter was put into his hands: he opened it in the presence of the seller, and said, he had to meet, at a certain coffee-house, at seven, a friend who would supply the money. So the seller left the goods and went home. He testified, that he considered them sold when he got the cash, not before. The prisoner absconded with them. The jury were instructed, to consider, whether the prisoner had any intention of buying and paying for the goods, or whether he ordered them merely to get possession of them, and convert them to his own use. They found the latter to be the fact, and convicted the prisoner, and the judges held the conviction to be right.[2] In another case, one bargaining with a trader about some waistcoats, said, "You must go to the lowest price, as it will be for ready money." The reply was, "Then you shall have them for 12*s.*;" to which the purchaser assented, and remarked, that he would put them into his gig, standing at the door. The trader replied, "Very well." He put them into the gig, drove off without paying, and was absent two years. The jury, trying him for larceny, returned for their verdict, specially: "In our opinion, the waistcoats were parted with conditionally, that the money was to be paid at the time, and that the defendant took them with a felonious intent." And the judges held, that he was rightly convicted. "This is an express finding of the jury," they said, "that the

[1] The State *v.* Gorman, 2 Nott & McC. 90; Rex *v.* Semple, 1 Leach, 4th ed. 420, 2 East P. C. 691; Rex *v.* Pear, 1 Leach, 4th ed. 212, 2 East P. C. 685, 697; Rex *v.* Tunnard, 2 East P. C. 687, 1 Leach, 4th ed. 214, note; The State *v.* Humphrey, supra; Reg. *v.* Cole, 2 Cox C. C. 340.

[2] Starkie *v.* Commonwealth, 7 Leigh, 752.

[3] Rex *v.* Pearce, 2 East P. C. 603.

[4] Rex *v.* Hench, Russ. & Ry. 163; The State *v.* Lindenthall, 5 Rich. 237.

[5] Ante, § 809, 811; Rex *v.* Adams, Russ. & Ry. 225; Reg. *v.* Adams, 1 Den. C. C. 38; Rex *v.* Atkinson, 2 East P. C. 673. **Intending to part with Ownership ultimately, not now.** — When one, with intent to steal, gets from another a bank-note, to deposit in a bank, he commits larceny of the note; Rex *v.* Goode, 2 Car. & P. 422, note; because, although the person defrauded intends ultimately to part with his property in the particular note, yet he does not mean to part with it at the time he delivers it, nor to the individual to whom he delivers it. See also Reg. *v.* Smith, 1 Car. & K. 423.

[6] Reg. *v.* Evans, Car. & M. 632. And see Rex *v.* Stock, 1 Moody, 87; Reg. *v.* Glass, 2 Car. & K. 395.

[7] Reg. *v.* Brown, Dears. 616; Reg. *v.* Smith, 1 Car. & K. 423. And see Reg. *v.* Beaman, Car. & M. 595; Rex *v.* Murray, 1 Leach, 4th ed. 344, 2 East P. C. 683; Reg. *v.* Butler, 2 Car. & K. 340; Reg. *v.* Heath, 2 Moody, 33; Reg. *v.* Goodenough, Dears. 210, 25 Eng. L. & Eq. 572.

[8] Ante, § 801.

[9] Rex *v.* Robson, Russ. & Ry. 418. See ante, § 810.

[10] Felter *v.* The State, 9 Yerg. 397.

[11] Ante, § 813.

[1] 2 East P. C. 693. And see the cases cited to the next section. Also Mowrey *v.* Walsh, 8 Cow. 238; Ross *v.* People, 5 Hill, N. Y. 294.

[2] Rex *v.* Campbell, 1 Moody, 179.

prosecutor only parted with the possession of the goods."[1] The same result is arrived at, where, by usage, goods bought are to be paid for before they are taken away; and the pretended purchaser, without consent, takes them feloniously, and does not pay.[2] But though the trader intends not to let the purchaser have the goods except for money, yet, if he finally parts with them for bills, the transaction, however fraudulent, is not larceny.[3]

§ 817. **Change, again.** — Where one asked a boy in a shop to give him change for half a crown; presenting it to the boy, who touched it, but did not get hold of it; he was held, having received the change before he reached out the half-crown, to have committed larceny of the change.[4]

§ 818. **Civil Right to reclaim Goods, distinguished.** — The reader should distinguish between cases of larceny, and civil cases in which the seller undertakes to reclaim goods alleged to have been obtained of him by fraud. Under many circumstances the purchaser's fraud enables the seller to get back the goods, while yet the consent he had given to part with them avails the defendant on a charge of larceny.[5] For, as concerns this crime, and the

[1] Reg. v. Cohen, 2 Den. C. C. 249, 5 Eng. L. & Eq. 545. And see Reg. v. Box, 9 Car. & P. 126; Rex v. Pratt, 1 Moody, 250; Rex v. Sharpless, 1 Leach, 4th ed. 92. Query, whether these cases overrule the doctrine of Rex v. Harvey, 1 Leach, 4th ed. 467, 2 East P. C. 669, in which it was held, that, if a horse is purchased and delivered to the buyer, who is to pay for it immediately, the latter does not commit larceny of the horse though he rides away with it without objection from the seller, saying he will return immediately and pay for it. The court expressly observed: "The property, as well as the possession, was entirely parted with." And see Reg. v. Sheppard, 9 Car. & P. 121; People v. Miller, 14 Johns. 371.

[2] Rex v. Gilbert, 1 Moody, 185. And see Reg. v. Slowly, 12 Cox C. C. 269, 4 Eng. Rep. 545. A person went into a shop, and told the clerk he wished to purchase a particular chattel. The clerk referred him to the shopkeeper, who refused to let him have it, except on his father's order. Afterward he entered the shop, in the shopkeeper's absence, without the order, asked again to see the chattel, told the clerk he had made all right with the shopkeeper, and carried it away. These facts were held to support a conviction for larceny. Commonwealth v. Wilde, 5 Gray, 83.

[3] Rex v. Parkes, 2 Leach, 4th ed. 614; s. c. nom. Rex v. Parks, 2 East P. C. 671.

[4] Rex v. Williams, 6 Car. & P. 390. Much to the same effect are Reg. v. Rodway, 9 Car. & P. 784; Rex v. Aickles, 2 East P. C. 675, 1 Leach, 4th ed. 294; Rex v. Oliver, 2 Russ. Crimes, 3d Eng. ed. 43, cited 2 Leach, 4th ed. 1072, 4 Taunt. 274; Reg. v. Johnson, 2 Den. C. C. 310, 14 Eng. L. & Eq. 570; Rex v. Metcalf, 1 Moody, 433; Prosser v. Rowe, 2 Car. & P. 421; Reg. v. Twist, 12 Cox C. C. 509, 6 Eng. Rep. 335. See ante, § 812 and note.

[5] Ross v. People, 5 Hill, N. Y. 294. And see Olmsted v. Hotailing, 1 Hill. N. Y. 317.

trespass necessary to constitute it, a consent to the taking is the same whether obtained by fraud or not.[1]

§ 819. **Ring-dropping.** — Another illustration of the doctrine, that, to prevent the felonious taking from being larceny, the consent must embrace the property in the thing, as well as the possession of it,[2] occurs in cases of what is called ring-dropping. A person, having pretended to find an article of value, — as a ring, with a jewel in it, which is worthless, but appears to be of diamond, — induces another, acknowledged to have a right to share in the prize, to let him have bank-bills or other thing on security of the article found; under the condition, that it shall belong entirely to the lender, if what is borrowed is not restored in such a time. Here, as the specific article borrowed was to be returned, the taking of it, with felonious intent, is larceny.[3] But where, also, in a case of ring-dropping, the prisoner had prevailed on the prosecutor to buy his share of the pretended prize, which was done, the offence was deemed not to be larceny; because the prosecutor had parted with his property in the money he gave, not merely with his possession.[4]

§ 820. **Exchange of Pledge with Pawnbroker.** — Again, if a pawnbroker delivers back to the pawner a pledge, on receiving from him another which he thinks has been shown him, and is of sufficient value, but really is a worthless thing substituted by sleight of hand for the article shown, — the pawner, committing this cheat, cannot be holden for a larceny of the pledge taken back; because the other, in relinquishing it, meant to part with his property therein.[5] And where the prisoner took a packet of diamonds to a pawnbroker, with whom he had previously pledged a brooch, and received the brooch and a further advance, pretending to give this packet, but really giving another, of similar appearance, containing only glass, his offence was held not to be larceny, but merely an indictable cheat.[6]

§ 821. **Consent, to detect Thief.** — The cases wherein a party

[1] See Vol. I. § 581–583; ante, § 811, 812.

[2] Ante, § 813.

[3] Rex v. Watson, 2 Leach, 4th ed. 640, 2 East P. C. 680; Rex v. Patch, 1 Leach, 4th ed. 238, 2 East P. C. 678; Rex v. Marsh, 1 Leach, 4th ed. 345; Rex v. Moore, 1 Leach, 4th ed. 314, 2 East P. C. 679. See Reg. v. Hazell, 11 Cox C. C. 597.

[4] Reg. v. Wilson, 8 Car. & P. 111. See Reg. v. Gardner, Leigh & C. 243, 9 Cox C. C. 253.

[5] Rex v. Jackson, 1 Moody, 119.

[6] Rex v. Meilheim, Car. Crim. Law, 3d ed. 281.

consents to the taking, in order to detect and bring to punishment the thief, were discussed in the preceding volume.[1]

§ 822. **Consent through Agent.** — Another proposition, already in a measure brought to view,[2] is, that the consent to the appropriation of the thing is the same whether coming directly from the principal, or indirectly through an agent; but, if through an agent, he must be authorized to give it. For example, —

Authorized or not. — If, during slavery, one with felonious intent took the master's goods from a consenting slave, he was held to commit larceny of them or not, according as the master had[3] or had not[4] told the slave to deliver them. So the getting of a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, is larceny, if taken with the intent to steal; because the servant has no authority to part with it except to the right person.[5] And if a man's servant delivers unauthorized his goods, under a pretended sale, to one who, knowing the want of authority, takes them with felonious intent, this one commits larceny of them.[6] The doctrine seems broadly to be, that a thief can avail himself of a permission given by the owner's agent, only when the agent had authority. The authority may be either general or special.[7]

§ 823. Thirdly. *The Possession of the Property which the Owner must have, and the Thief must not, in order for the Trespass to attach:* —

Must be Possession. — There can be no trespass in taking goods from one in whose possession they are not.[8] Thus, —

Money drawn on another's Check. — If a stockbroker, authorized to draw money on his principal's check for a particular purpose, draws and misappropriates it, he does not thereby commit larceny

[1] Vol. I. § 262, 263.

[2] Ante, § 812.

[3] Dodge *v.* Brittain, Meigs, 84; Vol. I. § 262, 263. And see Kemp *v.* The State, 11 Humph. 320.

[4] Hite *v.* The State, 9 Yerg. 198.

[5] Rex *v.* Longstreeth, 1 Moody, 137.

[6] Rex *v.* Hornby, 1 Car. & K. 305. And see Reg. *v.* Harvey, 9 Car. & P. 353.

[7] Reg. *v.* Sheppard, 9 Car. & P. 121; Rex *v.* Small, 8 Car. & P. 46; Rex *v.* Jackson, 1 Moody, 119; Rex *v.* Wilkins, 1 Leach, 4th ed. 520, 2 East P. C. 673; Rex *v.* Parkes, 2 Leach, 4th ed. 614; s. c. nom. Rex *v.* Parks, 2 East P. C. 671; Rex *v.* Pratt, 1 Moody, 250; Reg. *v.* Featherstone, Dears. 369, 26 Eng. L. & Eq. 570, 18 Jur. 538.

[8] Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532; Reg. *v.* Johnson, 2 Den. C. C. 310, 14 Eng. L. & Eq. 570; Rex *v.* Hawtin, 7 Car. & P. 281; Nelson *v.* Whetmore, 1 Rich. 318; The State *v.* Martin, 12 Ire. 157; Gadson *v.* The State, 36 Texas, 350; Garner *v.* The State, 36 Texas, 693; Rex *v.* Adams, Russ. & Ry. 225.

of the money; for it was never in the principal's possession.[1] And a servant who, taking his master's check to a bank for the cash, conceives there the idea of converting to his own use the bank bills when drawn, does not commit larceny by thus misappropriating them; for, in the language of the judge, "those bills had never been in the possession of the master, in any such sense as would authorize him to sue the servant in trespass for them. The bank-bills delivered to the servant were not the bills of the master while in the bank; they were the money of the bank, and, as such, were delivered to the servant; and never came to the hands of the master, or were held by him." [2]

§ 824. **Possession and Custody distinguished.** — There is a difference between a custody and a possession. For example, —

Servant's Possession — Larceny by Servant. — Goods in the custody of a servant are in the possession of the master. The servant may, therefore, commit larceny of them;[3] as, if a clerk in a store feloniously removes goods from it, this is larceny.[4] But a mere intent to steal does not constitute larceny in the servant; who becomes guilty only when, with the felonious intent, he does something with the goods contrary to his duty.[5]

Any bare Custody. — And, generally, where one has the bare charge or care of effects which belong to another, whether his relation to the owner be that of a servant or not, "the legal possession," observes Mr. East, "remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use." [6]

§ 825. **Taking Note to indorse, and refusing return.** — Therefore the maker of a promissory note, who, on paying it in part, took

[1] Rex *v.* Walsh, Russ. & Ry. 215, 2 Leach, 4th ed. 1054, 4 Taunt. 258.

[2] Commonwealth *v.* King, 9 Cush. 284, 288, opinion by Dewey, J.

[3] Reg. *v.* Samways, Dears. 371, 26 Eng. L. & Eq. 576; Reg. *v.* Robins, Dears. 418, 18 Jur. 1058, 29 Eng. L. & Eq. 544; Reg. *v.* Heath, 2 Moody, 33; Walker *v.* Commonwealth, 8 Leigh, 743; Rex *v.* Butteris, 6 Car. & P. 147; Reg. *v.* Manning, Dears. 21, 17 Jur. 28, 14 Eng. L. & Eq. 548; Rex *v.* Hammon, 4 Taunt. 304, 2 Leach, 4th ed. 1083; Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566, 598; Rex *v.* Robinson, 2 East P. C. 565; Gill *v.* Bright, 6 T. B. Monr. 130; Rex *v.* McNamee, 1 Moody, 368; Reg. *v.* Jackson, 2 Moody, 32; Commonwealth *v.* Brown, 4 Mass. 580; People *v.* Wood, 2 Parker C. C. 22; People *v.* Belden, 37 Cal. 51.

[4] Marcus *v.* The State, 26 Ind. 101; Commonwealth *v.* Davis, 104 Mass. 548.

[5] Reg. *v.* Roberts, 3 Cox C. C. 74. And see Reg. *v.* Low, 10 Cox C. C. 168; Reg. *v.* Warren, 10 Cox C. C. 359; Reg. *v.* Richardson, 1 Fost. & F. 488; post, § 830 et seq.

[6] 2 East P. C. 564; People *v.* Call, 1 Denio, 120.

it into his hands to indorse the payment, was deemed to have only the custody, while the possession remained in the holder; and, when afterward he refused to give it back, and converted it to his own use, the court held this to be larceny.[1]

§ 826. **Custody and Possession further distinguished.** — There are some nice distinctions between custody and possession. In pleading, which belongs to "Criminal Procedure" and not to these volumes, we have the doctrine that, as a man may do by an agent whatever he may by his personal volition,[2] he can have a possession by another, as well as by himself.[3] And though this other has a special property in the thing, carrying with it the possession, or such other care as will prevent his misappropriation of it from being theft, still an indictment for larceny against a third person may well enough lay the property in the general owner, even under circumstances in which it may just as well lay it in the bailee.[4]

§ 827. **Continued.** — But the question here is, under what circumstances the person having authority over a thing is so in *possession* of it that to misappropriate it will not be larceny; and in what other circumstances he has only the *custody* by reason of which his misappropriation of it will be larceny. And when that is ascertained, a further difficulty remains, namely, supposing the larceny possible, what act, superadded to the intent to steal, will amount to the asportation by trespass.[5] It is not practically convenient to separate these two branches of the inquiry, therefore we shall look at them together.

§ 828. **Continued.** — Among the classes of cases within this inquiry, we have those which involve the doctrine of —

Ultimate destination. — We saw something of this under the title "Embezzlement."[6] If a first person receives for a second, goods from a third, plainly he does not commit larceny as against the third, when he misappropriates them; because, on a principle already explained,[7] the third person had parted, by the delivery

[1] People *v.* Call, 1 Denio, 120. In substance like this, is Dignowitty *v.* The State, 17 Texas, 521. But see The State *v.* Deal, 64 N. C. 270. Compare this doctrine with some of the cases stated ante, § 797.

[2] See Broom Leg. Max. 2d ed. 643.

[3] Rex *v.* Longstreeth, 1 Moody, 137; Rex *v.* Clarke, 2 Leach, 4th ed. 1036; s. c. nom. Rex *v.* Clark, Russ. & Ry. 181; Reg. *v.* Ashley, 1 Car. & K. 198; Commonwealth *v.* Morse, 14 Mass. 217.

[4] Ante, § 780; Langford *v.* The State, 8 Texas, 115. And see The State *v.* Somerville, 21 Maine, 14.

[5] Ante, § 799.

[6] Ante, § 368.

[7] Ante, § 811–813.

to the first, with his property in the goods.[1] Plainly also he does not commit larceny against the second person, now really the owner, until the goods have come so far into the latter's hands as to be deemed, in law, to be in his possession; because, without a possession in the second person, the first cannot commit a trespass on them as against him. Therefore the doctrine is, that, when one has received from a third person goods for a second, he can become guilty of larceny of them only after they have reached their *ultimate destination*.[2]

§ 829. **Continued.** — What, within this rule, is an "ultimate destination"?

Person of Servant. — When a thing, which was never in the master's possession, is passing to him through the servant's hands, the person of the servant is not — at least, not ordinarily — its ultimate destination. Therefore, while the thing remains on the servant's person, the latter does not, as against his master, commit a trespass in transporting it about; and, though he has the intent to steal, the transaction is not larceny.[3]

§ 830. **Servant's own Hiding-place.** — If, in addition to this, the servant takes the thing and deposits it in a hiding-place of his own, he does not commit the trespass essential in larceny. Thus, in an old and familiar case, where one, authorized to sell some effects, sold them and concealed the money in his master's house; after which, as a separate transaction, he took this money, intending to appropriate it to his own use; he was held not to be guilty of larceny.[4]

Distinction — (When Larceny — When not). — The distinction is, that, if the clerk or servant puts the coins or bank-notes received from a customer into the cash or bill drawer, and afterward with felonious intent takes them out,[5] he commits larceny; but, if he puts them in the first instance into his own pocket, or if he car-

[1] In Rex *v.* Hawtin, 7 Car. & P. 281, this was so intimated by Alderson, B., in a case of money paid to one not authorized in fact to receive it, though the party paying it supposed he was authorized.

[2] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, Dears. 257, 18 Jur. 66; Rex *v.* Hawtin, supra; 2 East P. C. 568; Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 14 Jur. 870.

[3] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66, Dears. 257.

[4] Rex *v.* Dingley, cited 1 Show. 53, Gouldsb. 186, 2 Leach, 4th ed. 840; ante, § 823.

[5] Rex *v.* Hammon, Russ. & Ry. 221, 2 Leach, 4th ed. 1083, 4 Taunt. 304; Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567; Rex *v.* Murray, 1 Leach, 4th ed, 344, 2 East P. C. 683; Commonwealth *v.* Barry, 116 Mass. 1.

ries them directly elsewhere and conceals them, taking them on a subsequent occasion, he does not commit the offence, however felonious his intent.[1]

Person of Servant, again. — And it seems to have been further held, in a case which goes to the verge, that, if there is no place of deposit for the thing aside from the personal custody of the servant, who is to keep it for his master, and it is delivered at the place where his duty requires him to receive and keep it, he may then be guilty of larceny by converting it wrongfully; though it is not shown to have been put in any place separate from his person.[2]

§ 831. **Coals in Master's Cart.** — Where a servant was sent for some coals the master was purchasing, with direction to bring them home in the cart of the latter, this cart was held to be, within our present distinction, a place of ultimate destination; the reason being, that, since the cart was, in law, in the master's possession,[3] the coals therein must be deemed so also. And where the servant, on his way home, disposed of a part of the coals for his own benefit, he was held to have committed larceny of them.[4] Again, —

Straw at Stable-door. — A servant who brought some straw home for his master, was held to have delivered it at a place of ultimate destination when he laid it down at the stable-door, before taking it within; so that, by carrying a portion of it away from this spot, with felonious intent, he became guilty of this offence.[5]

§ 832. **Limitation of Doctrine — (Prior Ownership of Master).** — The doctrine of the last three sections does not apply where the master had the ownership of the specific thing, and consequently the legal possession of it, before its delivery to the servant; for, in such a case, this change of custody does not change the possession in law.[6] Therefore —

[1] Rex *v.* Bazeley, 2 Leach, 4th ed. 835; s. c. nom. Bazely's Case, 2 East P. C. 571; Rex *v.* Waite, 1 Leach, 4th ed. 28, 2 East P. C. 570. And see Reg. *v.* Green, 24 Eng. L. & Eq. 555, 18 Jur. 158, Dears. 323; Rex *v.* Headge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; Rex *v.* Walsh, Russ. & Ry. 215, 4 Taunt. 258, 2 Leach, 4th ed. 1054.

[2] Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 14 Jur. 870. And see observations in Reg. *v.* Reed, 24 Eng. L. & Eq. 562.

[3] Rex *v.* Robinson, 2 East P. C. 565.

[4] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66, Dears. 257. See also Rex *v.* Harding, Russ. & Ry. 125; Reg. *v.* Bunkall, Leigh & C. 371.

[5] Reg. *v.* Hayward, 1 Car. & K. 518.

[6] 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 21, pl. 4; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14. And see ante, § 823.

Servant sent for Goods purchased. — If a corn-factor purchases the cargo of a vessel laden with corn, — a case in which the purchase transfers the ownership before formal delivery to the buyer, — and sends his servant with a lighter to the ship for it, then, if the servant takes some of it directly from the ship before it is transferred to the lighter, he commits a larceny.[1]

Servant taking from Servant. — And possibly, under some circumstances, if a servant receives from a third person a thing for the master, not the master's before; in a case where the receipt is, as to other persons, a receipt in law by the master;[2] a second servant, taking the thing by delivery from the first, may commit larceny of it as against the master, into whose possession this second servant cannot deny that the thing has come.[3]

§ 833. **Bailees and others having Special Property.** — Common carriers and other bailees, and persons in the like relations, who have a special property in goods in their hands, and persons generally to whom goods are committed under contract, cannot become guilty of larceny of them while the relation subsists; their entire control and *quasi* ownership being inconsistent with the idea of a trespass. Such persons are said to have a possession of the goods, in distinction from a custody.[4]

§ 834. **Continued — (Relation ended — Breaking Bulk).** — But where the relation has ended, — as, for instance, where the goods conveyed by a carrier have fully reached their place of destination,[5] or he has broken open a package in violation of his trust,[6] — there may then be a larceny. This distinction has led to the apparently absurd proposition, that no offence is committed by a carrier stealing the entire parcel which he is carrying, but it is

[1] Rex *v.* Abrahat, 2 Leach, 4th ed. 824, 2 East P. C. 569.

[2] See Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66.

[3] Reg. *v.* Watts, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558, 14 Jur. 870.

[4] Wright *v.* Lindsay, 20 Ala. 428; Anonymous, J. Kel. 81, 82, 83; Rex *v.* Fletcher, 4 Car. & P. 545; Rex *v.* Pratley, 5 Car. & P. 533; Rex *v.* Savage, 5 Car. & P. 143; Rex *v.* Smith, 1 Moody, 473; Reg. *v.* Thristle, 1 Den. C. C. 502, 2 Car. & K. 842, 3 New Sess. Cas. 702, 13 Jur. 1035; Rex *v.* Banks, Russ. & Ry. 441; Commonwealth *v.* James, 1 Pick. 375.

[5] Anonymous, J. Kel. 33; 2 East P. C. 696. And see Rex *v.* Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689; post, § 861.

[6] Rex *v.* Madox, Russ. & Ry. 92; Rex *v.* Brazier, Russ. & Ry. 337; Robinson *v.* The State, 1 Coldw. 120. And see Commonwealth *v.* James, 1 Pick. 375; Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den C. C. 233; post, § 860.

larceny to steal a part.[1] If the bailment was gratuitous, it is still the same as though for hire.[2]

§ 835. **Distinctions reduced to another Form.** — The foregoing distinctions, being in all the books, could not properly be omitted. Yet they are not practically so helpful to the practitioner and the judge as they seem to be. In looking into each case, what we are to find, to make larceny of it, is a trespass; this is the point to which the other inquiries tend, as to a common centre. And the simpler propositions are the following: A servant may steal his master's goods; a bailee or any other person may steal the property intrusted to him; but, to do so, he must commit a trespass.[3] And a trespass requires for its commission an act differing with the circumstances of the particular case, and with the relations of the parties to the property. It consists in doing, by way of physical or manual force, as already explained,[4] something to the physical substance taken, of a nature or to an extent not lawfully done under the charge or bailment. If the thing done is such as would be no violation of duty, were the doer's intent not felonious; or, being a violation, would not be a technical trespass; the transaction is not larceny, though the intent be felonious. And the felonious intent and act of technical trespass must, in these as in other circumstances,[5] concur in point of time. Yet these plainer propositions cannot be followed safely without some reference to the adjudications. For the law on this subject is so nicely technical, that we can hardly affirm it to rest on any proposition, or series of propositions; or, indeed, on any thing. Let us see something further of the cases.

§ 836. **Servant doing what Duty forbids.** — If a servant, having an article in his custody, and intending to steal it, does, for the purpose of theft, any thing with the article forbidden by his duty, he commits larceny.[6] Thus, —

Absconding with Master's Cart. — "A carter going away with his master's cart was holden a felony."[7] For, being impelled by his master's mind rather than his own when in the line of duty, he

[1] Anonymous, J. Kel. 81, 82, 83, 2 East P. C. 696; Rex *v.* Howell, 7 Car. & P. 325; Commonwealth *v.* Brown, 4 Mass. 580. See, concerning these several classes of persons, post, § 858-871.

[2] The State *v.* Fairclough, 29 Conn. 47.

[3] Ante, § 799.

[4] Ante, § 804, 805.

[5] Ante, § 801.

[6] Powell *v.* The State, 34 Ark. 693.

[7] Rex *v.* Robinson, 2 East P. C. 565.

commits a trespass by departing of his own will out of that line.[1]

Selling Master's Goods. — So, if a servant has goods delivered him to convey to a customer, but sells them for his own benefit, — that is, carries them, with felonious intent, where his duty forbids, — he commits the trespass necessary in a larceny of the goods.[2]

Bailee doing what Duty forbids. — But what would be larceny in a servant is not necessarily so in a bailee. Thus, —

Carrying to Wrong Place — Selling. — A common carrier taking a parcel out of the way, or selling it, does not commit the tres-

[1] **Clerk taking Money.** — Exactly the same occurs where a clerk takes money out of his employer's till, and puts it into his own pocket, Rex *v.* Hammon, Russ. & Ry. 221, 2 Leach, 4th ed. 1083, 4 Taunt. 304; or (**Goods.** —) removes goods of his employer, intending to steal them, Reg. *v.* Manning, Dears. 21, 17 Jur. 28, 14 Eng. L. & Eq. 548, 22 Law J. N. S. M. C. 21; Walker *v.* Commonwealth, 8 Leigh, 743; Reg. *v.* Robins, Dears. 418, 18 Jur. 1058, 29 Eng. L. & Eq. 544; Reg. *v.* Samways, 26 Eng. L. & Eq. 576. These acts are larceny. **Bill of Exchange.** — So it is larceny for the confidential clerk of a merchant to take a bill of exchange, unindorsed, from the bill-box, and convert it to his own use, although he was in the habit of attending to the cash affairs from week to week; for, as it had not been delivered him by his employer for this purpose, the taking is tortious, from the employer's possession. Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567; and see ante, § 829, 830.

[2] Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566, 598; Rex *v.* McNamee, 1 Moody, 368; Reg. *v.* Jackson, 2 Moody, 32; Rex *v.* Butteris, 6 Car. & P. 147; Rex *v.* Stock, 1 Moody, 87; United States *v.* Clew, 4 Wash. C. C. 700; Rex *v.* Jones, 7 Car. & P. 151; Reg. *v.* Jenkins, 9 Car. & P. 38; Reg. *v.* Harvey, 9 Car. & P. 353. In the following cases, overruling the doctrine of Rex *v.* Watson, 2 East P. C. 562, the act was held to be larceny, the felonious shown: **Bill to send by Mail.** — One employed as clerk, in the daytime, but not residing in the house, converted to his own use a bill of exchange, which, in the usual course of business, he received from his employer, with directions to transmit it by post to a correspondent; Rex *v.* Paradice, 2 East P. C. 565. **Check for Creditor.** — Other clerks, receiving checks to deliver to creditors, appropriated to themselves the whole; Rex *v.* Metcalf, 1 Moody, 433; Reg. *v.* Heath, 2 Moody, 33. **Money.** — Others, receiving money; Rex *v.* Lavender, 2 East P. C. 556. A servant, being sent with 6*s.* to buy twelve cwt. of coals, bought a smaller quantity for 3*s.* 3*d.*, and appropriated one of the shillings to his own use; Reg. *v.* Beaman, Car. & M. 595. Another person, sent with another sum of money, misappropriated the whole; Reg. *v.* Smith, 1 Car. & K. 423. **Articles to sell.** — A servant, intrusted with some articles of clothing to sell, and money to make change, left the country with the money and clothing; Reg. *v.* Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 14 Jur. 513, 1 Eng. L. & Eq. 547. **Barge.** — One employed to take a barge to a certain place, being paid his wages in advance, and a separate sum of three sovereigns to pay tonnage, took the barge part way, paid a part of the sum for tonnage, and converted the rest of the money to his own use; Reg. *v.* Goode, Car. & M. 582. And see Reg. *v.* Goodenough, Dears. 210, 25 Eng. L. & Eq. 572. See, however, Reg. *v.* Evans, Car. & M. 632.

pass essential in larceny;[1] because, in the relation which he sustains, his own mind is to control his actions, — not the mind of the owner, to whom his responsibilities are very different from those of a servant. And where the prisoner, being specially employed to drive six pigs to a certain place, left one of them on the way with Mr. M., because it was tired; of which act he informed the owner, and was then directed to ask Mr. M. to keep it; but, instead of asking him, went and sold it to him; this selling was ruled, in a jury case, not to be larceny.[2] Obviously the sale involved no physical act done to that physical thing, the pig; which physical thing, being already in the purchaser's hands, required no manual delivery to convey the title.

§ 837. **Persons having Goods not intrusted.** — There is another class of cases; it differs both from those of bailees, and of servants general and special; in which the thing came lawfully and properly into the hands of the person, to whom, nevertheless, it was not intrusted. The doctrine concerning this class is, that, if in the original taking there was neither any evil intent nor a technical trespass, no larceny is committed by any subsequent misappropriation, with felonious intent. Consequently, —

Taken into Possession at Fire. — Where a woman, at a fire, joined her neighbors in removing goods, under the observation of the owner, but not at his request; and she secreted the goods she removed, and denied having them; but the jury found that her first intention was right, and the theft was an afterthought; she was held not to be guilty of larceny; "for, if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust."[3]

§ 838. **Lost Goods.** — If goods have been lost, and a person not knowing the owner has taken them into possession lawfully, the principle just stated shows that he cannot afterward, having ascertained who the owner is, commit larceny of them. Even, according to the current of opinion, which is a little disturbed by contrary intimations, the familiar rule concerning common carriers that the offence may be perpetrated by breaking bulk,[4] does not apply to lost goods. For, said Parke, B., "it seems difficult to

[1] Ante, § 833, 834.
[2] Reg. v. Jones, Car. & M. 611.
[3] Rex v. Leigh, 2 East P. C. 694, 1 Leach, 4th ed. 411, note.
[4] Ante, § 834.

apply that doctrine, which belongs to bailment where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding."[1] This doctrine of lost goods, with that of bailments, of larcenies by servants, and some others, will be further considered under another sub-title.

§ 839. **Trespass in Original Taking.** — If, in the original taking of an article, there was a trespass, even though it was but a technical civil one, and *a fortiori* if the taking was felonious, any subsequent asportation of the article is a renewal of the trespass; and, when done with intent to steal it, is larceny.[2] Therefore, —

Driving Sheep. — Where a defendant, in driving away a flock of his own lambs from a field, inadvertently drove with them a lamb belonging to another person; and, as soon as he had discovered his mistake, sold the lamb for his own, and denied all knowledge of the fact; he was held to have committed larceny of the sheep.[3] Again, —

Carrying to another County. — It is familiar doctrine, belonging, however, to the department of the Procedure, that, when a thief steals goods which he carries away, he becomes guilty of a complete larceny in every county or distinct locality into which he takes them, while his intent to steal continues.[4]

VI. *The Intent.*

§ 840. **What is meant by "The Intent."** — We saw, in the preceding volume,[5] that larceny requires a concurrence, with the act, of two intents; namely, a general one to do the trespass, and a

[1] Reg. v. Thurborn, 1 Den. C. C. 387, 395, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. v. Tharbone, 13 Jur. 499; s. c. Reg. v. Wood, 3 New Sess. Cas. 581. See also s. p. Lane v. People, 5 Gilman, 305; Ransom v. The State, 22 Conn. 153; The State v. Conway, 18 Misso. 321; The State v. Roper, 3 Dev. 473; People v. Cogdell, 1 Hill, N. Y. 94; People v. Anderson, 14 Johns. 294; Reg. v. Preston, 2 Den. C. C. 353, 8 Eng. L. & Eq. 589; Porter v. The State, Mart. & Yerg. 226. But see, as perhaps having a contrary bearing, Rex v. Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex v. Sears, 1 Leach, 4th ed. 415, note; The State v. Ferguson, 2 McMullan, 502; Cartwright v. Green, 2 Leach, 4th ed. 952, 8 Ves. 405. See further, concerning lost goods, post, § 878–883.
[2] Commonwealth v. White, 11 Cush. 483; Reg. v. Riley, 14 Eng. L. & Eq. 544, Dears. 149, 17 Jur. 189, 22 Law J. N. s. M. C. 48. But see Rex v. Holloway, 5 Car. & P. 524.
[3] Reg. v. Riley, supra.
[4] Crim. Proced. I. § 59, 60; II. § 727. As to stealing goods in another State or country and bringing them into our own, see Vol. I. § 137–142; The State v. Newman, 9 Nev. 48.
[5] Vol. I. § 342.

particular one. Commonly, however, when speaking of the intent in larceny, we mean the particular intent; and so shall we through the following sections.

Must be "Felonious." — This particular intent is called "felonious." Without it there can be no larceny.[1] "What is meant by felonious intent," said Reade, J., in a North Carolina case, "is a question for the court; and, after the court defines that, then it is for the jury to say whether [the defendant] had such intent."[2]

Difficult — Conflicting. — But the law on this question of intent is difficult, and the authorities are in a measure conflicting. Still there are, relating to it, some leading doctrines which are reasonably certain.

More than mere Trespass. — None of the authorities doubt, that the taking, to be felonious, must be by more than a mere careless trespass;[3] as, "if the sheep of A strays from the flock of A into the flock of B, and B drives it along with his flock, or by pure mistake shears it, this is not a felony; but, if he knows it to be another's, and marks it with his mark, this is an evidence of a felony."[4] Again, —

§ 841. **Deprive of entire Ownership.** — In general doctrine, the intent must be to deprive the owner of his entire ownership, in distinction from a temporary use of the property.[5] Thus, —

Taking a Thing to use and return it. — If one takes a horse, however wrongfully, merely to use and return it;[6] as, if an indentured servant, to escape from service, rides away his master's horse, not intending to deprive him of his ownership in it;[7] or,

[1] Blunt *v.* Commonwealth, 4 Leigh, 689; Witt *v.* The State, 9 Misso. 663; Rex *v.* Holloway, 5 Car. & P. 524; Reg. *v.* Godfrey, 8 Car. & P. 563; Smith *v.* Shultz, 1 Scam. 490; Rex *v.* Hall, 3 Car. & P. 409; The State *v.* Hawkins, 8 Port. 461; The State *v.* Gresser, 19 Misso. 247; Williams *v.* The State, 44 Ala. 396; Reg. *v.* Deering, 11 Cox C. C. 298; The State *v.* Matthews, 20 Misso. 55; The State *v.* Fritchler, 54 Misso. 424; Phelps *v.* People, 55 Ill. 334; Wood *v.* The State, 34 Ark. 341.

[2] The State *v.* Gaither, 72 N. C. 458, 460.

[3] McCourt *v.* People, 64 N. Y. 583; Mason *v.* The State, 32 Ark. 238; Umphrey *v.* The State, 63 Ind. 223; People *v.* Walker, 38 Mich. 156; Devine *v.* People, 20 Hun, 98.

[4] 1 Hale P. C. 507.

[5] Vol. I. § 566, 579; 1 Hale P. C. 509; Reg. *v.* Trebilcock, Dears. & B. 453, 7 Cox C. C. 408; Fields *v.* The State, 6 Coldw. 524; Reg. *v.* Guernsey, 1 Fost. & F. 394; The State *v.* Shermer, 55 Misso. 83; Reg. *v.* Holloway, and the other cases below cited; Rex *v.* Van Muyen, Russ. & Ry. 118; Reg. *v.* Yorke, 2 Car. & K. 841; s. c. nom. Reg. *v.* York, 1 Den. C. C. 335, Temp. & M. 20; The State *v.* South, 4 Dutcher, 28; Keely *v.* The State, 14 Ind. 36.

[6] The State *v.* Self, 1 Bay, 242.

[7] The State *v.* York, 5 Harring. Del. 493.

if the wrong-doer leads the animal from a stable which he enters at night, and rides it many miles to a tavern and leaves it, his purpose being simply to do this, without any intent to return it;[1] such person does not commit larceny. In like manner, if a thief takes a horse only to help himself off with other property stolen, he does not steal the horse.[2]

To get Pay for Work not done. — And where an employee in a tannery removed some dressed skins from the warehouse to another part of the premises, for the purpose of delivering them to the foreman and getting paid for them as his own work, this was held not to be larceny.[3]

To sell to Owner. — It would have been otherwise if the intent had been to sell the skins to the owner;[4] for then there would have been an intended appropriation of the entire property, instead of the interest in it which consists in having done labor thereon.

To entice to Fornication. — A man does not commit larceny of articles from a girl, when he takes them merely to make her come for them, to afford him the opportunity of enticing her into an act of fornication.[5]

To pledge, then redeem and return. — If one takes another's goods intending to pledge them, then redeem and return them, this, within the foregoing views, would at the first impression seem in strictness not to be larceny. And so it has been, by some judges, held.[6] But plainly this limitation of the intent must be shown by the defendant, to avail him; for the outward facts *prima facie* constitute a larceny. And Gurney, B., once said to a jury: "I confess I think, that, if this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would

[1] Rex *v.* Philipps, 2 East P. C. 662.

[2] Rex *v.* Crump, 1 Car. & P. 658; Rex *v.* McMakin, Russ. & Ry. 333, note.

[3] Reg. *v.* Holloway, 1 Den. C. C. 370, 2 Car. & K. 942, Temp. & M. 40, 3 New Sess. Cas. 410, 13 Jur. 86. This case is hardly distinguishable, on principle, from Reg. *v.* Richards, 1 Car. & K. 582, in which Tindal, C. J., ruled the other way.

[4] Reg. *v.* Hall, Temp. & M. 47, 1 Den. C. C. 381, 2 Car. & K. 947, 3 New Sess. Cas. 407, 13 Jur. 87, where the servant of a tallow chandler clandestinely removed, from an upper to a lower room in his master's warehouse, a quantity of fat, and placed it in the scales, representing afterward that a butcher had brought it for sale, — this was held to be larceny.

[5] Rex *v.* Dickinson, Russ. & Ry. 420.

[6] Rex *v.* Wright, Car. Crim. Law, 3d ed. 278, by Hullock, B., and Holroyd, J., stated also 9 Car. & P. 554, note.

be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined."[1] Now, if a man pledges an article, he transmits an ownership, which, though not perfect, will become so if he fails to perform the condition to the pledgee; and this is very different from his merely holding it in his own temporary custody and using it. Perhaps, therefore, in principle, the taking with intent to pledge is larceny, even though there is the further intent to redeem and return the thing pledged. So, at least, either from principle or from considerations of policy, such a transaction would now appear to be generally regarded.[2]

§ 841 *a*. **Part of the Thing.** — The doctrine seems to be, both in principle and authority, that, if the intent is, not to deprive the owner of the whole thing, but of a part of it, or a part interest in it, the transaction will be larceny. Thus, —

Taking to compel Reward. — The Massachusetts court has held, that, if one takes a horse found astray on his land, to conceal it until the owner offers a reward for its return and then claim the reward, or to induce the owner to sell it astray for less than its value, this is larceny. And Morton, J., said: "When a person takes property of another with the intent to deprive the owner of a portion of the property taken or of its value, such intent is felonious and the taking is larceny."[3] Again, —

Railway Ticket. — It is larceny fraudulently to take a railway ticket, meaning to use it in travel, though the ticket is to be returned at the end of the journey.[4]

§ 842. **Lucri causa — (Animo Furandi).** — Besides the foregoing doctrines, it is frequently laid down in the books, that the taking must also be *lucri causa*. That it must be *animo furandi* is a common expression, which really means nothing; for what is an intent to steal? Blackstone observes: "The taking and carrying away must be *felonious;* that is, done *animo furandi;* or, as the civil law expresses it, *lucri causa*. This requisite, besides excusing those who labor under incapacities of mind or will, indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and

[1] Reg. *v.* Phetheon, 9 Car. & P. 552, 553.

[2] Reg. *v.* Trebilcock, Dears. & B. 453, 7 Cox C. C. 408; Fields *v.* The State, 6 Coldw. 524.

[3] Commonwealth *v.* Mason, 105 Mass. 163, 167. The like has been held by the Court of Criminal Appeal in Ireland, Reg. *v.* O'Donnell, 7 Cox C. C. 337.

[4] Reg. *v.* Beecham, 5 Cox C. C. 181.

brings him home again; if a neighbor takes another's plough that is left in the field, and uses it upon his own land and then returns it; if under color of arrear of rent, where none is due, I distrain another's cattle or seize them; all these are misdemeanors and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party doth it clandestinely;[1] or, being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi;* wherefore they must be left to the due and attentive consideration of the court and jury."[2] Now these words of the commentator seem even ludicrously indefinite; yet really they convey about as exact an idea as can be stated, with any assurance of its being correct, applied in all the localities in which the common law is administered.[3] And we find much difficulty, not only in saying how far the decisions of the different States conflict with one another, but how far also the later decisions overturn the earlier.

§ 843. **Convert to own Use? — Advantage to Self? — Deprive Owner?** — There are authorities which seem even to maintain, that the thief must intend to convert the property to his own use.[4] But the true view, where the necessity of the *lucri causa* is conceded, is simply that he should intend some advantage to himself, in distinction from a mere act of mischief to another.[5] Thus, —

[1] **Secrecy of The Taking.** — In North Carolina a doctrine seems to prevail, in rather indistinct outline, to the effect that, for a taking to be larceny, it must be in some sense clandestine. The State *v.* Ledford, 67 N. C. 60; The State *v.* Deal, 64 N. C. 270. Now, in matter of evidence, secrecy in the taking, or an attempt to conceal the thing taken, may, according to general doctrine, be important. Long *v.* The State, 11 Fla. 295; Gardiner *v.* The State, 33 Texas, 692; McDaniel *v.* The State, 33 Texas, 419. But, in matter of law, the taking need not be secret, neither need the thing taken be concealed. The State *v.* Fenn, 41 Conn. 590. And see ante, § 796, 804, 816, 819, 820, 825, and various other places.

[2] 4 Bl. Com. 232. And see ante, § 841 and cases there cited.

[3] See ante, § 758 and note, and cases there cited.

[4] McDaniel *v.* The State, 8 Sm. & M. 401, 418; The State *v.* Hawkins, 8 Port. 461. But an intent to convert the property to his own use generally, is sufficient, though no intent is shown to do so in the county in which it is taken. The State *v.* Ware, 10 Ala. 814.

[5] Vol. I. § 566; ante, § 758. The Alabama court held, during slavery, that, in the absence of any statutory provision,

Taking to give away. — If the intent is to make a gift of the article to a friend, the offence is committed;[1] but here the view may be, that the thief first appropriated the thing to himself, then gave it away.

To feed to Owner's Horses. — And where a servant clandestinely takes grain belonging to his master to feed to the master's horses, he commits larceny of the grain, — a proposition settled in England, though upon it there were formerly doubts.[2]

To avoid Penalty. — Likewise, if a post-office clerk secretes a letter to avoid the penalty attached to a mistake he has made concerning it, he commits a larceny of the letter.[3]

To suppress Inquiry. — So does a servant-woman who intercepts and burns a letter to suppress inquiries it may suggest concerning her character.[4]

§ 844. **Idle Curiosity.** — On the other hand, Lord Abinger, C. B., in 1838, ruled, on a jury trial, that if, from idle curiosity, either personal or political, one opens a letter addressed to another, and keeps it, this is no larceny, though a part of his object is to prevent it from reaching its destination. "The term *lucri causa* infers," he said, "that it should be to gain some advantage to the party committing the offence. A malicious injury to the property of another is not enough."[5]

§ 845. **Tender of Value.** — We have intimations, that, if one taking an article tenders its value in money, he is, *prima facie*, not guilty of larceny. The offer of pay will not necessarily exempt him, but Mr. East says, it is "pregnant evidence."[6] This proceeds

it is not larceny to entice a slave from his master with the intent to secure to the slave his freedom; because, in such a case, the party intends no benefit to himself. The State *v.* Hawkins, 8 Port. 461. But the South Carolina tribunal characterized this as "a very novel and startling proposition;" for "the secret, fraudulent deprivation of the owner of his goods shows the felonious intent, as well without as with the *causa lucri*." The State *v.* Brown, 3 Strob. 508, 516. See post, § 847. And see People *v.* Juarez, 28 Cal. 380.

[1] Reg. *v.* White, 9 Car. & P. 344. And see Rex *v.* Curling, Russ. & Ry. 123.

[2] Rex *v.* Morfit, Russ. & Ry. 307; Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Reg. *v.* Careswell, 5 Jur. 251; Reg. *v.* Usborne, 5 Jur. 200; Reg. *v.* Handley, Car. & M. 547; Reg. *v.* Gruncell, 9 Car. & P. 365. See Reg. *v.* Smith, 1 Cox C. C. 10.

[3] Reg. *v.* Wynn, 1 Den. C. C. 365, Temp. & M. 32, 2 Car. & K. 859, 3 New Sess. Cas. 414.

[4] Reg. *v.* Jones, 2 Car. & K. 236, 1 Den. C. C. 188.

[5] Reg. *v.* Godfrey, 8 Car. & P. 563.

[6] 2 East P. C. 662; 3 Greenl. Ev § 157; Hammond on Larceny, parl. ed p. 223, pl. 719–721.

from the supposed necessity of a *lucri causa*. Yet, in principle, if we admit such foundation to underlie the law of larceny, still there may be an advantage in compelling another to sell for its value property he does not wish to dispose of, sufficient to sustain the idea of lucre.

§ 846. **Lucri Causa discarded in England.** — The English courts, however, seem at last to have utterly overthrown the old notion of *lucri causa*. "Will it be contended," asked Pollock, C. B., "that picking a man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?"[1] And thus, —

Backing Horse into Coal-pit. — As long ago as 1815, when the prisoner took a horse which he backed into a coal-pit and killed, to prevent it from furnishing evidence against one accused of stealing it, the majority of the English judges held his offence to be larceny.[2]

What Evil Intent — (Malicious Mischief — Stealing "Process" — Prevent Levy). — Undoubtedly this discarding of the *lucri causa* should not be construed to transmute malicious mischief into larceny. And, aside from the doctrine of malice, which pertains to malicious mischief, larceny still requires something more of evil in the intent than merely to deprive the owner of his goods by a wrongful act. Thus, Stat. 24 & 25 Vict. c. 96, § 30, having made it larceny to steal, among other things, any "process" issuing from a court, one was held not to have committed this offence, who, thinking, under a mistake of the law, to defeat a levy on his

[1] Reg. *v.* Jones, 1 Den. C. C. 188, 2 Car. & K. 236. And see Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Rex *v.* Morfit, Russ. & Ry. 307.

[2] Rex *v.* Cabbage, Russ. & Ry. 292. "Six of the learned judges, namely, Richards, B., Bayley, J., Chambre, J., Thomson, C. B., Gibbs, C. J., and Lord Ellenborough, held it not essential to constitute the offence of larceny that the taking should be *lucri causa;* they thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient; but some of the six learned judges thought that, in this case, the object of protecting Howarth by the destruction of this animal might be deemed a benefit or *lucri causa*. Dallas, J., Wood, B., Graham, B., Le Blanc, J., and Heath, J., thought the conviction wrong." p. 293. **Proposed by the English Commissioners.** — The English Criminal Law Commissioners, in 1834, while regarding the matter as doubtful on the authorities, proposed that the legislature should enact as follows: "The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 17, pl. 3. They observe: "Where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief, which belongs to a 'different branch of criminal jurisprudence.'"

goods, forcibly took from the officer the warrants and kept them. "This," said Cockburn, C. J., "was not done *animo furandi;* it was not done *lucri causa.* It was no more stealing than it would be to take a stick out of a man's hand to beat him with it."[1] There is always a broad distinction between theft and a mere trespass.[2]

§ 847. **Lucri Causa with us.** — The American courts have not very much discussed this question of *lucri causa.* In a United States tribunal in California it was held, that, where one took away muskets to prevent their being used against himself and friends, he did not commit larceny; there being no *lucri causa,* which was assumed to be an essential ingredient in this offence.[3] But the Mississippi court held, during slavery, that taking a slave with the intent to convey him to a free State, and there make him free, is larceny of the slave; because, it was said, an intent to deprive the owner of his ownership in the property is sufficient, though there is no *lucri causa.* "The rule is now well settled," observed Handy, J., "that it is not necessary to constitute larceny that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker; and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property."[4] And the Indiana court has laid down the doctrine, that the intent to defraud the owner, though without benefit to the thief, is a sufficient criminal intent in larceny.[5] So, in Texas, the taking of a thing with the intent to destroy it is deemed to be sufficient.[6]

§ 848. **How in Principle.** — The entire doctrine of larceny, in our law, is so technical as to render almost hopeless any attempt to settle a disputed point by an appeal to principle. Still, on the present question, if the *lucri causa* is required, this is placing the love of greed, as a base motive, pre-eminent over all other base motives. For it is immaterial to the person injured what species of base motive moved the wrong-doer. And the wrong to society

[1] Reg. *v.* Bailey, Law Rep. 1 C. C. 347, 349.

[2] Isaacs *v.* The State, 30 Texas, 450; ante, § 840.

[3] United States *v.* Durkee, 1 McAl. 196.

[4] Hamilton *v.* The State, 35 Missis. 214. And see ante, § 843, note.

[5] Keely *v.* The State, 14 Ind. 36. So in Alabama and New Jersey. Williams *v.* The State, 52 Ala. 411; The State *v.* Davis, 9 Vroom, 176.

[6] Dignowitty *v.* The State, 17 Texas, 521. And see Ridgeway *v.* The State, 41 Texas, 231; Mullins *v.* The State, 37 Texas, 337; The State *v.* Fenn, 41 Conn. 590.

is the same, whatever the nature of the baseness which prompted it. But, in reason, there are other evil motives as deserving of punishment as this which we term the love of greed. Surely a man who should secretly take from his rich neighbor some article of food to give to a famishing fellow-creature, having nothing of his own to bestow, is not, in the eye of a just morality, worse than he who should abstract the neighbor's bank-bills or negotiable bonds from their place of deposit, in order to impoverish the neighbor by committing them to the flames.

§ 849. **Taking to compel Payment of Debt.** — There is a Massachusetts case which holds, according to the reporter's head-note, that "taking money with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken, is a sufficient evidence of a *conversion* to the taker's own use, to constitute larceny." And plainly here is a sufficient *conversion;* but under the title False Pretences[1] we saw, that, for a man to get possession of property of his debtor to compel payment of the debt, not to defraud him, does not constitute that crime, though a false pretence was the instrument by which the possession was secured. And, in larceny, if the object of the taker was to compel, though in an irregular way, the owner of the goods to do what the law required him to do with them, — namely, pay his debt, — there is no legal principle rendering the act a felony.[2] Looking now into this case, we see that the reporter's head-note was advisedly written in what seems to be an unscientific way, to meet the exact point decided on facts not well presented to the court. And in the trial of the cause before the lower tribunal, the following correct instruction had been given: "The defendant would not be guilty of larceny, if the jury were satisfied that she took this money under the honest belief that she had a legal right to take this specific money in the way and under the circumstances that she did take it, although in fact she may have had no such legal right."[3] On the whole, therefore, though this is not a very satisfactory case, we cannot pronounce it adverse to sound doctrine, or to the doctrine laid down under the title False Pretences.

§ 850. **Taking Food — Ignorance of Law — Drunkenness — Care-**

[1] Ante, § 466.

[2] So held in Reg. *v.* Hemmings, 4 Fost. & F. 50.

[3] Commonwealth *v.* Stebbins, 8 Gray, 492. And see Farrell *v.* People, 16 Ill 506; Butler *v.* The State, 3 Texas Aj 403; post, § 1162 *a.*

lessness. — The questions of taking food to preserve one's life,[1] ignorance of law,[2] drunkenness,[3] carelessness,[4] and the like, as affecting the intent, were discussed in the preceding volume.

§ 851. **Claim of Right.** — One who in good faith takes another's property under claim of title in himself is exempt from the charge of larceny, however puerile or mistaken such claim may be.[5] And it is the same where the taking is on behalf of another believed to be the owner.[6] But a mere dishonest pretence will not protect the taker.[7]

§ 852. **Usage.** — The Massachusetts court, while adhering to this doctrine, denied that, on an indictment for the larceny of portions of the cargo of a vessel, one not an officer could rely on a custom for officers of vessels to appropriate to themselves small parts of the cargoes, or instances in which they had done so under claim of right; because it would not be a legal custom; or, if it was, it applied only to officers.[8]

VII. *Larcenies of Particular Things and by Particular Classes of Persons.*

§ 853. **What for this Sub-title.** — In the preceding sub-titles, the principal rules and doctrines of the law of larceny are brought to view; and, in illustration of them, frequent mention is made of the classes of persons and particular things to be specially considered in this sub-title. We shall here, therefore, take a sort of

[1] Vol. I. § 349.

[2] Vol. I. § 297. **Lost Goods.** — An ignorant woman, indicted for the larceny of lost goods, was permitted to show in defence that she supposed the finding gave her a title to them. Reg. v. Reed, Car. & M. 306. And see Rex v. Hall, 3 Car. & P. 409.

[3] Vol. I. § 411.

[4] Vol. I. § 320.

[5] Vol. I. § 297; Neely v. The State, 8 Texas Ap. 64; Sisk v. The State, 9 Texas Ap. 246; Harrall v. The State, 4 Texas Ap. 427; Morningstar v. The State, 59 Ala. 30; Morningstar v. The State, 55 Ala. 148; Herber v. The State, 7 Texas, 69; Wirt v. The State, 9 Misso. 663; Merry v. Green, 7 M. & W. 623; The State v. Homes, 17 Misso. 379; The State v. Simons, Dudley, Ga. 27; McDaniel v. The State, 8 Sm. & M. 401; Rex v. Hall, 3 Car. & P. 409; Reg. v. Halford, 11 Cox C. C. 88; Severance v. Carr, 43 N. H. 65; Kay v. The State, 40 Texas, 29; Smith v. The State, 42 Texas, 444; Varas v. The State, 41 Texas, 527; Johnson v. The State, 41 Texas, 608. See Vaughn v. Commonwealth, 10 Grat. 758; Randle v. The State, 49 Ala. 14.

[6] Rex v. Knight, 2 East P. C. 510; Herber v. The State, 7 Texas, 69; Baker v. The State, 17 Fla. 406; Miles v. The State, 1 Texas Ap. 510; The State v. Waltz, 52 Iowa, 227.

[7] Reg. v. Wade, 11 Cox C. C. 549.

[8] Commonwealth v. Doane, 1 Cush. 5. **As to Gleaning from Harvest Fields,** — by poor people, under a supposed right, see 2 Russ. Crimes, 36 Eng. ed. 10, 11; Roscoe Crim. Ev. 591.

retrospect of what has gone before, and add whatever of doctrine or authority may seem desirable.

§ 854. *Larcenies by Servants:* —

Mere Custodian. — A leading proposition is, that a servant is deemed to be, unlike a bailee, a mere custodian of a thing committed to his care by the master; instead of being, as a bailee is, in possession. Therefore —

May commit Larceny. — The servant may commit larceny of the thing, the same as any third person could do.[1] But, —

§ 855. **Trespass.** — Neither a servant nor any other person can be guilty of larceny unless he commits a trespass.[2] Therefore —

Previous Custody of Master — (Larceny and Embezzlement distinguished). — The goods, to be the subjects of larceny by the servant, must have been in the possession, actual or legal, of the master, before passing into the custody of the servant;[3] for, if they are delivered by a third person to the servant for the master, and, before they have reached their *ultimate destination*,[4] the servant converts them to his own use, his offence may be embezzlement,[5] but it is not larceny. The distinction is, that in the one instance the servant commits a trespass in the taking, in the other he does not.[6]

§ 856. **Illustrations of Larcenies by Servants.** — In previous discussions, we have seen many illustrations of larcenies by servants. They assume almost numberless forms. Thus, —

Salesman taking Goods or Money. — One employed by a mercantile firm as a salesman in their store, having full control of the goods in the store-room, and of the money in the cash drawer, for the purposes of his employment, commits larceny when he feloniously abstracts the money or the goods.[7]

[1] Ante, § 824.

[2] Ante, § 799.

[3] Ante, § 828; Rex v. Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566; Gill v. Bright, 6 T. B. Monr. 130; Reg. v. Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; People v. Call, 1 Denio, 120; Reg. v. Button, 11 Q. B. 929; The State v. Self, 1 Bay, 242; Reg. v. Hall, Temp. & M. 47, 1 Den. C. C. 381, 3 New Sess. Cas. 407, 13 Jur. 87; Reg. v. Privett, 1 Den. C. C. 193.

[4] Ante, § 828–832.

[5] Ante, § 365–368.

[6] See, as illustrating this distinction, besides cases already referred to in this section and in previous connections, Reg. v. Essex, Dears. & B. 371, 7 Cox C. C. 385; Reg. v. Lyon, 1 Fost. & F. 54; Reg. v. Spears, 2 Leach, 4th ed. 825, 2 East P. C. 568; Reg. v. Betts, Bell C. C. 90, 8 Cox C. C. 140; Cobletz v. The State, 36 Texas, 353; Reg. v. Middleton, Law Rep. 2 C. C. 38, 12 Cox C. C. 260, 4 Eng. Rep. 536; Reg. v. Poynton, Leigh & C. 247, 9 Cox C. C. 249; Ennis v. The State, 8 Greene, Iowa, 67.

[7] Walker v. Commonwealth, 8 Leigh,

Clerk having Access in One Instance. — And a clerk, having no general access to a place wherein money is kept, if sent to it for a particular purpose, stands on the same ground with one who has a general access, or with one who has no access at all; if he steals any of it, he commits this offence.[1]

Selling without Authority. — Clearly one who has no power to sell, or has power to sell only in a particular way, incurs the like guilt when he sells contrary to his authority, and puts the money into his pocket.[2]

Stat. Hen. 8. — Some doubts, in early times, concerning the liability of servants to the law of larceny, led, as we have seen, to the enactment of 21 Hen. 8, c. 7. It is of little practical importance, and has been already explained.[3]

Later Statutes. — And in later times, both in England and our own country, not only statutes of embezzlement[4] have given a wider protection to property against peculations by servants than the common law furnished; but provisions also have been adopted against what are properly called larcenies by servants, differing more or less, or not at all, from the common law.[5]

§ 857. *Larcenies by Bailees:*[6] —

Bailment, what — (Bailor — Bailee). — A bailment is where one has personal property intrusted to him, to be returned, or delivered to another, in specie, when the object of the trust is accomplished.[7] The general owner of the property is called the bailor; the one to whom it is intrusted, the bailee. It is immaterial whether the property is to be returned in the form in which it was delivered, or in an altered state.[8] The test is, that the identical thing — not another thing of equal value — is to be returned.[9]

743. And see Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567.

[1] Rex *v.* Murray, 1 Leach, 4th ed. 344, 2 East P. C. 683.

[2] Reg. *v.* Wilson, 9 Car. & P. 27.

[3] Ante, § 319, 320.

[4] Ante, § 321–323, 327, 855; Stat. Crimes, § 418.

[5] Stat. Crimes, § 413–429; United States *v.* Driscoll, 1 Lowell, 303; United States *v.* Fisher, 5 McLean, 23; Rex *v.* Moore, 2 Leach, 4th ed. 575, 2 East P. C. 582; Snell *v.* The State, 50 Ga. 219.

[6] See Stat. Crimes, § 417, 419–425.

[7] Stat. Crimes, § 423; Moss *v.* Bettis, 4 Heisk. 661; Mallory *v.* Willis, 4 Comst. 76; Foster *v.* Pettibone, 3 Seld. 433; Reg. *v.* Aden, 12 Cox C. C. 512, 6 Eng. Rep. 387; Reg. *v.* Clegg, 11 Cox C. C. 212; Reg. *v.* Richmond, 12 Cox C. C. 495, 6 Eng. Rep. 332; Reg. *v.* Hassall, Leigh & C. 58, 8 Cox C. C. 491; Reg. *v.* Garrett, 8 Cox C. C. 368, 2 Fost. & F. 14; Whitney *v.* McConnell, 29 Mich. 12.

[8] Mallory *v.* Willis, supra; Foster *v.* Pettibone, supra. See Reg. *v.* Daynes, 12 Cox C. C. 514, 6 Eng. Rep. 339.

[9] Marsh *v.* Titus, 6 Thomp. & C. 29, 3 Hun, 550; Reg. *v.* Hunt, 8 Cox C. C 495.

Bailee deemed in Possession. — Bailees, unlike servants, are deemed to be in possession of the property intrusted to them; so that the doctrines applicable to servants do not apply to them.[1]

How commit Larceny. — Yet if a bailee receives goods, where only the possession, not the ownership, was agreed to pass, meaning at the same time to steal them, he becomes thereby guilty of larceny;[2] or if, after receiving them, he, contrary to his duty, breaks bulk or otherwise ends his relation of bailee to the bailor, and then, with felonious intent, appropriates the goods to himself, he commits larceny; but, if he receives them honestly, he cannot afterward become guilty of this offence in respect of them, while the relation subsists.[3] Among particular bailees are —

§ 858. **Common Carriers**[4] **— (Business — Single Instance — For Hire).** — If a man claims exemption as a common carrier, in distinction from the liabilities applicable to servants, he need not show that the carrying of goods is his business; but, if he is employed in this way for hire[5] in the single instance, it is sufficient.[6]

Carrier's Servant. — A carrier's servant, who drives the wagon, is subject to liability like other servants, and not exempt like his master.[7]

§ 859. **Drovers.** — Concerning drovers, we have the following: one employed to drive a heifer to a particular place for so much money, not being in the general service of the owner, was held to be a servant and not a bailee.[8] So was one employed only occasionally, as a general drover, and paid by the day;[9] yet the court afterward expressed a doubt whether this would be decided again the same way.[10] Under other circumstances the drover has

[1] Ante, § 824–827, 833.

[2] Ante, § 813; People *v.* Smith, 23 Cal. 280.

[3] Ante, § 833, 834.

[4] For the general principles relating to larcenies by common carriers, &c., see ante, § 833, 834.

[5] From Reg. *v.* Evans, Car. & M. 632, it would seem that the employment need not even be for hire; and such is probably the true view.

[6] Rex *v.* Fletcher, 4 Car. & P. 545; Rex *v.* Howell, 7 Car. & P. 325. See Rex *v.* Pratley, 5 Car. & P. 533; Dame *v.* Baldwin, 8 Mass. 518; Rex *v.* Jones, 7 Car. & P. 151; Reg. *v.* Jenkins, 9 Car. & P. 38; Reg. *v.* Colhoun, 2 Crawf. & Dix C. C. 57; Moss *v.* Bettis, 4 Heisk. 661.

[7] Commonwealth *v.* Brown, 4 Mass. 580.

[8] Reg *v.* Jackson, 2 Moody, 32. See Rex *v.* Stock, 1 Moody, 87.

[9] Rex *v.* McNamee, 1 Moody, 368.

[10] Reg. *v.* Hey, Temp. & M. 209, 1 Den. C. C. 602, 2 Car. & K. 983, 14 Jur 154.

been deemed a bailee, who, though he sells the animal with felonious intent, instead of executing the trust, is still exempt from the charge of larceny.[1]

§ 860. **Breaking Bulk.** — As to what is a breaking of bulk by a carrier, which if done with felonious intent constitutes larceny,[2] a case in Massachusetts apparently decides, that it is such breaking to separate one entire package from several intrusted to the carrier, though no individual package is broken.[3] But this as general doctrine cannot be maintained. Perhaps it was intended to apply only to the particular case, which was that of a wagon load of packages to be transported in a body.[4] For, under other circumstances, the exact duty of the carrier may be to separate the packages; as, for instance, in transferring them from one vehicle to another; but he may never, even for this purpose, break a package. Therefore the English doctrine requires the particular package to be broken.[5] Thus, where the master and owner of a ship steals a package out of several delivered him to carry — as a single cask of butter from among many casks — without removing any thing from the particular package;[6] or where a carrier on land takes one truss of hay from a parcel of three trusses, but does not break open the truss taken;[7] or where a letter-carrier abstracts bank-notes from a directed envelope;[8] or where a drover of sheep removes one sheep from the flock;[9] such person does not commit larceny, however felonious his intent. But if the carrier separates one bank-bill from a package of bills;[10] or one stave from a parcel of staves;[11] the consequence is the other way. And probably, if he

[1] Reg. *v.* Goodbody, 8 Car. & P. 665; Rex *v.* Reilly, Jebb, 51; Reg. *v.* Hey, supra.

[2] Ante, § 834.

[3] Commonwealth *v.* Brown, 4 Mass. 580. And see Dane *v.* Baldwin, 8 Mass. 518. The case of Commonwealth *v.* Brown may perhaps be deemed to have turned on the point that the defendant was not a common carrier.

[4] See post, § 871.

[5] Rex *v.* Madox, Russ. & Ry. 92; Reg. *v.* Cornish, Dears. 425, 6 Cox C. C. 432, 33 Eng. L. & Eq. 527.

[6] Rex *v.* Madox, supra.

[7] Rex *v.* Pratley, 5 Car. & P. 533; s. p. in New York, People *v.* Nichols, 3 Parker C. C. 579, but afterward the other way, and in accordance with the Massachusetts doctrine, in the higher court by a majority of the judges. Nichols *v.* People, 17 N. Y. 114.

[8] Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395. See Reg. *v.* Jenkins, 9 Car. & P. 38; Rex *v.* Jones, 7 Car. & P. 151.

[9] Rex *v.* Reilly, Jebb, 51.

[10] Reg. *v.* Colhoun, 2 Crawf. & Dix C. C. 57.

[11] Rex *v.* Howell, 7 Car. & P. 325. There is no mention in this case, that the staves were tied together; and they seem not to have been See also post, § 870, 871.

has broken bulk, and stolen a part, he may then steal the remainder without a further breaking.[1]

§ 861. **Goods reaching Destination.** — On the question of the goods being fully transported, so that the carrier may commit larceny of them by a felonious taking without breaking bulk,[2] Lord Hale says, "that must be intended when he carries them to the place, and delivers or lays them down; for then his possession by the first delivery is determined, and the taking afterwards is a new taking."[3]

§ 862. **Receiving with Intent to steal.** — But the reader should remember, that a common carrier who receives goods intending to steal them (the person delivering them not meaning to part with the property, but only the possession) commits larceny in the receiving; and no breaking of bulk or other subsequent act is required.[4]

§ 863. **Statutes changing Common-law Rules.** — In some of the States, statutes have abolished the distinction which protects bailees; and they are answerable for the larceny of goods in their possession, at whatever time the intent to steal arises. In Missouri, the words are: "If any carrier or other bailee shall embezzle or convert to his own use, or make way with or secrete with intent to embezzle or convert to his own use, any money, goods, rights in action, property, or valuable security, or effects which shall have been delivered to him, or shall have come to his possession or under his care as such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, he shall on conviction be adjudged guilty of larceny."[5] But it is perceived that the offence created by this is in the nature of embezzlement.

§ 864. **Hirer of Goods.** — The hirer of goods is a bailee, with the relation to them already explained.[6] Therefore, —

[1] See Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den. C. C. 233; post, § 871.

[2] Ante, § 834.

[3] 1 Hale P. C. 504, 505; 2 East P. C. 696. See post, § 864, 865.

[4] Ante, § 813, 857; The State *v.* Thurston, 2 McMullan, 382; Reg. *v.* Hey, Temp. & M. 209, 1 Den. C. C. 602, 2 Car. & K. 983, 14 Jur. 154; People *v.* Smith, 28 Cal. 280.

[5] Norton *v.* The State, 5 Misso. 461. And see The State *v.* Haskell, 33 Maine, 127; Commonwealth *v.* Williams, 3 Gray, 461; White *v.* The State, 20 Wis. 233; Commonwealth *v.* Chathams, 14 Wright, Pa. 181; Defrese *v.* The State, 3 Heisk. 53; Phelps *v.* People, 55 Ill. 334; Stat. Crimes, § 420.

[6] Ante, § 834, 857–863. And see Reg. *v.* Brooks, 8 Car. & P. 295.

Hirer of Horse. — If one hires a horse, and sells it before the journey is performed; or sells it after, but before it is returned;[1] he commits no larceny, in a case where the felonious intent came upon him subsequently to receiving it into his possession.[2] But where the prisoner had a horse from a livery-stable in London, to go to Barnet, the jury were instructed, that, when he had accomplished the journey, and also brought the horse back to London, which under the contract of hiring he was bound to do, then, if instead of delivering it to the owner he "converted it after such return to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over."[3] And if one hiring a horse intends, when he receives it, to convert it to his own use, he thereby commits larceny.[4] No subsequent act of sale or conversion is, in such a case, necessary to complete the offence.[5]

§ 865. **Countermand of Bailment.** — A mere countermand of a bailment, with no resumption of possession, is not deemed sufficient to charge the bailee with larceny, if he misappropriates the article afterward. But where the bailee of a mare took her to a livery-stable, went to the owner and told him she was there, and settled with him the accounts concerning her; then the owner forbade him to take her again, and sent directions to the stable-keeper not to let him have her, but he got her of the latter by a false representation; the judges held, that he was rightly convicted of larceny; because the jury might infer, as they did, that the bailment was terminated, and the possession had reverted to the owner.[6]

§ 866. **Furniture let to Lodgers.** — One who hires furnished rooms stands on the same ground, as to the furniture, with other hirers of goods. Unless he meant to steal it when taking possession,[7]

[1] Ante, § 861.

[2] Rex v. Banks, Russ. & Ry. 441; Rex v. Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689. Otherwise in Missouri by statute, Norton v. The State, 4 Misso. 461; ante, § 862.

[3] Rex v. Charlewood, 1 Leach, 4th ed. 409. s. p. Reg. v. Haigh, 7 Cox C. C. 403. See also Commonwealth v. White, 11 Cush. 483; Richards v. Commonwealth, 13 Grat. 803; White v. The State, 11 Texas, 769; The State v. Cameron, 40 Vt. 555; Perham v. Coney, 117 Mass. 102.

[4] The State v. Williams, 35 Misso. 229. See Reg. v. Kendall, 12 Cox C. C. 598, 8 Eng. Rep. 609.

[5] Reg. v. Janson, 4 Cox C. C. 82, overruling Reg. v. Brooks, supra.

[6] Rex v. Stear, 1 Den. C. C. 349, Temp. & M. 11, 13 Jur. 41. See post, § 874.

[7] 2 East P. C. 585; 1 Hawk. P. C. Curw. ed. p. 146, § 24; ante, § 862.

he does not commit larceny if, in pursuance of a subsequent felonious intent, he sells or carries it away.[1]

Old Statute. — By 3 Will. & M. c. 9, § 5 (A. D. 1691), it was made felony to remove furniture from hired lodgings, with intent to steal it;[2] but the date of this enactment is subsequent to the settlement of our older colonies; and Kilty says, this particular section "does not appear, from an examination of the provincial records, to have extended" to Maryland.[3]

§ 867. **Goods delivered for Work to be done on them.** — East says: "If a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it, it is felony; for the entire property remains there only in the owner, and the possession of the workmen is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he, having the lawful possession of it, had afterwards embezzled it, this would not be felony; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is intrusted with the care of a thing for another to keep for his use."[4] So if a watchmaker honestly receives a watch to repair; and, from a corrupt purpose afterward coming to him, sells it for his own benefit, he does not commit larceny.[5]

§ 868. **Breaking Bulk in these Cases.** — But the doctrine of breaking bulk[6] applies in these cases. Therefore, —

Miller. — If a miller steals some of the meal made from corn delivered him to grind, he commits larceny.[7] And when one received barilla to grind, but fraudulently retained a part of it,

[1] Rex v. Raven, J. Kel. 24; Rex v. Meeres, 1 Show. 50.

[2] Note to Rex v. Meeres, supra.

[3] Kilty Report of Statutes, p. 179. So the Pennsylvania judges do not mention it as in force in Pennsylvania, though they mention other statutes of much later dates. Report of Judges, 3 Binn. 595. Its words are: "If any person or persons shall take away, with an intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, embezzling, or purloining shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in the case of felony."

[4] 2 East P. C. 682. And see Reg. v. Saward, 5 Cox C. C. 295; Commonwealth v. Superintendent, 9 Philad. 581; The State v. Jones, 2 Dev. & Bat. 544.

[5] Reg. v. Thristle, 1 Den. C. C. 502, 3 Cox C. C. 573, 2 Car. & K. 842, 13 Jur. 1035; Rex v. Levy, 4 Car. & P. 241, Vaughan, B., observing: "It would have been different if the prisoner had obtained the watch by trick or fraud."

[6] Ante, § 834, 860.

[7] 2 East P. C. 698.

returning a mixture of barilla and plaster of Paris, he was adjudged guilty of this offence.[1]

Repairer of Furniture. — Where also one has intrusted to him, for repair, a bureau in a secret drawer of which he discovers money, if he breaks open the drawer unnecessarily, and abstracts the money, converting it to his own use, he commits the offence; while, if his intent is to keep the money for the owner, he is not criminal.[2]

§ 869. **Animals to keep and Feed.** — If one receives a horse to agist, and afterward sells it for his own benefit, he does not commit larceny, in a case where there was no felonious intent in the original taking.[3]

§ 870. **Warehouse-men.** — Where a warehouse-man received on storage forty bags of wheat, without authority to sell, or "to make any alteration in the wheat, or to open the bags in order to show them, or for any other purpose;" and he separated with felonious intent some of the bags from the rest, opening those particular bags and appropriating all in each to his own use, this was held to be larceny. The judges deemed, "that the taking the whole of the wheat out of any one bag was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag."[4]

§ 871. **Dealers on Commission.** — One was employed to sell clothes about the country on commission. The owner fixed the price for which each article should be sold, and the money was to be returned with the unsold goods. This traveller, on one occasion, instead of making any sale from the parcel received, pawned fraudulently a part and applied the residue to his own use. And it was held, that there was but a single bailment of the articles forming the parcel; that the unlawful pawning of a part terminated this bailment; and that, consequently, the

[1] Commonwealth *v.* James, 1 Pick. 375.

[2] Cartwright *v.* Green, 2 Leach, 4th ed. 952, 8 Ves. 405, Lord Eldon observing also: **Tailor abstracting Pocket-book.** — "If a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is felony." See also Merry *v.* Green, 7 M. & W. 623.

[3] Rex *v.* Smith, 1 Moody, 473. And see Reg. *v.* Leppard, 4 Fost. & F. 51.

[4] Rex *v.* Brazier, Russ. & Ry. 337. See ante, § 860.

subsequent fraudulent appropriation of the residue was a larceny.[1]

§ 872. *Husband and Wife, and Persons receiving from each the Goods of the other:* —

Wife. — In consequence of the intimate legal relationship created by marriage, the wife can never commit the trespass necessary in larceny, by taking the husband's goods.[2]

Husband. — And for precisely the same reason, if the wife has goods which she holds to her separate use under statutes prevailing of late in most of our States, the husband cannot commit larceny of them.[3]

§ 873. **Person receiving from Wife — from Husband.** — There are cases which seem to assume, that, in the absence of any adulterous misconduct, a third person who receives the husband's goods from the wife is, in like manner, protected.[4] If this doctrine is sound, it also protects the receiver of the wife's goods from the husband. That, *prima facie*, such a person cannot be charged with larceny is plain in principle; because, in a case of felony, authority in husband or wife to dispose of the other's goods should be presumed. But there is, in principle, reason for not carrying the doctrine further.[5]

Adulterer receiving from Wife. — And it is settled that a man who has committed adultery with the wife, or who elopes with her intending to commit it, cannot protect himself on a charge of larceny, by showing a delivery of the goods to him by her. The reason is sometimes assumed to be, that he knows he has not the husband's consent in the wife's.[6] Hence, —

[1] Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den. C. C. 233. See ante, § 865.

[2] 1 Hawk. P. C. Curw. ed. p. 147, § 32; Rex *v.* Willis, 1 Moody, 375; Reg. *v.* Tollett, Car. & M. 112; Reg. *v.* Glassie, 7 Cox C. C. 1.

[3] 2 Bishop Mar. Women, § 152, 153.

[4] Authorities cited in the last two notes; also, Rex *v.* Harrison, 1 Leach, 4th ed. 47, 2 East P. C. 559; Reg. *v.* Fitch, Dears. & B. 187. But see Reg. *v.* Glassie, 7 Cox C. C. 1, 2.

[5] 2 Bishop Mar. Women, § 154.

[6] People *v.* Schuyler, 6 Cow. 572; Reg. *v.* Thompson, 2 Crawf. & Dix C. C. 491; Reg. *v.* Tollett, Car. & M. 112; Reg. *v.* Harrison, 12 Cox C. C. 19, 2 Eng. Rep. 174; 3 Greenl. Ev. § 158. Where the prisoner and the prosecutor's wife had jointly occupied themselves in removing the goods, he carrying boxes of things to the cart which took the things away, and the two then went off together, the presiding magistrate told the jury, "that, if they were satisfied that the prisoner and the prosecutor's wife, when they so took the property, went away together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but that, if . . . they did not go away with any such criminal purpose, and had never committed adultery together at

Husband dissenting. — From this it might be inferred, that, though there is no adultery, if the husband expressly forbids the taking on the wife's delivery, such taking, feloniously meant, will be larceny. It is not clear that the courts — at least, all courts — will go to this extent.[1] Is it material whether the taking was on the wife's *delivery*, or directly by the thief with her concurrence? In a case of the latter sort, the New York court laid down the doctrine, that, though there is no adultery actual or contemplated, still, if one intending to steal goods which he knows to be the husband's, carries them away in the wife's presence and with her consent, knowingly against the consent of the husband, he commits larceny of them.[2] In England, a case passed to judgment perhaps not quite in harmony with this doctrine, yet not distinctly in conflict with it.[3]

all, the prisoner would be entitled to his acquittal;" and this instruction was held, by the court of criminal appeal, to be right. Reg. *v.* Berry, Bell C. C. 95, 8 Cox C. C. 117.

[1] See Reg. *v.* Featherstone, infra, and the note in 1 Ben. & H. Lead. Cas. 199; Reg. *v.* Tollett, Car. & M. 112; 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 18, pl. 14.

[2] People *v.* Cole, 43 N. Y. 508. Grover, J., who delivered the opinion of the court, put the whole doctrine of larceny when adultery is intended or committed, upon the ground, that, in such circumstances, the thief knows he has not the consent of the husband; adding, — "Any other evidence that satisfies the jury that the prisoner knew the taking was against the will of the husband, although with the consent of the wife, will show him guilty of larceny, equally with proof that the property was taken to facilitate adulterous intercourse with the wife." p. 511.

[3] The case was this: The uncle and cousin of the wife, who was about to leave the house and cohabitation of her husband, came, in the night as well as afterward in the day, and with her privity, but secretly as respects him, carried off beds, carpets, and other things belonging to him; and then denied their possession of the goods. "The jury found, that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them." A verdict of guilty was ordered on these facts and this special finding; and the judges, on a case reserved, held it to be wrong. "No adultery," said Cockburn, C. J., "is shown to have taken place between either of the prisoners and the prosecutor's wife, nor is it found that any was intended. The goods were taken in the presence, with the privity and consent, of the wife when she was abandoning her husband's dwelling. It is not necessary to lay it down as law, that, supposing a stranger stole the goods of a husband, and the wife was privy to it, and consenting, such privity and consent on the part of the wife would, if there was *animus furandi* in the stranger, exonerate him from what would otherwise be larceny. In deciding that this conviction should be quashed, it is not necessary to adopt that doctrine; but, on the other hand, we take it to be clear that a wife cannot be guilty of larceny in simply taking the goods of her husband; and, if a stranger do no more than merely assist her in the taking, inasmuch as the wife, as principal, cannot be guilty of larceny, the stranger, as accessory, cannot be guilty. In this case, it was not left to the jury to say, whether the prisoners were acting as principals when the act was done, or whether the wife

§ 874. **Adulterer, again.** — To charge an adulterer, a mere delivery of the goods by the wife, at his lodgings, is not sufficient. There must be a personal taking by him, or they must be shown to be in his possession.[1] Yet such taking on delivery from her hands will do;[2] and so will a joint carrying away by the two.[3]

Wife's Clothes. — If a wife and adulterer elope together, carrying her clothes, he commits larceny of the clothes; for they are the husband's property.[4] So it has been ruled in England; but, in a case reserved, the judges refused to sustain a conviction where the wife and the adulterer were apprehended while walking away from the husband's house together, he carrying some of her personal apparel in a bandbox; Cockburn, C. J., observing, that "he was only assisting in carrying away the necessary wearing apparel of the wife."[5]

Old Statute. — Lord Hale, moreover, mentions, that, "if a man take away another man's wife against her will, *cum bonis viri*, this is felony by the statute of Westm. 2, c. 34."[6] No reason appears

was the principal and the prisoners merely aiding and assisting her. That finding might have raised the question; but, in its absence, we must assume that state of the case which is most favorable to the prisoners, and the conviction must be quashed." Reg. *v.* Avery, Bell C. C. 150, 153, 154, 8 Cox C. C. 184.

[1] Reg. *v.* Rosenberg, 1 Car. & K. 233, 1 Cox C. C. 21; Reg. *v.* Taylor, 12 Cox C. C. 627, 10 Eng. Rep. 509.

[2] Reg. *v.* Featherstone, Dears. 369, 18 Jur. 538, 26 Eng. L. & Eq. 570, 6 Cox C. C. 376, 1 Ben. & H. Lead. Cas. 199.

[3] Reg. *v.* Thompson, 1 Den. C. C. 549, Temp. & M. 294, 14 Jur. 488, 1 Eng. L. & Eq. 542; Rex *v.* Tolfree, 1 Moody, 243; Reg. *v.* Matters, Leigh & C. 511.

[4] Reg. *v.* Tollett, Car. & M. 112. And see Reg. *v.* Glassie, 7 Cox C. C. 1.

[5] Reg. *v.* Fitch, Dears. & B. 187.

[6] 1 Hale P. C. 514. This statute is otherwise cited as 13 Edw. 1, stat. 1, c. 34. It is plainly enough common law in this country, as far as applicable to our situation. But the words of it do not expressly cover the proposition stated by Lord Hale; and I cannot certainly derive it by inference; though perhaps it comes from the clause about "women carried away with the goods of their husbands." The entire enactment is as follows: "It is provided, that, if a man from henceforth do ravish a woman married, maid, or other where she did not consent, neither before nor after, he shall have judgment of life and of member. And likewise where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after, he shall have such judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit. And of women carried away with the goods of their husbands, the king shall have the suit for the goods so taken away. And if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action. He that carrieth a nun from her house, although she consent, shall be punished by three years' imprisonment, and shall make convenient satis

why this should not be larceny also by the more ancient common law.

Husband's Servant as Adulterer. — Though a man is in the husband's employ as servant, and takes the goods by command of the wife, still if it is done in the course of an adulterous elopement with her, he commits larceny, or not, precisely like one who is not a servant.[1]

§ 875. *Things concealed, wrecked, or astray:* —

What is Treasure-trove. — Coke says: "Treasure-trove is when any gold or silver, in coin, plate, or bullion, hath been of ancient time hidden, wheresoever it be found whereof no person can prove any property; it doth belong to the king, or to some lord or other of the king's grant, or prescription. The reason wherefore it belongeth to the king is a rule of the common law, that such goods whereof no person can claim property belong to the king; as wrecks, estrays, &c." It must be gold or silver; "for if it be of any other metal, it is no treasure; and, if it be no treasure, it belongs not to the king, for it must be treasure-trove. It is to be observed, that veins of gold and silver in the grounds of subjects belong to the king by his prerogative, for they are royal mines, but not of any other metal whatsoever in subjects' grounds. Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or elsewhere," is immaterial, "so as the owner cannot be known."

Misdemeanor of Concealing. — The concealment of treasure-trove is, by the common law, a misdemeanor punishable by fine and imprisonment.[2]

faction to the house from whence she was taken, and nevertheless shall make fine at the king's will."

[1] Reg. v. Mutters, Leigh & C. 511. And see the English reporter's note, citing and reviewing the cases on this general subject.

[2] 3 Inst. 132. In 1863, there was a conviction in England for the concealment of treasure-trove, on the following facts: A laborer was ploughing in some grounds; and the share of his plough, going deeper than any ploughshare had done before, turned up what he supposed to be pieces of old brass. It was, in truth, gold. Some other persons, ascertaining it to be gold, but keeping their discovery from him, bought it of him for brass, and sold it for gold, thus realizing over £500. They were indicted for concealing the treasure-trove, and convicted, and the conviction was held to be good. "The law is clear," said Erle, C. J., "that the queen has a right to treasure-trove, and the finder must not hinder the finding from becoming known. The facts here are, that Butcher [the laborer who ploughed up the gold] is an innocent finder, and thinks the treasure-trove is brass. The prisoners, on the

§ 876. **Larceny of Treasure-trove — (Wreck — Waif — Estray).** — "And," according to the old books, "he who takes away treasure-trove, or a wreck, waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony."[1] But this doctrine has some modern limitations, growing principally out of statutes, which give a particular ownership in these things; and out of more accurate notions, prevalent in later times, concerning the larceny of lost goods.[2]

Estray Beasts, with us. — In our States, there are statutory regulations concerning beasts astray. But they are not uniform.[3]

other hand, knowing it to be gold, and how it has been found, take it as brass, and sell it as gold, and tell falsehoods in order to conceal the transaction." Martin, B., made the following observation, which may, or may not, be held hereafter to qualify the doctrine respecting this offence: "I am inclined to think, that the first person who conceals the treasure is guilty, and not those into whose possession it comes subsequently. If, therefore, Butcher had known that the treasure was gold, I should have doubted whether the prisoners could have been convicted. Here, however, it is clear that Butcher was an innocent agent." Reg. v. Thomas, Leigh & C. 313, 325, 326. Another case of concealment of treasure-trove, particularly as to the form of indictment and as to the evidence, is Reg. v. Toole, Ir. Rep. 2 C. L. 36, 11 Cox C. C. 75.

[1] 1 Hawk. P. C. Curw. ed. p. 149, § 38; Hammond on Larceny, parl. ed. p. 21, pl. 23; 1 Hale P. C. 510; 2 Russ. Crimes, 3d Eng. ed. 86, 87.

[2] See ante, § 838; post, § 878–883. This subject is considerably discussed by Parke, B., in Reg. v. Thurborn, 1 Der C. C. 387, 2 Car. & K. 831, Temp. & M. 67. He said: "Treasure-trove and waif seem to be subject to a different construction from goods lost. **Treasure-trove — Waif.** — Treasure-trove is properly money supposed to have been hidden by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the Crown; as to waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. **Wreck — Estray.** — Wreck and stray are not exactly on the same footing as treasure-trove and waif; wreck is not properly so called if the real owner is known, and it is not forfeited until after a year and a day. The word estray is used in the books in different senses; as . . . where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge after being proclaimed, where the property vests in the Crown or its grantee of estrays and also of cattle straying in the manor." The whole of this opinion may be read with great profit. As to waif in this country, see Vol. I. § 970. **Derelict.** — As to what is derelict, in the sense of the admiralty, and what are the consequences of the doctrine, see The Bee, Ware, 332; Tyson v. Prior, 1 Gallis. 133; The Boston, 1 Sumner, 328; The Henry Ewbank, 1 Sumner, 400; Flinn v. Leander, Bee, 260; Wilkie v. Brig St. Petre, Bee, 82; Sheldon v. Sherman, 42 N. Y. 484. **Wreck, again.** — Where one had removed a valuable article, part of a wreck, from a wharf on which it had been placed, and afterward denied the possession of it, the question submitted to the jury on an indictment for the larceny of this article was, whether, when he took it, he meant to steal it. Reg. v. Hore, 3 Fost. & F. 315.

[3] Stat. Crimes, § 462; Walters v. Glats, 29 Iowa, 437.

And the question of the larceny of such beasts will depend much on these regulations. In Missouri, an estray may be the subject of larceny before it is posted, and the indictment properly lays the ownership in a person unknown.[1] In Texas, it is held that there can be no larceny of a horse which has run astray for years without a known owner; because there can be no intent to deprive one of property in the animal.[2]

§ 877. **Seaweed.** — In a late Irish case, the court held, one judge dissenting, that, though a man owns the shore of the sea, between high and low water mark, yet if he has not gathered the seaweed drifted there, another cannot commit larceny by taking it away. "It would be difficult to say," observed Whiteside, C. J., "that a man had a determinate property in seaweed floating, as was boldly insisted, between high and low water mark, and that he could pursue a bit of seaweed which had once touched his part of the shore and then floated out again to sea, and then touched or drifted on his neighbor's land." [3]

§ 878. *Lost Goods:* [4] —

Distinctions — (Abandoned — Lost — Mislaid). — The owner of goods need not keep a constant manual possession of them, to be protected in his rights of ownership. And though he forgets the place in which he laid them, or though for any other reason he knows not where they are, still they remain his. But he may abandon his property therein, and then it will vest in him who first takes possession with the intent to appropriate them as his own.

No Larceny of Things abandoned. — This appropriation is not larceny; and so the offence cannot be committed of abandoned goods.[5]

§ 879. **Mislaid.** — If a thing is mislaid, it is not therefore abandoned, neither is it lost. Thus, when a man getting a bill changed in a shop, laid his pocket-book on the table and went away; but, on missing it, immediately remembered where he had left it; the court held, on an indictment for stealing it, that this

[1] The State *v.* Casteel, 53 Misso. 124. See post, § 882, note.

[2] Johnson *v.* The State, 36 Texas, 375; Ritcher *v.* The State, 38 Texas, 643. See Reg. *v.* Matthews, 12 Cox C. C. 489, 6 Eng. Rep. 329; Debbs *v.* The State, 43 Texas, 650; Starck *v.* The State, 63 Ind. 285; Owens *v.* The State, 7 Texas Ap. 470.

[3] Reg. *v.* Clinton, Ir. Rep. 4 C. L. 6, 15. And see post, § 959 and note.

[4] See ante, § 838.

[5] See 2 East P. C. 606; Reg. *v.* Reed, Car. & M. 306, 308; Reg. *v.* Peters, 1 Car. & K. 245; McGoon *v.* Ankeny, 11 Ill. 558.

was not a case of lost property.[1] And the same was held, where a purchaser, at a market, left accidentally his purse on the prisoner's stall, neither he nor the prisoner knowing then of the mistake.[2] *A fortiori* this was so where one put a bucket of peas on a stranger's cart which he mistook for a friend's.[3] Larceny can be committed in these cases, precisely as though the thing were not mislaid.

Appearing to be Lost. — If the goods appear to be lost, but are not so in fact, the defendant, who relied on this appearance, may claim to have the case treated as if they were lost; for, on the question of intent, a party honestly misled concerning facts is to be judged of the same as if they were what he believes them to be.[4]

§ 880. **Whether Larceny of Goods really lost.** — Assuming goods to be really lost, the Tennessee doctrine seems, not quite certainly, to be, that no larceny of them is possible.[5] But the Eng-

[1] Lawrence *v.* The State, 1 Humph. 228.

[2] Reg. *v.* West, Dears. 402, 24 Law J. N. s. M. C. 4, 18 Jur. 1031, 29 Eng. L. & Eq. 525, Jervis, C. J., observing: "There is a clear distinction between property lost, and property merely mislaid, put down, and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding therefore does not arise." And see People *v.* Swan, 1 Parker C. C. 9; People *v.* McGarren, 17 Wend. 460; The State *v.* Williams, 9 Ire. 140; Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; The State *v.* McCann, 19 Misso. 249; Pritchett *v.* The State, 2 Sneed, 285; Pyland *v.* The State, 4 Sneed, 357.

[3] He went away to inquire their market price, and, on returning, found the owner of the cart, a vegetable dealer, carrying off the bucket, with beets and lettuce so piled on as to conceal the peas, and insolent and unwilling to surrender it on demand. The man was convicted of larceny. The State *v.* Farrow, Phillips, 161.

[4] Vol. I. § 303; Reg. *v.* Thurborn, 1 Den. C. C. 387, 389; Reg. *v.* Peters, 1 Car. & K. 245. And see 2 East P. C. 664.

[5] Lawrence *v.* The State, 1 Humph. 228; Porter *v.* The State, Mart. & Yerg. 226. In Morehead *v.* The State, 9 Humph. 635, 639, this question was discussed; — and the court held, that a runaway slave may be the subject of larceny. McKinney, J., said: "Lost property is looked upon, for some purposes, as abandoned by the former proprietor; and, as such, is returned into the common stock, or mass of things; and, therefore, as belonging to the first occupant or finder. And though the former proprietor is entitled to maintain an action for the recovery, yet, as against all other persons, the title vests in the finder. Therefore, though it may have been converted *animo furandi*, by the person finding it, it is no larceny, because the first taking was lawful. But this principle properly applies, perhaps, only to inanimate things, which cannot be transferred from or cease to be in the possession of the owner, without his own or another's act or default. It cannot, certainly, to the same extent, be applied even to animals, which possess the instinct and power of motion, and can remove themselves from place to place; though these may be

lish courts, and generally the American, allow of this offence as to such goods under certain circumstances.[1] Also, during slavery, statutory larcenies might be committed of runaway slaves; they, however, not being generally regarded exactly as lost property.[2]

§ 881. **How committed of Lost Goods.** — The prevailing doctrine, which may be subject to minute differences among our States, is, that the finder of lost goods may appropriate them to himself, subject to the claim of the owner, and to any claim in the public which a statute has established, — a point, however, depending much upon the particular statutory law of the State in which the question arises.[3] He, therefore, gains, immediately upon the finding, a special or particular kind of property in the goods;[4] and, as we have seen,[5] the nature of this special property is such, that, where there is no larceny in the original taking, there can be none in any subsequent misappropriation, even by breaking bulk, with a full knowledge of the true ownership.

§ 882. **Continued.** — Unless, therefore, there is a larceny in the original taking, there can be none committed afterward.[6] But the case stands somewhat on the doctrine stated in pages back,[7] that, if one receives, even on delivery from the owner, goods which he means when he receives them to steal, he commits the crime, provided the consent of the owner to the taking does not extend to a full and unconditional title. The law gives to the finder a title in lost goods, but not full and unconditional; and so, if he takes them with the intent to steal them, he commits a

lost in some instances, in the proper sense of the term." p. 637. s. p. Cash v. The State, 10 Humph. 111. See post, § 882, note.

[1] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. v. Tharbone, 13 Jur. 499; s. c. Reg. v. Wood, 3 New Sess. Cas. 581; Reg. v. Peters, 1 Car. & K. 245; Ransom v. The State, 22 Conn. 153; Tanner v. Commonwealth, 14 Grat. 635. And see the other cases cited to the next section.

[2] Murray v. The State, 18 Ala. 727; The State v. Miles, 2 Nott & McC. 1; Morehead v. The State, 9 Humph. 635; Cash v. The State, 10 Humph. 111; The State v. Williams, 9 Ire. 140; Randal v. The State, 4 Sm. & M. 349; The State v. Clayton, 11 Rich. 581. See Nelson v. Whetmore, 1 Rich. 318. But see Commonwealth v. Hays, 1 Va. Cas. 122.

[3] And see The State v. Jenkins, 2 Tyler, 377, 379; The State v. Apel, 14 Texas, 428; Lawrence v. Buck, 62 Maine, 275; The State v. Taylor, 25 Iowa, 273.

[4] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. v. Tharbone, 13 Jur. 499.

[5] Ante, § 838.

[6] Reg. v. Matthews, 12 Cox C. C. 489, 6 Eng. Rep. 329; Reg. v. Deaves, Ir Rep. 3 C. L. 306, 11 Cox C. C. 227; Reg. v. Christopher, Bell C. C. 29, 8 Cox C. C. 91; Reg. v. Shea, 7 Cox C. C. 147; Reg. v. Gardner, Leigh & C. 243, 9 Cox C. C. 253.

[7] Ante, § 804, 809, 811–813.

larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man, knowing the owner of goods, cannot lawfully pick them up, without returning them to him; but a man, not knowing the owner, can. The doctrine therefore is, that, if, when one takes goods into his hands, he sees about them any marks,[1] or otherwise learns any facts,[2] by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise, not.[3] Some of the cases say, if he knows who the owner is, or *has the means of ascertaining;*[4] but the better doctrine is as

[1] Lane v. People, 5 Gilman, 305; The State v. Conway, 18 Misso. 321; People v. McGarren, 17 Wend. 460; Anonymous, 2 Russ. Crimes, 3d Eng. ed. 14.

[2] Reg. v. Dixon, 36 Eng. L. & Eq. 597, Dears. 580; People v. Cogdell, 1 Hill, N. Y. 94; The State v. Ferguson, 2 McMullan, 502; People v. Swan, 1 Parker C. C. 9. And see The State v. Cummings, 33 Conn. 260.

[3] Reg. v. Glyde, Law Rep. 1 C. C. 139; Reg. v. York, 12 Jur. 1078; The State v. Roper, 3 Dev. 473; Reg. v. Mole, 1 Car. & K. 417; Tyler v. People, Breese, 227; Porter v. The State, Mart. & Yerg. 226; Reg. v. Reed, Car. & M. 306, 308; Randal v. The State, 4 Sm. & M. 349; Reg. v. Deaves, Ir. Rep. 3 C. L. 306, 11 Cox C. C. 227. And see People v. Kaatz, 3 Parker C. C. 129. But see The State v. Jenkins, 2 Tyler, 377, 379. In a Virginia case, the prisoner found in the street a pocket-book with money in it. He took it up and appropriated it to his own use, and denied all knowledge of it. "There is no fact proved," said the judge, "showing that the prisoner, at the time of the finding, knew the owner, or had the means of knowing him, or had reason to believe that he might be found. . . . It was not proved that there was any name or mark on the pocket-book, or other circumstances, to indicate then who was the owner." And this was held not to be larceny. Allen, P., observed: "If there were no marks on the property, or other circumstances indicating the owner, the appropriation to the finder's use does not amount to larceny." Tanner v. Commonwealth, 14 Grat. 635, 637. **Estray.** — It is held in Missouri, that a person who drives away cattle which have wandered from the owner's enclosure, and converts them with felonious intent to his own use, is none the less guilty of larceny when he is ignorant of their true owner, and their owner does not know where they are. Said Napton, J.: "Whatever may be the law concerning domestic animals, such as horses and cattle, in England, we do not consider the doctrine of the English criminal lawyers concerning lost goods as applicable to domestic animals in Missouri. It is with no propriety, either in view of custom or statutory law, that animals can be called *lost goods* here, simply because they are outside of the owner's enclosures, and the owner does not know where they are." The State v. Martin, 28 Misso. 530, 537. And see The State v. Williams, 19 Misso. 389; ante, § 876, 880, note.

[4] The State v. Weston, 9 Conn. 527; Reg. v. Breen, 3 Crawf. & Dix C. C. 30; Reg. v. Kerr, 8 Car. & P. 176; Rex v. Pope, 6 Car. & P. 346; Rex v. James, 2 Russ. Crimes, 3d Eng. ed. 14; Reg. v. West, Dears. 402, 24 Law J. N. S. M. C. 4, 18 Jur. 1031, 29 Eng. L. & Eq 525; Commonwealth v. Titus, 116 Mass. 42; Reg. v. Shea, 7 Cox C. C. 147; Reg. v. Knight, 12 Cox C. C. 102, 2 Eng. Rep. 186. See Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; Ransom v. The State, 22 Conn. 153; Reg. v. Preston, 2 Den. C. C. 353, 8 Eng. L. & Eq. 589; Rex v. Beard, Jebb, 9. In Reg. v. Peters, 1 Car. & K. 245, Rolfe, B., observes: "It is perfectly well known, that, if a person leave any thing in a stage-coach, if the owner can be found

above set down, because every man by advertising and inquiring can find the owner, if he is to be found, while the guilt of a defendant must attach at the moment, if ever, without depending on an if.[1]

§ 883. **Special Cases.** — Though the doctrine, for all ordinary cases, is thus plain, special circumstances will sometimes arise. Thus, —

Note dropped in Shop. — The prisoner was a hair-dresser, and the prosecutor had accidentally dropped a £10 note in his shop; but, the next morning, discovering its loss, had gone back and inquired for it of the hair-dresser, who denied all knowledge of it. The jury found specially, "1. That the note was dropped by the prosecutor in the shop, and that the prisoner found it there. 2. That the prisoner, at the time he picked up the note, did not know, nor had he reasonable means of knowing, who the owner was. 3. That he afterwards acquired knowledge who the owner was, and after that he converted the note to his own use. 4. That the prisoner intended when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever the owner might be. 5. That the prisoner believed, at the time he picked up the note, that the owner could be found." Now, if this was a case of lost property strictly, there was, pretty plainly, no larceny within the doctrines above laid down; and, *a fortiori*,

by inquiry, the party finding the thing, and appropriating it to his own use, is guilty of larceny. [See Rex v. Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex v. Sears, 1 Leach, 4th ed. 415, note; Lamb's Case, 2 East P. C. 664; Roscoe Crim. Ev. 502.] So, if it is found in a street, and there is any mark by which the owner can be discovered. So, in the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house. . . . If he took it up, and did not immediately bring it to the prosecutor, in the hopes, that, by coming next day, he would get a present of £5, perhaps it might not amount to a larceny. If he took it away with the intention to appropriate it, and only restored it because the reward was offered, it is clear that he is guilty of felony." In Reg. v. Christopher, Bell C. C. 27, 34, 8 Cox C. C. 91, the doctrine was laid down by Hill, J., thus: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown, that, at the time of finding, he had the felonious intent to appropriate the thing to his own use. . . . The other ingredient necessary is, that, at the time of finding, he had reasonable ground for believing that the owner might be discovered; and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found, — there must be the *immediate* means of finding him."

[1] See particularly on this point, Reg. v. Dixon, and People v. Cogdell, supra; The State v. Dean, 49 Iowa, 73.

there was none if the case was one of abandoned goods. If, on the other hand, the bank-note was to be regarded as not lost, plainly there was a larceny. The judges, however, seemed to regard this case neither as strictly of the one class, nor strictly of the other; yet they held, that the prisoner was properly convicted of the larceny of the note.[1]

Taking by one employed to find. — In North Carolina, a person who had lost a carpet-bag in the street employed another to find it. The latter found and concealed it, but he was held not to be guilty of larceny.[2]

VIII. *Remaining and Connected Questions.*

§ 884. **Grand — Principal of Second Degree.** — The distinction between grand and petit larceny appears in other connections.[3] "If two steal goods above the value of 12*d.* from the same person at the same time, this is grand larceny in both; for it is one entire felony, and both are guilty of the whole."[4]

§ 885. **Felony.** — This offence is felony.[5]

Principal and Accessory — Receiving. — Therefore the doctrine of principals[6] and of accessories[7] before[8] and after[9] the fact must be attended to; but these particulars were examined in the former volume. We shall devote a subsequent brief chapter in this volume to the law of receiving stolen goods.[10]

Punishment. — The punishment, also, which is chiefly of statutory regulation, has already been considered, in respect of its general principles.[11]

[1] Reg. v. Moore, Leigh & C. 1, 8 Cox C. C. 416. Cockburn, C. J., said of the note: "It was lost in the sense that it had been dropped out of the owner's purse; it was not lost in the sense that the owner did not know where to find it. As soon as the owner discovers his loss, he goes at once to the shop and inquires for it." And he added: "If this were not larceny, our law would be much more defective than I take it to be." p. 8 of the report in Leigh & C.

[2] The State v. England, 8 Jones, N. C. 399.

[3] Vol. I. § 679, 680. See ante, § 757.

[4] 2 East P. C. 740; 1 Hawk. P. C. 6th ed. c. 33, § 32.

[5] Vol. I. § 679, 680. **Cow-stealing.** — Cow-stealing, under the South Carolina statute, is misdemeanor. Burton v. Watkins, 2 Hill, S. C. 674; The State v. Hamblin, 4 S. C. 1. But see The State v. Ripley, 2 Brev. 300. It is punished by fine and imprisonment. The State v. Hamblin, supra. And see Stat. Crimes, § 173, 174.

[6] Vol. I. § 646–654.

[7] Vol. I. § 662–671.

[8] Vol. I. § 672–680.

[9] Vol. I. § 692–700.

[10] Post, § 1137 et seq.

[11] Vol. I. § 927 et seq. And see ante, § 55. As to various States, see Swinney v. The State, 8 Sm. & M. 576; Wilcox

§ 886. **Attempts.** — The doctrine of solicitations[1] and other attempts[2] to commit larceny was also discussed in the preceding volume.

§ 887. **Misprisions — (Treasure-trove).** — Likewise the doctrine of misprision was discussed in the first volume.[3] Blackstone mentions, among what he calls negative misprisions, "the concealing of treasure-trove,[4] which belongs to the king or his grantees by prerogative royal; the concealment of which was formerly punishable by death, but now only by fine and imprisonment."[5]

§ 888. **The Transaction how divisible.**[6] — It is quite possible for a man, in many circumstances, to commit more crimes than one in a single transaction.[7] Can he do it by a single impulse? Under some circumstances he can; as, if he discharges a loaded gun at one whom he means to kill, but accidentally the ball passes by this one and takes the life of another, he has murdered the latter, and made an assault on the former with the intent to kill him, by a single touch of the trigger of the gun. If he is tried for the murder, can he then be proceeded against for the felonious assault, or are the two crimes so far one that a conviction or acquittal of either will be a bar to an indictment for the other? This is a different question, upon which it is not certain the authorities are agreed. So, coming to the subject of this chapter, it is in some circumstances plain and in others doubtful, whether more larcenies than one have been committed in a single transaction, or what is the effect of a jeopardy, upon an indictment for a part, on an indictment for the residue. Let us, therefore, look at —

What has been held. — It is plain doctrine, followed in all our courts, that, if in a single transaction more articles than one belonging to the same owner are stolen, the indictment may charge the larceny of the whole in one count. Indeed, it is but

v. The State, 3 Heisk. 110; Tucker v. The State, 3 Heisk. 484; Commonwealth v. McKenney, 9 Gray, 114; Watkins v. The State, 14 Md. 412; Cornish v. The State, 15 Md. 208; The State v. Gray, 14 Rich. 174.

[1] Vol. I. § 767.

[2] Vol. I. § 741, 743, 744; Reg. v. Sutton, 8 Car. & P. 291, 2 Moody, 29, 2 Lewin, 272; Corneille v. The State, 16 Ind. 232; Wolf v. The State, 41 Ala. 412; Lovett v. The State, 19 Texas, 174; Reg. v. Cheesman, Leigh & C. 140, 9 Cox C. C. 100; Commonwealth v. Taggert, 3 Brews. 340; Berdeaux v. Davis, 58 Ala. 611; The State v. Utley, 82 N. C. 556; De Lacy v. The State, 8 Baxter, 401.

[3] Vol. I. § 717–722.

[4] As to treasure-trove, see ante, § 875, 876.

[5] 4 Bl. Com. 121.

[6] Vol. I. § 791 et seq.

[7] Vol. I. § 778, 1060–1064.

one larceny.[1] And, though the articles should have different owners, it is, at least, permissible to charge the larceny of them in the same way.[2] But, of course, whether there is a single owner or the owners are numerous, the indictment need not, unless the prosecuting power chooses, embrace all the articles stolen; and, if it charges the larceny of those only which belong to a particular person, it is the doctrine of some of the courts that another indictment may be maintained for those which are another person's.[3] Other courts hold, that whether there were more larcenies than one depends on whether there was more than one taking, and not on the number of articles stolen or their ownership;[4] and, if there was but one taking, there can be only one conviction.[5]

§ 889. **Continued.** — Though the articles are not taken and carried away together, yet, if the taking is one continuous transaction, the larceny is one.[6] Where the prisoner, having taken an

[1] The State v. Snyder, 50 N. H. 150; following The State v. Cameron, 40 Vt. 555; and overruling The State v. Nelson, 8 N. H. 163. s. p. The State v. Williams, 10 Humph. 101; Quitzow v. The State, 1 Texas Ap. 47; The State v. McCormack, 8 Oregon, 236; Kelly v. The State, 7 Baxter, 323; The State v. Faulkner, 32 La. An. 725.

[2] Lorton v. The State, 7 Misso. 55; The State v. Daniels, 32 Misso. 558; The State v. Morphin, 37 Misso. 373; Reg. v. Bleasdale, 2 Car. & K. 765; post, § 889; 2 Stark. Plead. 2d ed. 449 and note; The State v. Newton, 42 Vt. 537; The State v. Merrill, 44 N. H. 624; The State v. Lambert, 9 Nev. 321; Commonwealth v. Sullivan, 104 Mass. 552; The State v. Hennessey, 23 Ohio State, 339; Wilson v. The State, 45 Texas, 76; Hudson v. The State, 9 Texas Ap. 151; Addison v. The State, 3 Texas Ap. 40. This doctrine is denied in a Tennessee case, which holds, that a count charging the larceny of property of A and property of B is double, and therefore to be quashed. There were deemed to be as many distinct offences as owners of things stolen. "Every larceny," said the learned judge, "includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." Morton v. The State, 1 Lea, 498, 499. This reasoning overlooks the fact, that the accusation does not come from the private persons trespassed upon, but from the State, and the names of these persons are given simply as descriptive of the one act of trespass whereof the State complains. An assault is a trespass; but, where by one act two persons are thus trespassed upon, an indictment is good and not double which in one count sets out this trespass according to the fact. Crim. Proced. II. § 60.

[3] The State v. Thurston, 2 McMul. 382; Reg. v. Brettel, Car. & M. 609; Commonwealth v. Sullivan, 104 Mass. 552; The State v. Lambert, 9 Nev. 321.

[4] The State v. Newton, 42 Vt. 537. And see The State v. Hennessey, 23 Ohio State, 339; Scarver v. The State, 53 Missis. 407.

[5] The State v. Morphin, 37 Misso. 373, and the other Missouri cases, and some from other States, cited supra. See also Bell v. The State, 42 Ind. 335; People v. Connor, 17 Cal. 354; Reg. v. Knight, Leigh & C. 378, 9 Cox C. C. 437; Hozier v. The State, 6 Texas Ap. 542; The State v. Augustine, 29 La. An. 119.

[6] The State v. Trexler, 2 Car. Law Repos. 90; Rex v. Jones, 4 Car. & P. 217; The State v. Martin, 82 N. C. 672.

article, came back in about two minutes for a second, and in half an hour for a third, and the indictment was for stealing the three, Littledale, J., ruled that the carrying away of the first two articles might be regarded as one transaction, but that the larceny of the third was a separate offence; the period of half an hour being too long an interval to consider the act as continuing.[1] Plainly, however, such a question is not to be determined by the number of minutes or hours intervening, but by the nature of the transaction and the special facts. Where one was indicted for stealing coal, by working, for a series of years, through the help of innocent agents, a mine which extended into the lands of many different proprietors, — Erle, J., intimated that this was but one transaction, though he did not absolutely so direct, and said: "I should say, that, as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people."[2]

§ 890. **Local.** — That this offence, like all others, is local, so that the offender can be pursued only in the county of its commission,[3] is explained in "Criminal Procedure."[4]

Goods stolen in Foreign Jurisdiction. — In the first volume of this work, are discussed the principles by which to determine the indictability of the transaction where goods are stolen under a foreign jurisdiction and brought by the thief into our own.[5]

§ 891. **United States Bank Bills.** — The larceny of United States bank notes may be punished under State statutes.[6]

[1] Rex *v.* Birdseye, 4 Car. & P. 386.
[2] Reg. *v.* Bleasdale, 2 Car. & K. 765. See ante, § 431.
[3] Coon *v.* The State, 13 Sm. & M. 246.
[4] See Crim. Proced. I. § 45 et seq.
[5] Vol. I. § 136–143.
[6] The State *v.* Banks, Phillips, 577; Sallie *v.* The State, 39 Ala. 691.

CHAPTER XXVI.

LARCENY, COMPOUND.[1]

§ 892–894. Introduction.
895–899. Larcenies from the Person.
900–904. Larcenies from Particular Places.

§ 892. **How defined.** — A compound larceny is larceny aggravated by some attendant fact, increasing its enormity; the compound consisting of the larceny and the aggravating fact. It may be a —

Common-law Compound. — A familiar compound, known to the common law, is Robbery, to be treated of in a chapter further on. It consists mainly of larceny and assault.[2] A less pure compound is Burglary, already treated of; one of the ingredients of which is larceny, actual or attempted, or some other felony.[3] Or the aggravated larceny may be a —

§ 893. **Statutory Compound.** — The statutes on this subject are numerous; but, in one respect, they are alike. They require, for the constitution of the offence, first, a complete simple larceny; secondly, the particular aggravating matter which the statute points out. What we are to look at, therefore, in this chapter, concerns simply the aggravations.

§ 894. **How the Chapter divided.** — We shall consider, I. Larcenies from the Person; II. Larcenies from Particular Places.

I. *Larcenies from the Person.*

§ 895. *Private:* —

Stat. 8 Eliz. — The foundation statute respecting larcenies from the person is 8 Eliz. c. 4, § 2. It deprived of clergy those convicted of the "felonious taking of any money, goods, or chattels

[1] For matter relating to this title, see Vol. I. § 440, 566. See this volume, Larceny; Burglary; Robbery. For the pleading, practice, and evidence, see Crim. Proced. II. § 771 et seq.
[2] Vol. I. § 438, 566, 582, 1063; post, Robbery.
[3] Ante, § 111, 117.

from the person of any other, privily without his knowledge, in any place whatsoever." [1]

Not extend to Petit. — "But then," says Blackstone, "it must be such a larceny as stands in need of the benefit of clergy; namely, of above the value of twelve pence; or else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law." [2]

How far Common Law with us. — There were indictments under this statute in colonial times in Maryland,[3] and probably in other of the colonies. But benefit of clergy having been abolished in our States,[4] and special provisions made for the punishment of felonies as well as misdemeanors, this old enactment is no longer of practical force. Yet the interpretations given it by the English tribunals may enlighten our own, in expounding similar words in our legislative acts.

§ 896. **"Privily without his Knowledge."** — The words "privily without his knowledge" exclude the idea of open violence; [5] therefore a robbery is not within this statute.[6] Neither is an open larceny, without violence; [7] and, "in Brown's Case, where the prisoner took the prosecutor's watch out of his pocket while sleeping, but who was thereby awakened just at the instant, and caught at his watch, but missed it, Hotham, B., with the advice of Aston, J., left it to the jury, whether, under the circumstances of the case, they would acquit the prisoner of *privately* stealing, &c., and find him guilty of simple larceny; as it could not be well said to be *privately* stealing where the prosecutor had seen part of the fact." [8] On principle, however, if there was enough done, unknown to the prosecutor, legally to constitute a larceny, though there was done also, within his knowledge, something else which might be deemed a part of the same offence or not, this is sufficient; leaving the question still open, whether it is not sufficient if the thing privately done is simply a necessary ingredient in any part of the crime.[1]

[1] For a fuller recital and an exposition of this statute, see 2 East P. C. 700.
[2] 4 Bl. Com. 241. And see 2 East P. C. 701.
[3] Kilty Report of Statutes, 168.
[4] Vol. I. § 938.
[5] Stat. Crimes, § 222.
[6] 2 East P. C. 703. The words of the present English statute, differing from these, are "Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony," &c. Stat. 24 & 25 Vict. c. 96, § 40.
[7] Ib.
[8] Brown's Case, 2 East P. C. 702. And see other cases referred to by Mr East in the same connection.

§ 897. **On Person drunk, &c.** — If one is so drunk, or otherwise so incapacitated, as not to be capable of knowing what is done, can private larceny be committed on him, especially in a place not private? Mr. East says: "It was formerly holden, that persons asleep or drunk were not within the protection of the act, which speaks [in the preamble] of places of public resort and the like, where persons were supposed to use ordinary caution, and not expose themselves by carelessness or misbehavior to these accidents." [2] The doctrine finally settled appears to be, that, if the incapacity were brought about by any artifice of the thief, his case is within the statute; [3] while, if it came through the fault of the prosecutor (as where he becomes drunk voluntarily,[4] or even possibly through such carelessness as accidentally falling asleep),[5] the consequence is otherwise. Where there was neither fault nor carelessness in either the thief or the prosecutor, but the latter was asleep of necessity, a stealing from him was held to be within the statute.[6]

Superseded. — But this statute of Elizabeth has been superseded in England by later enactments against larceny from the person generally, omitting the words "privily," &c.; and most of the American statutes follow the modern English form.[7]

§ 898. *Not Private:* —

"From the Person." — A common form of the statutory inhibition is that adopted in Massachusetts; namely, "larceny by stealing from the person of another." To constitute this offence, the taking need not be either open and violent, or private and fraudulent; if it is with the knowledge of the owner, though without his dissent or resistance, it satisfies equally the requirements of the statute.[8] Snatching a thing from the hand is sufficient.[9] And

[1] See Vol. I. § 649, 650; 2 East P. C. 701, 702; Woodard v. The State, 9 Texas Ap. 412.
[2] 2 East P. C. 703.
[3] Rex v. Branny, 2 East P. C. 704, 1 Leach, 4th ed. 241, note.
[4] Rex v. Gribble, 1 Leach, 4th ed. 240, 2 East P. C. 706; Rex v. Kennedy, 2 Leach, 4th ed. 788, 2 East P. C. 706.
[5] Rex v. Thompson, 1 Leach, 4th ed. 443, 2 East P. C. 705. But see Rex v. Willan, 1 Leach, 4th ed. 495, 2 East P. C. 705. Contra, Reading's Case, 1 Leach, 4th ed. 240, note.
[6] Huckley's Case, 2 Leach, 4th ed. 789, note; Rex v. Willan, 1 Leach, 4th ed. 495, 2 East P. C. 705.
[7] See ante, § 896, note.
[8] Commonwealth v. Dimond, 3 Cush. 235. And see De Gaultie v. The State, 31 Texas, 32. It makes no difference that the person plundered was asleep. Hall v. People, 39 Mich. 717. See, as to the punishment, Commonwealth v. Nolan, 5 Cush. 288.
[9] Reg. v. Walls, 2 Car. & K. 214.

where the prisoner, at a railroad depot, took a bank-bill from the fingers of the prosecutor, who neither consented nor resisted, saying he would get for him his ticket, and then disappeared, — the court held that this statutory offence was committed.[1]

Protection of the Person. — The thing taken need not be actually attached to the person, but must be under its protection.[2] Probably the same rule applies here as in robbery.[3] It has been deemed, that, while a lodger is in his bed undressed and asleep, money in his trunk and the key of it in his pocket are under the protection, not of his person, but the house; and a stealing of them is larceny from the building, not the person.[4]

§ 899. **Asportation.** — In this sort of larceny, as in simple, there must be an asportation;[5] and there is an English case in which the majority of the judges considered, that lifting the article half way out of the pocket is too slight a severance from the person, though it would do in simple larceny.[6] But in Texas this was held to be sufficient in larceny from the person.[7] And, in England, where a watch, which the prisoner had drawn out, was immediately attached by the key to the prosecutor's button, there was deemed to be a severance from the person, as well as an asportation.[8]

II. *Larcenies from Particular Places.*

§ 900. **Under old Common Law.** — Under the common law of England, larcenies from dwelling-houses, shops, and the like, are mere simple larcenies; unless attended with a breaking of the habitation at night, when, as already explained,[9] they constitute a part of the crime of burglary.[10]

Old English Statutes. — But there are many old English statutes,

[1] Commonwealth *v.* Dimond, supra.

[2] Reg. *v.* Selway, 8 Cox C. C. 235.

[3] Post, § 1177, 1178.

[4] Commonwealth *v.* Smith, 111 Mass. 429. And see Reg. *v.* Hamilton, 8 Car. & P. 49, where, after a man had gone to bed with a prostitute, and had fallen asleep, leaving his watch in his hat on the table, a larceny of the watch by her was held not to be from his person. See also Rex *v.* Thomas, Car. Crim. Law, 8d ed. 295.

[5] Ante, § 898.

[6] Rex *v.* Thompson, 1 Moody, 78. See ante, §. 794, 795, and note.

[7] Flynn *v.* The State, 42 Texas, 301.

[8] Reg. *v.* Simpson, Dears. 421, 18 Jur. 1030, 29 Eng. L. & Eq. 530. As to Larceny "from the possession," see Rex *v.* Robinson, 2 Stark. 485. And see Rex *v.* Thomas, 2 East P. C. 605, 2 Leach, 4th ed. 684.

[9] Ante, § 111, 117, 892.

[10] 2 East P. C. 623; 4 Bl. Com. 239, 240.

some of which are early enough in date to be common law in this country,[1] whereby the benefit of clergy is taken away from theft committed in such places, under particular circumstances which the statutes specify.[2] Yet, as already explained,[3] such statutes have little or no practical operation when the plea of benefit of clergy is abolished; while the judicial interpretations of them may be important guides to the meaning of like terms in the legislation of the State.[4]

§ 901. **From "Dwelling-house" or "House."** — Among the more common of the modern statutory provisions, are those which make it specially punishable to steal from a "dwelling-house," or a "house." What is a "*dwelling-house*,"[5] and what a "*house*,"[6] are explained in other connections. And in "Statutory Crimes" the law of larceny and robbery from houses and dwelling-houses is perhaps sufficiently stated.[7] A reference to some cases in the note will be convenient.[8]

From "Shop," &c. — But the words to designate the place are numerous. The meaning of "*shop*"[9] is given in "Statutory Crimes;" so likewise are the meanings of most of the other terms.

[1] In a Georgia case, the court observed: "Every difficulty might be obviated by an indictment under the Stat. 12 Anne, for stealing to the value of forty shillings in a dwelling-house, computing the value of the goods according to American calculation. That statute, as far as it can operate, is in force in this State, because it is not in hostility with any similar section of the penal code, there being no section providing for the offence of larceny from the dwelling-house. The penal code of Georgia does not abrogate all the criminal law of England in force anterior to its passage, but leaves it as it was, with a restriction only as to any punishment which may be incompatible with the nature and purposes of a penitentiary system." The State *v.* Maloney, R. M. Charl. 84, Charlton, J.

[2] For an enumeration of them, see 4 Bl. Com. 240; 2 East P. C. 623 et seq.

[3] Ante, § 895.

[4] In Commonwealth *v.* Hartnett, 3 Gray, 450, 451, Metcalf, J., observed: "We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts. Yet the provisions of some of them, and the provisions of acts of Parliament for the punishment of other offences, have been enacted by our legislature, in every stage of our history. And in such cases (as well as in cases where English statutes respecting civil concerns have been enacted here), it has always been held, that the construction previously given to the same terms by the English courts is the construction to be given to them by our courts."

[5] Stat. Crimes, § 277 et seq.; Rex *v.* Turner, 6 Car. & P. 407; ante, § 104.

[6] Stat. Crimes, § 213, 277, 289; ante, § 11.

[7] Stat. Crimes, § 233, 234, 240, 525.

[8] Point *v.* The State, 37 Ala. 143; Taylor *v.* The State, 42 Texas, 387; Callahan *v.* The State, 41 Texas, 43; Wakefield *v.* The State, 41 Texas, 556; Williams *v.* The State, 41 Texas, 649; Reg. *v.* Murphy, 6 Cox C. C. 340.

[9] Stat. Crimes, § 295; Commonwealth *v.* Annis, 15 Gray, 197.

§ 902. **Goods under Protection of Place, &c.** — But the matter which is the most important is the proposition, illustrated in "Statutory Crimes,"[1] that these statutes apply only to things usually kept in the place wherein the larceny is by them made specially penal, and kept under the protection of this place, and to persons who are within the spirit of their provisions.[2] We have seen[3] that, if one going to bed puts his clothes and money by the bedside, they are under the protection of the dwelling-house, and not of the person; therefore the stealing of them is larceny in the dwelling-house.[4]

§ 903. **Wife.** — We have seen,[5] that a wife cannot commit simple larceny by stealing her husband's goods. In like manner, if she steals the goods of a third person, she does not add to this simple larceny the ingredient of taking them "in any building" when she takes them in a building owned by her husband. This is in accordance with the construction which, in England, was given to Stat. 12 Anne, stat. 1, c. 7, as explained in the work on Statutory Crimes.[6] And though the statutory words have been in this country changed, it is judicially decided that the ancient interpretation should still be followed.[7]

§ 904. **Other Compound Larcenies.** — There are various other compound larcenies; perhaps the most important of which are those, created by national statutes, for the protection of the mails.[8]

[1] Stat. Crimes, § 233.

[2] Williams *v.* The State, 41 Texas, 649; Wakefield *v.* The State, 41 Texas, 556; Taylor *v.* The State, 41 Texas, 337; Point *v.* The State, 37 Ala. 148; Martinez *v.* The State, 41 Texas, 126; Henry *v.* The State, 39 Ala. 679.

[3] Ante, § 898.

[4] Rex *v.* Thomas, Car. Crim. Law, 3d ed. 295; Reg. *v.* Hamilton, 8 Car. & P. 49. As to larceny from a coach, see Sharpe's Case, 2 Lewin, 233.

[5] Ante, § 872.

[6] Stat. Crimes, § 233.

[7] Commonwealth *v.* Hartnett, 3 Gray, 450; ante, § 900, note.

[8] *Postal Offences.* — 1. In the Revised Statutes of the United States, p. 1064–1068, § 5463–5480, the reader will find these and kindred offences set down under the larger title of "Postal Crimes." It would be useless to repeat the provisions here, but a brief statement of legal doctrines and the citation of some authorities may be helpful to the reader. Among the words used in these statutes is —

2. "**Secrete.**" — Thus, "any person employed in any department of the postal service who shall *secrete*, embezzle, or destroy any letter," &c. R. S. of U. S. § 5467. For cases expounding this word "secrete," see The State *v.* Williams, 30 Maine, 484; Reg. *v.* Wynn, 1 Den. C. C. 365, Temp. & M. 32, 2 Car. & K. 859, 3 New Sess. Cas. 414, 13 Jur. 107. There is an English statute not dissimilar to ours; and, under it, a stamper at the post-office who purloins a letter merely to deliver it as a missorted letter, and thus obtain the postage of it, does not "secrete" it, although containing money. The reason once given is, "that, as the statute extends to such letters only as contain valuable documents, the security of the documents was the object contemplated by the legislature; and, as the prisoner had no intention to put those documents in hazard, or to prevent the person for whom they were intended from receiving them, the case, though within the letter, was not within the spirit of the act, and the conviction was therefore wrong." Rex *v.* Sharpe, 1 Moody, 125, Car. Crim. Law, 3d ed. 147. In harmony with this doctrine, it is also held, that, if a carrier takes from the post-office a letter, intending to deliver it to the owner, and, at the same time, to embezzle the postage, he does not commit larceny of the letter. Rex *v.* Howatt, 2 East P. C. 604, 1 Leach, 4th ed. 83, note.

3. "**Person employed in the Postal Service.**" — According to English decisions, a letter-carrier is such a person, even while executing, by direction of a postmaster, a commission not strictly within the ordinary line of his duty. Reg. *v.* Bickerstaff, 2 Car. & K. 761. And so is any one, not in the ordinary service, while gratuitously assisting a postmaster, at his request, in assorting letters. Reg. *v.* Reason, 22 Eng. L. & Eq. 602. But a man, engaged at a receiving house of the general post-office in cleaning boots, assisting in tying up the letter-bags, and the like, is not a servant of the post-office. Rex *v.* Pearson, 4 Car. & P. 572. As to the letter's coming into the prisoner's hands "in consequence of his employment," see Rex *v.* Salisbury, 5 Car. & P. 155. As to a letter-carrier, with us, see United States *v.* Parsons, 2 Blatch. 104.

4. "**Post-office.**" — A receiving house is not, in England, a "post-office," but "a place for the receipt of letters." Reg. *v.* Pearson, supra. With us, the term "post-office" would seem to embrace every place of deposit for letters, used in the regular business of the mail service. It need not be a building set apart for that use, or any apartment or room in it. According to the extent of the business done, it may be a desk, or trunk, or box carried about a house or from one building to another. United States *v.* Marselis, 2 Blatch. 108. And see United States *v.* Nott, 1 McLean, 499.

5. "**Post Letter.**" — These words are in the English statute; and, though not in ours, their equivalent is. Any letter, posted in the ordinary way, whatever be its address and object, is a post letter; as, for example, one to a fictitious name, put into the post-office to test the honesty of a clerk. Reg. *v.* Young, 1 Den. C. C. 194, 2 Car. & K. 466, overruling Reg. *v.* Gardner, 1 Car. & K. 628; s. p. United States *v.* Foye, 1 Curt. C. C. 364. And see Reg. *v.* Rogers, 5 Cox C. C. 293. But a letter not deposited in the ordinary way does not come within this designation. Therefore, when, on suspicion being entertained of a letter-carrier, an assistant inspector wrote and sealed a letter, enclosing in it a marked sovereign, and took an opportunity while the carrier's back was turned to place it among some letters which the latter was sorting, — this was held not to be a post letter; and, though the carrier stole it, with the sovereign, the judges decided that his offence was only a simple larceny of the money. Reg. *v.* Rathbone, 2 Moody, 242, Car. & M. 220. And see Reg. *v.* Harley, 1 Car. & K. 89; Reg. *v.* Shepherd, Dears. 606, 36 Eng. L. & Eq. 599. See also Reg. *v.* Bickerstaff, 2 Car. & K. 761. It is not important, except as aggravating the offence, that the letter should contain money. United States *v.* Fisher, 5 McLean, 23. The letter need not be sealed. United States *v.* Pond, 2 Curt. C. C. 265, where also various other points are stated. And see United States *v.* Tanner, 6 McLean, 128.

6. **Embezzlement and Larceny.** —

Stealing from Vessel. — In Massachusetts, stealing from a vessel in the night-time has been held to be a distinct offence from that of stealing from a vessel in the daytime.[1]

[1] Commonwealth *v.* McLaughlin, 11 Cush. 598.

Other Questions. — Help on other questions relating to compound larcenies will be found in "Statutory Crimes."[1]

For various cases of post-office embezzlement and larceny, see United States v. Marselis, 2 Blatch. 108; United States v. Parsons, 2 Blatch. 104; United States v. Keene, 5 McLean, 509; United States v. Pond, 2 Curt. C. C. 265; United States v. Driscoll, 1 Lowell, 303; United States v. Emerson, 6 McLean, 406; Rex v. Brown, Russ. & Ry. 32, note; United States v. Hardyman, 13 Pet. 176; Rex v. Ranson, Russ. & Ry. 232, 2 Leach, 4th ed. 1090.

7. **The Tribunal — Not Felony.** — These post-office offences are punishable only in the United States tribunals; and are not, like larcenies at the common law, felonies. United States v. Lancaster, 2 McLean, 431.

[1] And see for various points: Devoe v. Commonwealth, 3 Met. 316; Commonwealth v. Tuck, 20 Pick. 356; Hopkins v. Commonwealth, 3 Met. 460. In Missouri, stealing in a dwelling-house is grand larceny, without regard to the value of the property stolen; and it may be punished as such under art. 3, § 32, of the act concerning crimes and punishments. The State v. Ramelsburg, 30 Misso. 26; The State v. Smith, 30 Misso. 114. See, as to the Alabama statutes, Case v. The State, 26 Ala. 17.

For LEWDNESS, see OPEN AND NOTORIOUS LEWDNESS, in Stat. Crimes. And see Vol. I. § 500, 1083 et seq., 1125 et seq.

CHAPTER XXVII.

LIBEL AND SLANDER.[1]

§ 905, 906. Introduction.
907–927. Definition and Nature of Libel.
928–944. Different Kinds of Libel.
945–947. Verbal Slander.
948, 949. Remaining and Connected Questions.

§ 905. **Common-law Offence.** — Libel is an offence under the common law both of England and of our States.[2] Verbal slander is indictable only in rare circumstances.

Civil Action. — For each, a civil action may, within recognized limits, be maintained.

§ 906. **What for this Chapter — How divided.** — If we should compare closely the civil suit and the criminal, we should discover places at which the two would seem to proceed on principles nearly if not quite identical; while, at other places, they would be wide apart. It will not compensate us to undertake the comparison throughout, yet occasionally we may advert to what is held by the civil courts. We shall consider, I. The Definition and Nature of Libel; II. The Different Kinds of Libel; III. Verbal Slander; IV. Remaining and Connected Questions.

I. *The Definition and Nature of Libel.*

§ 907. **Classed with Attempt.** — The offence of libel is founded on the doctrine of attempt.[3]

How defined. — It is any representation in writing,[4] or by pict-

[1] For matter relating to this title, see Vol. I. § 110, 204, 219–221, 308, 319, 470, 484, 500, 540, 591, 734, 761, 799, 917. See, in this volume, BLASPHEMY AND PROFANENESS. Also, NUISANCE, Vol. I. § 1071 et seq., with some of the succeeding chapters. For the pleading, practice, and evidence, see Crim. Proced. II. § 781 et seq. And see Stat. Crimes, § 388–392.

[2] Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Chapman, 13 Met. 68; The State v. Burnham, 9 N. H. 34.

[3] Vol. I. § 734. As to attempts generally, see Vol. I. § 723 et seq.

[4] Ante, § 525 et seq.

ures, effigies,[1] or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.[2]

§ 908. **Other Definitions.** — Starkie says: "The offence may consist in the tendency of the communication to weaken or dissolve religious or moral restraints, or to alienate men's minds from the established constitution of the state, or to engender hatred and contempt of the king or his government, or the houses of Parliament, or the administration of public justice, or in general to produce some particular inconvenience or mischief, or to excite individuals to the commission of breaches of the public peace, or other illegal acts."[3]

Concerning our own Definition. — Our own definition above, especially in the last clause of it,[4] is expressed in terms somewhat broader than are usually employed in the books; but it is believed to be sustained by the current of decision, as well as by the true reasons of the law of this offence.

Mischiefs. — Some of the mischiefs, the tendency to which renders the writing libellous, are the following: —

§ 909. First. **Breaches of the Peace.** — The common tendency, to which the books oftener allude than any other, is to create breaches of the peace. This is said to be the principal ground on which libels against individuals are indictable.[5]

[1] 1 Hawk. P. C. Curw. ed. p. 542, § 2, 3; Case de Libellis Famosis, 5 Co. 125 *a*.

[2] And see Commonwealth *v.* Clap, 4 Mass. 163, 168, 169; Steele *v.* Southwick, 9 Johns. 214; The State *v.* Farley, 4 McCord, 317; Case de Libellis Famosis, 5 Co. 125 *a*.

[3] 2 Stark. Slander, 130. **Defined in Delaware.** — We find in the books various definitions of libel; but the following, from the Delaware court, copied to a considerable extent from other sources, is not an uncommon form: "A libel is a *miscellaneous* [malicious] publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or to degrade him in society and lower him in the esteem and the opinion of the world, or to bring him into public hatred, contempt, or ridicule." The State *v.* Jeandell, 5 Harring. Del. 475. That the word "miscellaneous" is a misprint for "malicious," appears from the cases to which the court refers; namely, Layton *v.* Harris, 3 Harring. Del. 406, 407; Rice *v.* Simmons, 2 Harring. Del. 417, 431, 433. But this definition, the reader perceives, refers merely to libels on individuals, excluding the large and important class of public libels. Russell, after describing the various sorts of public libel, proceeds: **Defined by Russell.** — "With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule." 1 Russ. Crimes, 3d Eng. ed. 220.

[4] See post, § 912.

[5] Vol. I. § 591; 2 Stark. Slander, 211, 212; Commonwealth *v.* Clap, 4 Mass. 163, 168, 169; Case de Libellis Famosis, 5 Co. 125 *a*.

§ 910. Secondly. **Corruption of the Public Morals.** — This is another frequent ground of indictability. On it rests the entire class of what are called obscene libels;[1] and, in a degree, blasphemy and profaneness.[2]

§ 911. Thirdly. **Discontent toward the Government.** — Under this head we have all those publications which, coming short of actual treason, tend to create disaffection toward the form of government under which we live, or toward its administration and its laws. These libels will be further considered in subsequent sections.[3]

§ 912. Fourthly. **Incite to other Violations of Criminal Law.** — In the first volume, was considered the doctrine that any solicitation to commit a criminal act is itself a crime. It is an attempt.[4] Now, in libel, the rule appears to be, though not fully illustrated by adjudication, that any publication which tends to excite people to the commission of any crime is a libel; being, by the law of libel, made a substantive offence, in distinction from being left to punishment as a mere criminal attempt. It seems also to have been regarded in this way by Starkie.[5]

§ 913. *The Limitations and Restrictions of these General Propositions:* —

How General Doctrines limited in Law. — Our unwritten law consists of doctrines general in form, scarcely any one of which is universal in its application. Doctrine limits doctrine. By one doctrine or a series of doctrines, rights may be recognized and privileges guaranteed. If another doctrine appears, it is to have a certain scope, but not to overturn what is thus established. Therefore, —

Liberty of Press. — It being fundamental with us that the proper and open discussion of whatever concerns the public shall be free, the law of libel is never to be so administered as to impair the just liberty of the press. Consequently, though a particular publication is such on its face as the general law of libel prohibits, yet, if a suppression of it would be a restraint upon that open discussion of proper subjects which is essential to the

[1] Vol. I. § 500.

[2] Ante, § 73 et seq.

[3] Post, § 941, 942.

[4] Vol. I. § 767, 768.

[5] 2 Stark. Slander, 207 et seq.

liberty of the people, or to any other public or even private right, it cannot be punished criminally.[1]

§ 914. **Duty to speak.** — Not only the liberty of the press must be preserved, but the liberty of written discourse, as well as of oral, in all other relations where there is a duty to speak, whether the duty is due to the person speaking, to the person addressed, or to the public. If what is written, under such a duty, goes no further than duty demands, it is not indictable or actionable, unless express malice is shown; otherwise if it goes beyond the line of duty.[2] Thus, —

In Discipline — Remonstrance — Criticism — Advertising for Information. — If, in good faith, a member of an Odd Fellows' society,[3] or of a church,[4] or of a Quaker meeting,[5] prefers, entertains, or prosecutes charges against another member, in the course of the discipline established by the rules, whether written or otherwise understood, of the body in which the discipline is carried on; or, if a member of a school district writes in good faith a letter remonstrating against the appointment of a particular candidate as a teacher;[6] or, if any person criticises a literary production or work of art, publicly put forth;[7] or, if one, interested in acquiring any particular information, advertises for it;[8] — in these cases, and all others resting on the like reason, the man making the publication, without malice in his heart, is not to be holden for a libel, even though it contains matter, false in fact, of a nature injurious to another individual.[9] Of course, if he follows this apparent duty as a cloak to conceal actual malice, the result is otherwise. The publications described in this section are called in the law privileged.

[1] This doctrine comes rather from the cases generally, and the reasons of the law, than from express decision. And see Reg. v. Marshall, 2 Jur. 254; Rex v. Burdett, 4 B. & Ald. 95, 132; New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly, 188; Morton v. The State, 3 Texas Ap. 510.

[2] The State v. Burnham, 9 N. H. 34; Bradley v. Heath, 12 Pick. 163; Gassett v. Gilbert, 6 Gray, 94; Gilbert v. People, 1 Denio, 41; Commonwealth v. Featherston, 9 Philad. 594; Williamson v. Freer, Law Rep. 9 C. P. 393; Robinett v. Ruby, 13 Md. 95; Philadelphia, &c. Railroad v. Quigley, 21 How. U. S. 202; Davison v. Duncan, 7 Ellis & B. 229; Liddle v. Hodges, 2 Bosw. 537; Clark v. Molyneux, 3 Q. B. D. 237; Jacob v. Lawrence, 14 Cox C. C. 321; 1 Hawk. P. C. Curw. ed. p. 544, § 8.

[3] Streety v. Wood, 15 Barb. 105.

[4] Remington v. Congdon, 2 Pick. 310.

[5] Rex v. Hart, 1 W. Bl. 386.

[6] Bodwell v. Osgood, 3 Pick. 379.

[7] 1 Stark. Slander, 305–314; Thompson v. Shackell, Moody & M. 187; Green v. Chapman, 5 Scott, 340, 4 Bing. N. C. 92.

[8] Delany v. Jones, 4 Esp. 191.

[9] Vol. I. § 308.

§ 915. **Petition to Legislature.** — According to Hawkins, "no false or scandalous matter contained in a petition to a committee of Parliament" is indictable as a libel.[1]

Proceedings in Court. — He adds, that the same is true of the like matter "in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice;" "for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a court of justice."[2]

Publishing Judicial Proceedings. — When a case has been finally disposed of, a correct publication of the proceedings is not generally libellous.[3] But if the report, though accurate, is accompanied by comments and insinuations to asperse a man's character,[4] or statements of the like sort not properly belonging to the proceedings,[5] such extraneous matter is indictable. It has been further laid down, that a correct account of judicial transactions cannot be published when it contains matter of a scandalous, blasphemous, or immoral tendency;[6] though it is otherwise when the matter is merely defamatory of an individual.[7]

Counsel. — Counsel are protected while they keep within what is material to the cause, but not when they overstep this bound.[8]

§ 916. **Ex parte and Preliminary.** — The publication of *ex parte* and preliminary proceedings stands on a somewhat different ground. "Where the evidence is *ex parte*," says Starkie, "the party charged has no means of establishing a defence, and such premature statements tend to excite undue prejudices against the accused, and to deprive him of the benefit of a fair and impartial trial; and, therefore, in several instances, the publication of matters of criminal charge, contained in depositions before magistrates, has been held to be indictable."[9] This doctrine has

[1] 1 Hawk. P. C. Curw. ed. p. 544, § 8; 1 Stark. Slander, 239 et seq.; Wason v. Walter, Law Rep. 4 Q. B. 73.

[2] Hawk. & Stark. ut supra.

[3] 1 Stark. Slander, 263; 1 Russ. Crimes, 3d Eng. ed. 225; Ryalls v. Leader, Law Rep. 1 Ex. 296; Milissich v. Lloyds, 13 Cox C. C. 575.

[4] Commonwealth v. Blanding, 3 Pick. 304; Thomas v. Crosswell, 7 Johns. 264, 272. See Clark v. Binney, 2 Pick. 113; Rex v. Fleet, 1 B. & Ald. 379.

[5] Delegal v. Highley, 5 Scott, 154, 3 Bing. N. C. 950; s. c. nom. Delegall v. Highley, 8 Car. & P. 444.

[6] Rex v. Carlile, 3 B. & Ald. 167; 1 Stark. Slander, 264; 1 Russ. Crimes, 3d Eng. ed. 226.

[7] Wason v. Walter, Law Rep. 4 Q. B. 73, and other authorities above.

[8] Gilbert v. People, 1 Denio, 41; McLaughlin v. Cowley, 127 Mass. 316.

[9] 1 Stark. Slander, 265; Rex v. Fisher, 2 Camp. 563; Rex v. Fleet, 1 B. & Ald. 379; Rex v. Lee, 5 Esp. 123. And see 1 Russ. Crimes, 3d Eng. ed. 227; Stiles v.

generally been understood to extend to all preliminary examinations before a magistrate, though not in the strict sense *ex parte*. But in a case before the Queen's Bench in Ireland, the court, one judge dissenting, refused to grant a criminal information against a newspaper proprietor for a fair and impartial publication of such proceedings, though they contained matter reflecting unfavorably on the accused persons. And the judges deemed that they were not compelled to a contrary course by the authorities,[1] which they considered somewhat conflicting. Yet they allowed an information to go for collateral reflections on the parties.[2] And the English doctrine is clearly so now.[3]

Publication contrary to Order of Court. — When a cause is being finally tried, the judge, we have seen,[4] sometimes forbids, by order of court, any publication of the proceedings while the trial is progressing, and a disobedience to his order is a contempt of court; clearly, therefore, the publisher in such a case could not shield himself from an indictment for libel, on the ground that the libel was but a correct report of what was done.[5]

§ 917. **Legislative Proceedings.** — The publication of legislative doings is protected substantially like that of the doings of judicial tribunals.[6] If an individual is aspersed in his character thereby, he is without remedy.[7]

Privilege of Members. — So also the members of legislative assemblies are not to be called in question for their official acts, or for words spoken in debate.[8] But if a member causes a speech, which contains libellous matter, to be published, he is not protected in respect of such publication; for the publishing of it is an act outside of his legislative duties.[9]

Nokes, 7 East, 493; Carr *v.* Jones, 3 Smith, 491.

[1] Besides cases mentioned in our last note, the following were cited: Duncan *v.* Thwaites, 3 B. & C. 566; cases collected in Hodge's report of Reg. *v.* O'Doherty and Martin at p. 220; Reg. *v.* Clement, 4 B. & Ald. 218; Lewis *v.* Levy, Ellis, B. & E. 537; Cox *v.* Feeney, 4 Fost. & F. 13.

[2] Reg. *v.* Gray, 10 Cox C. C. 184.

[3] Usill *v.* Hales, 3 C. P. D. 319.

[4] Ante, § 259.

[5] See also Rex *v.* Burdett, 1 Ld. Raym. 148; Rex *v.* Jolliffe, 4 T. R. 285; Reg. *v.* Marshall, 2 Jur. 254; Rex *v.* Gilham, Moody & M. 165; Graves *v.* The State, 9 Ala. 447.

[6] 1 Stark. Slander, 239 et seq.

[7] Wason *v.* Walter, Law Rep. 4 Q. B. 73.

[8] Stark. ut sup.; 1 Kent Com. 235, note; May Parl. Law, 2d ed. 98, 100; Coffin *v.* Coffin, 4 Mass. 1. See Vol. I. § 461, 482.

[9] 1 Kent Com. 235, note; Rex *v.* Creevey, 1 M. & S. 273; Rex *v.* Abingdon, 1 Esp. 226, Peake, 236. See Rex *v.* Williams, 2 Show. 471; Rex *v.* Wright, 8 T. R. 293; Coffin *v.* Coffin, 4 Mass. 1.

§ 918. **Truth in Evidence.** — Under the common law, it was immaterial whether the matter of a libel were true or false. Its effect on the public and individuals was supposed to be, and perhaps it is, the same in either case. Therefore, though no man can maintain a civil action for true words which another has written or spoken concerning him,[1] yet their truth is, at the common law, no defence to a criminal prosecution.[2] This proposition is usually laid down of libels on individuals; but, in principle, and probably in authority, it applies also to all other libels.[3] Yet, —

Written under Duty. — This rule cannot strictly extend to libels published under a duty to speak;[4] for, in such cases, the inquiry concerning the motive, as whether the act was in good faith or an intended slander, is proper; and the question of the truth or falsehood of what is said may be vital to this issue.[5] And, —

Truth in Mitigation of Punishment. — Under the proper circumstances, a convicted defendant may rely, in mitigation of punishment, on the fact that he believed the publication true, though he may not show it to be really true.[6]

Truth as to Criminal Information. — If the proceeding is by information, a court having the discretion to grant or withhold it, will generally refuse where the libel probably contained only the truth.[7]

[1] 1 Stark. Slander, 229 et seq.

[2] Vol. I. § 591; 2 Stark. Slander, 251; 1 Hawk. P. C. Curw. ed. p. 543, § 6; 1 Russ. Crimes, 3d Eng. ed. 222; The State *v.* Burnham, 9 N. H. 34; Commonwealth *v.* Clap, 4 Mass. 163, 169; Cropp *v.* Tilney, Holt, 422; Rex *v.* Burdett, 4 B. & Ald. 95, 3 B. & Ald. 717; The State *v.* Lehre, 2 Brev. 446, 2 Tread. 809; Commonwealth *v.* Blanding, 3 Pick. 304; Rex *v.* Dean St. Asaph, 3 T. R. 428, note; Rex *v.* Withers, 3 T. R. 428; Rex *v.* Shipley, 4 Doug. 73; Rex *v.* Draper, 3 Smith, 390; Rex *v.* Bickerton, 1 Stra. 498; Rex *v.* Dennison, Lofft, 148; Case de Libellis Famosis, 5 Co. 125 *a*. And see People *v.* Crosswell, 3 Johns. Cas. 336, 357; 2 Stark. Slander, 252, note to Am. ed. **Copied.** — On the same principle, it is no defence that the libel was copied from another publication. 1 Russ. Crimes, 3d Eng. ed. 223; Rex *v.* Holt, 5 T. R. 436; Commonwealth *v.* Snelling, 15 Pick. 337; Reg. *v.* Drake, Holt, 425; Rex *v.* Bear, 2 Salk. 417; Reg. *v.* Brown, 11 Mod. 86; Lamb's Case, 9 Co. 59 *b*, Sir F. Moore, 813. **Current Report.** — Of course, also, it is no defence that the libel merely echoes a current report or rumor, or otherwise repeats what some other person has said. The State *v.* White, 7 Ire. 180.

[3] And see 2 Stark. Slander, 255.

[4] See ante, § 914.

[5] Commonwealth *v.* Clap, 4 Mass. 163; Commonwealth *v.* Blanding, 3 Pick. 304, 314, 316, 317; Commonwealth *v.* Morris, 1 Va. Cas. 176; The State *v.* Burnham, 9 N. H. 34; post, § 937.

[6] Rex *v.* Halpin, 4 Man. & R. 8, 9 B. & C. 65; Rex *v.* Burdett, 4 B. & Ald. 314. And see Graves *v.* The State, 9 Ala. 447.

[7] Rex *v.* Bickerton, 1 Stra. 498; Rex *v.* Draper, 3 Smith, 390; Reg. *v.* Gregory, 1 Per. & D. 110, 8 A. & E. 907; Rex *v.*

§ 919. **Policy of refusing Truth in Evidence.** — The policy of declining to receive the truth in defence has been much questioned, both in England and the United States. Evidently there are circumstances casting on one a sort of moral duty to state facts derogatory to another, not hitherto deemed adequate to make the communication privileged.[1] On the other hand, Starkie forcibly observes: "The admitting truth to be a justification against a criminal charge would be attended with one difficulty and mischief so great as, without material alterations in our criminal procedure, to be in effect insuperable. As any one may commence a prosecution for a libel on any other party, if a justification of the truth were admissible, the character of an individual might be made the subject of investigation without his authority, even without his knowledge, and without his having any opportunity to defend himself; thus it would be in the power of any two malicious men most effectually to injure and calumniate any other individual under the pretext of a judicial inquiry."[2]

§ 920. **Statutes changing Common-law Rule.** — A sort of middle course has, therefore, been adopted by legislation in England, and generally in this country; a statute providing, in substance, that the truth may be given in evidence, to be a defence only when the further fact appears that the publication was made with good motives and for justifiable ends. In some of our States, the statute is even more favorable to defendants than this. So strongly, indeed, has this matter impressed itself on the public mind, that the provision is found even in the constitutions of some of the States.[3]

§ 921. **Changed Conditions.** — This alteration in the law of libel but adapts it to an altered state of society. In early periods, when it was being moulded to present wants, the newspaper was a thing unknown. Then a written statement by one of an unwel-

Eve, 1 Nev. & P. 229, 5 A. & E. 780; Rex v. Miles, 1 Doug. 284; Rex v. Wright, 2 Chit. 162. See Rex v. Dennison, Lofft, 148.

[1] Ante, § 914 et seq.

[2] 2 Stark. Slander, 253, 254.

[3] In England the provision is in Stat. 6 & 7 Vict. c. 96, § 6; as to which see Reg. v. Newman, 1 Ellis & B. 268, Dears. 85, 22 Law J. N. S. Q. B. 156, 17 Jur. 617, 18 Eng. L. & Eq. 113; Brown v. Brine, 1 Ex. D. 5, 6. The statute applies only to the final trial, not to the preliminary examination; Reg. v. Carden, 5 Q. B. D. 1, 14 Cox C. C. 359; Reg. v. Townsend, 10 Cox C. C. 356. As to the United States, see 2 Stark. Slander, 2d Am. ed. 252, note; Barthelemy v. People, 2 Hill, N. Y. 248; Commonwealth v. Bonner, 9 Met. 410; Commonwealth v. Snelling, 15 Pick. 337; The State v. White, 7 Ire. 180; Vol. I. § 319.

come truth concerning another did no good, since it did not reach the eyes of the public at large. But it did tend most powerfully, in a semi-barbarous condition of society, to stir up the hot blood of the person against whom it was made. Wisely, therefore, did the courts, in those circumstances, forbid the defendant, indicted for a libel, to rely on its truth in defence. Now all is changed. Our prisons, the gallows itself, must be deemed in some respects subordinate to the mightier power of the press, as correctives of the social wickedness of men. Many a wretch has felt the keen exposure of his villainy, when voiced from the million-tongued printed page, as no mortal ever felt the sentence bidding him mount the gallows to be hanged. Therefore a different rule should govern this question of libel now, from the one which properly governed it centuries ago.

§ 922. **The Intent.** — The universal doctrine of the law, that there can be no crime without a criminal mind,[1] necessarily has its application to libel.[2] But —

Implied Evil Mind. — The courts have held parties criminal by reason of an implied evil intent, in cases of libel, to a degree perhaps not witnessed under any other title of the criminal law. In the first volume, we saw how one is responsible for publications put forth by his servant;[3] but, when a man intentionally and personally publishes of another matter which is libellous, he is, according to the general doctrine, held to have malice in law against that other, whatever may have been his motives in fact.[4] And —

Intend Consequences. — The principle, that one is presumed to intend the probable consequences of his act, applies also to all other libels.[5]

§ 923. **In Principle how the Intent.** — It is believed, that the doctrines concerning the intent are not, in most of our States, so firmly established and accurately defined as to exclude from the

[1] Vol. I. § 287.

[2] Commonwealth v. Snelling, 15 Pick. 337; Rex v. Reeves, Peake Ad. Cas. 84; Root v. King, 7 Cow. 613; Rex v. Harvey, 3 D. & R. 464, 2 B. & C. 257.

[3] Vol. I. § 221. A late interesting case is Reg. v. Holbrook, 3 Q. B. D. 60, 4 Q. B. D. 42.

[4] Commonwealth v. Blanding, 3 Pick. 304; Commonwealth v. Bonner, 9 Met. 410; Commonwealth v. Snelling, 15 Pick. 337; Root v. King, 7 Cow. 613; Reg. v. Gathercole, 2 Lewin, 237. But see Rex v. Reeves, Peake Ad. Cas. 84.

[5] Reg. v. Lovett, 9 Car. & P. 462; Rex v. Harvey, 3 D. & R. 464, 2 B. & C. 257; Stockdale's Case, 22 Howell St. Tr. 237, 300. See Taylor v. The State, 4 Ga. 14; Commonwealth v. Snelling, 15 Pick. 337.

judicial mind, in future causes, every inquiry after the true principle. All men must submit to the laws. And if one has intentionally published words which the laws declare to be a libel, he can no more bring forward good motives in defence, than can the murderer, saying, that he killed his victim to render him happy in heaven.[1] If he published carelessly, not knowing or indifferent what, he should be held criminally responsible for any libel put forth, the same as though he had read every word. If he intrusted his publishing affairs to another, who was a careless, incompetent person, as he knew, he should likewise be holden to answer criminally for any libel. But beyond this outer verge the doctrine should not be carried. When a man — for instance, the proprietor of a newspaper — is painstaking in the selection of his assistants, is ready to correct any error into which they may have fallen, is mindful of his high trust as a manager of a vast power, it is unjust, oppressive, contrary to all true legal rule, for the judge to tell the jury, that they must convict him for words introduced into his sheet by some accident over which he had no control.

§ 924. **In what Sense the Words.** — From the necessity of an evil intent, proceeds the doctrine mentioned in our first volume, that the words are to be understood in the sense meant by the party accused.[2] Shaw, C. J., stated this doctrine thus: "It is a general rule of construction, in actions of slander, indictments for libel, and other analogous cases, where an offence can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it."[3]

Obscure and Ambiguous. — He proceeds: "If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used."[4]

§ 925. **Ironical.** — So, also, the form of the libel is immaterial; for, if the language is ironical,[5] or is otherwise so framed as not to

[1] See Vol. I. § 309 and note.
[2] Vol. I. § 308.
[3] Commonwealth *v.* Kneeland, 20 Pick 206, 216.
[4] Ib.
[5] 1 Hawk. P. C. Curw. ed. p. 543, § 4; Reg. *v.* Browne, Holt, 425; s. c. nom Reg. *v.* Brown, 11 Mod. 86.

convey directly the idea meant, yet, if it is adapted to accomplish the evil purpose, it is sufficient.[1]

Incomplete Expression. — An incomplete expression is sufficient, provided it is understood; as, if the words are "the bishops," the meaning may be shown to be "the bishops of England."[2] So "a defamatory writing," says Hawkins, "expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity cannot possibly be understood by a judge and jury."[3]

§ 926. **What Act is necessary.** — No crime is, at the common law, committed except when there is some act added to the criminal intent.[4] This proposition indicates the true doctrine concerning libels, as indictable offences; it is not necessary that there should be any complete publication, but —

Attempt. — An attempt to publish, wherein there is an act and not merely an intent, is all which the law requires.[5] Perhaps, in strictness, the attempt is not to be deemed a substantive offence, but to stand on the ground of other attempts; yet, as this offence of libel is misdemeanor, not felony, the distinction is practically unimportant.

§ 927. **Merely writing Libel.** — The attempt appears to be sufficient where the party merely writes a libel, with the criminal intent.[6]

Publishing. — And for one to commit the full offence of publishing, he need not make the publication general; to cause it to be conveyed to any person who reads it, is sufficient.[7] Even the

[1] See Rex *v.* Woodfall, Lofft, 776; Rex *v.* Slaney, 5 Car. & P. 213; Rex *v.* Jenour, 7 Mod. 400.
[2] Baxter's Case, 3 Mod. 69. And see Barnett *v.* Allen, 3 H. & N. 376.
[3] 1 Hawk. P. C. Curw. ed. p. 543, § 5.
[4] Vol. I. § 204-206.
[5] Rex *v.* Paine, 5 Mod. 163, 167.
[6] Rex *v.* Burdett, 4 B. & Ald. 95, 1bb; Rex *v.* Paine, 5 Mod. 163, 167. See, however, Lamb's Case, 9 Co. 59 *b*, Sir F. Moore, 813. And see Rex *v.* Bear, 2 Salk. 417; Anonymous, 1 Vent. 31.
[7] Swindle *v.* The State, 2 Yerg. 581.

sale of an obscene print in private, to one who first requested to see it, the motive being to prosecute the seller, has been deemed an adequate publication.[1] Moreover, —

To Person libelled. — The full criminal offence is committed by sending the libel to the one libelled, though it reaches the ears of no third person.[2] But for this the civil action cannot be maintained.[3]

II. *The Different Kinds of Libel.*

§ 928. **What for this Sub-title.** — Descending now from this general view of criminal libels, we shall classify them, and subject each class to a minuter inspection.

§ 929. *Libels on Private Individuals : —*

How defined. — A libel of this class is any writing, picture, or other like representation of a nature to blacken the reputation of the person, or to hold him up to contempt and ridicule.[4]

What accomplish. — There is no need it should actually effect this object; it may, indeed, be powerless;[5] but it must be calculated to produce the result.

§ 930. **Imputing Crime.** — It does not require the imputation of

[1] Reg. v. Carlile, 1 Cox C. C. 229.

[2] Phillips v. Jansen, 2 Esp. 624; Rex v. Pownell, W. Kel. 58; The State v. Avery, 7 Conn. 226; Rex v. Wegener, 2 Stark. 245; Swindle v. The State, supra; Reg. v. Brooke, 7 Cox C. C. 251. And see, on the matter of this section, 1 Hawk. P. C. Curw. ed. p. 545, 546. In England a criminal information was refused, for a letter between private individuals, containing abusive matter, but not exciting to a breach of the peace. Wightman, J., observed: "No doubt the expressions made use of in this letter are libellous, and would support an indictment; but I do not think you have shown such a case as calls for the intervention of this court." Ex parte Dale, 2 Com. Law, 870, 871, 28 Eng. L. & Eq. 165.

[3] Sheffill v. Van Deusen, 13 Gray, 304.

[4] Ante, § 908, note; 1 Hawk. P. C. Curw. ed. p. 542, § 1; Commonwealth v. Clap, 4 Mass. 163, 168; Dexter v. Spear, 4 Mason, 115; The State v. Henderson, 1 Rich. 179; Rex v. Benfield, 2 Bur. 980; Hillhouse v. Dunning, 6 Conn. 391; Steele v. Southwick, 9 Johns. 214; The State v. Farley, 4 McCord, 317; The State v. Atkins, 42 Vt. 252. **On what Principle.** — Starkie says: "It seems to be perfectly settled, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt, or ridicule, amounts to a libel in the indictable sense of the word. And since the reason is, that such publications create ill blood, and manifestly tend to a disturbance of the public peace, the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which the party reflected upon will exert," &c. 2 Stark. Slander, 210, 211.

[5] Rex v. Woodfall, Lofft, 776.

a crime;[1] though such imputation is generally, perhaps always, sufficient to render the publication libellous.[2]

Compared with Actionable. — And "it seems," says Starkie, "that, in general, where a defamatory libel reflecting on the character of an individual will support an action for damages, the publication of it amounts to an indictable offence, inasmuch as it tends to provoke animosity and violence, and to disturb the peace of society."[3] But the similitude is not complete between libels indictable and actionable.[4]

§ 931. **Illustrations of Words not Indictable.** — The following have been adjudged not libellous: —

Refusal to water Street. — "The above druggist, in the city of Detroit, refusing to contribute his mite, with his fellow-merchants, for watering Jefferson Avenue, I have concluded to water said avenue, in front of Pierre Feller's store, for the week ending June 27, 1846;" the court observing, that one had a right to refuse, therefore the statement of his refusal had no legal tendency to hold him up to ridicule or contempt.[5]

Contradict Witness. — Nor is it libellous to publish a positive contradiction of facts sworn to by a witness; because this does not imply perjury by the witness.[6]

Beware of Facts, &c. — The following words come short: "Dear Sir, As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see who you keep under your roof. She need not go among her female friends and say she has been cruelly censured, as from her general character, which is perfectly and universally known, we are sure to hear all she says. Yours, &c., John Farley."[7]

General Abuse. — And terms of mere general abuse are not enough.[8] Accordingly the words, "The mayor and aldermen of

[1] The State v. Henderson, 1 Rich. 179; Clement v. Chives, 4 Man. & R. 127; s. c. nom. Clement v. Chivis, 9 B. & C. 172; Hillhouse v. Dunning, 6 Conn. 391; Steele v. Southwick, 9 Johns. 214; Clark v. Binney, 2 Pick. 113; Rex v. Pownell, W. Kel. 58.

[2] The State v. White, 7 Ire. 180; Hillhouse v. Dunning, 6 Conn. 139; Walker v. Winn, 8 Mass. 248.

[3] 2 Stark. Slander, 211, 212. And see Smith v. The State, 32 Texas, 594.

[4] See, for instance, ante, § 918, 927.

[5] People v. Jerome, 1 Mich. 142.

[6] Steele v. Southwick, 9 Johns. 214.

[7] The State v. Farley, 4 McCord, 317

[8] Tappan v. Wilson, 7 Ohio, 190.

A are a pack of as great villains as any that rob on the highway," were held in an old case not to be indictable; the somewhat singular reason assigned being, "for what is it to the government that the mayor, &c., are a pack of rogues?"[1]

§ 932. **Illustrations of Words Indictable.** — On the other hand, the following are specimens of adjudged libels: A published statement, that a person named has been guilty of gross misconduct, in insulting two females and some gentlemen, in a barbarous manner;[2] a printed account of a ludicrous marriage, between an actress and a married man;[3] a statement, that a person mentioned voted twice for officers on the same ballot at a State election;[4] that he attended a political meeting while his wife lay dead at home;[5] that he labors under mental derangement.[6]

"Swore terribly." — So of the following words: "'Our army swore terribly in Flanders,' said Uncle Toby; and, if Toby were here now, he might say the same of some modern swearers; the man [a witness] is no slouch at swearing to an old story." For if we assume that these words do not imply perjury, still they hold up the person to contempt and ridicule, as being too thoughtless if not too criminal duly to regard his obligations as a witness, and unworthy of credit.[7] The same was held, where a party to a public investigation into his conduct as an officer published, in a report of the investigation, the following comments on the testimony of a witness: "I am extremely loath to impute to the witness or his partner improper motives in regard to the false accusations against me: yet I cannot refrain from the remark, that, if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me."[8] Likewise —

[1] Rex v. Granfield, 12 Mod. 98. See Rex v. Baker, 1 Mod. 35; Rex v. Waite, 1 Wils. 22; Rex v. Spilker, 2 Show. 207.

[2] Clement v. Chivis, 4 Man. & R. 127; s. c. nom. Clement v. Chivis, 9 B. & C. 172.

[3] Rex v. Kinnersley, 1 W. Bl. 294. The court, on granting the information, observed: "It is high time to put a stop to this intermeddling in private families."

[4] Walker v. Winn, 8 Mass. 248.

[5] The State v. Atkins, 42 Vt. 252.

[6] 2 Stark. Slander, 181; Rex v. Harvey, 2 B. & C. 257.

[7] Steele v. Southwick, 9 Johns. 214.

[8] Clark v. Binney, 2 Pick. 113.

"Hireling Murderer." — It is indictable to publish of one, that he is a "hireling murderer."[1]

§ 933. **Illustrations of Libels addressed to the Person.** — Of libels addressed *to* the person complaining, the following are specimens: "You are a scoundrel, and defrauded the king of his duty; I will prick you to the heart, and call you to an account."[2] Also a letter, by a man, to the wife of another (in Connecticut, where adultery is felony), implying that she had acted libidinously toward the writer, and had invited him to an adulterous intercourse with her, and sought opportunities for consummating the act; the object of the letter being to insult and abuse her, debauch her affections, alienate them from her husband, entice her into adultery, and bring her into disgrace and contempt.[3] These were held to be indictable libels.

§ 934. *Libels on Bodies of Men and Corporations:* —

Numbers. — A libel need not be on a particular person.[4] If directed against many it is equally an offence, and perhaps the fact of numbers defamed renders the act the more reprehensible.[5] Therefore, —

Corporation. — A corporation is in proper circumstances indictable for libel.[6] The words "whenever a burgess of it puts on his cap and gown, Satan enters into him," were once adjudged adequate;[7] but we may doubt whether they should be so deemed now.

§ 935. *Libels by Corporations:* —

In Corporate Capacity. — A corporation, in its corporate capacity, has been held liable to a civil action for libel.[8] The consequence is not inevitable that therefore it would be indictable,[9] yet such also has been adjudged.[10]

Individual Members. — However this may be, the individual members who participated in the libel are indictable, even though it was published in the corporate capacity.[11] Therefore an order, entered in the books of a corporation, stating that one named, against whom large damages in a suit for malicious prosecution in carrying on an indictment had been recovered, acted from good

[1] Smith v. The State, 32 Texas, 594.

[2] Rex v. Pownell, W. Kel. 58.

[3] The State v. Avery, 7 Conn. 266.

[4] 2 Stark. Slander, 213.

[5] See Vol. I. § 232, 235, 243–245, 250–252; ante, § 147, 161.

[6] The State v. Boogher, 3 Misso. Ap. 442; Brennan v. Tracy, 2 Misso. Ap. 540.

[7] Rex v. Baker, 1 Mod. 35.

[8] Aldrich v. Press Printing Co., 9 Minn. 133.

[9] Vol. I. § 422.

[10] The State v. Atchison, 3 Lea, 729.

[11] Vol. I. § 424.

motives, was held to subject the members making it to an information for libel. Said Buller, J.: "Nothing can be of greater importance to the welfare of the public, than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country."[1]

§ 936. *Libels on Official Persons:* —

Specially reprehensible. — Libels on official persons are specially reprehensible. Therefore —

Conduct of Jurors. — It is indictable to publish of one in his capacity of petit juror, in a civil cause, that he agreed with another juror to stake, upon a game of draughts, the decision of the amount of damages to be awarded.[2] So it is libellous to say, "the grand jury that presented me are perjured rogues;" the court observing, "The words are scandalous, and an offence, though the presentment were false; for a grand jury ought not to be called 'perjured rogues,' though they had by mistake or misinformation made a false presentment."[3] And although it is lawful "with decency and candor to discuss the propriety of the verdict of a jury or the decisions of a judge," — yet, if a publication contains no reasoning, and is put forth with the view of bringing into contempt the administration of justice, not of illustrating truth, it is libellous.[4]

Town Clerk. — A criminal information was once granted on the following words, in a letter to a mayor: "I am sure you will not be persuaded from doing justice by any little arts of your town clerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile."[5]

Justice of Peace. — Another, for publishing, of a justice of the peace and alderman, that he was scandalously guilty of telling a lie; "nothing," says the report, "tending more to breach of the peace than the word *lie*."[6]

§ 937. *Libels on Candidates for Office:* —

How far Privileged. — The books are less distinct than one would expect on the question, how far, in our elective government, scandalous publications reflecting on candidates for

[1] Rex v. Watson, 2 T. R. 199.
[2] Commonwealth v. Wright, 1 Cush. 46.
[3] Rex v. Spiller, 2 Show. 207, 210.
[4] Rex v. White, 1 Camp. 359, note. And see Anonymous, Lofft, 462; Reg. v. Collins, 9 Car. & P. 456; Commonwealth v. Snelling, 15 Pick. 321.
[5] Rex v. Waite, 1 Wils. 22.
[6] Rex v. Staples, Andr. 228. And see Rex v. Brigstock, 6 Car. & P. 184.

office are privileged.[1] To render privileged any communication, it should be made properly, to the proper persons. Therefore, if a man is a candidate, not for the popular vote, but for appointment to office by officers having the appointing power, this fact does not render privileged an attack on him through the newspapers; it simply protects a proper remonstrance to those in whom the appointing power is lodged.[2] Again, —

Truth in Evidence. — Without the help of a statute allowing the truth of a libel to be given in evidence, one indicted for a libel on a candidate for office may show it to be true in his justification.[3] But —

Whether fully Privileged. — This is not holding the libel to be privileged in the full meaning of the expression, rendering it sufficient in defence that the motives were good and the words were believed to be true; and, in this sense, the Minnesota court laid it down distinctly and forcibly, that libellous matter, published in a newspaper, in regard to a candidate for public office, is not privileged.[4] On principle, if a man is a candidate for the popular vote, and there are newspapers circulating in his district, a duty is imposed on all good citizens to communicate to the voters information concerning his fitness, and the newspaper is the proper channel; so that the communication becomes privileged. And this is believed to be the better doctrine even in point of authority.[5]

[1] Ante, § 914.
[2] Hunt v. Bennett, 19 N. Y. 173.
[3] Commonwealth v. Clap, 4 Mass. 163, 169; Root v. King, 7 Cow. 613; ante, § 918.
[4] Aldrich v. Press Printing Co., 9 Minn. 133.
[5] In Townshend Slander & Lib. 2d ed. § 247, is a full collection of authorities, and the question well put by the author. There is a wide difference between what is said about an officer and a candidate for office. Parsons, C. J., once intimated that every person holding an elective office should be regarded as a candidate for such office; "for," he said, "as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct." Commonwealth v. Clap, supra, at p. 169, A. D 1808. These observations, the reader will note, were made before the *outs* among the demagogues had established the principle of "rotation in office." At present, the presumption should rather be, that every man who talks loudly about political affairs, and shows himself to be destitute of political wisdom, shall be deemed a candidate for office, particularly for every office for which he is specially unfitted. But to hold that every officer shall be deemed already a candidate for re-election, is to abolish the distinction altogether; and probably no judge at the present day would follow the *dictum* of this learned chief justice. **Conduct at Political Meeting.** — According to an English case, the conduct of a person at a public meeting to pro-

§ 938. *Libels on Distinguished Persons abroad:* —

Heavy Offences. — The connection of government with government is so intimate, that libels on persons of distinction and authority abroad are particularly reprehensible.[1]

mote the election of one to parliament is a proper subject for discussion, and unfavorable comments on it are privileged. Davis *v.* Duncan, Law Rep. 9 C. P. 396.

[1] 1 Russ. Crimes, 3d Eng. ed. 246. Starkie has collected several cases, which he states as follows: **Instances.** — "In the case of Rex *v.* D'Eon [see Rex *v.* D'Eon, 1 W. Bl. 510, 3 Bur. 1513], an information was filed against the defendant by the attorney-general for publishing a libel upon the Count de Guerchy, who was at that time residing in this kingdom in the capacity of ambassador from the court of France. The information charged the defendant with an intention to defame the character and abilities of the Count de Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behavior in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of ambassador. The defendant was convicted. — Lord George Gordon [see Lord George Gordon's Case, 22 Howell St. Tr. 213] was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashurst in passing sentence observed, that, unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the State. — The defendant, John Vint [see Vint's Case, 27 Howell St. Tr. 627], was found guilty upon an information, charging him with having published the following libel: 'The Emperor of Russia is rendering himself obnoxious to his subjects, by various acts of tyranny; and ridiculous in the eyes of Europe, by his inconsistency; he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight;' with intent to traduce the Emperor of Russia, and interrupt and disturb the friendship subsisting between that country and Great Britain. — Jean Peltier [see Peltier's Case, 28 Howell St. Tr. 529] was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our Lord the King and his subjects and the said Napoleon Bonaparte and the French republic. The most obnoxious passages of the libel were these: 'O! eternal disgrace of France; — Cæsar, on the bank of the Rubicon, has against him in this quarrel the Senate, Pompey, and Cato; and in the plains of Pharsalia if fortune is unequal, if you must yield to the destinies Rome in this sad reverse, at least there remains to avenge you a poignard among the last Romans.' 'As for me, far from envying his (Bonaparte's) lot, let him name (I consent to it) his worthy successor. Carried on the shield, let him be elected Emperor. Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen.' Upon the trial, Lord Ellenborough, C. J., referred to the cases of Lord George Gordon and Vint, and said, 'I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries.'" 2 Stark. Slander, 216–219.

[1] Vol. I. § 177, 178, 190–203; ante, § 281, 284–288, 611.

[2] See United States *v.* Hudson, 7 Cranch, 32; post, § 942.

[3] 1 Hawk. P. C. Curw. ed. p. 542, § 1; 1 Russ. Crimes, 3d Eng. ed. 243; Commonwealth *v.* Clap, 4 Mass. 163, 168.

[4] Case de Libellis Famosis, 5 Co. 125

[5] Rex *v.* Critchley, 4 T. R. 129, note post, § 941.

State Courts — United States. — But, for reasons which sufficiently appear in other parts of these volumes,[1] there may be a question, to what extent the State tribunals in our country can take cognizance of this class of libels; and the United States courts have no common-law jurisdiction.[2]

§ 939. *Libels on the Dead:* —

General Doctrine. — Any writing put forth to blacken the memory of one deceased is a libel indictable;[3] "for it stirs up others of the same family, blood, or society, to revenge, and to break the peace."[4]

§ 940. **Illustrations — (How the Indictment).** — In one case, after the announcement of the death of a member of parliament, it was added: "He was blessed with an ample fortune, which he enjoyed in a manner that rendered him in early years of life a truly valuable husband, and a friend. He could not be called a friend to his country; for he changed his principles for a red ribband, and voted for that pernicious project, the excise." These words were held to be a libel; perhaps, in part, because they reflected on the government.[5] But something more must be alleged in the indictment — a question possibly of pleading — than simply, that the defendant published the words. Where the libel was on a private person deceased, an allegation not charging it to have been made to bring contempt on his family, or to stir up hatred against it, or to provoke his relatives to a breach of the peace, was held to be insufficient. "To say, in general," said Lord Kenyon, C. J., "that the conduct of a dead person can at no time be canvassed; to hold, that, even after ages are passed, the conduct of bad men cannot be contrasted with good, — would be to exclude the most useful part of history. And therefore it must be allowed, that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in Rex *v.* Critchley [the case just stated], then it comes within

the rule; then it is done with a design to break the peace, and then it becomes illegal." [1]

§ 941. *Libels on the Government:* —

How defined. — A libel on the government is any written calumny tending to excite disaffection toward it.[2]

Compared with Treason. — Treason, at the common law, is the most aggravated form of one general offence, of which libel on the government stands at the outer border.[3]

§ 942. **Discussion not forbidden.** — The object of this branch of our legal system is, not to interfere with temperate and reasoning discussions of political questions and of public measures, when conducted in a proper manner to promote lawful reform, but to check those uprisings of mind which lead to unlawful revolution.[4]

United States — States. — The courts of the United States have no common-law jurisdiction of these libels.[5] How it is in the States is a complicated inquiry not to be entered into here. Practically the punishment of them is hitherto nearly or quite unknown in our country.

§ 943. *Obscene Libels:* —

Doctrine defined. — The publication of any writing tending to corrupt the public morals is clearly a libel indictable. Hawkins indeed expresses a doubt, whether such a writing, "full of obscene ribaldry, without any kind of reflection upon any one," is so; but, whatever question may have been entertained heretofore, "it is now," in the language of Mr. Starkie, "fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal courts" [6] of England, and in the common-law criminal tribunals of this country.[7] Such is an

[1] Rex v. Topham, 4 T. R. 126, 129.

[2] 1 Gab. Crim. Law, 647; 2 Stark. Slander, 160 et seq.; Reg. v. Drake, 11 Mod. 78; Rex v. Pain, Comb. 358; Rex v. Horne, Cowp. 672.

[3] See ante, § 911.

[4] Authorities in last note but one; also Rex v. Woodfall, Lofft, 776; Rex v. Lambert, 2 Camp. 398; Reg. v. Collins, 9 Car. & P. 456; Reg. v. Sullivan, 11 Cox C. C. 44.

[5] United States v. Hudson, 7 Cranch, 32; ante, § 938.

[6] 2 Stark. Slander, 155.

[7] Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S. & R. 91; Bell v. The State, 1 Swan, Tenn. 42. See Ex parte Slattery, 3 Pike, 484. And see The State v. Appling, 25 Misso. 315; Barker v. Commonwealth, 7 Harris, Pa. 412; People v. Hallenbeck, 2 Abb. N. Cas. 66; Willis v. Warren, 1 Hilton, 590; Commonwealth v. Dejardin, 126 Mass. 46.

obscene book [1] or print.[2] The law seems to stand on the same ground, relating to this subject, as to the subject of the exposure of the person already discussed.[3]

§ 944. **Circulation by Mail.** — The circulation of obscene books through the mails is prohibited by act of Congress.[4]

III. *Verbal Slander.*

§ 945. **Whether indictable.** — The general question, whether mere words uttered, but not written, are indictable, seems not clear on the authorities. As one of principle, it embarrasses us less; because, since verbal slander is actionable, there appears to be no reason why, in cases in which it operates to the detriment of the public, in distinction from a mere individual, according to the principles of public detriment unfolded in the preceding volume,[5] it should not be punished.

§ 946. **Under other Names indictable.** — And it is clear on the authorities that various forms of oral words are indictable when called by some other name than slander. Thus, —

Illustrations — (Blasphemy — Challenge to Duel — Obscenity). — We have seen,[6] that oral blasphemy is a crime; also an oral challenge to fight a duel; [7] likewise the public utterance of obscene words.[8] Again, —

Contempts of Court. — There are contempts of court, consisting of words spoken to the judge or magistrate, which, as we have seen,[9] are indictable.

Under Name of Slander. — And in various cases, the broader general doctrine, that verbal slander, especially against magistrates, corporations, and the like, is under some circumstances indictable, appears to be recognized.[10] For instance, —

[1] Commonwealth v. Holmes, 17 Mass. 336; Rex v. Curl, 2 Stra. 788, overruling Reg. v. Read, 11 Mod. 142.

[2] Commonwealth v. Sharpless, 2 S. & R. 91; Dugdale v. Reg., 1 Ellis & B. 435, 16 Eng. L. & Eq. 380.

[3] Vol. I. § 1125 et seq.

[4] R. S. of U. S. § 3878; Stat. 1865, c. 89, § 16, 13 Stats. at Large, 507.

[5] Vol. I. § 230 et seq.

[6] Ante, § 76 et seq.; The State v. Steele, 3 Heisk. 135.

[7] Vol. I. § 539. And see ante, § 312.

[8] Bell v. The State, 1 Swan, Tenn. 42; The State v. Appling, 25 Misso. 315; Barker v. Commonwealth, 7 Harris, Pa. 412; The State v. Barham, 79 N. C. 646; The State v. Brewington, 84 N. C. 783.

[9] Ante, § 265, 266.

[10] Vol. I. § 470, 539, 591; Rex v. Baker, 1 Mod. 35; Reg. v. Nun, 10 Mod. 186, 187; Rex v. Darby, 3 Mod. 139, Comb. 65; Anonymous, Comb. 46; Reg. v. Taylor, 2 Ld. Raym. 879. See also 2 Stark

Words against Grand Jury. — The words, merely spoken, that "the last grand jury that presented me are perjured rogues," have been held to be indictable.[1]

Words sung in Street. — And an information has been maintained for singing, in the streets, songs reflecting on the prosecutor's children, with intent to destroy his domestic happiness.[2] But —

Contrary Doctrine. — There are other cases which seem to be contrary to these, holding the like words not to be adequate; and some of them go far to indicate, that no words are alone indictable as mere slander; but that they must have some other foundation on which the crime involved in the uttering of them may rest.[3] Plainly, not all actionable words are indictable; as, while a civil suit will lie for calling a man a thief, an indictment will not.[4]

§ 947. **In Principle.** — In legal reason, first, not all spoken words can be indictable when they would be if written; secondly, under some circumstances, some spoken words must be indictable. As to the first proposition, reference need only be made to the rules which govern the civil suit for oral slander. In this suit, something more must be shown of the words than that they would be actionable if they were written; and plainly the rule could not be drawn more tight in criminal jurisprudence. As to the second proposition, to say, that in no circumstances will the criminal law bridle the tongue, is to give to this member too great freedom to be tolerated in a civilized community. Suppose, for instance, a man should make it his business to go through a principal street in a large city, telling infamous false tales of every one whose name he could get, — becoming a common bearer of this kind of scandal, — it would be a reproach to the law not to curb the nuisance.[5]

Slander, 194–197, 208, 220, 221; Ex parte Marlborough, 5 Q. B. 955, 1 New Sess. Cas. 195, 13 Law J. N. s. M. C. 105, 8 Jur. 664. See Rex *v.* Penny, 1 Ld. Raym. 153; Reg. *v.* Rea, 17 Ir. Com. Law, 584.

[1] Rex *v.* Spiller, 2 Show. 207, 210.

[2] Rex *v.* Benfield, 2 Bur. 980.

[3] Rex *v.* Weltje, 2 Camp. 142; Reg. *v.* Langley, 3 Salk. 190, 2 Ld. Raym. 1029; Reg. *v.* Rogers, 7 Mod. 28; Rex *v.* Burford, 1 Vent. 16; Rex *v.* Wrightson, 11 Mod. 166; Rex *v.* Walden, 12 Mod. 414, Ex parte Chapman, 4 A. & E. 773; Rex *v.* Pocock, 2 Stra. 1157, 7 Mod. 310; Reg. *v.* Shaftow, 11 Mod. 195; Rex *v.* Leafe, Andr. 226; Rex *v.* Bear, 2 Salk. 417; s. c. nom. Rex *v.* Beare, 1 Ld. Raym. 414, 416. So laid down in Missouri, The State *v.* Wakefield, 8 Misso. 11.

[4] Rex *v.* Freake, Comb. 13.

[5] And see Vol. I. § 472–477, 939.

IV. *Remaining and Connected Questions.*

§ 948. **Misdemeanor — Punishment.** — Libel is misdemeanor;[1] punishable in the way pointed out in the preceding volume.[2]

Participants. — And we have seen,[3] that all who participate in misdemeanors are principal offenders. Thus, "if one repeats and another writes a libel, and a third approves what is writ, they are all makers of such libel; for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty."[4]

§ 949. **Attempt.** — We have already, in this chapter, considered the doctrine of attempt.[5] On the principle involved in this doctrine, the transmission of a sealed letter, containing libellous matter, is indictable.[6] It is an attempt to publish the libel.

Each copy. — Every separate copy of a libel, which a defendant publishes, is a several publication, subjecting him to a distinct indictment.[7]

[1] 1 Hawk. P. C. Curw. ed. p. 547, § 21; Rex *v.* Dangerfield, 3 Mod. 68; Case de Libellis Famosis, 5 Co. 125.

[2] Vol. I. § 940 et seq.; Rex *v.* Benfield, 2 Bur. 980, 985.

[3] Vol. I. § 684–689, 705.

[4] Reg. *v.* Drake, Holt, 425. And see Rex *v.* Paine, 5 Mod. 163, 167; Rex *v.* Bear, Carth. 407, 408; Rex *v.* Williams, 2 Camp. 646; Reg. *v.* Cooper, 1 Cox C. C. 266.

[5] Ante, § 926, 927.

[6] Hodges *v.* The State, 5 Humph. 112.

[7] Rex *v.* Carlile, 3 B. & Ald. 161; s. c. nom. Rex *v.* Carlisle, 1 Chit. 451.

For LIQUOR NUISANCE, see Stat. Crimes.
LIQUOR SELLING, see Stat. Crimes.
LIVING IN ADULTERY, see Stat. Crimes.
LIVING IN FORNICATION, see Stat. Crimes.