# CHAPTER XXVIII.

## LORD'S DAY.[1]

§ 950–952. Introduction.
953–964. By what Acts.
965. Repetitions amounting to Nuisance.
966, 967. Connecting other Offences with this.
968–970. Remaining and Connected Questions.

§ 950. **Nature of the Offence.** — The violation of the Lord's Day or Christian Sabbath is forbidden by statutes in England and in all our States. Whether it is an offence at the common law, and, if so, what are its limits, are questions considered in other connections.[2] We saw, in the first volume,[3] on what principle the law, whether statutory or common, enjoins on the whole community the setting apart — for rest, or for worship, or for both — of one day in seven; and we saw, that, though most people deem the rest of the Sabbath to be of Divine injunction, pertaining to the department of religious duty, yet, whether so or not, still the thing itself is of the highest consequence to man in all his interests, even those which are physical and material. Therefore the violation of the Lord's Day, or the Sabbath, or the First Day of the Week, — different terms to signify the same thing, — is properly made punishable.

§ 951. **Statutes constitutional.** — Yet, plain though this proposition is, the question has been agitated, whether enactments against Sabbath-breaking are not repugnant to those constitutional provisions which, in most of our States, secure to the people freedom of worship and the rights of conscience. Thus, in Pennsylvania: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own

[1] For matter relating to this title, see Vol. I. § 499; Stat. Crimes, § 143, 198, 213, 237, 245, 560, 852. For the pleading, practice, and evidence, see Crim. Proced. II. § 812 et seq.

[2] Vol. I. § 499 and note; Crim. Proced. II. § 812.

[3] Vol. I. § 499 and note.





conscience; no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent. No human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall be given by law to any religious establishment or modes of worship." But this provision is held not to be violated by laws, and their enforcement, against Sabbath-breaking.[1] A like doctrine prevails in Arkansas,[2] in Indiana,[3] in California,[4] in Texas,[5] in Missouri,[6] and in Massachusetts.[7] It prevails also in New York, where moreover it has been held, that a statute forbidding theatres to be opened on Sunday does not "deprive the actor of his property," which are the words of the constitution, though it prohibits what may be the most profitable use of the theatre.[8] The institution of the Sabbath, as a day of rest from worldly labor, dear to him who reveres it for its Divine origin, has to the statesman and jurist a significance of a different kind. It is the corner-stone of public morality and happiness, viewed merely as of civil regulation. And though the law should not foster any particular sect of religion at the expense of the rest, or even at the expense of him who conscientiously rejects all current forms; still it should not cast off a good thing, beneficial to the entire community, simply because the majority of the people believe it, not only to be good, but to be sanctioned also by religion.

§ 952. **How the Chapter divided.** — We shall consider, I. By what Acts Particular Statutory Provisions are violated; II. Repetitions

[1] Specht *v.* Commonwealth, 8 Barr, 312.

[2] Shover *v.* The State, 5 Eng. 259.

[3] Voglesong *v.* The State, 9 Ind. 112; Foltz *v.* The State, 33 Ind. 215; Schlit *v.* The State, 31 Ind. 246.

[4] Ex parte Andrews, 18 Cal. 678; Ex parte Bird, 19 Cal. 130. But see Ex parte Newman, 9 Cal. 502.

[5] Gabel *v.* Houston, 29 Texas, 335; Bohl *v.* The State, 3 Texas Ap. 683.

[6] The State *v.* Ambs, 20 Misso. 214.

[7] Commonwealth *v.* Has, 122 Mass. 40.

[8] Lindenmuller *v.* People, 33 Barb. 548; Neuendorff *v.* Duryea, 69 N. Y. 557. **Saturday.** — In Massachusetts it was held, that a statute prohibiting the use of bowling alleys after six o'clock *Saturday* afternoon is constitutional. And the court observed: "It is clearly within the power of the legislature to make police regulations as to the hours and modes of occupying places of amusement, so as to make their use consistent with the peace of the community. The reason which induced the legislature to make it penal to suffer any persons to play after certain hours in the evening are not for us to inquire into." Commonwealth *v.* Colton, 8 Gray, 488. **By-laws.** — As to city ordinances against Sabbath-breaking, see Canton *v.* Nist, 9 Ohio State, 439; Piqua *v.* Zimmerlin, 35 Ohio State, 507; The State *v.* Bott, 31 La. An. 663; Gabel *v.* Houston, supra.

amounting to Nuisance; III. Connecting other Offences with this, IV. Remaining and Connected Questions.

### I. *By what Acts particular Statutory Provisions are violated.*

§ 953. **In what Terms the Statutes.** — The language of our statutes is not entirely uniform; but, in general, they provide in varying words against the doing of ordinary labor or business on the Lord's day, excepting from this provision works of necessity and charity.

**Inhibition — Exception.** — Of course, then, a transaction, to be indictable, must fall within the general inhibition; and must not, within the exception. If, at either point, it fails, it is not prohibited by the statute. Let us first look at the —

§ 954. **General Inhibition.** — There are various forms of it, but of substantially one meaning. Thus —

**"Common Labor" — (Trading — Contracting).** — The words of the Ohio enactment are "common labor;" and they are held to include "trading, bartering, selling, or buying any goods, wares, or merchandise."[1] The making of a promissory note on Sunday was adjudged, in Indiana, to be "common labor," rendering it void.[2] But in Nebraska, the contrary is held of a Sunday contract.[3] It is unsettled whether the mere selling of two cigars on Sunday is "common labor," where such is not the defendant's avocation.[4] If within his usual avocation, it is an offence to sell a single cigar,[5] or "two quarts of beer."[6]

[1] Cincinnati *v.* Rice, 15 Ohio, 225. See Bloom *v.* Richards, 2 Ohio State, 387; Sellers *v.* Dugan, 18 Ohio, 489.

[2] Reynolds *v.* Stevenson, 4 Ind. 619. **"Ordinary Calling."** — In Georgia, a promissory note made on Sunday, but not within the "ordinary callings" of the party, is not void under the statute of 1762. Sanders *v.* Johnson, 29 Ga. 526. **"Work or Servile Labor."** — In New York, an agreement to publish an advertisement in a newspaper issued on Sunday has been adjudged void, and the price not recoverable by suit. Smith *v.* Wilcox, 25 Barb. 341 In another New York case, Ingraham, P. J., said: "It [the statute] prohibits work or servile labor, and the exposure to sale of merchandise, except certain articles of food. Making a contract or agreement is not forbidden." Therefore it was held that a benevolent society might lawfully hold its business meetings and transact its business on Sunday. People *v.* Young Men's &c., Society, 65 Barb. 357. And see Peate *v.* Dickens, 3 Dowl. P. C. 171; Rex *v.* Whitmash, 7 B. & C. 596; Begbie *v.* Levi, 1 Cromp. & J. 180; post, § 968.

[3] Horacek *v.* Keebler, 5 Neb. 355.

[4] Wetzler *v.* The State, 18 Ind. 416. See Drury *v.* Defontaine, 1 Taunt. 131; Scarfe *v.* Morgan, 4 M. & W. 270, 1 Horn & H. 292.

[5] Foltz *v.* The State, 33 Ind. 215.

[6] Eitel *v.* The State, 33 Ind. 201, criticising Wetzler *v.* The State, supra.





**"Worldly Employment" — (Driving Omnibus).** — In Pennsylvania, the driving of an omnibus, as a public conveyance, is held to be a "worldly employment," not lawful on this day.[1]

§ 955. **Acts unlawful on other Grounds.** — We shall see, by and by,[2] that a particular act may be a violation both of the Sunday law and of another provision either of the common or statutory law. But, in matter of mere interpretation of the statute, —

**Gaming.** — The Indiana court held, that gaming cannot be deemed "common labor," or one's "usual avocation." It "is," said Davison, J., "an offence defined by statutory law — it is a criminal act — the doing of which on any day of the week is forbidden; and it seems to us that an act thus forbidden cannot be held to be an act of common labor or of usual avocation."[3] But, —

**Liquor Selling.** — Where there is no general prohibition, in any statute, of the sale of intoxicating liquor, and it is therefore lawful for a person to make such selling his "usual avocation," if then a statute forbids "common labor" on the Lord's day, a liquor seller, selling on that day, though but in a single instance, violates the statute.[4]

§ 956. **"Labor, Business, Work."** — The Massachusetts statute has the words "any manner of labor, business, or work;" and it is held that —

**Making Will.** — The execution of a will does not come within the inhibition, so as to render the will void. Not every thing pertaining to earthly affairs is "labor, business, or work." For example, —

**Marrying.** — "A contract of marriage," said the learned judge, "is a purely civil contract. . . . Yet no one would contend that it would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the Sabbath, or that a contract of marriage entered into before and

[1] Johnston *v.* Commonwealth, 10 Harris, Pa. 102; Commonwealth *v.* Jeandell, 2 Grant, Pa. 506. See Commonwealth *v.* Nesbitt, 10 Casey, Pa. 398; Commonwealth *v.* Jacobus, 1 Leg. Gaz. Rep. 491; Rex *v.* Middleton, 4 D. & R. 824, 3 B. & C. 154; Sandiman *v.* Breach, 7 B. & C. 96, 9 D. & R. 796; Augusta, &c. Railroad *v* Renz, 55 Ga. 126.

[2] Post, § 966.

[3] The State *v.* Conger, 14 Ind. 396, 397.

[4] Voglesong *v.* The State, 9 Ind. 112 See post, § 961, 966.

solemnized by a magistrate would be invalid because the act was done on the Lord's day."[1] But —

**Journeying to a Market.** — Travelling to market on the Sabbath, in order to be ready to supply customers on Monday morning, is within these statutory terms.[2]

§ 957. **Employment of like Class.** — In "Statutory Crimes,"[3] we saw that, when 29 Car. 2, c. 7, § 1, forbade any "tradesman, artificer, workman, laborer, or *other person* whatsoever," to exercise his ordinary calling on the Lord's day, —

**Farmer.** — This was held not to extend to a farmer;[4] because it could do so only by force of the words "any other person whatsoever," and these are limited in construction to persons of like classes with those specifically enumerated. This sort of interpretation is applied in various other particulars.[5]

§ 958. **Evident Meaning.** — And, in general terms, these statutes are to be so construed as not to make acts criminal which plainly they were not meant to prohibit.[6] Therefore —

**Baking.** — The statute just mentioned was held not to forbid the baking of puddings and pies for dinner on Sunday; though, on the other hand, it was deemed to be a violation of the statute for a baker to bake bread in the ordinary course of his business.[7]

**Driving to Church.** — And in Pennsylvania it has been adjudged not to be in violation of the act of 22d April, 1794, for a hired domestic servant to drive his employer's family to church;[8] while yet, as we have seen,[9] the driving of an omnibus, as a public conveyance, is held, in the same State, to be unlawful.[1]

[1] Bennett *v.* Brooks, 9 Allen, 118, 122, opinion by Bigelow, C. J.

[2] Jones *v.* Andover, 10 Allen, 18.

[3] Stat. Crimes, § 245.

[4] Reg. *v.* Cleworth, 4 B. & S. 927.

[5] Bennett *v.* Brooks, 9 Allen, 118.

[6] Stat. Crimes, § 231-240.

[7] Rex *v.* Younger, 5 T. R. 449; Rex *v.* Cox, 2 Bur. 785. Hawkins observes: "It is said to have been agreed by the court, that an indictment will lie on this statute [Stat. 29 Car. 2, c. 7] against a baker for baking loaves of bread or rolls on the Lord's day in the usual way of his trade, because that is not a work of necessity; but that it will not lie for baking puddings, pies, or meat for dinners; for the Sabbath is more likely to be generally observed by a baker staying at home to bake the dinners of a number of families, than by his going to church, and those families or their servants staying at home to dress dinners for themselves; and this sort of exercise of a trade not only falls within the exception of 'works of necessity and charity,' but is also within the proviso, as being for this purpose a cook's shop; it being as reasonable that a baker should bake for the poor, as that a cook should roast or boil for them." 1 Hawk. P. C. Curw. ed. p. 360, § 8.

[8] Commonwealth *v.* Nesbit, 10 Casey 398.

[9] Ante, § 954.





**Shaving Customers.** — Perhaps, in like manner, it would not be unlawful for a private barber to shave his master on Sunday; but, in England,[2] and in Pennsylvania,[3] it has been adjudged so for a barber to shave customers in the ordinary way.

§ 959. **Works of Necessity and Charity.** — But these statutes except out of their general inhibition "works of necessity and charity." What are such works, it is not easy to lay down by rule. The "necessity" is not absolute and physical.[4] Perhaps the connection of this word with "charity" may mollify the construction. Work to prevent a great waste of property is held to come within this exception. For example, —

**Saving Sap.** — If a man has a maple sugar orchard, he may gather and even boil his sap on Sunday, when he cannot otherwise prevent its waste.[5]

**Malting Barley.** — It takes ten days to malt barley. "After four days, the barley is drawn on a kiln to dry; and, while there, it must be turned four times each day for two days; the third, three times, when it is out of much danger." And this turning of it, on Sunday, has been held to be within the exception of the statute, not subjecting the party to indictment.[6]

**Gathering Sea-weed.** — On the other hand, it is held in Massachusetts that the gathering of sea-weed at ten o'clock of a Sunday evening, at low tide, on a secluded beach, does not come within this exception, though the sea-weed is in danger of being washed away and lost by the next flood tide.[7] We may doubt

[1] See also Scully *v.* Commonwealth, 11 Casey, 511.

[2] Phillips *v.* Innes, 4 Cl. & F. 234.

[3] Commonwealth *v.* Jacobus, 1 Leg. Gaz. Rep. 491.

[4] See Vol. I. § 350-355; post, § 960; and the note following the next.

[5] Whitcomb *v.* Gilman, 35 Vt. 297; Morris *v.* The State, 31 Ind. 189.

[6] Crocket *v.* The State, 33 Ind. 416, Ray, C. J., observing: "In Massachusetts, in Commonwealth *v.* Knox, 6 Mass. 76, as early as the beginning of the present century, Chief Justice Parsons recognized the principle that any labor necessary, by which, he says, 'cannot be understood *physical* necessity,' but such labor as is necessary to accomplish a lawful object, under the circumstances of any particular case, cannot be considered as against the prohibition of the statute. So in McGatrick *v.* Wason, 4 Ohio State, 566, it was held, that 'the necessity may grow out of, or, indeed, be incidental to, a particular trade or calling.' Clearly, in the case in judgment, it is such an incident."

[7] Commonwealth *v.* Sampson, 97 Mass. 407, Hoar, J., observing: "It is not easy to give a precise rule for cases of this kind, some of which come very near the line. The definition which has been given of the phrase 'works of necessity or charity,' that it 'comprehends all acts

whether the courts in all our States will follow a doctrine which thus forbids the saving of property. Again, —

**Preventing Stoppage of Mills.** — The same court held, that the clearing out of a wheel-pit, to prevent the stoppage of mills employing many hands, is not a work of "necessity or charity," which can be lawfully done on the Sabbath.[1]

§ 960. **Travelling — (The Mails — Passenger).** — The driver of a coach, carrying the United States' mail in pursuance of a contract with the postmaster-general, does not, it is held in Massachusetts, violate this statute; though a passenger who rides in the coach does. The constitution of the United States would probably protect the driver, even if the statute were in terms adverse. But, the judge added, "travelling, when from necessity, is not prohibited by that section. By necessity, cannot be understood physical necessity; for a case in which any man is physically obliged to travel can hardly be imagined. But a moral fitness or propriety of travelling, under the circumstances of any particular case, may be deemed necessity within this section; and *a fortiori*, when the travelling is necessary to execute a lawful contract, it cannot be considered as unnecessary travelling against the prohibition of the statute. . . . But let it be remembered, that our opinion does not protect travellers in the stage-

which it is morally fit and proper should be done on the Sabbath,' may itself require some explanation. **Save Life, Property, prevent Suffering.** — To save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood, or tempest, or other unusual peril, would unquestionably be acts which fall within the exception. But it is no sufficient excuse for work on the Lord's day, that it is more convenient or profitable if then done than it would be to defer or omit it. Jones *v.* Andover, 10 Allen, 18. . . . **Wreck.** — If a vessel had been wrecked upon the beach, it would have been lawful to work on Sunday for the preservation of property which might be lost by delay. **Fish.** — But if the fish in the bay or the birds on the shore happen to be uncommonly abundant on the Lord's day, it is equally clear that it would furnish no excuse for fishing or shooting on that day. **Whale.** — How it would be if a whale happened to be stranded on the shore, we need not determine. Whether a case wholly exceptional, and involving a large amount of accessible value, would require any modification of the rule, is not now in question. The deposit of sea-weed upon the shore by the waves, if not constant, is frequent. It is not property which has been reduced into possession, and afterward been exposed to loss or hazard. There was no certainty, or strong probability, that equally good opportunities of gathering it would not often recur on other days. The collecting of it on the beach as it is found there from time to time is one of the ordinary branches of agricultural labor." p. 409, 410. See ante, § 877.

[1] McGrath *v.* Merwin, 112 Mass. 467.





coach, or the carrier of the mail in driving about any town to discharge or to receive passengers; and much less in blowing his horn, to the disturbance of serious people, either at public worship or in their own houses. The carrier may proceed with the mail on the Lord's day to the post-office; he may go to any public-house to refresh himself and his horses; and he may take the mail from the post-office and proceed on his route. Any other liberties on the Lord's day our opinion does not warrant."[1]

**Other Travelling.** — The travelling which will be protected on Sunday as "necessary" must be on a real, not fancied, necessity; recognized by the law, and not resting merely in the belief of the party.[2] Thus, —

**To procure Change of Hours.** — A travelling by one to induce his master to change his hours of labor from the night to the day, that he may sleep better, is not a work either of "necessity or charity."[3] But —

**Procure Medicine.** — It is otherwise of a travelling to procure medicine for a sick yet convalescent child.[4] So —

**Visit to Father.** — It is a filial duty, and not forbidden, the Pennsylvania court has held, for a son to travel on Sunday to visit his father in the country.[5]

§ 961. **Sale of Liquor by Taverners on Sunday.** — The Pennsylvania statute of 1794 is in the following words: "If any person shall do or perform any worldly employment or business whatever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practise any unlawful game, hunting, shooting, sport, or diversion whatsoever on the same day, and be convicted thereof, every such person so offending shall, &c. *Provided always*, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouses, lodging-houses, inns, and other houses of entertainment, for the use of sojourners, travellers, or strangers, or to hinder watermen from landing their passengers, or ferrymen

[1] Commonwealth *v.* Knox, 6 Mass. 76, opinion by Parsons, C. J. And see United States *v.* Hart, Pet. C. C. 390; Flagg *v.* Millbury, 4 Cush. 243. See also Murray *v.* Commonwealth, 12 Harris, Pa. 270.

[2] Johnson *v.* Irasburgh, 47 Vt. 28. **Running Street Cars**, in cities and their vicinity, has been adjudged a work of necessity. Augusta, &c. Railroad *v.* Renz, 55 Ga. 126.

[3] Connolly *v.* Boston, 117 Mass. 64.

[4] Gorman *v.* Lowell, 117 Mass. 65. As to selling the medicine, see Reg. *v.* Howarth, 33 U. C. Q. B. 537.

[5] Logan *v.* Mathews, 6 Barr, 417, 420. See also Commonwealth *v.* Nesbit, 10 Casey, Pa. 398.

from carrying over the water travellers or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life before nine o'clock in the forenoon, nor after five of the clock in the afternoon of the same day." And the court has held, that the keeper of a tavern violates this statute, if he sells on the Sabbath intoxicating liquors to a traveller, or to a temporary sojourner.[1] But in Delaware, under the former statute of the latter State, the contrary was decided.[2]

§ 962. **Exposing Goods for Sale, &c.** — In Missouri, "exposing to sale any goods, wares, or merchandise; keeping open any ale or porter house, grocery, or tippling-shop; and selling or retailing any fermented or distilled liquor, on the first day of the week, commonly called Sunday," — were made punishable. Under this provision, the acts, it was held, must have been done for the accommodation of customers, and have been in continuation of the usual occupation of the week.[3]

§ 963. **Keep open Shop.** — A statute punishing a person who "shall keep open his shop, warehouse, or workhouse" on the Lord's day, is violated though the door be not actually left open, if the occupant is within ready to do business, and there is no obstruction to persons entering.[4]

§ 964. **"Traveller."** — To make a person a "traveller," within the English statute of 18 & 19 Vict. c. 118, § 2, it is not necessary he should be journeying on business. "Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of a journey, whether of business or of

[1] Omit *v.* Commonwealth, 9 Harris, Pa. 426. So also in Tennessee, The State *v.* Eskridge, 1 Swan, Tenn. 413. According to a Pennsylvania case, the sale of liquors on Sunday, by a licensed innkeeper, is not an indictable offence under the acts of 11th March, 1834, and 16th April, 1849. The only penalty incurred by such a sale is that imposed by the act of 1794, forbidding worldly employments on the Lord's day. Commonwealth *v.* Naylor, 10 Casey, 86.

[2] Hall *v.* The State, 4 Harring. Del. 182. See ante, § 955; Hudson *v.* Geary, 4 R. I. 486; Reg. *v.* Whiteley, 3 H. & N. 143; Commonwealth *v.* Naylor, 10 Casey, 86. See The State *v.* Benjamin, 2 Oregon, 125.

[3] The State *v.* Crabtree, 27 Misso. 232. See ante, § 954.

[4] Commonwealth *v.* Harrison, 11 Gray, 308; Commonwealth *v.* Lynch, 8 Gray, 384. "It is not to be doubted," said Metcalf, J., in the last-cited case, "that any shop is kept open, on any day of the seven, when it is kept perfectly accessible to those who wish to enter it, and the owner or his servant or agent, is within, ready to do business." p. 385 See also Koop *v.* People, 47 Ill. 327.





pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it."[1] Persons walking in a town on a Sunday morning to enjoy the country air, and taking refreshment at an inn, though only two miles from their residence, are "travellers."[2]

## II. *Repetitions amounting to Nuisance.*

§ 965. **General View.** — The reader will find something on this subject in "Criminal Procedure."[3] Aside from what is there laid down, it has been held in Pennsylvania, on a *habeas corpus* hearing before a single judge, that, —

**Multiplicity of Acts.** — Though one act of Sabbath-breaking is punishable by a fine, there may be such a succession of acts, of the same sort, as will amount to a public nuisance indictable and abatable. Thus, —

**Public Conveyance.** — The driving of a public conveyance, for hire, on Sunday, is a violation of the act of 1794, inflicting the penalty of four dollars for performing worldly employment on the "Lord's day, commonly called Sunday." But, as a further consequence, the running of cars on passenger railroads on Sunday being, by reason of the noise accompanying them, a disturbance of the peace of the Sabbath, and the rights of worship and of rest, the drivers of such cars may be arrested and held for a breach of the peace.[4]

[1] Atkinson *v.* Sellers, 5 C. B. N. S. 442, 448, Cockburn, C. J.

[2] Taylor *v.* Humphries, 17 C. B. N. S. 539. And see 10 C. B. N. S. 429. See further, as to who is a "traveller," Fisher *v.* Howard, 10 Cox C. C. 144; Leslie *v.* Lewiston, 62 Maine, 468; Hinckley *v.* Penobscot, 42 Maine, 89.

[3] Crim. Proced. II. § 812 et seq.

[4] Commonwealth *v.* Jeandell, 2 Grant, Pa. 506. The judge, Thompson, observed: "When worldly employment is carried on in such a manner, and in such places, as to disturb the public peace and quiet, and the religious exercises of a community, either at home or in churches, or places of public worship, and it may not or cannot be restrained by the imposition of the defined penalty in the act, do not such circumstances constitute a breach of the public peace of the Sabbath, and may not the offender or offenders be held to bail to keep the peace? . . . Travelling, or riding for recreation, is not a breach of the Sabbath, and persons may not be arrested for riding along the street for such purposes. The disturbance, if any, occasioned by the vehicle, would be but for an instant, and not soon recurring. This is very unlike in character the carrying of passengers in a vehicle along the same route every six minutes, as was intended by the company on the day the arrest was made. . . . The penalty imposed by the act of 1794 is for the performance of worldly employment — a punishment for the act. The offence complained of here is the disturbance of the public peace; and the worldly employment, the kind and man-

### III. *Connecting other Offences with this.*

§ 966. **Same Act both Sabbath-breaking and other Crime.** · Though the commission of crime cannot be deemed "common labor,"[1] unless what is done is of a sort to be such in spite of its criminality;[2] still, if a statute against Sabbath-breaking in terms forbids a thing, the thing does not cease to be Sabbath-breaking though it should also be prohibited by some other statute. Thus, —

**Open Shop and Selling Liquor.** — Where a statute had made penal the keeping open of a shop on the Lord's day, "for the purpose of doing business therein," it was held that a defendant violated it, though what he did consisted in selling liquor contrary to the inhibitions of another statute.[3]

§ 967. **Nuisance.** — It is but repeating what in point of legal principle has been already said,[4] to state, that one by the repetitions of sales of liquor on Sunday, where each sale is a violation of a statute, may make his premises a nuisance, and be indictable likewise on this ground.[5]

### IV. *Remaining and Connected Questions.*

§ 968. **Contracts.** — Some of the foregoing questions arose in civil actions on contract, but the judgments are equally binding in criminal cases. Further adjudications on contract are referred to in the note.[6]

ner of it, is only evidence of the offence charged. It is not covered by the act of 1794." p. 508–511. And see Vol. I. § 1119–1121.

[1] Ante, § 955.

[2] See, for illustration, Wetzler *v.* The State, 18 Ind. 35.

[3] Commonwealth *v.* Trickey, 13 Allen, 559. See Hingle *v.* The State, 24 Ind. 35; Morris *v.* The State, 47 Ind. 503; Harman *v.* The State, 11 Ind. 311.

[4] Ante, § 965.

[5] The State *v.* Williams, 1 Vroom, 102; Commonwealth *v.* Shea, 14 Gray, 386.

[6] See Bloom *v.* Richards, 2 Ohio State, 387; Hooper *v.* Edwards, 25 Ala. 528; Stackpole *v.* Symonds, 3 Fost. N. H. 229; Smith *v.* Wilcox, 19 Barb. 581; Hilton *v.* Houghton, 35 Maine, 143; Richardson *v.* Kimball, 28 Maine, 463; Sellers *v.* Dugan, 18 Ohio, 489; Goss *v.* Whitney, 27 Vt. 272; Bryant *v.* Biddeford, 39 Maine, 193; Hussey *v.* Roquemore, 27 Ala. 281; Mohney *v.* Cook, 2 Casey, 342; Varney *v.* French, 19 N. H. 233; Slade *v.* Arnold, 14 B. Monr. 287; Greene *v.* Godfrey, 44 Maine, 25; Adams *v.* Gay, 19 Vt. 358; Northrup *v.* Foot, 14 Wend. 248; Jordan *v.* Moore, 10 Ind. 386; Broome *v.* Wellington, 1 Sandf. 664; Bosley *v.* McAllister, 13 Ind. 565; Way *v.* Foster, 1 Allen, 408; Miller *v.* Roessler, 4 E. D. Smith, 234; Sherman *v.* Roberts, 1 Grant, Pa. 261; Stryker *v.* Vanderbilt, 3 Dutcher, 68; Bumgardner *v.* Taylor, 28 Ala. 687; Robeson *v.* French, 12 Met. 24; Rainey *v.* Capps, 22 Ala. 288.





**Judicial Proceedings, &c.** — There is in the books much law concerning arrests, recognizances entered into, and judicial proceedings conducted on Sunday. But these discussions do not seem quite in place here. Some cases appear in a note.[1]

**Other Points.** — Some other points, relating to the subject of this chapter, remain; but not of interest to justify a particular examination of them here.[2]

§ 969. **Conscientious Observers of another Day.** — These statutes extend their penalties by interpretation to persons who conscientiously keep, as their Sabbath, another day of the week.[3] But some of them contain express provisions for the protection of such persons.[4]

§ 970. **The Intent.** — To violate these statutes requires no particular criminal intent, other than simply to do the thing which they forbid.[5] The various doctrines explained in the first volume are applicable. Thus, —

**Mistake of Fact.** — If one, without fault or carelessness,[6] lets on the Sabbath a carriage believing it is to be used for a work of necessity or charity, while in fact it is not so used, he does not thereby become guilty of crime.[7] And one authorized to sell liquor on Sunday to travellers, but forbidden to sell to others,

[1] Nabors *v.* The State, 6 Ala. 200; Bland *v.* Whitfield, 1 Jones, N. C. 122; Cory *v.* Silcox, 5 Ind. 370, 373; The State *v.* Schnierle, 5 Rich. 299; Chapman *v.* The State, 5 Blackf. 111; Keith *v.* Tuttle, 28 Maine, 326; Blood *v.* Bates, 31 Vt. 147; Harris *v.* Morse, 49 Maine, 432; True *v.* Plumley, 36 Maine, 466; The State *v.* Suhur, 33 Maine, 539; Pearce *v.* Atwood, 13 Mass. 324; Langabier *v.* Fairbury, &c., Railroad, 64 Ill. 243; Johnston *v.* People, 31 Ill. 469; Davis *v.* Fish, 1 Greene, Iowa, 406; Chapman *v.* The State, 5 Blackf. 111; Rosser *v.* McColly, 9 Ind. 587; McCorkle *v.* The State, 14 Ind. 39; Joy *v.* The State, 14 Ind. 139; Mayo *v.* Wilson, 1 N. H. 53; Webber *v.* Merrill, 34 N. H. 202, 209; Watts *v.* Commonwealth, 5 Bush, 309; Rice *v.* Commonwealth, 3 Bush, 14; Bass *v.* Irvin, 49 Ga. 436; Commonwealth *v.* Marrow, 3 Brews. 402; Blood *v.* Bates, 31 Vt. 147; Taylor *v.* Phillips, 3 East, 155.

[2] See Commonwealth *v.* Newton, 8 Pick. 234; The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310; Hall *v.* The State, 3 Kelly, 18; The State *v.* Williams, 4 Ire. 400; The State *v.* Brooksbank, 6 Ire. 73; The State *v.* Goff, 20 Ark. 289; Hudson *v.* Geary, 4 R. I. 485.

[3] Specht *v.* Commonwealth, 8 Barr, 312; Commonwealth *v.* Hyneman, 101 Mass. 30. And see Stansbury *v.* Marks, 2 Dall. 213.

[4] Commonwealth *v.* Trickey, 13 Allen, 559; Commonwealth *v.* Hyneman, supra.

[5] Shover *v.* The State, 5 Eng. 259; Brittin *v.* The State, 5 Eng. 299.

[6] Vol. I. § 313 et seq.

[7] Myers *v.* The State, 1 Conn. 502.

should not be convicted if, when he sold it, he believed on good reason that he was supplying refreshment to a traveller, though in fact the person was not a traveller.[1]

[1] Taylor v. Humphries, 17 C. B. N. S. 539; Vol. I. § 303; Stat. Crimes, § 132, 355–359, 632, 663–665, 730, 820–825, 877, 1021, 1022.

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For LOTTERIES, see Stat. Crimes.
MAGISTRATE, see MALFEASANCE AND NON-FEASANCE IN OFFICE.
MAIM, see MAYHEM.
MAINTENANCE, see CHAMPERTY AND MAINTENANCE.





# CHAPTER XXIX.

## MALFEASANCE AND NON-FEASANCE IN OFFICE.[1]

§ 971. Introduction.
972–977. Justices of the Peace and the like.
978, 979. Sheriffs and the like.
980–982. Some Miscellaneous Topics.

§ 971. **First Volume — This Chapter, and how divided.** — In the preceding volume,[2] we took a general view of the duty of officers in respect of their official trusts, and how far their neglect or refusal of it renders them indictable. In this chapter, we are simply to consider something of the application of elementary doctrines to, I. Justices of the Peace and other like Officers; II. Sheriffs and other like Officers; after which we shall look at III. Some Miscellaneous Topics.

### I. *Justices of the Peace and other like Officers.*

§ 972. **Criminal Responsibility of Inferior Magistrates.** — We have seen,[3] that, according to the more common doctrine, justices of the peace and other inferior magistrates may be holden criminally for malfeasance, even in respect of their judicial conduct. Most of the cases in the English books concern the granting of —

**Criminal Information.** — In this, the court acts on its discretion as well as the law; and, though it cannot grant an information where an indictment would not lie, it may refuse one. As foundation for an information, —

**Corruption.** — The court requires evidence of something more than a mere mistake concerning their duty; it requires corrup-

[1] For matter relating to this title, see Vol. I. § 218, 239, 299, 316, 321, 459–464, 707. See this volume, BRIBERY; PRISON BREACH, &c. And see Stat. Crimes, § 568, 805, 806, 828, 969. For the pleading, practice, and evidence, see Crim. Proced. II. § 819 et seq.

[2] See the places referred to in the last note, and particularly § 459–464.

[3] Vol. I. § 462.

tion.[1] Corruption, also, is necessary to sustain an indictment;[2] but more exactly how this is we shall see further on.[3]

§ 973. **Instances of Informations granted.** — Informations have been granted against a justice of the peace for convicting defendants without summons;[4] for refusing an ale-house license from motives of resentment;[5] for sending a man to the house of correction without cause;[6] for declining to administer an oath, as the statute required him to do;[7] for discharging a prisoner on insufficient bail;[8] for bailing a felon;[9] for otherwise admitting to bail where he had no authority;[10] for refusing bail, or particular persons as such;[11] for adding to an order, requiring the concurrence of two justices, the name of a second one;[12] for making a false return to a mandamus;[13] for sitting as magistrate in a case in which he was personally interested;[14] and for some other improper acts and omissions.[15]

§ 974. **Instances of Indictments.** — Indictments have been maintained, for issuing a warrant where there was no complaint and proceeding under the same;[16] for discharging an offender without sufficient sureties;[17] for not attempting to suppress a riot.[18]

[1] Rex *v.* Halford, 7 Mod. 193; Rex *v.* Hann, 3 Bur. 1716; Rex *v.* Jackson, 1 T. R. 653; Reg. *v.* Badger, 7 Jur. 216, 12 Law J. N. S. M. C. 66; Anonymous, 16 Jur. 995, 14 Eng. L. & Eq. 151; Rex *v.* Cotten, W. Kel. 125; Rex *v.* Baylis, 3 Bur. 1318; Rex *v.* Rye Justices, Say. 25; Rex *v.* Seaford Justices, 1 W. Bl. 432; Rex *v.* Williamson, 3 B. & Ald. 582; Rex *v.* Jackson, Lofft, 147; Rex *v.* Lancashire Justices, 1 D. & R. 485; Rex *v.* Cozens, 2 Doug. 426; In re Fentiman, 4 Nev. & M. 126, 2 A. & E. 127; Rex *v.* Davie, 2 Doug. 588; Rex *v.* Corbett, Say. 267; Reg. *v.* Badger, 6 Jur. 994; Rex *v.* Friar, 1 Chit. 702; Rex *v.* Borron, 3 B. & Ald. 432.

[2] Vol. I. § 462; The State *v.* Porter, 2 Tread. 694; Commonwealth *v.* Rodes, 6 B. Monr. 171; Lining *v.* Bentham, 2 Bay, 1; The State *v.* Johnson, 2 Bay, 385; The State *v.* Gardner, 2 Misso. 23; Jones *v.* People, 2 Scam. 477. See The State *v.* Leigh, 3 Dev. & Bat. 127; The State *v.* Lenoir Justices, 4 Hawks, 194.

[3] Post, § 976; Vol. I. § 299.

[4] Rex *v.* Allington, 1 Stra. 678. See Rex *v.* Cotten, W. Kel. 125; The State *v.* Odell, 8 Blackf. 396.

[5] Rex *v.* Hann, 3 Bur. 1716; Rex *v.* Williams, 3 Bur. 1317. See Rex *v.* Athay, 2 Bur. 653; People *v.* Norton, 7 Barb. 477.

[6] Rex *v.* Okey, 8 Mod. 45.

[7] Smith *v.* Langham, Skin. 60, 61.

[8] Rex *v.* Lediard, Say. 242; Respublica *v.* Burns, 1 Yeates, 370. See Reg. *v.* Tracy, 6 Mod. 179.

[9] Rex *v.* Clarke, 2 Stra. 1216.

[10] Rex *v.* Brooke, 2 T. R. 190.

[11] Reg. *v.* Badger, 6 Jur. 994. See Rex *v.* Jones, 1 Wils. 7.

[12] Rex *v.* Howard, 7 Mod. 307.

[13] Anonymous, Lofft, 185.

[14] Rex *v.* Davis, Lofft, 62.

[15] Rex *v.* Fielding, 2 Bur. 719; Rex *v.* Phelps, 2 Keny. 570; Rex *v.* Wykes, Andr. 238; Anonymous, Lofft, 44. See also Rex *v.* Stukely, 12 Mod. 493.

[16] Wallace *v.* Commonwealth, 2 Va. Cas. 130.

[17] People *v.* Coon, 15 Wend. 277.

[18] Respublica *v.* Montgomery, 1 Yeates, 419; Reg. *v.* Neale, 9 Car. & P. 431. See also The State *v.* Leigh, 3 Dev. & Bat. 127; The State *v.* Lenoir Justices, 4 Hawks, 194; Rex *v.* Pinney, 5 Car. & P. 254.





§ 975. **Whether Indictment properly Maintainable.** — As already observed,[1] it is not quite universally held, that justices of the peace are liable to an indictment, even for official corruption, in respect of their judicial proceedings. Certainly there is reason in declining to cast upon their shoulders, as judges of the inferior courts, a heavier burden than is borne by the judges of the superior. If the law subjects them, as it does the higher judges, to impeachment for official misconduct, this should be enough in the first instance, leaving them to be indicted, if this proceeding is also to be resorted to, after they are disrobed of office. But it is believed that the relations of these officers to the law differs somewhat in the different States, therefore that no one enunciation of doctrines would be good as applied in every locality.

§ 976. **Ministerial distinguished from Judicial.** — Inferior magistrates, like justices of the peace, have duties of a ministerial sort; and, in reason, and it is believed in authority, they may be punishable for malfeasance or non-feasance in respect of such a duty, where they would not be if it were judicial. Thus, —

**Corruption, again.** — When one who was both mayor and justice of the peace was on trial for the neglect of not suppressing a riot, Littledale, J., said to the jury: "Mere good feeling, or upright intentions, are not sufficient to discharge a man if he has not done his duty. The question here is, whether the defendant did all that he knew was in his power, and which would be expected from a man of ordinary prudence, firmness, and activity."[2] But this is plainly not the corruption which would be required to convict a magistrate in respect of judicial misconduct.[3] As to what is corruption in magistrates, Ashhurst, J., once observed: "Though they have denied generally that they acted from any interested motives in the business, yet that is not sufficient; for, if they acted even from passion or from opposition, that is equally corrupt as if they acted from pecuniary considerations."[4] In a South Carolina civil case, where a justice of the peace and a constable were sued jointly for false imprisonment, it was held that they were liable, if, instigated by the magistrate, the constable

[1] Ante, § 972; Vol. I. § 462.

[2] Rex *v.* Pinney, 5 Car. & P. 254, 270.

[3] Ante, § 972.

[4] Rex *v.* Brooke, 2 T. R. 190, 195. And see People *v.* Brooks, 1 Denio, 457; The State *v.* Coon, 14 Minn. 456.

executed a warrant of arrest for felony nine months after it was issued; the party who procured it in the first instance not having made any recent application to have it executed, and ill-will toward the arrested person having prompted the arrest. Said Grimké, J., "The warrant which had issued nine months before the arrest was stale and insufficient."[1]

§ 977. **Mistake of Law.** — Obviously, if the magistrate mistook the law when he pronounced a judicial judgment, he was not corrupt in fact; yet if, as some of the cases imply,[2] he is not to be deemed, like other men, to have known the law, we have here a very dangerous exception to a necessary general rule.[3] Probably a knowledge of the law must be, at least *prima facie*, presumed.

## II. *Sheriffs and other like Officers.*

§ 978. **Criminally responsible.** — The criminal liability of sheriffs and their deputies, constables, coroners, and the like, for malfeasance and non-feasance in office, is clear beyond question.[4] Thus, —

**Hue-and-Cry.** — In an old case, an indictment was held to lie against a constable for refusing to pursue a hue-and-cry against a burglar; "because it is the constable's duty, upon notice given to him, presently to pursue."[5]

**Not receiving and holding Prisoner.** — And any like officer is thus amenable for not taking to prison one committed on a magistrate's warrant.[6] So also is the keeper of a jail, for refusing to receive a prisoner.[7]

**Non-return of Precept.** — And the official person may be punished criminally for the non-return of a precept;[8] but, if his term of office expires before the return day, the consequence is other-

[1] Garvin v. Blocker, 2 Brev. 157. And see Guenther v. Whiteacre, 24 Mich. 504.

[2] Vol. I. § 299, 462; Hiss v. The State, 24 Md. 556; Rex v. Brooke, 2 T. R. 190.

[3] Vol. I. § 292 et seq.

[4] Vol. I. § 459; Rex v. Harrison, 1 East P. C. 382; Reg. v. Wyat, 1 Salk. 380; s. c. nom. Reg. v. Wyatt, 2 Ld. Raym. 1189; The State v. Berkshire, 2 Ind. 207; Shaw v. Macon, 21 Ga. 280.

[5] Crouther's Case, Cro. Eliz. 654.

[6] Reg. v. Johnson, 11 Mod. 62. In this case, it was held to be no excuse that the prisoner was kept safely in the officer's own house, and brought before the magistrate for examination at the time required. See also Rex v. Mills, 2 Show. 181; Ex parte Taws, 2 Wash. C. C. 353.

[7] Rex v. Cope, 7 Car. & P. 720.

[8] Reg. v. Wyat, 1 Salk. 380; s. c. nom. Reg. v. Wyatt, 2 Ld. Raym. 1189.





wise.[1] Yet, if the guilt were incurred while he was an officer, the indictment may be found afterward.[2]

**Statutes.** — Both in aid of these doctrines and in extending them, statutes have been enacted in some of our States.[3]

§ 979. **Sheriff for Acts of Deputy.** — Whether a sheriff is answerable criminally for the wrong-doing of his deputy, was considered in the first volume.[4]

## III. *Some Miscellaneous Topics.*

§ 980. **Discretionary Functions.** — If an officer's functions are discretionary, he cannot be punished for honestly exercising them by declining to do a thing. Therefore, —

**Overseers of Poor.** — It being discretionary, in North Carolina,[5] for overseers of the poor to make by-laws and regulations for their comfort, an indictment will not lie for omitting to make them, especially if no corrupt intent is shown.[6]

§ 981. **"District Officer" — (Jailer furnishing Liquor).** — In South Carolina, a jailer is within the statute of 1829, "for the punishment of official misconduct of district officers;" and the furnishing, in large quantities, of spirituous liquors to prisoners in his charge is "official misconduct," subjecting him to criminal liability.[7]

§ 982. **Other Officers.** — Officers other than those mentioned in the foregoing sections of this chapter are liable criminally for their official misconduct.[8] Thus, —

**Inspector of Beef.** — In Pennsylvania, an inspector of beef is thus liable for refusing to perform his duty.[9]

**Selectmen. — (Not commit Civil Wrong).** — In New Hampshire, the selectmen of a town are not indictable for neglecting to remove a school-house to a new site, designated by the report of a committee, if such site is not the property of the school-district,

[1] The State v. Woodside, 7 Ire. 296.

[2] The State v. Sellers, 7 Rich. 368.

[3] The State v. Carr, 71 N. C. 106; Barter v. Martin, 5 Greenl. 76; The State v. Hein, 50 Misso. 362; Pippin v. The State, 36 Texas, 696; The State v. Bevans, 37 Iowa, 178; Commonwealth v. Mitchell, 3 Bush, 30; McBride v. Commonwealth, 4 Bush, 331.

[4] Vol. I. § 218.

[5] R. S. c. 87, § 13.

[6] The State v. Williams, 12 Ire. 172.

[7] The State v. Sellers, 7 Rich. 368.

[8] Rex v. Bembridge, 3 Doug. 327. And see Rex v. Surrey, 1 Chit. 650.

[9] Commonwealth v. Genther, 17 S. & R. 135.

and no steps have been taken to have it laid out as a school lot; for they could not make the removal without committing a civil trespass.[1]

**Other Crime.** — An officer may commit an ordinary crime, like any other person;[2] but this is not malfeasance in office.

[1] The State v. Bailey, 1 Fost. N. H. 185.

[2] Commonwealth v. Robinson, 1 Gray, 555. For further cases illustrating the general doctrine of this chapter, see Rex v. Hemmings, 3 Salk. 187; Rex v. Commings, 5 Mod. 179; Rex v. Everett, 2 Man. & R. 35, 8 B. & C. 114; Rex v. Barrat, 2 Doug. 465; Rex v. Friar, 1 Chit. 702; Mann v. Owen, 4 Man. & R. 449, 9 B. & C. 595; Rex v. Osborn, 1 Comyns, 240; The State v. Leach, 60 Maine, 58; The State v. Gardner, 5 Nev. 377; Ex parte Harrold, 47 Cal. 129; Rex v. Bull, 1 Wils. 93.





# CHAPTER XXX.

## MALICIOUS MISCHIEF.[1]

§ 983. Introduction.
984–991. The Property.
992–995. The Act of Mischief.
996–998. The Intent.
999. English Statutes as in Force with us.
1000. Remaining and Connected Questions.

§ 983. **Multifarious.** — The offence of malicious mischief is both common-law and statutory, but chiefly the latter; the statutes are very numerous and diverse; and it is allied to the common-law crime of larceny. Therefore —

**First Volume.** — A considerable discussion of it could not be omitted from the elementary elucidations in our first volume.

**Statutory Crimes.** — It being so wide an offence and so largely statutory, it necessarily found a place in "Statutory Crimes."

**This Volume.** — Being an offence at the common law, a general discussion of it could not be omitted from this volume.

**Criminal Procedure.** — Therefore a chapter on the pleading, practice, and evidence, corresponding to the present chapter, became necessary in "Criminal Procedure."

**Repetitions avoided.** — This more than usual division of the discussion, and the insertion of parts of it in so many different places, seems at the first impression objectionable; but a contrary course would have been open to still greater objection. Possibly all reference to the statutes might have been well omitted from this chapter. But what is said here is not said again elsewhere. No substantial repetitions are anywhere permitted.

**How defined.** — In the first volume, the definition by the North Carolina court was adopted; namely, that malicious mischief at the common law is "the wilful destruction of some article of

[1] For matter relating to this title, see Vol. I. § 429, 568–570, 577, 595, 792. For the pleading, practice, and evidence, see Crim. Proced. II. § 837 et seq. And see, as to both law and procedure, Stat. Crimes, § 156, note, 246, 314, 430–449.

personal[1] property, from actual ill-will or resentment towards its owner."[2]

**How the Chapter divided.** — We shall consider, I. The Property; II. The Act of Mischief; III. The Intent; IV. English Statutes as in Force with us; V. Remaining and Connected Questions.

## I. *The Property.*

§ 984. **Whether extends to Real Estate.** — In the first volume, there is an intimation that perhaps this offence is analogous to larceny, to the extent of exempting real estate from being the subject of it; and on this idea rests the above definition.[3] But the old authorities create a doubt whether the analogy can be carried so far, and many deem that they establish the contrary. Thus (confining ourselves to the old books), —

**Defacing Tombs.** — Lord Coke says, that the defacing of tombs, sepulchres, or monuments for the dead, "is punishable by the common law;"[4] while still they are real estate. Also —

**Copper from Buildings.** — The old doctrine is plain, that tearing up and carrying away copper fixed to the freehold is a common-law misdemeanor.[5] Again, —

**Muniments of Title.** — It is a misdemeanor at the common law to steal a record which concerns the realty,[6] but it is not larceny.[7] Moreover, as distinguishing malicious mischief from larceny, —

**Chose in Action.** — It has been held to be indictable to tear an account stated and settled between parties, — a proposition of law, however, the correctness of which has been doubted.[8]

§ 985. **To what Property under American Authorities.** — In this country, the decisions concerning even the indictability of malicious mischief are not uniform;[9] so likewise are they not uniform on the question now under consideration. The New York court has maintained, that all kinds of property, real and personal, may be the subject of this offence.[10] On the other hand, the doctrine in Maine is, that an indictment at the common law will not lie

[1] Query as to the word "personal." See post, § 984.
[2] Vol. I. § 569.
[3] Vol. I. § 569, 577.
[4] 3 Inst. 202.
[5] Rex *v.* Joyner, J. Kel. 29.
[6] Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12.
[7] Ante, § 770.
[8] Reg. *v.* Crisp, 6 Mod. 175 and note.
[9] Vol. I. § 569.
[10] Loomis *v.* Edgerton, 19 Wend. 419.





for cutting and girdling fruit-trees;[1] and in North Carolina, that it cannot be supported for "unlawfully, wickedly, and maliciously" cutting and destroying a quantity of standing Indian corn.[2] So the New Jersey court has refused to uphold a prosecution for taking up and removing a corner-stone in the boundary line between two estates, with intent to injure the owner of one of them.[3] But an indictment is held to lie for maliciously, wickedly, and wilfully killing a cow, the property of another;[4] also, a dog;[5] also, a horse;[6] also, for poisoning cattle;[7] also, charging that the defendant "unlawfully, wickedly, maliciously, and mis-

[1] Brown's Case, 3 Greenl. 177.
[2] The State *v.* Helmes, 5 Ire. 364. And see The State *v.* Robinson, 3 Dev. & Bat. 130.
[3] The State *v.* Burroughs, 2 Halst. 426. The court say: "The offence charged is exclusively a private injury, and in no way concerns the public further than any other private wrong. The cases cited from Burrow [Rex *v.* Wheatly, 2 Bur. 1125; Rex *v.* Storr, 3 Bur. 1698; Rex *v.* Atkyns, 3 Bur. 1706] are strongly in point." See also Commonwealth *v.* Powell, 8 Leigh, 719.
[4] People *v.* Smith, 5 Cow. 258.
[5] The State *v.* Latham, 13 Ire. 33. **Further of Dogs.** — The same under a statute which has the words "any property." The State *v.* Sumner, 2 Ind. 377. So also in New Hampshire, Fowler, J., observing: "We do not deem it material to the decision of the question before us, whether dogs are or are not the subject of larceny. Admitting, that, by our laws, they are not, it by no means follows that they may not be the subject of the wilful and malicious injury punished by the act under which the present indictment was found. The evident design of that act was to afford more effectual protection against injuries to property under aggravated circumstances, by punishing, as criminal offences, acts which before its passage had been regarded only as civil injuries. And we can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the wilful and malicious injury of the reckless and malignant, as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner, or in a public street or square, or any other species of personal property." The State *v.* McDuffie, 34 N. H. 523, 527. On the other hand, as dogs, ante, § 773, are not the subjects of larceny at the common law, the Virginia court held, that the killing of a dog is not within the malicious-mischief statute, the words of which are, "any tree already cut, or any other timber, or property, real and personal, belonging to another," &c. Commonwealth *v.* Maclin, 3 Leigh, 809. In like manner, in Minnesota, during the time of the territory, a dog was adjudged not to be within the words "horse, cattle, or other beast." United States *v.* Gideon, 1 Minn. 292. And see Stat. Crimes, § 246, note, 344, 443, 548.
[6] The State *v.* Council, 1 Tenn. 305; Respublica *v.* Teischer, 1 Dall. 335. **Indictable Acts enumerated.** — In the last-mentioned case, the court observed: "The poisoning of chickens; cheating with false dice; fraudulently tearing a promissory note, and many other offences of a similar description; . . . breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot; and the embezzlement of public moneys, have, likewise, in this State," been held to be indictable. See also The State *v.* Landreth, 2 Car. Law Repos. 446.
[7] Commonwealth *v.* Leach, 1 Mass. 59.

chievously did set fire to, burn, and consume one hundred barrels of tar," &c.[1]

§ 986. **Under Statutes.** — Under statutes, English and American, a wide range has been given to this offence. And thus almost every species of property, real and personal, has been made the subject of it. For example, the words "cattle,"[2] "beast,"[3] "stack,"[4] "threshing-machine,"[5] "public property,"[6] "trees,"[7] and a great variety of other words, have been employed.

§ 987. **"Woods."** — A North Carolina statute has the term "woods;" and the court has held, that it includes an old field which has been "turned out," without fencing around it, and broom sedge and pine bushes have grown up in it, and it is surrounded by forest land; consequently a person setting fire to such a field incurs the statutory penalty.[8]

§ 988. **"Other Property."** — In Virginia it was enacted, that "any person who shall, &c., destroy or injure any tree already cut, or any other timber or property, real or personal, belonging to another," &c., — shall be indictable. And the court held, that the words "other timber or *property*" are not limited in construction to property of the kind before mentioned;[9] but they cover domestic animals, like hogs.[10]

§ 989. **Property obtained by Wrong.** — Under the statute of Maine, it is held to be unimportant whether the property came

[1] The State *v.* Simpson, 2 Hawks, 460.

[2] 2 East P. C. 1074; Reg. *v.* Tivey, 1 Car. & K. 704, 1 Den. C. C. 63; Rex *v.* Austen, Russ. & Ry. 490; The State *v.* Abbott, 20 Vt. 537; Rex *v.* Haywood, 2 East P. C. 1076, Russ. & Ry. 16; Rex *v.* Chapple, Russ. & Ry. 77. See Frierson *v.* Hewitt, 2 Hill, S. C. 499; United States *v.* Mattock, 2 Sawyer, 148. **Buffalo.** — In Missouri it has been held, that a buffalo, though domesticated, does not come within the word "cattle." The State *v.* Crenshaw, 22 Misso. 457.

[3] Taylor *v.* The State, 6 Humph. 285.

[4] Stat. Crimes, § 216; Rex *v.* Salmon, Russ. & Ry. 26; Commonwealth *v.* Erskine, 8 Grat. 624; Commonwealth *v.* Macomber, 3 Mass. 254; Reg. *v.* Spencer, Dears. & B. 131, 7 Cox C. C. 189.

[5] Rex *v.* Mackerel, 4 Car. & P. 448; Rex *v.* Fidler, 4 Car. & P. 449; Rex *v.* West, 2 Deac. Crim. Law, 1687; Rex *v.* Chubb, 2 Deac. Crim. Law, 1687; Rex *v.* Barlett, 2 Deac. Crim. Law, 1687; Rex *v.* Hutchins, 2 Deac. Crim. Law, 1686.

[6] Read *v.* The State, 1 Ind. 511, Smith, Ind. 369.

[7] The State *v.* Moultrieville, 1 Rice, 158; Reg. *v.* Whiteman, Dears. 353, 23 Law J. N. S. M. C. 120, 18 Jur. 434, 25 Eng. L. & Eq. 590.

[8] Hall *v.* Cranford, 5 Jones, N. C. 3. And see Averitt *v.* Murrell, 4 Jones, N. C. 322.

[9] Stat. Crimes, § 245, 246; ante, § 957.

[10] **Commonwealth *v.* Percavil, 4 Leigh, 686.**





by right or by wrong to the hand of the person injured.[1] This, we have seen,[2] is the rule also in larceny.

§ 990. **"Field of Owner."** — A statute in North Carolina made it punishable, "if any person shall unlawfully and on purpose kill, maim, or injure any live stock running at large in the range or in the field or pasture of the owner;" and it was held not to be within the statute for a man to injure stock found in his own field, which was enclosed and under cultivation.[3]

**Trespassing Cattle.** — On the other hand, the words of the Illinois statute being, "shall unlawfully, wantonly, wilfully, or maliciously kill, wound, disfigure, or destroy any horse, mare," &c.; the court held, that the owner of land has no right to kill or injure cattle trespassing upon it, and if he does, he is liable under the statute for malicious mischief.[4]

§ 991. **Injuries to Person.** — There are various statutes affording protection to the person of individuals, — perhaps not properly falling within our present title. The most important are against malicious shooting,[5] and malicious stabbing,[6] cutting,[7] and wounding.[8] The reader will find some points of interest in the cases cited.[9]

### II. *The Act of Mischief.*

§ 992. **At the Common Law.** — It is not possible to draw, with minute precision, a line which shall show the act necessary to constitute malicious mischief, and no more. Still it must be some damage to the property, of a nature serious, and worthy of the law's notice.

**Wounding Animal.** — East says: "An indictment at the common law which charged, that the prisoner, 'on the 23d of May, &c., with force and arms, at, &c., one black gelding of the value of £30, of the goods and chattels of William Collyer, then and there

[1] The State *v.* Pike, 33 Maine, 361. And see The State *v.* Davis, 2 Ire. 153.

[2] Ante, § 781.

[3] The State *v.* Waters, 6 Jones, N. C. 276.

[4] Snap *v.* People, 19 Ill. 80.

[5] Stat. Crimes, § 322; 1 East P. C. 412; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* St. George, 9 Car. & P. 483; Henry *v.* The State, 18 Ohio, 32; Rex *v.* Reynolds, Russ. & Ry. 465; Rex *v.* Voke, Russ. & Ry. 531; Reg. *v.* Murphy, 1 Crawf. & Dix C. C. 20; Trimble *v.* Commonwealth, 2 Va. Cas. 143; Rex *v.* Holt, 7 Car. & P. 518.

[6] Stat. Crimes, § 315.

[7] Stat. Crimes, § 315; Rex *v.* Fraser, 1 Moody, 419; Rex *v.* Hunt, 1 Moody, 93.

[8] Stat. Crimes, § 314; Reg. *v.* Walker, Dears. 358, 25 Eng. L. & Eq. 589.

[9] See also post, § 1004.

being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace,'" &c., was held by the judges to be inadequate; "for, if the case were not within the Black Act, the fact in itself was only a trespass; for the words *vi et armis* did not imply force sufficient to support an indictment."[1] And the New Jersey court, on a careful examination of the authorities, which it considered not to be uniform, held, that malicious mischief in wounding an animal without killing it, is not an indictable offence either by the New Jersey statute or at the common law.[2] On principle, such wounding, viewed as mere torture to the creature,[3] could not constitute the mischief meant by the common law; but, if it had proceeded so far as to impair the value of the animal as property, it should be deemed adequate. The mischief done to a building in tearing copper from it, or a tomb in defacing it,[4] is a mere wounding, not a killing, of the building or the tomb.

§ 993. **Wife.** — A wife cannot commit this offence on her husband's property.[5]

§ 994. **Under Statutes.** — The act of mischief required by the statutes will appear from their terms, and from discussions in "Statutory Crimes." In England, we have the act of demolishing or beginning to demolish a house,[6] setting fire to various property,[7] damaging it,[8] wounding,[9] and the like.

§ 995. **"Disfigure."** — With us it has been held, that to cut the hair from the tail of a horse, or to cut off his mane, is to "disfigure" the horse.[10]

**Alter.** — A statute which, to protect the owners of cattle in respect of the marks put upon them, forbids the "altering" of a brand, is violated when a new brand is impressed upon a cow already branded.[11]

[1] Ranger's Case, 2 East P. C. 1074.
[2] The State *v.* Beekman, 3 Dutcher, 124; s. P. The State *v.* Manuel, 72 N. C. 201.
[3] Vol. I. § 594–597; Stat. Crimes, § 1093.
[4] Ante, § 984.
[5] Anonymous, 6 Mod. 88.
[6] Stat. Crimes, § 214; Vol. I. § 340; Reg. *v.* Howell, 9 Car. & P. 437; Reg. *v.* Harris, Car. & M. 661, note; Rex *v.* Batt, 6 Car. & P. 329; Rex *v.* Thomas, 4 Car. & P. 237; Rex *v.* Price, 5 Car. & P. 510; Reg. *v.* Adams, Car. & M. 299; Reg. *v.* Simpson, Car. & M. 669.
[7] Stat. Crimes, § 311; Rex *v.* Salmon, Russ. & Ry. 26.
[8] Stat. Crimes, § 313, note.
[9] Stat. Crimes, § 216, 314; Lemon *v.* The State, 19 Ark. 171.
[10] Boyd *v.* The State, 2 Humph. 39.
[11] Linney *v.* The State, 6 Texas, 1. See The State *v.* Matthews, 20 Misso. 55; The State *v.* Nichols, 12 Rich. 672.





**"Matter or Thing."** — And a statute against "knowingly and wilfully packing or putting into any bag, bale, or bales of cotton, any stone, wood, trash-cotton, cotton seed, or any matter or thing whatsoever, or causing the same to be done, to the purpose or intent of cheating or defrauding any person or persons whomsoever," embraces, the South Carolina court has held, the putting in of an undue quantity of water.[1]

### III. *The Intent.*

§ 996. **Malice against Owner.** — The meaning of the word "malice" was stated in the preceding volume.[2] Now, the act, in malicious mischief, must proceed from malice;[3] and, according to the general doctrine, the malice must be against the owner of the property, not against another person, or against the property itself; it not being, for instance, sufficient where a man kills an animal out of an ill mind toward it.[4]

**To prevent Repetition of Trespass.** — Where, in North Carolina, the jury found that the defendant, indicted for stabbing a mare, "took the mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound, with a view to prevent a repetition of the injury," — the malice was held not to be adequate. The judge deemed that the act, in this offence, must be "done in a spirit of wanton malignity, without provocation or excuse, and under circumstances which bespeak a mind prompt and disposed to the com-

[1] The State *v.* Holman, 3 McCord, 306.
[2] Vol. I. § 427, 429.
[3] 1 East P. C. 412; The State *v.* Council, 1 Tenn. 305; Commonwealth *v.* Walden, 3 Cush. 558; The State *v.* Doig, 2 Rich. 179.
[4] Vol. I. § 595; 2 East P. C. 1072; Rex *v.* Austen, Russ. & Ry. 490; The State *v.* Robinson, 3 Dev. & Bat. 130; The State *v.* Pierce, 7 Ala. 728; The State *v.* Jackson, 12 Ire. 329; Rex *v.* Pearce, 1 Leach, 4th ed. 527, 2 East P. C. 1072; Rex *v.* Kean, 2 East P. C. 1073; s. c. nom. Rex *v.* Hean, 1 Leach, 4th ed. 527, note; Rex *v.* Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; The State *v.* Wilcox, 3 Yerg. 278; United States *v.* Gideon, 1 Minn. 292; The State *v.* Enslow, 10 Iowa, 115, 117; Northcot *v.* The State, 43 Ala. 330; Hobson *v.* The State, 44 Ala. 380; Hill *v.* The State, 43 Ala. 335; The State *v.* Newby, 64 N. C. 23. Contra, in Georgia, where it is deemed sufficient that the act be wantonly and recklessly done. Mosely *v.* The State, 28 Ga. 190. As to the construction of the Alabama statute, see Johnson *v.* The State, 37 Ala. 457. For a fuller view of the malice required under the statutes, see Stat. Crimes, § 433–437.

mission of mischief." [1] Possibly not all our courts would require the malice to go quite so far.[2]

§ 997. **How under Statutes.** — This question is discussed in "Statutory Crimes." [3] In England, it has been made immaterial by statute, "whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." [4]

§ 998. **Mischief under Claim of Right.** — Plainly, if the mischief is done under a claim of right, the offence is not committed; [5] the same principle applying here as in larceny.[6]

## IV. *English Statutes as in Force with us.*

§ 999. **General View.** — There are many English statutes of malicious mischief, some of which are of an early date; but no one of them can, on very clear principles, confidently be said to be common law in this country.[7]

**In South Carolina.** — In a South Carolina case the court observed: "We have of force the Statute 37 Hen. 8, c. 6, against burning of frames, and the Statute 22 & 23 Car. 2, c. 7, against the burning of any stack, house, building, or kiln, maliciously in the night-time; but not Stat. 9 Geo. 1, c. 22, commonly called the Black Act." [8] This result, however, comes from express legislation.

**Black Act.** — The Black Act of 9 Geo. 1 has been held not to be common law in Georgia.[9]

[1] The State v. Landreth, 2 Car. Law Repos. 446, opinion by Taylor, C. J.

[2] There is, however, a series of cases stated 2 East P. C. 1072 et seq., which appear to go fully as far as this North Carolina decision. See also Stat. Crimes, § 437; Taylor v. Newman, 4 B. & S. 89, 9 Cox C. C. 314.

[3] Stat. Crimes, § 433–437.

[4] 7 & 8 Geo. 4, c. 30, § 25; Reg. v Tivey, 1 Car. & K. 704, 1 Den. C. C. 63, decided on that statute and on 7 & 8 Geo. 4, c. 30, § 16, and 7 Will. 4 & 1 Vict. c. 90, § 2; 2 Russ. Crimes, 3d Eng. ed. 544; 1 Gab. Crim. Law, 685. See also Rex v. Salmon, Russ. & Ry. 26; Rex v. Hunt, 1 Moody, 93; Commonwealth v. Walden, 3 Cush. 558. The present statute is 24 & 25 Vict. c. 97, § 58. Stat. Crimes, § 434.

[5] 2 Russ. Crimes, 3d Eng. ed. 545; Goforth v. The State, 8 Humph. 37; The State v. Newkirk, 49 Misso. 84; The State v. Hause, 71 N. C. 518; Palmer v The State, 45 Ind. 388; The State v. Luther, 8 R. I. 151; Taylor v. Newman, 4 B. & S. 89, 9 Cox C. C. 314; Hobson v The State, 44 Ala. 380.

[6] Ante, § 851.

[7] Stat. Crimes, § 431. Mr. East has made a full collection of them, as see 2 East P. C. 1036 et seq.

[8] The State v. Sutcliffe, 4 Strob. 372, 397; The State v. DeBruhl, 10 Rich. 23.

[9] The State v. Campbell, T. U. P. Charl. 166; Stat. Crimes, § 432.





## V. *Remaining and Connected Questions.*

§ 1000. **Felony or Misdemeanor.** — This offence, at the common law, is misdemeanor, not felony.[1] In some of our States, under statutes, it is felony; in others, misdemeanor,[2] — a question on which the practitioner should consult the statutes of his own State.

[1] Ante, § 512; Black v. The State, 2 Md. 376.

[2] Black v. The State, 2 Md. 376; Commonwealth v. Macomber, 3 Mass. 254; Britton v. Commonwealth, 1 Cush. 302; Trimble v. Commonwealth, 2 Va. Cas. 143.

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For MALICIOUS WOUNDING, see ante, § 991; post, MAYHEM; also, Stat. Crimes.
MALPRACTICE, see Vol. I. § 217, 314, 558, 896; and this Vol. CONTEMPT; HOMICIDE.
MANSLAUGHTER, see HOMICIDE.
MARRIAGE LAWS, see Stat. Crimes, and Bishop on Mar. and Div.

# CHAPTER XXXI.

## MAYHEM AND STATUTORY MAIMS.[1]

§ 1001. **How defined.** — The common-law offence of mayhem is defined, in the language of Hawkins, to be "a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary."[2]

1 For matter relating to this title, see Vol. I. § 257, 259, 513, 935. See this volume, ASSAULT; BATTERY; HOMICIDE. For the pleading, practice, and evidence, see Crim. Proced. II. § 851 et seq. And see, for both law and procedure, Stat. Crimes, § 316, 447, 448, 495–498, 505.

2 1 Hawk. P. C. Curw. ed. p. 107, § 1. And see Vol. I. § 259; Stat. Crimes, § 316; 1 East P. C. 393; Reg. *v.* Hagan, 8 Car. & P. 167, 171. **Proposed in New York.** — The New York commissioners propose the following definition: "Every person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance, or disables any member or organ of his body, or seriously diminishes his physical vigor, is guilty of maiming." And they add: **Concerning the Definition.** — "Definitions of mayhem found in several of the more familiar English authorities confine the offence to such wounds as impair the powers of attack or defence; the gravamen of the offence being deemed to consist in the disability for self-protection which it creates. Consult 4 Bl. Com. 205, 150; 1 Inst. § 502. [**Nature of the Offence.** — I apprehend, that, according to the authorities here referred to, and to the teachings of the books generally, the gravamen of a mayhem, at the common law, was not so much that the person maimed was unable to protect himself, viewed simply in respect of self-preservation, as that he was unable to fight in defence of the king and country, and, as a soldier, protect himself on the field of battle. And see Vol. I. § 259, 513; Stat. Crimes, § 316.] Earlier authorities, however, are to be found, giving the word a more extended signification. Thus, Pulton (De Pace Regis, 1609, fol. 15, § 58 and 59) says: 'Maiheming is when one member of the commonweale shall take from another member of the same a natural member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labor in the time of peace; and also diminisheth the strength of his bodie, and weaken him thereby to get his owne living, and by that meanes the commonweale is in a sort deprived of the use of one of her members.' Wounds which merely disfigured the person without impairing the general strength or the powers of some particular member seem to have been excluded by all the common-law definitions of mayhem; though made the subject of several stringent enactments." Draft of a Penal Code, p. 89, 90.

2. I cannot forbear citing a little further from Pulton, at the place above referred to by the New York commissioners: "This maiheming is a dismembring of a man, or taking away some member, or part of his bodie, or the use thereof: as when a wound, blow, or hurt is given, or done by one person or more to another person, whereby he is





**Disfiguring and Mayhem distinguished.** — East says: "If the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem.

the lesse able to defend himselfe in the time of warre, or to get his living in time of peace; and, therefore, **What Acts are Mayhem.** — If a man do put out the eye, or cut off the hand, or foot, or any joynt of the hand or foot of another, it is maihem, though it be done by chaunce-meddly. (But if one man of malice pretended [prepensed?] do cut out the tongue, or put out the eyes of any of the king's subjects, it is felony.) And if one man doe crush the mouth or head of another, or breake out his foreteeth, it is maihem, for with them he may defend himselfe in battaile; but to break his hinder teeth, or to cut off his nose, or ears, whereby he looseth his hearing, is no maihem, but a deformitie, or blemish of his bodie, and no weakening of his strength. It is a maihem to pull any bone out of a man's hand, or to cut off any finger of a man's hand, or to breake any of them, so that they become shrunke up, or dried up, or dead, or crooked. Gelding of a man is also a maihem; though it be in a secret place, yet it maketh him more feeble, and unable to defend himselfe in battaile, or to worke for his living. If by any wound received the sinewes or veines of a man be shrunke up, it is a maihem. To cut off the cheeke or jawbone of any person, or so to crush or breake any of them that the same person is the lesse able to take his meat or drinke, is a maihem. If one person or more doe take another person by force, and put him in the stockes, or otherwise bind him fast, and after pour so much skalding hote oyle and vinegar, or hote melted lead, or other skalding liquor, upon any part of his bodie, and so continue it untill it doth wast and consume the flesh of the same part, and drie up and mortifie the vaynes and sinews of the same part, it is a maihem. If A doe strike at B, and the weapon wherewith he striketh, breaking or falling out of his hand by the force of the blow, doth put out the eyes of D, this shall be adjudged a maihem, for that A hath an intention at the first to doe some hurt in striking at B. The greatnesse or smalnesse of the wound in some of the cases aforesaid doth make the difference, whether it be a maihem or not."

3. **Felony or Misdemeanor.** — The reader perceives, that this old author singles out one instance of mayhem, and calls it felony, without giving a special designation to the other instances. And we shall see, in the text, before we close this chapter, that there is some confusion in the books as to whether, at the common law, mayhem is to be deemed a felony or a misdemeanor. Now, if we were to trace the matter fully through all the old books and records, we should probably find, that, according to the ancient common law, some maims were deemed to be felonies; others, misdemeanors; while to others there was assigned a special place between felony and misdemeanor. But however this may be, **Blending with Battery.** — When the maim was a misdemeanor, and it was punished purely as a violation of the criminal law, the question was of but little consequence whether it was regarded technically as a mayhem, under this particular name, or as an aggravated battery, which was also a misdemeanor. Therefore the line separating the lesser mayhems from batteries, as the law has come to us, is, most naturally, not very distinct.

4. **Mayhem as Civil Tort.** — But there is another distinction, namely, between the civil offence of mayhem, viewed simply as a tort against the individual, and for which damages in money might be demanded, and the indictable crime. Now, if the reader will read on, in Pulton, beyond the place whence the above passages are extracted, he will see that the mayhem of which this author is particularly treating is such as was punishable by the old and now obsolete process of **Appeal of Mayhem**; and, says Jacob, **Law Dict.** tit. Appeal, "Appeal of mayhem is the accusing one that hath maimed another;

Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye [1] or foretooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law." [2]

§ 1002. **Old English Statutes.** — There are, on this subject, some old English statutes, a part of which seem, on principle, to belong to our common law. Yet they are not deemed either by Kilty [3] or the Pennsylvania judges [4] to have been received by us. They are stated by East as follows: —

**5 Hen. 4.** — "By Stat. 5 Hen. 4, c. 5, to remedy a mischief which then prevailed of beating, wounding, imprisoning, or maiming persons, and after purposely 'cutting their tongues or putting out their eyes' to prevent them from giving evidence against the perpetrators, it is enacted, that 'in such case the offenders that so cut tongues or put out the eyes of any, and that duly proved and found that such deed was done of malice prepensed, shall incur the pain of felony.' That is, as Lord Coke explains it, if the act be done voluntarily and of set purpose, however sudden the occasion.[5]

**37 Hen. 8.** — "By Stat. 37 Hen. 8, c. 6, if any person 'maliciously, willingly, or unlawfully cut or cause to be cut off the ear or ears of any subject, otherwise than by authority of law, chance-medley sudden affray, or adventure, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass, but shall forfeit £10 to the king for every such offence, in the name of a fine.'" [6]

**Statutes imposing Forfeiture.** — We may observe, that old English statutory provisions, like this latter one, imposing a mere forfeiture to the party and to the king, are not commonly deemed to be in force in this country.[1]

but, this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages." Pulton, however, fol. 16, after saying, that "an appeale of maihem is in effect but an action of trespass, wherein the plaintiffe shall recover damages according to the qualitie and quantitie of the offence," adds, "and the defendant shall be imprisoned." But as showing that the appeal is pretty purely a civil action, he mentions, fol. 17, that a plea of release of all demands, by the plaintiff, will avail the defendant in bar. See post, § 1008, note.

5. **Further of the Definition.** — The consideration, therefore, that Pulton is speaking of the semi-civil wrong, not of the purely criminal offence, reconciles the apparent discrepancy, pointed out by the New York commissioners, between his definition of mayhem, and the definitions of the more modern and standard writers on the criminal law.

[1] Chick v. The State, 7 Humph. 161.

[2] 1 East P. C. 393; Britton, Kel. Tr. 165.

[3] Kilty Report of Statutes, 53, 77, 95.

[4] Report of Judges, 3 Binn. 595 et seq.

[5] See post, § 1006.

[6] 1 East P. C. 393, 394.





§ 1003. **Coventry Act.** — The remaining statute, mentioned by East, is later in date than the first settlements here; but sufficiently early to be common law in some of them, within the rule that the law of the mother country when a colony is settled becomes the law of the colony as far as applicable to its circumstances.[2] It is 22 & 23 Car. 2, c. 1 (A.D. 1670), "commonly called the Coventry Act, from the circumstance of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge, as was supposed, for some obnoxious words uttered by him in Parliament. It enacts, 'that, if any person or persons shall, on purpose and of malice aforethought, by laying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject; with intention, in so doing, to maim or disfigure him in any the manners before mentioned; that then the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence as aforesaid, shall be declared to be felons, and suffer death as in cases of felony without benefit of clergy.' But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender." [3] The meaning of the words "slit the nose," [4] with some others in this statute, is explained in "Statutory Crimes." [5]

§ 1004. **American Legislation.** — Our own legislation is modelled chiefly on the English, but it is not in all particulars alike in our several States. Something of it, and how interpreted, will appear from the cases in the note.[6]

[1] See also, on the question of these statutes being in force in this country, ante, § 999.

[2] Bishop First Book, § 51–56.

[3] 1 East P. C. 394.

[4] Stat. Crimes, § 317.

[5] A full exposition of this statute is given by East. See also 1 Hawk. P. C. Curw. ed. p. 108, 1 9.

[6] The State v. Abram, 10 Ala. 928; The State v. Simmons, 3 Ala. 497; The State v. Briley, 8 Port. 472; The State v. Absence, 4 Port. 397; Eskridge v. The State, 25 Ala. 30; The State v. Coleman, 5 Port. 32; Adams v. Barrett, 5 Ga. 404; Commonwealth v. Newell, 7 Mass. 245; The State v. Girkin, 1 Ire. 121; The State v. Crawford, 2 Dev. 425; The State v. Mairs, Coxe, 453; Scott v. Commonwealth, 6 S. & R. 224; Chick v. The State, 7 Humph. 161; Commonwealth v. Lester, 2 Va. Cas. 198; Moore v. The

§ 1005. **"Maim" — Consent.** — In "Statutory Crimes," was considered the meaning of the word "maim;"[1] and, in the preceding volume, the effect of a maiming of one's self, or another at his request,[2] with some other points.

§ 1006. **"Malice aforethought."** — The words "malice aforethought," in these statutes, do not require premeditation.[3]

**"Premeditated Design."** — The words of the New York statute are, instead of "malice aforethought," as in the Coventry Act,[4] "from premeditated design."[5] These words are of a somewhat different meaning; and it follows from views presented under the title "Homicide,"[6] that, under this statute, there must be a specific intent to maim, but it need not be in the mind for any appreciable space of time before the blow is given.[7]

§ 1007. **"Biting off the Ear."** — To constitute a biting off of the ear, the whole ear need not be taken away; if enough is removed to impair the personal appearance, and render the individual less comely, no more is required; but not less will do.[8]

**"Member."** — The external ear is a "member" of the human body.[9] The Texas doctrine, however, would seem to be, that the court could not say this as matter of law, but the jury may find it as fact,[10] where the word "ear" is not in the statute.

§ 1008. **Felony or Misdemeanor.** — Hawkins says: "It is to be observed, that all *maim* is felony. It is said, that anciently castration was punished with death, and other maims with the loss of member for member. But afterwards no maim was punished in any case with the loss of life or member, but only with fine and imprisonment."[11] And Mr. East observes: "All maims are said to be felony; because anciently the offender had judgment of the loss of the same member, &c., which he had occasioned to

State, 4 Chand. 168; United States *v.* Scroggins, Hemp. 478; The State *v.* Bohannon, 21 Misso. 490; Foster *v.* People, 50 N. Y. 598. And see ante, § 991.

[1] Stat. Crimes, § 314, 316. And see The State *v.* Briley, 8 Port. 472.

[2] Vol. I. § 260, 513.

[3] Ante, § 1002; The State *v.* Girkin, 1 Ire. 121; The State *v.* Crawford, 2 Dev. 425; The State *v.* Simmons, 3 Ala. 497. As to "wilfully" see The State *v.* Abram, 10 Ala. 928.

[4] Ante, § 1003.

[5] Stat. Crimes, § 496.

[6] Ante, § 728.

[7] Foster *v.* People, 50 N. Y. 598; Godfrey *v.* People, 63 N. Y. 207; Burke *v.* People, 4 Hun, 481. See Slattery *v.* The State, 41 Texas, 619; Molette *v.* The State, 49 Ala. 18.

[8] The State *v.* Girkin and The State *v.* Crawford, 2 Dev. 425; The State *v.* Abram, 10 Ala. 928.

[9] Godfrey *v.* People, 5 Hun, 369.

[10] Slattery *v.* The State, 41 Texas, 619.

[11] 1 Hawk. P. C. Curw. ed. p. 107, § 3. And see Vol. I. § 935.





the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been afterwards considered more in the nature of an aggravated trespass. Lord Coke accordingly classes it as an offence 'under all felonies deserving death, and above all other inferior offences.' But particular statutes have extended both the crime and the punishment."[1] In this country, the common-law offence of mayhem is not generally considered to be a felony, unless committed by castration, and then perhaps it is.[2]

[1] 1 East P. C. 393.

[2] Commonwealth *v.* Newell, 7 Mass. 245; Adams *v.* Barrett, 5 Ga. 404; Commonwealth *v.* Lester, 2 Va. Cas. 198. And see The State *v.* Absence, 4 Port. 397. But see The State *v.* Thompson, 30 Misso. 470; Canada *v.* Commonwealth, 22 Grat. 899. See also ante, § 1001, note. I am inclined to think that some of the obscurity in the books as to what was the old law has arisen from a failure to distinguish between the cases in which the proceeding was by *appeal* (now abolished in England and never known in this country), and by suit in the king's name, as by indictment or information. Britton, who writes in the name of the king, says: "Concerning mayhems, we are content that the maimed shall sue by appeals of felony against the offenders; and when any appellee is convicted of such felony, and brought up for judgment, let the judgment be this, that he lose the like member as he has destroyed of the plaintiff; and, if the plaint be made against a woman who has deprived a man of his members, she shall have judgment to lose a hand, being the member wherewith she committed the offence. In this felony no prosecution shall lie at our suit with a view to the judgment of loss for loss; but if the appeal be abated, the felons shall answer for such felonies, and if they are attainted at our suit, they shall be awarded to prison, and ransomed thence for breaking our peace." 1 Nichols Trans. 122.

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For MEETING, ILLEGAL, see UNLAWFUL ASSEMBLY; also, DISORDERLY HOUSE, Vol. I. § 1106 et seq.
MISCHIEF, see MALICIOUS MISCHIEF.
MURDER, see HOMICIDE.
NOXIOUS TRADES, see Vol. I, § 1138 et seq.
NUISANCE, see Vol. I. § 1071 et seq.
OBSCENE LIBEL, see ante, § 943, 944.

## CHAPTER XXXII.

### OBSTRUCTING JUSTICE AND GOVERNMENT.[1]

§ 1009. **Scope of this Chapter.** — The first volume contains a general exposition of the principles which determine the indictability of acts. In that exposition, we examined the topic of this chapter to an extent which leaves little to be added.[2]

§ 1010. **"Resist or oppose."** — A statute of Alabama provides, that, "if any person shall knowingly resist or oppose any officer of this State, in serving, or attempting to serve, or execute, any legal writ or process whatsoever," he shall be punished in a way pointed out. This requires an active opposition; merely taking charge of a debtor's property, keeping it out of the officer's view, and refusing, when called on by the officer, to produce it, is not enough.[3]

§ 1011. **"Impede or Hinder."** — In Vermont, it is by statute punishable "if any person or persons shall impede or hinder any officer, judicial or executive, civil or military, under the authority of the State, in the execution of his office." In construing which, the court held, that, if a man takes from a justice of the peace a writ and refuses to give it back, thereby stopping proceedings in the cause, he does not commit the statutory offence, whatever may be his common-law liability.[4]

**Assault on Officer.** — One mode of resisting or impeding an officer is to assault him while in the execution of his office.[5] If the assault is in opposing a lawful arrest by the officer without a

[1] For matter relating to this title, see Vol. I. § 340, 440, 457, 458, 468, 688, 696, 697; and see this Vol. PRISON BREACH, RESCUE, AND ESCAPE; and Stat. Crimes, § 216, 228, 570. For the pleading, practice, and evidence, see Crim. Proced. II. § 879 et seq.

[2] See Vol. I. § 450 et seq.

[3] Crumpton *v.* Newman, 12 Ala. 199. And see Johnson *v.* The State, 30 Ga. 426; The State *v.* Moore, 39 Conn. 244; The State *v.* Welch, 37 Wis. 196; Commonwealth *v.* Tobin, 108 Mass. 426.

[4] The State *v.* Lovett, 3 Vt. 110. See further, on points of this kind, The State *v.* Hailey, 2 Strob. 73; The State *v.* Henderson, 15 Misso. 486; The State *v.* Noyes, 25 Vt. 415; Reg. *v.* Green, 8 Cox C. C. 441; Commonwealth *v.* Sheriff, 8 Brews. 343.

[5] Ante, § 51.





warrant, it is no defence that the latter, neglecting his duty, did not afterward make complaint against the defendant for the offence for which he was arrested.[1]

§ 1012. **Resisting Attachment of Goods.** — What a man may do in defence of his property was discussed in the first volume.[2] Within certain limits he may maintain possession of his own personal effects by force.[3] And it has been held that the case is not different, though an officer comes to attach them on a writ against a third person.[4] On the other hand, all right forcibly to resist the officer has by other courts been denied; it being deemed, that, in these circumstances, the owner should yield his claim at once to trial by law.[5] Between these extremes the Vermont court holds a middle ground; namely, that the facts which render a stranger guilty of impeding an officer will not necessarily make the owner so, but he may resist by all peaceable means, yet not to personal violence.[6]

§ 1013. **Liberating Impounded Cattle.** — In Georgia it was held, that one breaking a pound, and liberating a cow put there by the city marshal in obedience to a city ordinance, is not within an ordinance punishing those who oppose the marshal in executing ordinances of this sort. Said McDonald, J.: "The act had been completed, and the ordinance executed, before the defendant committed the act which is alleged to have constituted the offence. The breach of the pound was no opposition or interruption of the officer in the execution of the ordinance."[7]

[1] Commonwealth *v.* Tobin, 108 Mass. 426. And see Commonwealth *v.* McGahey, 11 Gray, 194.

[2] Vol. I. § 836 et seq.

[3] Ante, § 520.

[4] Commonwealth *v.* Kennard, 8 Pick. 133; Oliver *v.* The State, 17 Ark. 508.

[5] The State *v.* Richardson, 38 N. H. 208; The State *v.* Fifield, 18 N. H. 34.

[6] The State *v.* Miller, 12 Vt. 437.

[7] Rome *v.* Omburg, 22 Ga. 67, 69.

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For OBSTRUCTING RIVERS AND OTHER WAYS, see WAY.
OFFICIAL MISCONDUCT, see MALFEASANCE AND NON-FEASANCE IN OFFICE.
OPEN LEWDNESS, see Stat. Crimes. And see EXPOSURE OF PERSON, Vol. I. § 1125 et seq.
PEDDLING, see Stat. Crimes.

# CHAPTER XXXIII.

## PERJURY.[1]

§ 1014–1016. Introduction.
1017–1029. The Oath and Tribunal.
1030–1042. Materiality of the Testimony.
1043, 1044. The Testimony as being false.
1045–1048. The Intent.
1049, 1050. English Statutes as Common Law with us.
1051–1053. American Statutes.
1054–1056. Remaining and Connected Questions.

§ 1014. **Distinguished from other Offences.** — If a particular evil act is not perjury, it may still be indictable as some other offence. Thus, —

**Statutory Oath false.** — In England, the Bills of Sale Acts of 17 & 18 Vict. c. 36, and 29 & 30 Vict. c. 96, having provided for the registering of bills of sale of personal property after the manner of our registry laws as to real estate, and having made "an affidavit of the time of such bill of sale being made or given" a prerequisite to its registry, one swore falsely in his affidavit and was indicted for perjury. "It is clear," said Kelly, C. B., "that the making of such false affidavit is not strictly perjury [it not being in a judicial proceeding or course of justice]. The prisoner, therefore, is not liable to any sentence that can only be pronounced against those guilty of perjury. It is also clear, however, that the taking of a false oath in a case like this, where an affidavit is required for the purposes of a statute, is a misdemeanor at common law, and renders the guilty person liable to punishment for a common-law misdemeanor." Therefore the allegations peculiar to the indictment for perjury were rejected as surplusage; and, the other allegations being sufficient, the defendant was sentenced

[1] For matter relating to this title, see Vol. I. § 320, 437, 468, 564, 589, 734, 942, 974. For the pleading, practice, and evidence, see Crim. Proced. II. § 899 et seq. And see Stat. Crimes, § 129, 183, 378, note, 568, 570–572, 815.





as for the misdemeanor at common law.[1] In the first volume may be seen other illustrations of acts punishable on the same ground as perjury, while in law they are not perjury.[2]

§ 1015. **How defined.** — Perjury is the wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry.[3]

§ 1016. **How the Chapter divided.** — Following this definition, we shall consider, I. The Oath and the Tribunal administering it; II. The Materiality of the Testimony to the Issue or Point of Inquiry; III. The Testimony as being false; IV. The Intent; V. English Statutes as Common Law in our States; VI. American Statutes; VII. Remaining and Connected Questions.

### I. *The Oath and Tribunal administering it.*

§ 1017. **Doctrine of this Sub-title.** — What is chiefly to be elucidated under this sub-title is, that the oath must be one required in some judicial proceeding or course of justice, and must be taken substantially in the form directed by law, before an officer authorized to administer it.

§ 1018. **Oath defined.** — "An oath," says Lord Coke, "is an affirmation or denial by any Christian of any thing lawful and

[1] Reg. v. Hodgkiss, Law Rep. 1 C. C. 212. Compare this with Tuttle v. People, 36 N. Y. 431, where an indictment for perjury was sustained. And see Warner v. Fowler, 8 Md. 25; Smith v. Myers, 41 Md. 425.

[2] Vol. I. § 468. See also post, § 1029.

[3] The following are some of the definitions of perjury: —

**Hawkins.** — "Perjury, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." 1 Hawk. P. C. Curw. ed. p. 429.

**Lord Coke.** — "Perjury is a crime committed when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subornation of others." 3 Inst. 164. This definition is followed in substance by Blackstone, 4 Bl. Com. 137; and by Gabbett, 1 Gab. Crim. Law, 791.

**Russell** — follows Hawkins; only, by what is probably a misprint, he has the words "*court* of justice" instead of "*course* of justice." 2 Russ. Crimes 3d Eng. ed. 596. The same in Bac. Abr. Perjury.

**Peters, J.** — "Perjury is a corrupt, wilful, false oath, taken in a judicial proceeding, in regard to a matter or thing material to a point involved in the proceeding. The oath must be taken before some officer or court having authority to administer it." Hood v. The State, 44 Ala. 81, 86.

**Hume** — writing of the Scotch law — defines perjury to be the "judicial affirmation of falsehood upon oath." 1 Hume Crim. Law, 2d ed. 360. See also 1 Alison Crim. Law, 465.

honest, before one or more that have authority to give the same, for advancement of truth and right, calling Almighty God to witness that his testimony is true."[1] But it is not necessary that the person to whom the oath is administered should be a Christian, or swear in the Christian form.[2] And in other respects this definition by Coke does not fully accord with modern views. Let it, therefore, be amended, thus: An oath is a solemn asseveration of the truth of a thing, made, by a person under the sanction of his religion, appealing to the Supreme Being, in the presence of one having the civil authority to administer it.

**Affirmation.** — An affirmation is a modern, statutory device, by which those whose consciences revolt at an oath as an offence to God may, through another form, place themselves in a like position with persons who have taken the oath. It is similar to an oath, but omits the appeal to the Deity, and substitutes the word "affirm" for "swear."

**Concerning the Form of the Oath.** — Coke proceeds: "An oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministered to any unless the same be allowed by the common law, or by some act of Parliament. Neither can any oath, allowed by the common law, or by act of Parliament, be altered but by act of Parliament. It is called a corporal oath,[3] because he toucheth with his hand some part of the Holy Scripture."[4]

**Form of Administering.** — The form of administering an oath seems never to have been regarded as essential; but, in practice, it ought to be such as is most binding on the conscience of him who takes it, and to accord with his religious belief.[5] Even if a statute prescribes the uplifting of the hand, and it is taken by laying the hand on the gospels and kissing them, this will be good; the statutory provision being deemed directory only.[6]

[1] 3 Inst. 165.

[2] 2 Hawk. P. C. Curw. ed. p. 609.

[3] **"Corporal Oath."** — In an Indiana case the court held, that the terms "corporal oath" and "solemn oath" are synonymous; and that an oath taken with the hand uplifted is properly described by either term in an indictment for perjury. Jackson *v.* The State, 1 Ind. 184, Smith, Ind. 124; s. p. The State *v.* Norris, 9 N. H. 96, the court observing: "The term corporal oath must be considered as applying to any bodily assent to the oath of the witness."

[4] 3 Inst. 165.

[5] 2 Hawk. P. C. Curw. ed. p. 609; Gill *v.* Caldwell, Breese, 28.

[6] Commonwealth *v.* Smith, 11 Allen, 243, 252. **Kissing the Book.** — If a witness, in taking the oath, by an accident kisses a book not the Evangelists, neither he nor the administering tribunal being aware of the mistake, the oath is still binding. People *v.* Cook, 4 Seld. 67. Kissing the book is not the essence of the oath; and an indictment for administering an unlawful oath may be sustained where the book was not kissed. Rex *v.* Haly, 1 Crawf. & Dix C. C. 199.





**Conforming to Statutory Oath.** — Where the form of the oath is prescribed by statute, the provision is construed as so far directory[1] that a departure from the words, in matter, not of substance, but of form merely, does not exempt the person taking it from the pains of perjury.[2] If, however, the substance of the statute is not followed, no perjury can be assigned of the oath.[3] Thus, —

**Testimony in Writing.** — If a statute requires certain testimony to be in writing, then if, contrary to this, it is received orally, no indictment for perjury will lie upon it.[4]

**Affidavit.** — The signature of the affiant is not essential in an affidavit, and perjury may be assigned on it without.[5]

[1] See Stat. Crimes, § 255.

[2] The State *v.* Dayton, 3 Zab. 49; Sharp *v.* Wilhite, 2 Humph. 434; The State *v.* Owen, 72 N. C. 605; Edwards *v.* The State, 49 Ala. 334; Faith *v.* The State, 32 Texas, 373; The State *v.* Pile, 5 Ala. 72. And see The State *v.* Shreve, 1 Southard, 297; The State *v.* Keene, 26 Maine, 33; The State *v.* Whisenhurst, 2 Hawks, 458; Reg. *v.* Southwood, 1 Fost. & F. 356; Tuttle *v.* People, 36 N. Y. 431. **Wrong Oath.** — The Minnesota statute provides one form of jurors' oath for capital cases, and another for others; and it has been held, that, though the difference is but trivial, a failure to follow the statute vitiates the verdict in a capital case. Maher *v.* The State, 3 Minn. 444. See The State *v.* Davis, 69 N. C. 383; Edmondson *v.* The State, 41 Texas, 496; Sutton *v.* The State, 41 Texas, 513; Bray *v.* The State, 41 Texas, 560; Bawcom *v.* The State, 41 Texas, 189; Morgan *v.* The State, 42 Texas, 224. **Immaterial variance.** — Where an indictment alleged that the defendant was sworn to speak "the truth, the whole truth, and nothing but the truth," and the evidence was that he was sworn to tell the whole truth and nothing but the truth, the variance was held to be immaterial. The State *v.* Gates, 17 N. H. 373. The **Scotch Law as to Form.** — Alison, in his work on the criminal law of Scotland, says: "Certain formalities are required in the administration of oaths; and it is indispensable that such as are fixed by law or custom should have been observed in the oath which is the subject of an indictment for perjury. Thus, if the oath is not reduced to writing in situations where by law or custom it should have been done; or if the oath of a witness or party has not been read over to him before signing; or if, after being read over, it has not been signed either by the deponent or the presiding commissioner or judge; or if the judge has refused to take down any explanation which the deponent requested to have added after hearing it read over; or if the oath has been emitted verbally, the panel has modified or explained away his story; — in all these situations, the law considers the perjury as not having been committed. In some of them there is not the finished and deliberate intention to assert a falsehood on oath which the law deems indispensable to the offence; in others, the deposition has not been duly authenticated or proved to have been accurately taken down, and, therefore, the proper evidence is wanting on which the crime is to be substantiated." 1 Alison Crim. Law, 474.

[3] Ashburn *v.* The State, 15 Ga. 246.

[4] The State *v.* Trask, 42 Vt. 152. And see The State *v.* Steele, 1 Yerg. 394.

[5] Commonwealth *v.* Carel, 105 Mass. 582; Turpin *v.* Eagle Creek, &c. Road, 48 Ind. 45.

§ 1019. **Voluntary Witness.** — The witness need not have been brought into court by a subpœna,[1] nor need he be compellable to testify; for, if he does give evidence under oath, it is the same whether reluctantly or voluntarily.[2]

**Incompetent.** — And if a party becomes a witness for himself, when his testimony is not by law receivable, he may still commit the crime of perjury;[3] though the contrary seems, in one case, to have been held.[4] Indeed, the doctrine is general, that, though one is not a legal and competent witness in a cause, yet, if he is actually admitted and testifies, he commits perjury when what he testifies to is wilfully false.[5] But, —

**Legal Weight — (Naturalization).** — If the testimony of the witness can have no weight in law, as affecting the issue, then it is not perjury, on the familiar ground that it is immaterial. Therefore, where, on an application for naturalization, the applicant himself swore to his residence, while, observed the court, "the act of Congress of 1802 is express that the oath of the applicant shall, in no case, be allowed to prove his residence," — this false swearing was held not to be perjury.[6]

§ 1020. **Authorized to administer Oath.** — The oath must be administered by one having legal authority; otherwise there is no perjury in false testimony given under it.[7] For example, —

**Proper Officer.** — If it is administered by a judge of a State tribunal, out of the territorial jurisdiction of the State;[8] or by a master in chancery in a matter pending before the Admiralty Court;[9] or by any proper officer acting under an invalid appointment;[10] there can be no perjury. Moreover, —

[1] Commonwealth v. Knight, 12 Mass. 274.

[2] Anonymous, 3 Salk. 248.

[3] The State v. Molier, 1 Dev. 263; Van Steenbergh v. Kortz, 10 Johns. 167; Montgomery v. The State, 10 Ohio, 220; Sharp v. Wilhite, 2 Humph. 434; The State v. Keene, 26 Maine, 33; Haley v. McPherson, 3 Humph. 104. And see The State v. Whisenhurst, 2 Hawks, 458.

[4] The State v. Hamilton, 7 Misso. 300. And see Lamden v. The State, 5 Humph. 83; post, § 1027.

[5] Chamberlain v. People, 23 N. Y. 85. And see People v. Young, 31 Cal. 563.

[6] The State v. Helle, 2 Hill, S. C. 290. And see Silver v. The State, 17 Ohio, 365; post, § 1024, 1038. This provision as to naturalization is continued in R. S. of U. S. § 2165.

[7] Rex v. Wood, 2 Russ. Crimes, 3d Eng. ed. 632; McGragor v. The State, Smith, Ind. 179, 1 Ind. 232; The State v. McCroskey, 3 McCord, 808; Rex v. Hanks, 3 Car. & P. 419; Morrell v. People, 32 Ill. 499; Commonwealth v. Hughes, 5 Allen, 499. See post, § 1026 and note.

[8] Wickoff v. Humphrey, 1 Johns. 498.

[9] Reg. v. Stone, Dears. 251, 23 Law J. N. S. M. C. 14, 17 Jur. 1106, 22 Eng. L. & Eq. 598.

[10] 1 Hawk. P. C Curw. ed. p. 431, 482, § 4; Muir v. The State, 8 Blackf. 154. See Reg. v. Newton, 1 Car. & K 469; Mahan v. Berry, 5 Misso. 21. Consider and compare this doctrine with Vol. I. § 464.





**Jurisdiction.** — The cause must be one of which the tribunal or magistrate has jurisdiction.[1]

**Clerk of Court.** — An oath administered by a clerk of the court is ordinarily the same as administered by the judge; subject, perhaps, to statutory exceptions in some localities.[2]

§ 1021. **Clerk exceeding Jurisdiction.** — A statute of the United States having provided a punishment "if any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and wilfully swear or affirm falsely," — McLean, J., held, that an oath not required by law or by order of the court, administered by the clerk of a court, is extrajudicial;[3] and, though false, lays no foundation for an indictment.[4]

§ 1022. **State Court administering Act of Congress.** — There are instances in which — not speaking particularly of perjury — the tribunals of the United States properly administer the laws of the States, yet, on the other hand, it is settled, after some diversity of opinion, that the State judicatories cannot do this of the United States laws. If, therefore, an act of Congress expressly authorizes a State court to try persons accused of an offence against the General Government, and if the latter court consents, still it cannot do so. The authority is void.[5] But —

[1] Wyld v. Cookman, Cro. Eliz. 492, pl. 9; Paine's Case, Yelv. 111; The State v. Alexander, 4 Hawks, 182; The State v. Hayward, 1 Nott & McC. 546; The State v. Wyatt, 2 Hayw. 56; Commonwealth v. White, 8 Pick. 453; The State v. Furlong, 26 Maine, 69; Boling v. Luther, N. C. Term. R. 202; Pankey v. People, 1 Scam. 80; Montgomery v. The State, 10 Ohio, 220; Reg. v. Ewington, 2 Moody, 223; Clark v. Ellis, 2 Blackf. 8; Weston v. Lumley, 33 Ind. 486; Reg. v. Senior, Leigh & C. 401, 9 Cox C. C. 469; Reg. v. Bacon, 11 Cox C. C. 540; Reg. v. Hughes, Dears. & B. 188, 7 Cox C. C. 286; Reg. v. Shaw, 10 Cox C. C. 66; Reg. v. Lewis, 12 Cox C. C. 163, 2 Eng. Rep. 216; Reg. v. Willis, 12 Cox C. C. 164, 2 Eng. Rep. 218; Reg. v. Simmons, Bell C. C. 168; s. c. nom. Reg. v. Simmonds, 8 Cox C. C. 190.

[2] Server v. The State, 2 Blackf. 35; McGragor v. The State, Smith, Ind. 179, 1 Ind. 232; Warwick v. The State, 25 Ohio State, 21.

[3] Post, § 1027.

[4] United States v. Babcock, 4 McLean, 113.

[5] Story, Const. § 1756; People v. Lynch, 11 Johns. 549; United States v. Lathrop, 17 Johns. 4; United States v. Cornell, 2 Mason, 60; The State v. Pike, 15 N. H. 83; Ely v. Peck, 7 Conn. 239 Davison v. Champlin, 7 Conn. 244; Commonwealth v. Feely, 1 Va. Cas. 321; Jackson v. Rose, 2 Va. Cas. 34; Haney v. Sharp, 1 Dana, 442; Wetherbee v. Johnson, 14 Mass. 412; Stearns v. United States, 2 Paine, 300; The State v. Mc-

**Concurrent Jurisdiction.** — There may be a concurrent jurisdiction in some matters of *habeas corpus*, and the like.[1]

§ 1023. **Perjuries under National Government.** — It follows, that perjury against the United States cannot be punished in the State courts.[2] For, in the language of Bradley, J., "whilst certain offences, involving breaches of the peace, counterfeiting the public money, &c., may be violations of both Federal and State laws, and punishable under both, perjury in a judicial proceeding is peculiarly an offence against the system of laws under which the court is organized." And, indeed, by the statutes of the United States, it is cognizable only in the national tribunals.[3]

**Oath before State Officer.** — Still it is held, that a justice of the peace or other State officer, authorized to administer oaths, may be so empowered by federal law as to render a false testifying pursuant to the oath a crime punishable in the courts of the United States.[4] And, —

**Naturalization Oath.** — If perjury is committed in a State court, in taking out naturalization papers under the laws of the United States, the doctrine has been laid down both ways, that it is, and that it is not, indictable in the State tribunal.[5]

**Custom-house Oath.** — An oath required to be taken before the collector of customs may be sufficiently administered, under the acts of Congress, by his deputy.[6]

Bride, Rice, 400, overruling The State *v.* Wells, 2 Hill, S. C. 687; The State *v.* Adams, 4 Blackf. 146. Contra, United States *v.* Smith, 1 Southard, 33; Buckwalter *v.* United States, 11 S. & R. 193. See Commonwealth *v.* Schaffer, 4 Dall. App. xxvi.; The State *v.* Randall, 2 Aikens, 89; The State *v.* Buchanan, 5 Har. & J. 500; The State *v.* Tutt, 2 Bailey, 44.

[1] Commonwealth *v.* Fox, 7 Barr, 336; Ex parte Smith, 5 Cow. 273; Stearns *v.* United States, 2 Paine, 300; Ex parte Gist, 26 Ala. 156.

[2] The State *v.* Adams, 4 Blackf. 146; The State *v.* Pike, 15 N. H. 83; People *v.* Kelly, 38 Cal. 145.

[3] Brown *v.* United States, U. S. Cir. Ct. N. Dist. Ga. May 24, 1875.

[4] United States *v.* Bailey, 9 Pet. 238; United States *v.* Winchester, 2 McLean, 135.

[5] In Rump *v.* Commonwealth, 6 Casey, 475, the Pennsylvania court held such perjury to be indictable in the State tribunal, as an offence against the State, though it might also be proceeded against in the courts of the United States, as an offence against the General Government. Said Lowrie, C. J.: "Although such cases arise under the Constitution and laws of the United States, yet because these are part of the law of the land, and merely give the rule for the exercise of our admitted State functions, our State courts may entertain this jurisdiction." p. 477. Contra, by the supreme court in one of the judicial districts in New York. People *v.* Sweetman, 3 Parker C. C. 358. A later case in New Hampshire, reviewing the whole question, holds, that such perjury may be punished in the State court. The State *v.* Whittemore, 50 N. H. 245.

[6] United States *v.* Barton, Gilpin, 439. Stat. Crimes, § 129.





**Against United States, Statutory only.** — Perjury against the United States is not indictable as a common-law offence, but only under the acts of Congress.[1] And, of course, the case must come within those acts.[2]

§ 1024. **Illustrations of Perjury.** — The following cases show in what circumstances the false testimony is perjury: —

**False Plea.** — A defendant in a cause knowingly gives in a false plea on oath, where an oath to the plea is required.[3]

**False Articles — Affidavit.** — One maliciously tenders, under oath, articles of the peace which are untrue;[4] or a false affidavit in aid of a bill in equity praying an injunction,[5] or in aid of a petition for a writ of *habeas corpus*,[6] or for a continuance,[7] or a new trial,[8] or to remove a cause to a higher court.[9] A defendant in a summary process makes a false affidavit to rid himself of the charge.[10] But the affidavit, to be the subject of perjury, must be one provided for by law.[11]

**Voir Dire.** — A juror answers corruptly as to his competency.[12]

**Bail.** — One offered as bail swears falsely to qualify himself.[13]

**Poor Debtor — Before Grand Jury — Mitigation of Sentence.** — A person takes a false oath under the insolvent debtor's act;[14] or testifies falsely before a grand jury;[15] or falsely, after a conviction, on the question of mitigation of sentence.[16] In these and many other cases the crime is perjury.

§ 1025. **Before what Court or Officer.** — Hawkins says: "It seems to be clearly agreed, that all such false oaths as are taken

[1] Vol. I. § 189–203; Anonymous, 1 Wash. C. C. 84.

[2] United States *v.* Kendrick, 2 Mason 69.

[3] The State *v.* Roberts, 11 Humph. 539. See Commonwealth *v.* Litton, 6 Grat. 691; ante, § 1019.

[4] Rex *v.* Parnell, 2 Bur. 806.

[5] Rex *v.* White, Moody & M. 271. See Rex *v.* Dudman, 2 Glyn & J. 389, 7 D. & R. 324, 4 B. & C. 850.

[6] White *v.* The State, 1 Sm. & M. 149.

[7] The State *v.* Shupe, 16 Iowa, 36; The State *v.* Flagg, 27 Ind. 24.

[8] The State *v.* Chandler, 42 Vt. 446.

[9] Pratt *v.* Price, 11 Wend. 127.

[10] Rex *v.* Crossley, 7 T. R. 315.

[11] Ortner *v.* People, 6 Thomp. & C. 548.

[12] The State *v.* Wall, 9 Yerg. 347; Commonwealth *v.* Stockley, 10 Leigh, 678.

[13] Commonwealth *v.* Hatfield, 107 Mass. 227; People *v.* Tredway, 3 Barb. 470.

[14] Commonwealth *v.* Calvert, 1 Va. Cas. 181. See Respublica *v.* Wright, 1 Yeates, 205.

[15] Reg. *v.* Hughes, 1 Car. & K. 519. And see Commonwealth *v.* Pickering, 8 Grat. 628; Commonwealth *v.* Parker, 2 Cush. 212. The same, under the statute of Indiana. The State *v.* Offut, 4 Blackf. 355. Also, under this Indiana statute, the same of an affidavit for the continuance of a cause. The State *v.* Johnson, 7 Blackf. 49.

[16] The State *v.* Keenan, 8 Rich. 456. See Stephens *v.* The State, 1 Swan, Tenn. 157.

before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries. It hath been holden, that, not only such persons are indictable for perjury who take a false oath in a court of record upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of equity, or spiritual court, or any other lawful court,[1] whether the proceedings therein be of record or not, or whether they concern the interest of the king or subject. And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorized by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and therefore that a false oath before a sheriff, upon a writ of inquiry of damages, is as much punishable as if it were taken before the court on trial of the cause."[2]

§ 1026. **In Course of Justice.** — The test to determine whether the oath is such as renders a violation of it perjury is, whether it is administered in a *course of justice*.[3] Thus, —

**Oath of Office.** — The offence cannot be founded on a mere oath of office.[4] But —

**Poor Debtor.** — It may be committed in the examination of a poor debtor before a justice of the peace; because, though the proceeding is not judicial, it is in a course of justice.[5]

**Ecclesiastical Council.** — In Connecticut, a false oath before an ecclesiastical council, in a course of discipline, will, it has been held, sustain an indictment for perjury,[6] — a proposition which, it is presumed, would not be everywhere accepted.[7]

**Case in Arbitration — Temporal Gain or Loss.** — A case in arbitration, under a rule of court, is in a course of justice; therefore a false swearing before the arbitrators is perjury.[1] And the South Carolina tribunal, on the strength of the Connecticut doctrine just stated, not only held this, where the oath had been administered by a justice of the peace, but laid it down further, that, in all cases of an oath taken "in the course of a proceeding sanctioned by the express enactment of the legislature, or by the common consent and usage of mankind, and from which a temporal loss to any one arises, it is perjury to swear falsely."[2] The oath cannot, according to another case, be administered by the arbitrators themselves, who have no power,[3] but must be by an officer, as a justice of the peace, authorized to administer oaths.[4] The Missouri tribunal held, not altogether in conflict with this doctrine, that, when the submission to arbitrators is by parol, out of court, a witness cannot commit perjury, though duly sworn by a justice of the peace.[5]

**Other Cases.** — The foregoing doctrines extend to other cases falling within the like principle.[6]

[1] For instance, a court baron. Anonymous, 1 Mod. 55; Anonymous, 1 Sid. 454.

[2] 1 Hawk. P. C. Curw. ed. p. 430, § 3.

[3] See cases cited infra, to this section; also Commonwealth *v.* Warden, 11 Met. 406; Reg. *v.* Castro, Law Rep. 9 Q. B. 350, 12 Cox C. C. 454, 6 Eng. Rep. 317.

[4] The State *v.* Dayton, 3 Zab. 49. There may be various reasons for this proposition. Hawkins says: "The notion of perjury is confined to such public oaths only, as affirm or deny some matter of fact, contrary to the knowledge of the party; and, therefore, it doth not extend to any promissory oaths whatsoever [see post, § 1030]. From which it clearly follows, that no officer, public or private, who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury in respect of such oath; yet it is certain that his offence is highly aggravated by being contrary to his oath, and therefore that he is liable to the severer fine on that account." 1 Hawk. P. C. Curw. ed. p. 431.

[5] Arden *v.* The State, 11 Conn. 408.

[6] Chapman *v.* Gillet, 2 Conn. 40.

[7] See post, § 1027





[1] Reg. *v.* Ball, 6 Cox C. C. 360.

[2] The State *v.* Stephenson, 4 McCord, 165. See post, § 1027.

[3] Ante, § 1020.

[4] The State *v.* McCroskey, 3 McCord, 308. See also Reg. *v.* Hallett, 2 Den. C. C. 237, 15 Jur. 433, 20 Law J. N. S. M. C. 197. Hawkins says: "It seemeth clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle." 1 Hawk. P. C. Curw. ed. p. 431, § 4. See ante, § 1018.

[5] Mahan *v.* Berry, 5 Misso. 21.

[6] **Court Martial.** — It seems that the taking of a false oath before a court martial is perjury at the common law. Reg. *v.* Heane, 4 B. & S. 947; The State *v.* Gregory, 2 Murph. 69. **Fishing Bounty.** — Where taking false oath to procure, not perjury. United States *v.* Nickerson, 1 Sprague, 232. **Legislative Investigation.** — Perjury may be committed on, within the California statute. Ex parte McCarthy, 29 Cal. 395. **Oath to procure Marriage License.** — Perjury may be assigned on. Warwick *v.* The State, 25 Ohio State, 21; Reg. *v.* Barnes 10 Cox C. C. 539; Call *v.* The State, 20 Ohio State, 330. See post, § 1029. **Depositions for Foreign Use.** — Under statutes, perjury on. Stewart *v.* The State, 22 Ohio State, 477; Commonwealth *v.* Smith, 11 Allen, 243; see post, § 1029. And see, for other illustrative cases, People *v.* Travis, 4 Parker C. C. 213; United States *v.* Sonachall, 4 Bis. 425; Harris *v.* People, 6 Thomp. & C. 206, 4 Hun, 1; Reg. *v.* Greenland, Law Rep. 1 C. C. 65; Reg. *v.* Tomlinson, Law Rep. 1 C. C. 49, 10 Cox C. C. 332; Reg. *v.* Proud, Law Rep. 1 C. C. 71, 10 Cox C. C. 455; Reg. *v.* Berry, Bell C. C. 46, 8 Cox C. C. 121; Commonwealth *v.* Hughes, 5 Allen, 499.

§ 1027. **Extrajudicial.** — We are thus led to the general proposition, that no extrajudicial oath will sustain an indictment for this offence.[1] Therefore, —

**Swearing to Account.** — In South Carolina, swearing to an account, to be rendered before an administrator, has been held to be extrajudicial, not subjecting the party who swears falsely to an indictment.[2] A like doctrine has been held, in Tennessee, as applicable to a cause in the Court of Chancery, wherein there was no right to administer the oath.[3] But where an oath of this sort is made of effect by statute, the false swearing will be perjury.[4]

**In Bargaining.** — "A false oath," says Hawkins, "taken by one upon the making of a bargain, that the thing sold is his own, is not punishable as perjury."[5]

§ 1028. **Cause properly in Court.** — Thus are we led to the further proposition, that, not only must the tribunal have jurisdiction of the cause, as before explained,[6] but the cause must be properly in court.[7] Therefore, —

**Abated.** — If it is abated by the death of a party, or otherwise, there is no perjury in the false swearing.[8] But —

**Defects in Proceedings.** — Where, in the proceedings, there is a mere formal defect, which is amendable;[9] or where, in an affidavit out of court, there is something in the jurat which must be amended before it can be used,[10] the actual use of it not being essential to the offence;[11] or probably in all cases of defective proceedings voidable merely, not void;[12] or, *a fortiori*, where the judge at the trial permits the cause to go on upon a pleading not sufficiently definite,[13] or perhaps not completed,[14] or, by agree-

[1] Pegram *v.* Styron, 1 Bailey, 595; Lamden *v.* The State, 5 Humph. 83; Waggoner *v.* Richmond, Wright, 173; Rex *v.* Foster, Russ. & Ry. 459; Wickoff *v.* Humphrey, 1 Johns. 498; United States *v.* Nickerson, 1 Sprague, 232.

[2] Pegram *v.* Styron, supra.

[3] Lamden *v.* The State, supra. See ante, § 1019.

[4] Warner *v.* Fowler, 8 Md. 25.

[5] 1 Hawk. P. C. Curw. ed. p. 431. And see ante, § 1014.

[6] Ante, § 1020.

[7] See cases cited to this section, infra; also Reg. *v.* Scotton, 8 Jur. 400; Reg. *v.* Ewington, Car. & M. 319.

[8] Rex *v.* Cohen, 1 Stark. 511; The State *v.* Hall, 49 Maine, 412; Reg. *v.* Pearce, 3 B. & S. 531, 9 Cox C. C. 258.

[9] Pippet *v.* Hearn, 1 D. & R. 266, 5 B. & Ald. 634; Rex *v.* Christian, Car. & M. 388; The State *v.* Lavalley, 9 Misso. 834.

[10] Rex *v.* Hailey, Ryan & Moody, N. P. 94, 1 Car. & P. 258. See Cook *v.* Staats, 18 Barb. 407.

[11] Rex *v.* Hailey, supra; Rex *v.* Crossley, 7 T. R. 315; Rex *v.* Christian, Car. & M. 388.

[12] Van Steenbergh *v.* Kortz, 10 Johns 167.

[13] The State *v.* Keene, 26 Maine, 33.

[14] The State *v.* Lewis, 10 Kan. 157. See Commonwealth *v.* Smith, 11 Allen, 243.





ment of parties, before an inadequate number of jurors,[1] or where otherwise a defect in the proceedings has been waived by the parties;[2] perjury may be committed.

**Preliminaries Waived.** — There is much, in a cause, which a party may waive; and, if a defendant, not being served with process, appears and answers to the plaintiff's allegations, the court has complete jurisdiction, and perjury may be committed.[3]

**Judgment reversed.** — A man's responsibility to the criminal law depends on the facts existing when his alleged wrongful act is committed.[4] Therefore, in perjury, though the final judgment has been reversed on writ of error, any false swearing at the trial may still be proceeded against by indictment.[5]

**Witness not believed.** — And if the cause goes to the jury, and they give no credit to the false testimony, the result is not different.[6]

**Cause not yet Pending.** — As a sort of general doctrine, if a suit is contemplated, perjury in it cannot be committed until it is commenced.[7] But there are cases in which a statute permits depositions to be taken in aid of an intended future suit; and, in such a case, it is plain in principle that false swearing will be perjury. And in New Hampshire it was held, that perjury may be committed in an affidavit made to be used in a naturalization proceeding, the usual practice being to receive in evidence an affidavit of this sort. And Smith, J., considered, that, on the authorities, "perjury may be committed in affidavits taken to be used in some judicial proceeding which the party taking them intends to institute, although he afterwards fails to carry out that intention."[8]

§ 1029. **Indictable False Swearing, which is not Perjury.** — A false affidavit may be of a nature to be indictable as a misdemeanor,

[1] The State *v.* Hall, 7 Blackf. 25.

[2] Reg. *v.* Fletcher, Law Rep. 1 C. C. 320.

[3] Reg. *v.* Fletcher, Law Rep. 1 C. C. 320, 12 Cox C. C. 77; Reg. *v.* Mason, 29 U. C. Q. B. 431; Reg. *v.* Simmons, Bell C. C. 168; s. c. nom. Reg. *v.* Simmonds, 8 Cox C. C. 190.

[4] Commonwealth *v.* Tobin, 108 Mass. 426; People *v.* Jones, 1 Mich. N. P. 141. But see Commonwealth *v.* Dickinson, 8 Pa. Law Jour. Rep. 265.

[5] Reg. *v.* Meek, 9 Car. & P. 513.

[6] Hamper's Case, 3 Leon. 230.

[7] People *v.* Chrystal, 8 Barb. 545.

[8] The State *v.* Whittemore, 50 N. H. 245, 249, referring to Rex *v.* White, 1 Moody & M. 271; King *v.* Reg. 14 Q. B. 31. And see Miller *v.* Munson, 34 Wis. 579; Mairet *v.* Marriner, 34 Wis. 582; Reg. *v.* Bishop, Car. & M. 302.

on common-law principles, while it does not amount to the technical offence of perjury.[1] Thus, —

**Foreign Affidavit.** — While perjury cannot be assigned on a foreign affidavit,[2] yet, if a person knowingly uses it here, being false, he commits the indictable misdemeanor of attempting to pervert public justice.[3] And, —

**To procure Marriage Certificate.** — In England, a false oath taken before a surrogate, to deceive him into granting improperly a marriage certificate, though not perjury, is a criminal misdemeanor.[4]

## II. *Materiality of the Testimony to the Issue or Point of Inquiry.*

§ 1030. **Must be Material.** — What is sworn to must, for perjury to be predicated upon it, be pertinent and material to the issue or question in controversy.[5]

§ 1031. **Prejudicial.** — Some of the authorities add, that it must also be of a nature to prejudice some person or the State.[6] This,

[1] Rex *v.* O'Brian, 2 Stra. 1144, 7 Mod. 378; Ex parte Overton, 2 Rose, 257; Rex *v.* De Beauvoir, 7 Car. & P. 17; ante, § 1014.

[2] Musgrave *v.* Medex, 19 Ves. 652.

[3] Omealy *v.* Newell, 8 East, 364. As to false evidence given here, under a commission from a tribunal in a foreign country, see Calliand *v.* Vaughan, 1 B. & P. 210; ante, § 1026, note.

[4] Reg. *v.* Chapman, 1 Den. C. C. 432, Temp. & M. 90, 13 Jur. 885, 18 Law J. N. S. M. C. 152. See ante, § 1026, note.

[5] Bullock *v.* Koon, 4 Wend. 531; Reg. *v.* Tate, 12 Cox C. C. 7, 2 Eng. Rep. 164; Reg. *v.* Naylor, 11 Cox C. C. 13; Reg. *v.* Harvey, 8 Cox C. C. 99; Reg. *v.* Berry, Bell C. C. 46, 8 Cox C. C. 121; Reg. *v.* Ball, 6 Cox C. C. 360; Hembree *v.* The State, 52 Ga. 242; Commonwealth *v.* Grant, 116 Mass. 17; The State *v.* Gibson, 26 La. An. 71; The State *v.* Trask, 42 Vt. 152; Reg. *v.* Townsend, 4 Fost. & F. 1089; The State *v.* Aikens, 32 Iowa, 408; Gibson *v.* The State, 44 Ala. 17; Hood *v.* The State, 44 Ala. 81; Nelson *v.* The State, 47 Missis. 621; Reg. *v.* Alsop, 11 Cox C. C. 264; Galloway *v.* The State, 29 Ind. 442; The State *v.* Hobbs, 40 N. H. 229; Reg. *v.* Townsend, 10 Cox C. C. 356; Wood *v.* People, 59 N. Y. 117.

[6] Rex *v.* Aylett, 1 T. R. 63; Commonwealth *v.* Knight, 12 Mass. 274; The State *v.* Ammons, 3 Murph. 123; Martin *v.* Miller, 4 Misso. 47; Pankey *v.* People, 1 Scam. 80; Reg. *v.* Overton, Car. & M. 655; Commonwealth *v.* Pickering, 8 Grat. 628; Reg. *v.* Phillpotts, 2 Den. C. C. 302; s. c. nom. Reg. *v.* Philpotts, 8 Eng. L. & Eq. 580; Reg. *v.* Yates, Car. & M. 132, 5 Jur. 636; McMurry *v.* The State, 6 Ala. 324; White *v.* The State, 1 Sm. & M. 149; Rex *v.* Drue, 1 Sid. 274; Weathers *v.* The State, 2 Blackf. 278; The State *v.* Hayward, 1 Nott & McC. 546; Steinman *v.* McWilliams, 6 Barr, 170; Commonwealth *v.* Parker, 2 Cush. 212; The State *v.* Hattaway, 2 Nott & McC. 118; Hinch *v.* The State, 2 Misso. 158; Studdard *v.* Linville, 3 Hawks, 474. In The State *v.* Dodd, 3 Murph. 226, Henderson, J., observed: "We know of no rule or criterion by which an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is only injurious to the State, or even to an individual, when it tends to prevent right. Therefore, to constitute perjury, it must be to some material fact tending to injure some person. If it be entirely immaterial, it cannot affect any one; it wants a necessary ingredient to constitute it an offence against society." **Advantageous to the State.** — If an oath has been broken by giving false testimony advantageous to the government, still the prosecuting authority may proceed against the giver of it for perjury. Agar's Case, Sir F. Moore, 627.





however, is a mere formal proposition, of no practical consequence. As of course, false swearing to what is material in a controversy is prejudicial, both to the public interests, and to those of the individual whose rights it was meant to defeat.

§ 1032. **Nature of the required Materiality.** — How, and to what extent, the testimony must be material can best be shown by illustrations; thus, —

**Collateral Issue — (Credit of a Witness).** — It need affect only a collateral issue;[1] as, "if the credit of a witness is in question, and another person to support it swears falsely, it is perjury."[2]

**Abate the Suit.** — Likewise it is perjury to swear falsely to what would, if true, merely cause the particular proceeding to be abated.[3]

**Link in Chain of Evidence.** — Neither need it be sufficient of itself alone to produce the wrong result; if it is a part, or link, it is sufficient.[4]

**Voluntary or not.** — So there is no rule making any distinction, whether it comes voluntarily from the witness, in answer to no question put, or is responsive to a particular inquiry; for, in either case, the witness is sworn to speak the truth.[5]

**Promissory.** — Of course, a promise cannot be material to any

[1] The State *v.* Keenan, 8 Rich. 456; The State *v.* Lavalley, 9 Misso. 834; Commonwealth *v.* Pollard, 12 Met. 225; The State *v.* Shupe, 16 Iowa, 36.

[2] Rex *v.* Greep, Holt, 535, Comb. 459; s. c. nom. Rex *v.* Griepe, 1 Ld. Raym. 257, 12 Mod. 139; s. c. nom. Rex *v.* Gripe, 1 Comyn, 43, note; Wood *v.* People, 59 N. Y. 117. And see Salmons *v.* Tait, 31 Ga. 676; Reg. *v.* Worley, 3 Cox C. C. 535.

[3] Reg. *v.* Mullany, Leigh & C. 593. **Irrelevant, but to mislead.** — In this case Erle, C. J., said: "When the question arises, whether false swearing in a judicial proceeding, with intent to mislead, is to be free from punishment, because it is wholly irrelevant and immaterial to the issue that is being tried, that will be a question for the fifteen judges to decide [referring to some observations by Maule, J., in Reg. *v.* Phillpotts, 2 Den. C. C. 302, 306], though, for my own part, I should be inclined to hold that any false swearing in a judicial proceeding, with intent to mislead, whether material or not, would amount to the crime of perjury." p. 596.

[4] The State *v.* Dayton, 3 Zab. 49; Commonwealth *v.* Pollard, 12 Met. 225; Wood *v.* People, 59 N. Y. 117.

[5] Commonwealth *v.* Knight, 12 Mass. 274.

issue; and a mere promissory oath, or promissory statement under oath, is no perjury.[1]

§ 1033. **Old Illustrations of Immaterial.** — Hawkins, an authority of himself,[2] observes as follows: "It seemeth clear, that, if the oath for which a man is indicted of perjury be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant. As if, upon a trial in which the question is whether such a one was *compos* or not, a witness introduces his evidence by giving a history of a journey which he took to see the party, and happens to swear falsely in relation to some of the circumstances of the journey. Also it hath been adjudged, that, where a witness, being asked by a judge whether A brought a certain number of sheep from one town to another all together? answered that he did so; where in truth A did not bring them all together, but part at one time and part at another; yet such witness was not guilty of perjury, because the substance of the question was, whether A did bring them at all or not, and the manner of bringing them was only a circumstance. And upon the same ground it is said to have been adjudged, that, where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties? answered, that it was, where in truth it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was no way material whether it were paid for one or both. Also it is said to have been resolved, that a witness who swore that one drew his dagger and beat and wounded J. S., where in truth he beat him with a staff, was not guilty of perjury, because the beating only was material.[3]

§ 1034. **Materiality as affected by the Form of the Question.** — If, in the trial of a cause, the attention of a witness is directed to a specific thing, and the form of the question indicates that he is expected to be exact in his answer, not only is he placed on his

[1] 1 Hawk. P. C. Curw. ed. p. 431. See ante, § 1026 and note.

[2] See Vol. I. § 77, 78.

[3] 1 Hawk. P. C. Curw. ed. p. 433, § 8; Ib. 8th ed. c. 69, § 8.





guard against mistakes, but the jury are led to give to the testimony a consideration which otherwise they might not do. Therefore, in some circumstances, the form of the interrogatory is decisive as to whether or not the false swearing is perjury. Thus, —

**Between two Dates — Specific.** — Where a transaction was on a particular Sunday, and the prisoner had in general terms testified that it did not take place on any Sunday between two dates which included the one in question, this was ruled, by Pollock, C. B., not to sustain an indictment for perjury; because his attention "ought to have been called to the particular day on which the transaction took place, as to which he was to speak."[1] Yet, consistently with this ruling, and expressly recognizing it as correct, the Court of Criminal Appeal held, that, where at a trial the prisoner was asked three or four times by the advocate and the judge, whether he did at any time, either on his own account or that of another person named, have of A any coals on credit, to which he answered "I did not," — this was sufficiently specific.[2]

[1] Reg. *v.* Stolady, 1 Fost. & F. 518.

[2] Reg. *v.* London, 12 Cox C. C. 50. Hawkins, writing of the materiality of the evidence, says: "Perhaps, in all these cases, it ought to be intended, that the question was put in such a manner that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appears to be false; surely [**Immaterial, to strengthen the Material.** See post, § 1037.] — he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds I cannot but think the opinion of those judges very reasonable who held, that a witness was guilty of perjury, who, in an action of trespass for breaking the plaintiff's close and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's, because they were marked with such a mark, which he knew to be the defendant's mark, where in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and, though it signified nothing to the merits of the cause whether the sheep had any mark at all or not, yet, inasmuch as the assigning such a circumstance in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it

§ 1035. **Pertinent Evidence wrongly admitted.** — The reader will call to mind cases in which, when a party puts a question to a witness, who answers it, he is bound by the answer; not being permitted to contradict the witness by producing other testimony. Suppose, however, he does produce other testimony, and the court, contrary to rule, receives it; and the witness, testifying, speaks falsely: — is this perjury? In a late English case, it appeared that a woman was delivered of a bastard child on the 29th of March, 1861. On her application thereafter for an order of affiliation, she was on cross-examination asked by the defendant, whether one Gibbon did not have carnal connection with her the previous September. This was at a time subsequent to the conception, and her answer, whatever it might be, could only go to her credibility as a witness; it would not directly affect the issue. Still, had she answered falsely, she might have been indicted for perjury. But her answer, right or wrong, bound the defendant, and, according to the established rule of evidence, he could not be permitted to contradict what she said responsive to his question. She replied, that she did not have the connection. Gibbon was then produced, and was by the magistrates permitted, contrary, as we have seen, to the rule, to testify against her, and he declared that the connection did take place. For this testimony, which was false, he was indicted; and the majority of the English judges decided, after hearing two arguments, that the indictment for perjury could be maintained.[1]

should not be equally punishable. But I cannot find this matter anywhere thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which, from the consideration of the circumstances of each particular case, may generally without any great difficulty discern, whether the matter in which perjury is assigned were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not." 1 Hawk. P. C. Curw. ed. p. 434, § 8, cl. 2; Ib. 6th ed. c. 69, § 8, cl. 2. And see observations of Erle, C. J., ante, § 1031, note.

[1] Reg. *v.* Gibbon, Leigh & C. 109, 9 Cox C. C. 105. Said Cockburn, C. J.: "I have to deliver the opinion of all the judges who have heard the case, except my brothers Crompton and Martin, that the conviction was right, and should be affirmed. The question was pertinent, so far as the complainant was concerned, and she was bound to answer it. Although it did not refer to the main issue, which was the paternity of the child, it had a bearing upon what was indirectly in issue, namely, how far the complainant was deserving of credit. Possibly, if the complainant had answered the question in the affirmative, not much weight would have been attached to her admission in deciding the main issue. Certainly, if she had answered the question falsely, she might have been indicted for perjury. She was bound to answer. Then, inasmuch as the question only





§ 1036. **How in Principle** — The true test would seem, in reason, to be, whether the evidence could have properly influenced the tribunal. Though by accepted rules of practice it ought to have been rejected; still, if admitted, it must be deemed to have wrought its legitimate results. The ruling of the judge was the law for the moment and the occasion when and upon which the witness gave the testimony; therefore, if it was pertinent and false, it should be adjudged perjury.

§ 1037. **Strengthening what is Material.** — Where the evidence is simply to explain how it was the witness knew the thing which he states,[1] — as where, testifying to an *alibi*, he mentions the person's residence and habits, to show he could not be mistaken on the main point, — here, since the incidental matter is calculated to incline the jury to give a more ready credit to the substantial part, it will sustain a conviction for perjury, if wilfully false.[2]

§ 1038. **Further Illustrations of Material Evidence.** — The reader, in tracing out the law, will not omit the authorities cited at

affected her credit, as soon as she had answered it, all should have been bound by her answer. That is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what I have already said was indirectly in issue, the credibility of the complainant. The evidence having been admitted, although wrongly, Reg. *v.* Phillpotts, 2 Den. C. C. 302, is an authority that perjury may be assigned upon it. That decision is directly in point, and I entirely go along with it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth." Crompton, J., with whom Martin, B., concurred, said: "I am not satisfied that the conviction was right. Before a man can be convicted of perjury, it is necessary to show that his evidence was material in the cause. Formerly it was necessary to show on the indictment how the evidence was material. Subsequently it became sufficient to allege that it was material, without showing how it was so. Then, how is this evidence material? It does not affect the question in the cause. It could only be asked of the woman as going to her credit, as might be done on a trial for stealing, and her answer must be taken. The case has been very properly distinguished from cases of rape, by my brother Williams. I agree with the chief justice, that, though once it was doubtful, yet it is now clearly established, that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it. But, subject to this liability, her answer was conclusive. As soon as that was given, it ought to have been taken as established that no connection with Gibbon had taken place. Then, that being so, that matter was no longer a question in the cause; and the allegation of materiality would not be true, because by law the fact must be assumed to have been as the woman stated it to be. The evidence was inadmissible, because it was no longer a question in the cause. The woman's answer was conclusive proof on the subject." p. 119-121. See Reg. *v.* Murray, 1 Fost. & F. 80.

[1] Ante, § 1034, note.

[2] Reg. *v.* Tyson, Law Rep. 1 C. C. 107.

§ 1031, 1032; but a few points further, within the general doctrine, will be of assistance to him.

**Aggravate Damages or Punishment.** — Testimony tending to aggravate the damages or punishment is material.[1]

**Credit of Witness.** — So also, in some late cases, the English judges have held the broad doctrine, that "every question on cross-examination that goes to the credit of a witness is material;" and the answer, if wilfully false, will be perjury.[2] There is practical difficulty in applying this rule; and how far the American courts will carry it, cannot be stated.[3]

**Statute of Frauds.** — Another proposition is, that, if a witness denies on his oath a promise which the Statute of Frauds requires to be in writing, he does not commit this offence; because the promise by parol does not bind the party, and so the proof of it by parol has no tendency to establish any question in issue.[4] But, —

**Trustee Process — Usurious Contract.** — In Massachusetts, under the former usury laws, one summoned as trustee in a garnishment process could discharge himself by declaring on oath that he had paid the money on a usurious contract. Still if, after such discharge, on a controversy concerning the oath of the trustee, the principal defendant denies under oath the existence of the usurious contract, he commits, the denial being false, the offence of perjury.[5] And, —

**Writing impeached for Fraud.** — Where a written agreement is attempted to be impeached in a court of equity for fraud, if, in answer to the bill, the defendant denies parol qualifications of it, this denial, when false, is perjury.[6]

§ 1039. **Affidavit for Search-warrant.** — Where an affidavit to procure a search-warrant on a charge of felony is false, the affi-

[1] Stephens *v.* The State, 1 Swan, Tenn. 157; The State *v.* Norris, 9 N. H. 96.

[2] Reg. *v.* Overton, 2 Moody, 263 (and see the American note), Car. & M. 655; ante, § 1035, note. Where a witness was inquired of, — "Have you not passed by the name of Abbott, and also of Johnson?" And he replied, "I have never passed by the assumed name of Abbott or Johnson," — this, though false, was ruled not to be perjury. Reg. *v.* Worley, 3 Cox, C. C. 535.

[3] Studdard *v.* Linville, 3 Hawks, 474, overruling The State *v.* Strat, 1 Murph. 124.

[4] Rex *v.* Dunston, Ryan & Moody, N. P. 109; Rex *v.* Benesech, Peake Ad. Cas. 93. And see ante, § 1019; 2 Russ. Crimes, 3d Eng. ed. 601.

[5] Commonwealth *v.* Parker, 2 Cush. 212.

[6] Reg. *v.* Yates, Car. & M. 132, 5 Jur. 636; 2 Russ. Crimes, 3d Eng. ed. 602.





ant is equally indictable whether a particular person is mentioned as the guilty one, or not.[1] Again, —

**Joint Defendants.** — On a proceeding against three or more for assault, the acts of each are receivable in evidence against all; therefore testimony concerning such acts, if wilfully false, is perjury.[2]

**Omission.** — Hume, writing of the Scotch law, says, "it will be difficult to ground, in any case, a relevant charge of perjury upon a mere omission;" [3] but clearly this distinction points only to the difficulty of making proof, for witnesses are sworn to tell the whole truth.[4]

§ 1039 *a.* **Materiality for the Court.** — The materiality of the testimony is a question of law, not of fact.[5] But, like any other question of law, it may be so mingled with fact that the court should submit it, with proper instructions upon the law, to the jury.[6]

§ 1040. **Opinion of Witness.** — The opinion of a witness may be important to the issue. If then he swears falsely to his opinion, he commits perjury; though this is usually difficult to establish in proof.[7] And, —

**Construction of Writings.** — Growing, it may be, out of the difficulty of proof, the doctrine is laid down, that perjury cannot be committed in testimony to the legal construction of a written instrument.[8] Generally such a question will be for the court, and evidence to it irrelevant, therefore not a foundation for perjury; but, in cases not involving this principle, no reason appears why, if a witness swears to a construction which he

[1] Carpenter *v.* The State, 4 How. Missis. 163.

[2] The State *v.* Norris, 9 N. H. 96.

[3] 1 Hume Crim. Law, 2d ed. 361.

[4] United States *v.* Conner, 3 McLean, 573; Commonwealth *v.* Cook, 1 Rob. Va. 729. See Rex *v.* Moody, 5 Car. & P. 23; s. c. nom. Rex *v.* Mudie, 1 Moody & R. 128.

[5] Cothran *v.* The State, 39 Missis. 541; Reg. *v.* Courtney, 7 Cox, C. C. 111; People *v.* Jones, 1 Mich. N. P. 141; The State *v.* Lewis, 10 Kan. 157.

[6] Reg. *v.* Goddard, 2 Fost. & F. 361; Reg. *v.* Worley, 3 Cox, C. C. 535.

[7] Reg. *v.* Schlesinger, 10 Q. B. 670, 12 Jur. 283, 17 Law J. N. S. M. C. 29; Fergus *v.* Hoard, 15 Ill. 357; The State *v.* Lea, 3 Ala. 602; Patrick *v.* Smoke, 3 Strob. 147; The State *v.* Cruikshank, 6 Blackf. 62; Rex *v.* Pedley, 1 Leach, 4th ed. 325. See 1 Hawk. P. C. Curw. ed. p. 433, § 7 and note; 1 Gab. Crim. Law, 793; 2 Russ. Crimes, 3d Eng. ed. 597; 1 Alison Crim. Law, 468. **Sufficiency of Surety.** — A witness, testifying to the sufficiency of a surety at a particular time, says, "he considered him good;" that expression is not merely his opinion, but is admissible as a statement of fact. Commonwealth *v.* Thompson, 3 Dana, 301.

[8] Rex *v.* Crespigny, 1 Esp. 280; The State *v.* Woolverton, 8 Blackf. 452.

knows to be wrong, and the proof of his corruption is ample, he should not be indictable as a perjurer the same as for any other false swearing.

**Charge of Larceny.** — Where the words of the witness were, that a person named "did feloniously steal, take, and carry away a rifle," &c., this was held to be a statement of fact, not of law.[1]

§ 1041. **Testimony as to Interlineations.** — If interlineations in a written instrument are shown to have been made by one or other of two persons, then, if he who made them swears that he did not, he commits perjury.[2]

**"Value Received."** — The words "value received" are not material in a promissory note; therefore it is not perjury for a defendant to deny having used them in making such a note.[3]

§ 1042. **Negative Testimony.** — When a man untruly testifies, that he did not send his son to school a year, he commits perjury or not, according as the fact of such sending is relevant or not to the issue on trial.[4]

**Enforcing Laws against Gaming.** — A witness swearing falsely, before the grand jury, as to his knowledge whether or not persons had violated the laws against gaming, commits perjury.[5]

### III. *The Testimony as being false.*

§ 1043. **Corrupt.** — The testimony, we shall see by and by,[6] must be corrupt; and from this proposition may be inferred the further one, that it must be false.[7] But, —

**True, yet believed to be False.** — If the witness supposes he is testifying falsely, it is corrupt as to him, and a perversion of truth

[1] Hoch *v.* People, 3 Mich. 552. And see The State *v.* Lea, 3 Ala. 602.

[2] Smith *v.* Deaver, 6 Jones, N. C. 563.

[3] People *v.* McDermott, 8 Cal. 288. I have stated, in the text, what of undoubted law can be drawn from this case. **Form of an Instrument.** — But the case seems to hold, that, where a defendant is sued on a promissory note, declared on as containing the words "value received," if he swears to having made a note, but not in these words, he does not, though his oath is false, commit perjury. Now, it seems to me, that, under some circumstances, there might be, for instance, a question of variance raised on such testimony, rendering it material; and, if it amounted to a denial of the making of the particular note, it would be material in the fullest sense.

[4] Floyd *v.* The State, 30 Ala. 511. And see Flemister *v.* The State, 48 Ga. 170.

[5] The State *v.* Terry, 30 Misso. 368.

[6] Post, § 1045 et seq.

[7] The State *v.* Wood, 17 Iowa, 18; The State *v.* Raymond, 20 Iowa, 582; The State *v.* Trask, 42 Vt. 152; Juarequi *v.* The State, 28 Texas, 625.





in a course of justice; it is, therefore, perjury, though in fact what he says is true.[1]

§ 1044. **Testifying to Two Opposite Things.** — If a witness testifies — either in two different causes, or in one cause at different examinations, or at one examination — to two opposite things, irreconcilable with each other, he commits perjury in making the false statement, but not in making the true one.[2] And though what he said when he told the truth may be shown in evidence against him on an indictment for the falsehood, yet there must be testimony outside of his own contradictory statements as to which of them is false.[3]

### IV. *The Intent.*

§ 1045. **Deliberate and Corrupt.** — Hawkins says: "It seemeth that no one ought to be found guilty [of this offence], without clear proof that the false oath alleged against him was taken with some degree of deliberation; for, if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable."[4]

§ 1046. **"Wilful and Corrupt."** — That perjury must be what the law calls wilful and corrupt is settled.[5] Even an indictment which charges the defendant with having "falsely" and maliciously given in the testimony is not sufficient, unless it also alleges that the swearing was "wilful," or was "corrupt;" or perhaps the two words must be united.[6]

[1] Vol. I. § 437; 3 Inst. 166; Bishop First Book, § 116-119.

[2] Martin *v.* Miller, 4 Misso. 47; Maynard's Case, 1 Vent. 182.

[3] 1 Hume Crim. Law, 2d ed. 366; Dodge *v.* The State, 4 Zab. 455; Reg. *v.* Hughes, 1 Car. & K. 519; The State *v.* J. B., 1 Tyler, 269. The majority of the judges, in People *v.* Burden, 9 Barb. 467, seemed to be of opinion, that the circumstances and form of the second statement may be such as to render it sufficient in proof of perjury in the first, without external evidence.

[4] 1 Hawk. P. C. Curw. ed. p. 429, § 2.

[5] Wyld *v.* Cookman, Cro. Eliz. 492, pl. 9; Rex *v.* Smith, 2 Show. 165; United States *v.* Babcock, 4 McLean, 113; The State *v.* Carland, 3 Dev. 114; The State *v.* Hascall, 6 N. H. 352.

[6] Rex *v.* Richards, 7 D. & R. 665; s. c. nom. Rex *v.* Stephens, 5 B. & C. 246; Green *v.* The State, 41 Ala. 419; Cothran *v.* The State, 39 Missis. 541; Crim. Proced. II. § 917.

**Mistake of Fact.** — A mere mistake of the facts is not, therefore, enough.[1]

§ 1047. **Acting under Professional Advice.** — If a man makes a true statement to a lawyer who reduces it to writing, then swears to the writing under persuasion of this legal adviser, in whom he has confidence, that it does not differ from the oral representation, he cannot be convicted of perjury, though in fact the writing is wrong.[2] So, generally, if one states truly the facts to the writer of an affidavit, and adds his oath to it when drawn up, he does not commit perjury, though it is erroneously written by the amanuensis; "for," observed the judge, "the witness, in such case, has a right to believe that the affidavit was drawn according to his statements."[3] And in general terms, the corruption required in perjury may be negatived by showing that the party testified honestly under legal advice.[4] So —

**Rash Swearing.** — To swear rashly to what is not true is not necessarily perjury.[5]

§ 1048. **Specific Intent — (Intoxication).** — But the question of greatest difficulty is, whether, under all circumstances, a witness, to commit perjury, must have in his mind the specific intent to swear to what is not true. In a New York case, Walworth, while circuit judge, stated to the jury, that intoxication is no defence to a charge of perjury.[6] If this is universally so, the result is, that men may commit perjury without the specific intent.[7] On the other hand, Baldwin, J., once laid it down, that reckless disregard of truth, by a witness who has no belief that he is swearing falsely, will not constitute this offence; though his testimony

[1] Reg. *v.* Muscot, 10 Mod. 192, 195; Rex *v.* De Beauvoir, 7 Car. & P. 17; Reg. *v.* Fontaine Moreau, 11 Q. B. 1028; Commonwealth *v.* Cook, 1 Rob. Va. 729; The State *v.* Lea, 3 Ala. 602; Scott *v.* Cook, 1 Duvall, 314.

[2] United States *v.* Stanley, 6 McLean, 409. And see United States *v.* Conner, 3 McLean, 583; McLean, J., in this last case, observing: "The maxim is admitted, that ignorance of the law constitutes no excuse for the commission of a crime. But the intention with which the act is done must give a character to the act. A man may innocently commit homicide. If, in doing a lawful act, he should unintentionally kill a fellow-creature, he is in no sense guilty of a crime. A bankrupt . . . acts fairly in submitting the facts to his counsel, and, by acting under his advice, he shows a desire to conform to the law;" so that, if he makes a mistake by an omission from his schedule, he does not commit perjury.

[3] Jesse *v.* The State, 20 Ga. 156, 169, opinion by McDonald, J.

[4] Hood *v.* The State, 44 Ala. 81.

[5] United States *v.* Atkins, 1 Sprague, 558, explained in United States *v.* Moore, 2 Lowell, 232.

[6] People *v.* Willey, 2 Parker C. C. 19.

[7] See the chapter on Drunkenness, Vol. I. § 397 et seq.





is in fact false, and he would have made it true if he had used caution. This learned judge added: "His negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be *wilful* where the oath is according to the belief and conviction of the witness as to its truth."[1] And, on the whole, the doctrine best supported seems to be, as stated in the preceding volume, that the intent must be specific, to swear untruly.[2]

**Swearing without Knowledge.** — Consistently with the doctrine which requires a specific intent, it is held, that, if a man swears to a thing of which he is conscious he has no knowledge, he commits perjury;[3] "although," adds Reade, J., in a North Carolina case, "he believes it to be true, and although it turns out to be true."[4] For the declaration of a witness is, that he knows what he speaks to be true; and, if he is conscious he does not know it, he means to swear falsely, however the fact may turn out to be.

### V. *English Statutes as Common Law in our States.*

§ 1049. **Common-law Offence.** — In an English case, Pollock, C. B., said: "Perjury was always an offence at common law."

**Stat. Eliz.** — He added: "The statute of Elizabeth defined the offence and increased the punishment."[5] It is 5 Eliz. c. 9, A. D. 1562. The Pennsylvania judges say, "it is in force except the 10th, 11th, 12th, and 13th sections, which are inapplicable to this commonwealth, and except the punishment by imprisonment, and paying of money, which is altered by our act of Assembly for reforming the penal laws."[6] In truth, this statute has been little used either in England or the American colonies; though, as the Pennsylvania judges in effect observe, it is doubtless, in a certain sense, common law in our country. The material parts of it, with

[1] United States *v.* Shellmire, Bald. 370, 378.

[2] Vol. I. § 320. "I agree, rather, with Mr. Bishop's opinion, that there must be some fact falsely stated, with knowledge of its falsity, before there can be perjury." Lowell, J., in United States *v.* Moore, 2 Lowell, 232, 235. And see Johnson *v.* People, 94 Ill. 505.

[3] The State *v.* Gates, 17 N. H. 373.

[4] The State *v.* Knox, Phillips, 312. See ante, § 1043.

[5] Reg. *v.* Gibbon, Leigh & C. 109, 111, 9 Cox C. C. 105.

[6] Report of Judges, 3 Binn. 595, 621. And see Roberts Dig. Stats. 359, where are the first nine sections of the statute It contains, in all, thirteen sections.

expositions, may be found in Hawkins.[1] This learned writer observes: "Prosecutions upon this statute, being more difficult than by indictment at common law, are very seldom brought."[2]

**1 Anne.** — The statute of 1 Anne, stat. 2, c. 9, § 3, providing that witnesses for the defendant in treason and felony should be sworn the same as for the crown, made the false oath perjury. But, without this clause, the same would have been held on common-law principles.

§ 1050. **Further of English Statutes.** — We may, therefore, dismiss the old English statutes as being of little consequence, as to the law, in the United States. How they are, as to the procedure, we see elsewhere.[3]

## VI. *American Statutes.*

§ 1051. **In General.** — In most of our States, perhaps all, there are statutes which define this offence, or provide for its punishment; and some of them increase a little its boundaries. Of the latter sort, is the New York statute.[4]

§ 1052. **Kentucky.** — In Kentucky: "If any person, in any matter which is or may be judicially pending, or on any subject in which he can be legally sworn, or on which he is required to be sworn, when sworn by a person authorized to administer an oath, shall wilfully and knowingly swear, depose, or give in evidence that which is untrue and false, he shall be confined," &c. It was observed: "This provision of the statute embraces, and was obviously intended to embrace, a large class of offences which did not amount to perjury at common law, and for which no punishment had been provided. And to constitute an offence of this class, it is not made necessary by the statute, either that the oath should be taken in a matter judicially pending at the time, or in a matter material to any point in question. The offence is complete if it be shown that the false oath was taken, knowingly and wilfully, on a subject on which the party could be legally sworn, and before a person legally authorized to administer the oath."[5]

[1] 1 Hawk. P. C. Curw. ed. p. 436 et seq., where also are given some subsequent English enactments.

[2] Ib. p. 437, note.

[3] Crim. Proced. II. § 901 et seq.

[4] See the observations of the commissioners in Draft of a Penal Code, 46 et seq.

[5] Commonwealth *v.* Powell, 2 Met. Ky. 10, 12, opinion by Duvall, J.





§ 1053. **Massachusetts.** — In Massachusetts: "Whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely, in regard to any matter or thing respecting which such oath or affirmation is required, shall be deemed guilty of perjury."[1] But it is needless to follow these provisions, since each practitioner will consult the statutes of his own State.[2]

## VII. *Remaining and Connected Questions.*

§ 1054. **Treason or Felony.** — "Before the Conquest," says Lord Coke, "perjury was punished, sometimes by death, sometimes by banishment, and sometimes by corporal punishment, &c."[3] But afterward the usual penalty of misdemeanor — imprisonment, fine, and the like — became universal; and, since then, if not always, this offence is at the common law misdemeanor, not felony.[4] In some of the States, as Georgia,[5] it is felony by force of the statutes.[6]

§ 1055. **Attempts.** — We have seen,[7] that perjury, though a substantive crime, partakes of the nature of attempt. Still the wrongful doing, to constitute the full offence, must proceed to a defined extent; and, where it has not gone so far, it may be indictable as an attempt,[8] on principles explained in the preceding volume.[9] Thus, —

**False Affidavit — (Sworn to or not).** — If one merely writes an affidavit, not sworn to or used, he is not guilty of the complete offence of perjury, however false it is;[10] though, if it is sworn to, being false, yet not tendered in court, he does become fully guilty.[11] Again, —

**Oath before Unauthorized Person.** — If one takes an oath before an officer not authorized to administer it, intending it shall be

[1] Gen. Stats. c. 163, § 2. And see Commonwealth *v.* Hughes, 5 Allen, 499.

[2] And see Stat. Crimes, § 571, 572.

[3] 3 Inst. 163.

[4] 3 Inst. 163; Case of False Affidavits, 12 Co. 128; Ryalls *v.* Reg. 13 Jur. 259, 18 Law J. N. S. M. C. 69; Rex *v.* Wallengen, 1 Sid. 106; Manney's Case, 12 Co. 101; Reg. *v.* Dunn, 12 Jur. 99; Rex *v.* Johnson, 2 Show. 1, 4; 2 Chit. Crim. Law, 313.

[5] A. *v.* B., R. M. Charl. 228.

[6] And see De Bernie *v.* The State, 19 Ala. 23. For the punishment in New Jersey, see Dodge *v.* The State, 4 Zab. 455.

[7] Vol. I. § 437.

[8] Reg. *v.* Stone, Dears. 251, 23 Law J. N. S. M. C. 14, 17 Jur. 1106, 22 Eng. L. & Eq. 593; post, § 1056.

[9] Vol. I. § 723 et seq.

[10] Rex *v.* Taylor, Holt, 534.

[11] Ante, § 1028.

used in a course of justice, he is punishable for an attempt, the same as if, the officer being authorized as he supposed him to be, he would then be for the offence complete.[1]

§ 1056. **Soliciting another to Perjury.** — If one solicits another to commit perjury, who does not, the solicitation is an indictable attempt,[2] according to principles already sufficiently discussed.[3] But —

**Committing Perjury by Another.** — If the person solicited commits the perjury, being a misdemeanor, a doctrine pervading all misdemeanors[4] renders the soliciting party guilty of the full offence of perjury, precisely as if committed directly by himself.[5] Perjury, committed by thus procuring another to do it, has been honored in our law by the separate name of —

**Subornation of Perjury.** — It is, in fact, mere perjury. But statutes, in some of the States, have expressly made it a separate offence.[6] A brief chapter will be devoted to it further on.

[1] Reg. *v.* Stone, supra.

[2] 1 Hawk. P. C. Curw. ed. p. 485, § 10; Rex *v.* Phillips, Cas. temp. Hardw. 241; Rex *v.* Johnson, 2 Show. 1, 2; Reg. *v.* Darby, 7 Mod. 100; Rex *v.* Margerum, Trem. P. C. 168.

[3] Vol. I. § 767, 768.

[4] Vol. I. § 685, 686.

[5] Vol. I. § 468; 1 Hawk. P. C. Curw. ed. p. 435; 3 Inst. 167; 2 Russ. Crimes, 3d Eng. ed. 596; Rex *v.* Johnson, 2 Show. 1, 4; Commonwealth *v.* Douglass, 5 Met. 241. And see United States *v.* Staats, 8 How. U. S. 41; Commonwealth *v.* Smith, 11 Allen, 243, 256.

[6] Commonwealth *v.* Smith, supra.

For PETIT LARCENY, see Vol. I. § 679, 680, 935, 942, 948, 974, 975. And see ante, LARCENY, particularly, § 757, 884.





# CHAPTER XXXIV.

## PIRACY.[1]

§ 1057. **By Law of Nations — Municipal Law.** — Piracy is an offence by the law of nations; and, moreover, the statutes of the United States make some acts piracy which are not such under the international law. The distinction is important.[2]

§ 1058. **Piracy by Law of Nations defined.** — Piracy, by the law of nations, is any act of forcible depredation on the high seas, committed in a spirit of general hostility to mankind, for gain or other private ends of the doers.[3]

[1] For matter relating to this title, see Vol. I. § 120, 306, 985.

[2] In re Ternan, 9 Cox, C. C. 522; Vol. I. § 120; post, § 1062.

[3] *Other Definitions, with Explanations,*— **Kent.** — "Piracy is robbery, or a forcible depredation, on the high seas, without lawful authority, and done *animo furandi,* and in the spirit and intention of universal hostility. It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy." 1 Kent Com. 183.

**Lord Coke.** — A pirate is "a rover and a robber upon the sea." 3 Inst. 113.

**Leach** — one of the editors of Hawkins: "A pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure." And again: "A pirate, at the common law, is a person who commits any of those acts of robbery and depredation upon the high seas, which, if committed on land, would amount to felony there." 1 Hawk. P. C. Curw. ed. p. 251, § 1, 3.

**Russell** — follows the last definition. 1 Russ. Crimes, 3d Eng. ed. 94.

**Sir Charles Hedges.** — "Piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Rex *v.* Dawson, 13 Howell St. Tr. 451, 454.

**Lord Justice Mellish** — delivering the opinion of the Privy Council — adopts the last definition. Attorney-General *v.* Kwok-a-Sing, Law Rep. 5 P. C. 179, 199, 8 Eng. Rep. 143, 161, 12 Cox, C. C. 565.

**Exposition by Nelson, J.** — In the early part of our secession civil war, in two instances privateersmen, acting by commission from the rebel government, were tried in the civil tribunals, not for piracy under the law of nations, but for a sort of statutory piracy, defined to be where "any person shall, upon the high seas, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof." In one of these cases, before the Circuit Court for the southern district of New York, Judge Nelson, with whom was associated Judge Shipman, concurring, said, among other things, to the jury. "It has already been determined by the highest authority, the Supreme Court of the United States, that we must look to the common law for

§ 1059. **By whom and against what.** — The common idea of a pirate is one who, in the words of Nelson, J., "roves the sea in an armed vessel, without any commission from any sovereign State, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet."[1] But, besides this, the mariners sailing a vessel may commit piracy upon it; as, if they "shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel, or furniture," feloniously.[2] And the passengers, doing the same, incur the like guilt.[3]

§ 1060. **Piracy under Law of Nations in United States.** — By the Revised Statutes of the United States: "Every person who, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterward brought into or found in the United

a definition of the term robbery; as it is to be presumed it was used by Congress in the act in that sense; and, taking this rule as our guide, it will be found the crime consists in this: the felonious taking of goods or property of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear. . . . It need not be a taking which, if upon the high seas, would amount to piracy according to the law of nations, or what, in some of the books, is called general piracy or robbery. **Piracy by the Law of Nations defined.** — This is defined to be a forcible depredation upon property upon the high seas without lawful authority, done *animo furandi*, — that is, as defined in this connection, in a spirit and intention of universal hostility. A pirate [under the law of nations] is said to be one who roves the sea in an armed vessel, without any commission from any sovereign State, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers; the only difference being, that the sea is the theatre of the operations of one, and the land of the other. And as general robbers and pirates upon the high seas are deemed enemies of the human race, — making war upon all mankind indiscriminately, the crime being one against the universal laws of society, — the vessels of every nation have a right to pursue, seize and punish them. Now, if it were necessary on the part of the government to bring the crime charged in the present case against the prisoners within this definition of robbery and piracy, as known to the common law of nations, there would be great difficulty in so doing either upon the evidence, or perhaps upon the counts as charged in the indictment — certainly upon the evidence. For that shows, if any thing, an intent to depredate upon the vessels and property of one nation only, — the United States, — which falls far short of the spirit and intent, as we have seen, that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the act of Congress prescribes as a crime, and may be denominated a statute offence as contradistinguished from that known to the law of nations." Savannah Pirates, Warburton's Trial of the Officers and Crew of the Privateer Savannah, p. 370, 371.

[1] See the last note.

[2] Rex *v.* Dawson, 13 Howell St. Tr. 451, 454, by Sir Charles Hedges, Judge of the Admiralty.

[3] Attorney-General *v.* Kwok-a-Sing, Law Rep. 5 P. C. 179, 200, 8 Eng. Rep. 143, 161.





States, shall suffer death."[1] Before the adoption of this revision in 1874, and with the exception of a brief period, our tribunals had no jurisdiction to punish piracies against the law of nations; though there were then, as now, statutory piracies bearing to it a considerable resemblance.[2]

[1] R. S. of U. S. § 5368.

[2] In an edition of this work published before the statutes were revised, it was stated as follows: The tribunals of the United States have no common-law jurisdiction. Vol. I. § 189 et seq. Piracy, therefore, being an offence committed out of the States, — unless, indeed, be excepted some localities which are both on the high seas and within a particular State, — cannot be punished, except under a statute enacted by Congress. On the third of March, A D. 1819, the following was adopted: "If any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death." 3 U. S. Stats. at Large, c. 77, § 5, p. 510. But the next section provides, "That this act shall be in force until the end of the next session of Congress;" and, though other parts of it were afterward made perpetual, this section was not. Dunlop's Digest of the United States Laws, p. 598, note. It was, however, provided at the next session, that the foregoing section "is hereby continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects as fully as if the duration of the said section had been without limitation." Act of May 15, 1820, 3 U. S. Stats. at Large, c. 113, § 2, p. 600. And though we may perhaps infer, that the word "heretofore" was written by mistake of the engrosser for *hereafter*, yet thus it stands in every printed edition of the United States laws, one of which, if not all, was carefully read by the original rolls, is made by act of Congress evidence in court, and bears the highest marks of correctness. The provision simply authorized the courts to punish the offence if already committed. See Stat. Crimes, § 180. Stat. 1790, c. 9, § 8, creates an offence something like piracy, but I do not understand it to be the piracy of the law of nations. It provides "that, if any person, &c., shall commit upon the high seas, &c., murder or robbery, or any other offence which if committed within the body of a county would by the laws of the United States be punishable with death; or, if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or, if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and, being thereof convicted, shall suffer death." Upon this an eminent legal person, to whom I am much indebted, writes me as follows: "In reviewing some questions of criminal law lately, it had occurred to me that you may have stated somewhat broadly, under the head of 'Piracy,' the idea that there is no act of Congress punishing that offence as an offence under the law of nations. The 8th section of the act of 1790, which it was intimated in United States *v.* Palmer, 3 Wheat. 610, could not apply to any but our own subjects, was afterwards in Klintock's Case, 5 Wheat. 144, held applicable to all pirates owning no lawful nationality. And in United States *v.* Pirates, 5 Wheat. 184, it was held this section was not repealed by the 5th section of the act of 1819. If so, then it would seem that as to most piratical sea-rovers we have sufficient legislation. The case of The Malek Adhel, 2 How. U. S. 210, was also one of piracy under the law

§ 1061. **Authorities, &c.** — The doctrine of piracy under the law of nations, therefore, has not been much illustrated in our courts. It is not best to enter further into the subject. But the reader is referred to some authorities which he may consult if occasion requires.[1]

§ 1062. **Statutes.** — Besides the statute, already mentioned, conferring on the courts jurisdiction over piracy under the law of nations, we have provisions creating various statutory piracies.[2] But —

**General View.** — The reader will have these before him; and, when a question of piracy arises, sufficient time is given for a full examination, not only of the statutes, but the decisions.[3] Further expositions are not deemed necessary here.

§ 1063. **Conclusion.** — Under the title Treason, we shall enter into a consideration of various things, which, in some circumstances, may be illustrative of the law of piracy.

of nations if any thing. I have not found any subsequent change of statutes, but there may be something I have failed to notice."

[1] 1 Hawk. P. C. Curw. ed. p. 251; 2 East P. C. 792; 4 Bl. Com. 71; 3 Chit. Crim. Law, 1090; 1 Russ. Crimes, 3d Eng. ed. 94, and see the American note; 1 Gab. Crim. Law, 814; Roscoe Crim. Ev. 832; 2 Deac. Crim. Law, 1027; 3 Inst. 111; 3 U. S. Stats. at Large, p. 510, note. The reader may consult also the following cases: —

*Cases of Common-law Doctrine*, applied either in the construction of the statutes or otherwise. — The Marianna Flora, 11 Wheat. 1; United States *v.* Gibert, 2 Sumner, 19; United States *v.* Tully, 1 Gallis. 247; The Antelope, 10 Wheat. 66; United States *v.* Jones, 3 Wash. C. C. 209, 228; Adams *v.* People, 1 Comst. 173, 177; United States *v.* Pirates, 5 Wheat. 184; United States *v.* Palmer, 3 Wheat. 610.

*Under English Statutes.* — The Magellan Pirates, 18 Jur. 13, 25 Eng. L. & Eq. 595; Rex *v.* Curling, Russ. & Ry. 123; Reg. *v.* McGregor, 1 Car. & K. 429.

*Under American Statutes and Treaties.* — United States *v.* Jones, 3 Wash. C. C. 209; United States *v.* Tully, 1 Gallis. 247; United States *v.* Smith, 5 Wheat. 153; United States *v.* Pirates, 5 Wheat. 184; United States *v.* Palmer, 3 Wheat. 610; United States *v.* Klintock, 5 Wheat. 144; British Prisoners, 1 Woodb. & M. 66; United States *v.* Howard, 3 Wash. C. C. 340.

[2] R. S. of U. S. § 5369–5375.

[3] See, for these, the note to the last section.

**For POLYGAMY, see Stat. Crimes.**





# CHAPTER XXXV.

## PRISON BREACH, RESCUE, AND ESCAPE.[1]


§ 1064–1067. Introduction.
1068, 1069. These Several Offences viewed as Accessorial.
1070–1084. The Substantive Offence of Prison Breach.
1085–1091. The Substantive Offence of Rescue.
1092–1106. The Substantive Offence of Escape.


§ 1064. **Nature of this Subject.** — The three-fold subject of this chapter involves some complications of doctrine, and some doubts. The offences are analogous, and at points they blend, yet are not the same; the old books relating to them are obscure, and there are not sufficient modern adjudications to make ways which appear crooked straight. The consequence must be, that the chapter itself will seem less compact and satisfactory than most other parts of these volumes.

§ 1065. **Prison Breach defined.** — Prison breach is a breaking and going out of prison by one lawfully confined therein.

**Rescue defined.** — Rescue is a deliverance of a prisoner from lawful custody by any third person.[2]

**Escape defined.** — The word escape has two separate meanings in the law. The one is the allowing, voluntarily or negligently, of a prisoner lawfully in custody to leave his confinement. The other is the going away, by the prisoner himself, from his place of lawful custody, without a breaking of prison.

§ 1066. **Accessorial and Substantive.** — These offences are, in part, to be regarded in a double aspect. In the first place, the wrongful act, if it consists in aiding another, is often, not always, such as constitutes the doer an accessory after the fact to the

[1] For matter relating to these titles, see Vol. I. § 218, 316, 321, 350, 465, 639, 693, 695–697, 707. And see Stat. Crimes, § 217, 568. For the pleading, practice, and evidence, see Crim. Proced. II. § 940 et seq.

[2] Blackstone defines rescue to be "the forcibly and knowingly freeing another from an arrest or imprisonment." 4 Bl. Com. 131.

crime of the person assisted. In the next place, the same act, while it is thus accessorial, is frequently, not always, a substantive crime also. That is, the thing done, which we are to contemplate in this chapter, may be what makes the one doing it an accessory after the fact, or it may be such as renders him guilty of a substantive offence, or it may be both of these together; in which last case, the indictment may charge it as being either the one or the other, at the election of the power which prosecutes.[1] This is a distinction of the highest importance; and some legal persons, overlooking it, have gone far astray in opinions relating to this subject.

§ 1067. **How the Chapter divided.** — We shall consider, I. These Several Offences viewed as Accessorial; II. Prison Breach; III. Rescue; IV. Escape; under which last three heads we shall contemplate the offence as substantive, looking at it occasionally also as accessorial.

### I. *These Several Offences viewed as Accessorial.*

§ 1068. **Accessory After.** — We learn, from discussions in the preceding volume,[2] that an accessory after the fact, in a felony, is one who in any way aids the principal felon, whom he knows to be guilty of the felony. Hence, —

**Helping to Escape.** — As observed by Lord Hardwicke, "a man may become an accessory to a felony after the fact, by assisting a felon convict, being in custody under a sentence of transportation, to escape out of prison; provided it be such an assistance as doth in law amount to a receiving, harboring, or comforting such felon."[3]

§ 1069. **The Broader Doctrine.** — But this is only a particular form of aiding the felon; and the accessorial offence may be equally committed by any other assistance given him at any time after his felony is done, either by way of escape from confinement, or by harboring or concealing him, knowing of his guilt; it being immaterial whether he has been arrested, or otherwise proceeded against, or not.[4]

[1] Vol. I. § 696, 697.
[2] Vol. I. § 692.
[3] Rex *v.* Burridge, 3 P. Wms. 439, 485.
[4] The State *v.* Cuthbert, T. U. P. Charl. 13; Commonwealth *v.* Miller, 2 Ashm. 61.





### II. *The Substantive Offence of Prison Breach.*

§ 1070. **Felony or Misdemeanor.** — This offence has already been defined.[1] Under the ancient common law, it was felony, whatever the cause of the imprisonment; provided, of course, that the imprisonment was lawful.[2] But, —

**Stat. Edw. 2.** — As felony was punishable by death, this was visiting too heavily a breaking away from confinement under a light sentence for some trivial offence. Accordingly the statute *de frangentibus prisonam*, 1 Edw. 2, stat. 2, ameliorated this severity where the imprisonment was for misdemeanor, by providing, "that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."[3]

**How in our States.** — There is no room to doubt, that this statute is common law with us; and that, by force of it, combined with the anterior common law, any prisoner who frees himself from lawful imprisonment by breaking, commits thereby a felony or a misdemeanor, according as the imprisonment was for a crime of the one grade or the other.[4]

§ 1071. **Breaking without Exit.** — But a mere breaking is not sufficient to constitute this offence: the prisoner must make his exit also.[5]

**Attempt.** — Evidently, however, the mere breaking, done with the intent to escape, would constitute an indictable attempt.[6]

§ 1072. **Breaking from Civil Process.** — It cannot be stated, on the authority of the books, whether, to make a breaking and exit indictable, the imprisonment must be for crime, or whether it will be adequate if on mere civil process. There are utterances both ways.[7]

[1] Ante, § 1065.
[2] 2 Inst. 589; 1 Hale P. C. 607; Anonymous, 1 Dy. 99, pl. 60.
[3] For expositions of this statute, see 2 Inst. 589; 2 Hawk P. C. Curw. ed. 184; 1 Hale P. C. 608. And see Commonwealth *v.* Miller, 2 Ashm. 61.
[4] See 2 Hawk. P. C. Curw. ed. p. 183, § 1, p. 186 et seq. and § 21; 4 Bl. Com. 130; Rex *v.* Haswell, Russ. & Ry. 458.
[5] 2 Hawk. P. C. Curw. ed. p. 186, § 12.
[6] As to the doctrine of attempt, see Vol. I. § 723 et seq.
[7] Hawkins says, that, according to

§ 1073. **How in Principle.** — In reason, the administration of justice is an object of prime regard, as well in civil suits as in criminal. Hence perjury in a civil cause is indictable.[1] So is bribery.[2] So are tampering with witnesses and other acts of the like sort.[3] Therefore the helping of a person out of prison, or the breaking from confinement by the prisoner himself, should be deemed an offence as well when the imprisonment is in a civil cause as in a criminal.

§ 1074. **Imprisonment Unlawful.** — Where the imprisonment is unlawful, — either from want of a proper warrant of commitment, when a warrant is necessary, or because there is no lawful right to detain the prisoner without warrant, — the offence is not perpetrated, though the prison is broken. But, —

**Lawful, yet not guilty.** — If the imprisonment is lawful, though the party imprisoned is not guilty of what is laid to his charge, he commits this offence when he breaks the prison and escapes.[4]

§ 1075. **The Breaking.** — To constitute a prison breach, as distinguished from escape,[5] the prison must be broken. But —

**Uncertain.** — The doctrine on this question and some others is not distinct, being little discussed in the modern books. And if we turn to the old ones, evidently much in them, relating to the three heads of Prison Breach, Rescue, and Escape, is not correct as there stated; while, at the same time, we have not sufficient adjudications of a modern date to render valuable any exposition

the better opinion, before the statute *de frangentibus prisonam*, a prison breach was felony "if the party were lawfully in prison for any cause whatsoever, whether criminal or *civil*, and whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him." 2 Hawk. P. C. Curw. ed. p. 183, § 1. And Coke, perhaps favoring the same view, observes: "It appeareth, by our ancient authors of the law, that, if a prisoner, *whatsoever the cause was for which he was committed*, had broken the king's prison, and escaped out, it was felony." 2 Inst. 589. Also it was ruled at *nisi prius* in England, to be indictable at the common law for one to help a prisoner out of custody, though confined under the remand of the commissioners for the relief of insolvent debtors, not on any criminal charge. Reg. *v.* Allan, Car. & M. 295, 5 Jur. 296. And see Vol. I. § 466, 467. On the other hand, **Escape,** — Hawkins himself says, that for an *escape* to be indictable, the confinement "must be for a criminal matter; and," he even adds, "some are said to have holden that no escape is criminal but where the commitment is for felony." 2 Hawk. P. C. Curw. ed. 191, § 3. To make a distinction between escape and prison breach on this point is impossible. See post, § 1076.

[1] Ante, § 1024, 1026.

[2] Ante, § 85, 86.

[3] Vol. I. § 467, 468.

[4] 2 Hawk. P. C. Curw. ed. p. 185; 2 Inst. 590; Commonwealth *v.* Miller, 2 Ashm. 61. See also Rex *v.* Fell, 1 Ld. Raym. 424.

[5] Ante, § 1065; post, § 1092, et seq.





of the modern law, other than is contained in the foregoing sections.[1] Therefore —

**Quotation from Gabbett.** — A quotation from Gabbett will be helpful.[2]

§ 1076. **Stat. 1 Edw. 2, and its Construction.** — Gabbett[3] — let us cite his authorities with his text — says: "Breach of prison, or even the conspiracy to break it, was felony at the common law; for whatever cause, criminal or civil, the party was lawfully imprisoned;[4] but the severity of the common law was mitigated by the statute *de frangentibus prisonam*, 1 Edw. 2, St. 2.[5] So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony at the common law; and to break prison when lawfully confined on any inferior charge, was, by this statute, punishable only as a high misdemeanor, by fine and imprisonment.[6] We must here notice the several points which have been ruled upon the construction of this statute.

§ 1077. **"What is a Prison, and a Lawful Imprisonment within Stat. 1 Edw. 2. St. 2.** — First, then, it is laid down as a clear principle, that any place whatsoever wherein a person under a lawful arrest for a supposed crime is detained, whether in the stocks, or in the street, or in the common jail, or the house of a constable or private person, is properly a prison within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty; and the statute therefore extends as well to a prison in law as a prison in deed.[7] But the imprisonment must be a lawful one: and with respect to this point it is clear, that, if a person be taken upon a *capias* awarded on an indictment against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record which makes his commitment lawful, however innocent he may be, and though the prosecution be ever so groundless.[8] And so if an innocent person be committed by a lawful *mittimus* on such a suspicion of felony, actually done by some other, as will

[1] Ante, § 1064.

[2] As to Gabbett's book, and why in a case like this I quote from it, see ante, § 506, note.

[3] 1 Gab. Crim. Law, 305 et seq.

[4] 1 Hale, 607–609; 2 Hawk. c. 18, § 1; 2 Inst. 589; 4 Bl. Com. 130.

[5] For this statute, see ante, § 1070.

[6] 4 Bl. Com. 130.

[7] 2 Hawk. c. 18, § 4; 2 Inst. 589. See ante, § 748.

[8] 2 Hawk. c. 18, § 5.

justify his imprisonment, though he be not indicted, he is within the statute if he break the prison; for, as he was legally in custody, he ought to have submitted to it till he had been discharged by due course of law.[1] But if no felony at all were done, and the party be not indicted, no *mittimus* for such a supposed crime will make him guilty, within the statute, for breaking the prison; his imprisonment being unjustifiable.[2]

§ 1078. "**How far the Offence depends upon the Nature or Lawfulness of the Mittimus.** — And though a felony were done, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking of the prison will not be felony, if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment in such a case depends wholly on the *mittimus:* but if the party were taken up for such strong causes of suspicion of felony as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison, though he happen to have been committed by an informal warrant; for the necessity of a *mittimus* from a magistrate depends rather on the constant settled practice of justices of the peace, than any direct law; and therefore it seems difficult to maintain that the informality of such a *mittimus* should make it lawful for the prisoner to break the prison; when, by the ancient common law, any private person might, of his own authority, justify both an arrest and commitment for treason or felony, on a reasonable cause of suspicion.[3]

§ 1079. "**How far it depends upon the Nature of the Crime for which the Party is confined.** — As to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the Statute 1 Edw. 2, it is clear, from the express words of the act, that, if the crime for which the party is charged in the *mittimus* do not require judgment of life or member, and the offence, in truth, be no greater than the *mittimus* doth suppose it to be, his breaking the prison will not amount to felony. And it is also clear, that, to make the prison breaking a felony, the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent: as where A is committed to prison for a dangerous wound given

[1] 2 Hawk. c. 18, § 6.
[2] 2 Hawk. c. 18, § 7.
[3] 2 Hawk. c. 18, § 8; 1 Hale, 610.





to B, and breaks the prison, and then B dies; for though, to some intent, such offence be esteemed capital from the time of the first act, yet, as it was in truth but a trespass at the time of the breaking of the prison, and it was then uncertain whether it would ever become capital, and becomes such afterwards, *ab initio*, by fiction only, for some special purposes, such fiction shall not exclude the party from the advantages of this beneficial law (1 Edw. 2). Yet an offender breaking prison while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment.[1] But it is not material, whether the offence for which the party was imprisoned were capital at the time of the passing of the statute (1 Edw. 2), or was made so by subsequent statutes; for the object of the statute was to restrain the common law (which made all breaches of prison felonies) to the cases of imprisonment for capital offences; and therefore, when an offence is made a capital one, it is as much out of the benefit of the statute (1 Edw. 2) as if it had been always so.[2] It is also to be observed, that, though the offence for which the party is committed be supposed, in the *mittimus*, to be of such a nature as requires a capital judgment, yet, if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems that the breaking of the prison on a commitment for it cannot, by this statute, be felony; as the words are, 'except the cause for which he was taken and imprisoned require such a judgment.' And, on the other hand, if the offence which was the cause of the commitment be of such a nature as requires a capital judgment, but be supposed, in the *mittimus*, to be of an inferior degree, it will, as it seems, be felony within the meaning of the statute; since the fact for which he was arrested and committed, does in truth require judgment of life, though the nature or quality of the offence be mistaken in the *mittimus*.[3]

§ 1080. "**A Party attainted is within the Statute.** — A party actually attainted of the crime charged against him, who breaks his prison, is as clearly within the meaning of the statute, as one under an accusation only; though the offence of one already attainted, not requiring any second judgment, is not therefore

[1] 2 Hawk. c. 18, § 14.
[2] 2 Inst. 592; 2 Hawk. c. 18, § 13.
[3] 2 Hawk. c. 18, § 15.

within the precise words of the statute, namely, 'except the cause for which he was taken and imprisoned *require such a judgment*.' But the manifest meaning of the statute is, that the breaking of prison shall not be a capital offence, unless the crime for which the party was *in prison* be also a capital offence: — the makers of the statute could not intend a greater favor to persons actually attainted, and under the condemnation of the law, than to persons under an accusation only.[1]

§ 1081. "**What Force is necessary to constitute a Prison Breaking.** — The next point for consideration is, what shall be said to be a breaking of prison within the meaning of the statute; and the rules upon this subject are, that there must be an actual breaking, or some real force or violence, and not such only as may be implied by construction of law: and, therefore, if without any obstruction a prisoner go out of the prison doors, being opened by the consent or negligence of the jailer, or otherwise escape, without using any kind of force or violence, he is guilty of a misdemeanor only.[2] In a recent case, where one Haswell, who was convicted of horse-stealing, made his escape from the house of correction, by tying two ladders together, and placing them against the wall of the yard; on the top of which wall was a range of bricks placed loose, and without mortar, some of which were thrown down by the prisoner (it was supposed accidentally) in getting over the wall, Mr. Baron Wood doubted, whether there was such force used as to constitute the crime of prison-breaking; or whether it amounted only to an escape; and, the point being reserved, the judges were unanimously of opinion that this was a prison-breaking, and punishable as a common-law felony.[3]

§ 1082. "**The Breaking must be by or with the Privity of the Prisoner.** — Another rule is, that the breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for, if the prison be broken by others without his procurement or consent, and he escape through the breach so made, it seems that he cannot be indicted for the breaking, but only for the escape."[4]

§ 1083. **Cases of Necessity.** — "It is also to be understood, that the breaking must not be from a necessity arising out of an

[1] 2 Hawk. c. 18, § 16.

[2] 1 Hale, 611; 2 Hawk. c. 18, § 9.

[3] Rex *v.* Haswell, Russ. & Ry. 458.

[4] 2 Hawk. c. 18, § 10.





inevitable accident happening without any fault of the prisoner; as where the prison is set on fire by lightning, or otherwise without his privity, and he breaks it open to save his life."[1]

§ 1084. **Imprisonment for Petit Larceny.** — Another proposition in the books is, that, where the imprisonment is for petit larceny,[2] the breach of the prison is not felony.[3] It was held, however, to be felony in New York.[4]

### III. *The Substantive Offence of Rescue.*

§ 1085. **How differs from Prison Breach — from Escape.** — We have already defined this offence.[5] It differs from prison breach only in this, that prison breach is by the prisoner himself, while rescue is by another; both prison breach and rescue bearing a common relation to escape by the prisoner, as the more aggravated forms of one offence. This appears to be the true statement, though there are passages in the books from which somewhat different views may be drawn.

**How the Classification should be.** — We see herein, that the law is not always wise in its classification of crimes; because, if it were, it would make but one offence of the three which stand at the head of this chapter; dividing it into breaking, whether by the prisoner or by a third person, which would be its aggravated form; and into escape and assisting the escape, which would be its milder form.

§ 1086. **Further of Classification.** — The books sometimes speak as though the only higher manifestation of the offence of rescue was prison breach. But, —

**Breaking by Third Person — Prisoner escaping.** — If there should be a case wherein the defendant had delivered from restraint a prisoner who did not concur in the act which freed him, and the prisoner should then take his liberty, clearly it would be rescue in this defendant, but in the prisoner only escape. Such indeed seems to be the doctrine of Hawkins.[6]

§ 1087. **Rescue as Accessorial.** — Moreover, Hawkins says, that,

[1] 2 Inst. 590; 1 Hale, 611. The foregoing extracts are from 1 Gab. Crim. Law, 305–308.

[2] Vol. I. § 679, 680, 935.

[3] 2 Hawk. P. C. Curw. ed. p. 187, § 15.

[4] People *v.* Duell, 3 Johns. 449. As to prison breach under the Massachusetts statute, see Commonwealth *v.* Briggs, 5 Met. 559.

[5] Ante, § 1065.

[6] 2 Hawk. P. C. Curw. ed. p. 186, § 10.

according to the better opinion, a man guilty of rescue cannot "be arraigned for such offence *as for a felony*, until the principal offender be first attainted,"[1] — a rule which plainly does not apply to prison breach. And this is true where the rescuer is prosecuted for an accessorial crime, as before mentioned.[2] If, however, the imprisoned person and the rescuer were acting together, rendering mutual aid, they would be principals in one crime, and neither would be an accessory to the other.[3] Even under the most rigid rules of the common law, any principal can be punished in advance of any other.

§ 1088. **Compared with Escape, again — (Officer or not).** — A doctrine correct in principle is, that a rescue is committed by a person other than an officer, while an escape, of the kind not done by the prisoner himself, is always the act or neglect of an officer.[4] Yet there are intimations in the books, that a mere private individual may be guilty of the latter offence.[5] They can have no foundation in any just legal distinction; because the substantive escape rests, plainly, on the duty of the officer to discharge his official trust. But third persons, who are not officers, may undoubtedly become accessories at the fact to any kind of escape, whether by an officer or by the prisoner himself:[6] in other words, principals in the second degree; and, therefore, punishable in the same manner as the prisoner escaping, or the officer permitting him to escape.[7]

§ 1089. **Must be Exit from Prison.** — "As the party himself," says Hawkins, "seems not to be guilty of felony by breaking the prison, unless he go out of it, so neither is a stranger, unless the prisoner actually go out of the prison."[8] Yet, —

**Attempt.** — Though the act of breaking, with the intent to let the prisoner escape, may not be a technical rescue unless he does escape, it is indictable, nevertheless, as an attempt.[9]

§ 1090. **Felony or Misdemeanor.** — A rescue, where the restraint

[1] 2 Hawk. P. C. Curw. ed. p. 202, § 8. s. p. The State *v.* Cuthbert, T. U. P. Charl. 13.

[2] Ante, § 1068, 1069.

[3] Vol. I. § 648-650, 653.

[4] And see The State *v.* Errickson, 3 Vroom, 421.

[5] 2 Hawk. P. C. Curw. ed. p. 200.

[6] And see People *v.* Rathbun, 21 Wend. 509.

[7] See ante, § 1068, 1069; post, § 1101, note.

[8] 2 Hawk. P. C. Curw. ed. p. 202, § 8.

[9] The State *v.* Murray, 15 Maine, 100. See People *v.* Rathbun, 21 Wend. 509. And see concerning attempts, Vol. I § 723 et seq.





is for felony, is felony; and, where for misdemeanor, it is misdemeanor.[1]

§ 1091. **Mistake of Fact — (Rescue from Private Person).** — It is not an offence to rescue a prisoner from the hands of a private person, unless the one rescuing knows that the prisoner was under arrest for a felony or misdemeanor.[2]

## IV. *The Substantive Offence of Escape.*

§ 1092. **Course of this Sub-title.** — Escape having been defined,[3] we shall first, for reasons already pointed out,[4] look at an extract from Gabbett,[5] with his authorities; then conclude the discussion with such further views as the few decisions in the modern books render practicable.

§ 1093. **"Escape defined and distinguished from Prison Breaking and Rescue.** — The escape of a person arrested upon criminal process, whether effected with or without force, before he is discharged by due course of law, is punishable as an offence against public justice. . . . And it is a clear principle of law, that an indictment will lie not only against the party who gains his liberty before he is legally discharged, but also against the officer by whose default, and from whose legal custody, he has been suffered to escape. It will lie against the party himself, because all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; and therefore whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of the law, is guilty of a high contempt, and punishable with fine and imprisonment.[6]

§ 1094. **"To constitute an Escape there must be an Actual Arrest, and a Legal and Continuing Imprisonment.** — To constitute an escape, it is however necessary that there shall have been an actual arrest; and therefore it has been holden that, if an officer, having a war-

[1] 4 Bl. Com. 131; 2 Hawk. P. C. Curw. ed. p. 202, § 6; Rex *v.* Stokes, 5 Car. & P. 148; Rex *v.* Haswell, Russ. & Ry. 458; Jenk. Cent. 171. And see Anonymous, 2 Salk. 586, Holt, 628; Rex *v.* Vaux, 11 Mod. 287; Rex *v.* Pember, Cas. temp. Hardw. 112; Anonymous, Dalison, 1.

[2] The State *v.* Hilton, 26 Misso. 199.

[3] Ante, § 1065.

[4] Ante, § 1075.

[5] 1 Gab. Crim. Law, 297 et seq.

[6] 2 Hawk. c. 17, § 5; Cro. Car. 210.

rant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.[1] And, in the next place, the arrest must have been for some criminal matter which justifies the imprisonment; for, if the party be arrested for a supposed crime, where no such crime was committed (and the party not indicted for it); or for such a slight suspicion of an actual crime, and by such an irregular *mittimus*, as will neither justify the arrest nor imprisonment, — the officer is not guilty of an escape, by suffering the prisoner to go at large. And Serjeant Hawkins lays it down as a good general rule, that, wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape.[2] But, according to the same learned writer, if the warrant of commitment do plainly and expressly charge the party with treason or felony, and in other respects it be not strictly formal, yet it seems that the jailer suffering an escape is as much punishable as if the warrant were perfectly right; for it would be highly inconvenient to suffer jailers to take advantage of a slip of this kind in commitments; which, being generally made by persons of no great knowledge in the law, cannot be expected to be always agreeable to its forms; and, therefore, if they be good in substance, the public good seems to require that the jailer be as much bound to observe them as if they were never so exactly made.[3] To constitute this offence it is further essential, that the imprisonment shall be continuing at the time of the escape;[4] and such continuance must be grounded on that satisfaction which public justice demands for the crime committed; for, if a prisoner be acquitted and detained only for his fees, it will not be criminal to suffer him to escape, unless it be a part of the punishment; as where he is condemned to imprisonment for a certain time, and also until he pays his fees, as in such case he is not merely detained as a debtor.[5]

[1] 2 Hawk. c. 19, § 1.
[2] 2 Hawk. c. 19, § 2.
[3] 2 Hawk. c. 19, § 24.
[4] And see Rex *v.* Kelly, 1 Crawf. & Dix C. C. 203.
[5] Hawkins (vol. 2, c. 19, § 4) says, that this is to be intended where the fees are due to others as well as the jailer; for otherwise the jailer would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release





§ 1095. "**Negligent and Voluntary Escapes distinguished.** — As to the distinction between voluntary and negligent escapes, there can be no doubt but that, wherever an officer who hath the custody of a prisoner charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged with.[1] And it seems to have been the opinion of Lord Hale, that, in some cases, an officer may be adjudged guilty of a voluntary escape who had no intent to save the prisoner, but meant only to give him a liberty which by law he had no right to give;[2] but Serjeant Hawkins dissents from this opinion, and observes, that there are some cases wherein an officer has been found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of prison on a promise to return, or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen), and yet only adjudged guilty of a negligent escape; and he infers, that the judgment to be made of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted, &c.[3] But, in general, a negligent escape, as contradistinguished from a voluntary escape, is where the party arrested or imprisoned escapes against the will of him in whose custody or prison he is lawfully detained, and is not retaken before he has been lost sight of.[4]

§ 1096. "**An Escape implies the Negligence or Connivance of the Officer.** — And so strongly does the law incline to presume negligence in the officer where an escape occurs, that, though such prisoner should break jail, yet it seems that it will be deemed a negligent escape in the jailer; because it will be attributed to a want of due vigilance in the jailer or his officers:[5] and, upon the same principle, if a person in custody on a criminal charge, suddenly, and without the assent of the constable, kill, hang, or drown

[1] 2 Hawk. c. 19, § 10.
[2] See post, § 1104.
[3] 2 Hawk. c. 19, § 10.
[4] Dalt. c. 159, § 6.
[5] 1 Hale, 601.

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[5] 1 Hale, 601.

himself, this is also considered as a negligent escape in the constable.[1] And not only is the jailer responsible for the security of the jail, and the safe custody of the prisoners, but a neglect in not keeping jails in a proper state of repair, by those who are liable to the burden of repairing them, appears, in many instances, to have been treated as an indictable offence, as tending to the great hinderance and obstruction of justice.[2] It seems, however, that the presumption of default in the jailer, in cases of escape, may be rebutted by satisfactory proof that all due vigilance was used, and that the jail was so constructed as to have been considered, by persons of competent judgment, a place of perfect security.[3]

§ 1097. "**What Officers are criminally responsible for the Escape of Prisoners.** — Whoever *de facto* occupies the office of jailer is liable to answer for a negligent escape; and it is in no way material whether or not his title to the office be legal; for the ill consequence to the public is the same in either case, and there seems to be no reason that a wrongful officer should have a greater favor than a rightful one.[4] It seems, however, that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody; and will not lie against the mere servants of such officers.[5] As to the case of a sheriff, he is as much liable to answer for an escape suffered by the jailer or bailiff (who are his officers or ministers) as if he had actually suffered it himself. But though a sheriff may be indicted for the offence of his jailer or bailiff (whether the escape was voluntary or negligent), and fined and imprisoned in respect thereof, yet where the jailer voluntarily suffers a felon to escape, it shall be felony only in the jailer, who was *immediately* intrusted with the custody, and not in the sheriff. And so a principal jailer is only *finable* for a voluntary escape suffered by his deputy; for no one shall suffer capitally for the crime of another; and, if a deputy jailer be not sufficient to answer (the fine) for a negligent escape, his principal must answer for him. And in the case of a justice of peace, if he bails a person not bailable by law, it is a negligent escape, for which he is finable at common law, and

[1] Dalt. c. 159, § 5.

[2] See the precedents 3 Chit. C. L. 668, 669; 4 Wentw. 363.

[3] 1 Russ. C. L. 371.

[4] 2 Hawk. c. 19, § 23. And see ante, § 392; Commonwealth *v.* Connell, 3 Grat. 587.

[5] 3 Burn (Chitty's) *Escape*, p. 5.





by the justices of jail delivery; and the jailer is in such case excused.[1]

§ 1098. "**Persons suffering Escapes, how proceeded against.** — Persons charged with having suffered escapes may be proceeded against by indictment or information; and, in some cases, the proceeding is a summary one in the nature of an attachment: as where, persons being present in a court of record are committed to prison by such court, if the keeper of the jail (who is bound to have them always ready when the court shall demand them) shall fail to produce them, the court will adjudge him guilty without further inquiry, unless he have some reasonable excuse; as that the prison was set on fire, or broken open by enemies, &c.; but, as to other prisoners who are not so committed, the jailer or other person who has them in custody is not punishable for their escape (except in some special cases) until it be presented.

§ 1099. "**When a Voluntary Escape amounts to Felony.** — We have already observed, that a voluntary escape[2] amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; and this will be the case, whether the person escaping were actually committed to some jail, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime and not indicted;[3] for the law communicates the crime of the offender to the person allowing him to escape. . . . And no escape will amount to a felony, unless the cause for which the party was committed were actually such at the time of the escape: and, therefore, if a jailer suffer one to escape who is committed for having given a dangerous wound to another who afterwards dies of such wound, yet he is not guilty of felony; for that the offence of the prisoner was but a trespass at the time of the escape; and though by a fiction of law it be afterwards, for some purposes, esteemed a felony from the time of the giving the wound, yet it shall be so construed in respect of those only who were privy to the wound.[4] It is also laid down, that a person who has suffered another to escape cannot be arraigned for such escape, as for felony, until the principal be attainted; on the ground that he is only punish-

[1] 1 Hale, 596; 2 Hawk. c. 19, § 19. See Vol. I. § 218–221, 316.

[2] That is, an escape knowingly suffered by an officer, and as against the officer.

[3] 2 Hawk. c. 19, § 22.

[4] 2 Hawk. c. 19, § 25

able in this degree as an accessory to the felony; and no accessory ought to be tried until the principal be attainted; but that he may be indicted and tried for a misprision or misdemeanor before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape.[1]

§ 1100. "**Punishment of Negligent Escapes.** — Whenever a person is found guilty, upon an indictment or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king; which is most properly to be called a fine: and it seems that, by the common law, the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds; and, for suffering such escape of a person indicted and not attainted, was five pounds;[2] but if the person escaping were neither attainted nor indicted, that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper: and if the party had twice escaped, it seems that the penalties above mentioned were of course to be doubled; yet that the forfeiture was to be no greater for suffering a prisoner committed on two several accusations to escape than if he had been committed but on one.[3] It is said that one voluntary escape amounts to a forfeiture of a jailer's office; and that if a jailer suffer many negligent escapes, he may also be ousted by the court.[4] And whereas persons indicted of felonies, after removing the indictments before the king, and yielding themselves to the marshals of the King's Bench, had been, incontinently, let to bail by the marshals, the 5 Edw. 3, c. 8, E. & I. enacts, that, if any such prisoner be found wandering out of prison, by bail or without bail, the marshal, being found guilty, shall have a year's imprisonment, and be ransomed at the king's will.

§ 1101. "**Escapes, when suffered by Private Persons, how punished.**[5] — A private person may be also guilty of an escape; and

[1] 2 Hawk. c. 19, § 26. But see the clause of 7 Geo. 4, c. 64, § 11, English, and 9 Geo. 4, c. 54, § 25, Irish. The doctrine of Mr. Gabbett's text on this last point cannot be correct; for a voluntary escape suffered by an officer must correspond to a prison breach by the prisoner. See ante, § 1070, 1071, 1074, 1085-1087.

[2] 2 Hawk. c. 19, § 31, 33; Hale, Sum. 113; Staundf. P. C. 35. But see 1 Hale, 604.

[3] 2 Hawk. c. 19, § 33.

[4] 2 Hawk. c. 19, § 30.

[5] See ante, § 1088.





is, in general, punishable in like manner as a jailer or other officer: and the general rule is, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he has discharged himself by delivering him over to some other who by law ought to have the custody of him.[1] And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person who receives him, and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted [with] him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought at his peril to have taken care of him.[2] But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer (as the sheriff or his bailiff, or a constable), from whose custody the prisoner escapes, such private person will not be chargeable. He cannot, however, excuse himself from the escape by alleging that he delivered the prisoner over to an officer, without showing to whom in particular, by name, he so delivered him, that the court may certainly know who is answerable.[3] And, as to the manner in which a private person is punishable for an escape, it is laid down that if it be voluntary, he is punishable in the same manner as an officer; and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court.[4]

§ 1102. "**Aiding Escapes, or Attempts to escape, how punished.** — As to aiding prisoners in escaping, or attempting to escape, it seems to be clear, that, by the common law, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which

[1] 2 Hawk. c. 20, § 1; 1 Hale, 595.

[2] 2 Hawk. c. 20, § 2.

[3] 2 Hawk. c. 20, § 5.

[4] 2 Hawk. c. 20, § 6. There are many cases in which private persons, by the conduct mentioned in Mr. Gabbett's text, become accessories after the fact in the felony of the prisoner who is permitted to escape. But unless they are such accessories, or unless their act amounts to a rescue, they, having no legal duty to perform like that incumbent on officers of justice, clearly cannot be more heavily punished than can the prisoner whom they aid and abet at the fact be punished for the same escape. In this view they are punishable, but not as officers are; they are rather punishable as a woman is who aids a man in committing a rape See ante, § 1088.

he is condemned, is sufficient to make the person giving such assistance an accessory after the fact to such felony: and the aiding and assisting any prisoner to escape out of prison, by whatever means it may be effected, or whatever be the nature of the offence with which such prisoner is charged, is an offence of a mischievous nature, and indictable as an obstruction to the course of justice."[1]

§ 1103. **Escape by Prisoner himself — (Misdemeanor).** — An escape by a prisoner himself is no more than a misdemeanor, whatever be the crime for which he is imprisoned. But this doctrine does not include prison breach;[2] it refers only to his walking away where there are no obstructions to prevent, as, says Hawkins, "if, without any obstruction, a prisoner go out of the prison doors, being opened by the consent or negligence of the jailer, or otherwise escape without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony."[3]

§ 1104. **Consent of Keeper.** — The keeper of a prison, or other officer having a prisoner in custody, has no right to consent to an escape; and, if he does, the escaping prisoner is no less guilty.[4] Thus, —

**Prisoner having Liberties given.** — In Connecticut, where an imprisoned convict, by permission of his keeper, went about the land connected with the jail; went to market and brought thence provisions for the inmates; cooked for them in the kitchen of the dwelling-house attached to it; went to the adjacent barn, and there fed and milked the cow; and from the barn, without the jailer's knowledge, departed, — he was held, by the majority of the court, to be guilty of a criminal escape. Said the judge: "It was long ago decided by the Court of King's Bench in England, that, although a prisoner departs from prison with the keeper's license, yet it is an offence as well punishable in the prisoner as in the keeper.[5] That doctrine has never since been overruled, but often recognized as law."[6] Church, J., who dissented, was

[1] 2 Hawk. c. 29, § 26. The foregoing quotation is from 1 Gab. Crim. Law, p. 297–303.

[2] Ante, § 1070, 1076.

[3] 2 Hawk. P. C. Curw. ed. p. 186, § 9; 4 Bl. Com. 129, 130. Such an escape is prison breach in Scotland. Hutton's Case, 1 Swinton, 497.

[4] Commonwealth *v.* Sheriff, 1 Grant, Pa. 187. See Gano *v.* Hall, 42 N. Y. 67.

[5] Referring to Hobert's Case, Cro. Car. 209.

[6] Referring to The State *v.* Doud, 7 Conn. 384.





of opinion, that the prisoner should not be convicted unless, when he went to the barn, he meant to escape, and of this the jury should judge.[1]

**Keeper granting Liberties.** — A sentence to a prison means to the four walls of it; and, if the keeper permits a prisoner to go at large, he commits thereby the crime of escape;[2] unless, indeed, the statute authorizes, as it sometimes does, a range outside.[3] So a constable of the night is guilty of an indictable misdemeanor if he suffers to escape a street-walker, delivered to his custody by one of the nightly watch.[4]

§ 1105. **Felony or Misdemeanor.** — This has already been in part considered.[5] In cases not coming within a different rule, escape is felony or misdemeanor according as that for which the escaping prisoner was confined is the one or the other; and, at the common law, it is to receive the same punishment.[6]

§ 1106. **English and American Statutes.** — There are, on this subject, some English statutes later than 1 Edw. 2, stat. 2, *de frangentibus prisonam;*[7] and there are some American ones; but they seem not to require any special observation here.[8]

[1] Riley *v.* The State, 16 Conn. 47, majority opinion by Waite, J.

[2] Luckey *v.* The State, 14 Texas, 400; Smith *v.* Commonwealth, 9 Smith, Pa. 320; Nall *v.* The State, 34 Ala. 262. And see White *v.* The State, 13 Texas, 133.

[3] Schoettgen *v.* Wilson, 48 Misso. 253; Commonwealth *v.* Curley, 101 Mass. 24.

[4] Rex *v.* Bootie, 2 Bur. 864; s. c. nom. Rex *v.* Booty, 2 Keny. 575. See Brock *v.* King, 2 Jones, N. C. 302.

[5] Ante, § 1102, 1103.

[6] Weaver *v.* Commonwealth, 5 Casey, 445. **Punishment.** — And see, as to the punishment, Stevens *v.* Commonwealth, 4 Met. 360; Oleson *v.* The State, 20 Wis. 58; The State *v.* Doud, 7 Conn. 384.

[7] Ante, § 1070.

[8] See Rex *v.* Shaw, Russ. & Ry. 526; Rex *v.* Walker, 1 Leach, 4th ed. 97; Rex *v.* Greeniff, 1 Leach, 4th ed. 363; Reg *v.* Payne, Law Rep. 1 C. C. 27, 10 Cox C. C. 231; Kyle *v.* The State, 10 Ala. 236; Hughes *v.* The State, 1 Eng. 131; The State *v.* Bates, 23 Iowa, 96; Commonwealth *v.* Mitchell, 3 Bush, 30; Barthelow *v.* The State, 26 Texas, 175; Kavanaugh *v.* The State, 41 Ala. 399; People *v.* Tompkins, 9 Johns. 70.

For PROFANE SWEARING, see BLASPHEMY AND PROFANENESS.
PUBLIC MEETINGS, see DISTURBING MEETINGS.
PUBLIC SHOWS, see Vol. I. § 1145 et seq.
PUBLIC WAY, see WAY.

# CHAPTER XXXVI.

## RAPE.[1]

§ 1107. Introduction.
1108–1115. History and Definition.
1116, 1117. The Man who commits the Offence.
1118, 1119. The Woman on whom it is committed.
1120, 1121. Kind of Force necessary.
1122–1126. Consent which prevents Act from being Rape.
1127–1132. Carnal Knowledge necessary.
1133. Carnal Abuse of Children.
1134–1136. Remaining and Connected Questions.

§ 1107. **How the Chapter divided.** — We shall consider, I. History and Definition of the Offence; II. The Man who commits the Offence; III. The Woman on whom it is committed; IV. The Kind of Force necessary; V. The Consent which will prevent the Act from being Rape; VI. The Carnal Knowledge necessary; VII. Carnal Abuse of Children; VIII. Remaining and Connected Questions.

### I. *History and Definition of the Offence.*

§ 1108. **Whether Statutory, or at Common Law.** — Rape is generally treated of, in England, as a statutory offence. In a certain sense it is so there; and, in another, it is there an offence at the common law. In our own country, it is, at least, an offence at the common law in the sense that the English statutes were accepted by the settlers as of common law force with them.

**How in England.** — Hale classes this offence among "felonies by act of Parliament." He proceeds: "Rape was anciently a felony, as appears by the laws of Adelstane mentioned by Bracton, lib. 3, and was punished by loss of life. But in process of

[1] For matter relating to this title, see Vol. I. § 259, 261, 373, 554, 746, 762, 788, 795, 808, 935. For the pleading, practice, and evidence, see Crim. Proced. II. § 947 et seq. And see, as to both law and procedure, Stat. Crimes, § 212, 318, 478–494, 505, 511, 643.





time that punishment seemed too hard; but, the truth is, a severe punishment succeeded in the place thereof, namely, castration, and the loss of the eyes, as appears by Bracton (who wrote in the time of Henry III.), lib. 3, c. 28. But then, though the offender was convict at the king's suit, the woman that was ravished, if single, might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereunto."[1]

§ 1109. **Stat. Westm. 1.** — The same authority informs us, that thus stood the law when Stat. Westm. 1 (3 Edw. 1, c. 13, A. D. 1275) was enacted, as follows: "The king prohibiteth, that none do ravish, nor take away by force, any maiden within age [that is, under twelve years[2]], neither by her own consent nor without, nor any wife or maiden of full age, nor any other woman against her will; and, if any do, at his suit that will sue within forty days the king shall do common right; and, if none commence his suit within forty days, the king shall sue; and such as be found culpable shall have two years' imprisonment, and after shall fine at the king's pleasure; and, if they have not whereof, they shall be punished by longer imprisonment, according as the trespass[3] requireth."

§ 1110. **How construed.** — Says Lord Hale: "This statute gives a punishment by imprisonment and ransom only, if attaint at the king's suit, and takes away castration and putting out of eyes; but, it seems, as to the suit of the party, if commenced within forty days, it alters not the punishment before."[4]

§ 1111. **Stat. Westm. 2.** — Thus we are at a period in the history of this offence when it was simply a misdemeanor punishable by fine and imprisonment. We are next to inquire what were the limits assigned it by the act which raised it to felony; that is, how it was therein defined. We have the answer in that part[5] of Stat. Westm. 2 (13 Edw. 1), c. 34, A. D. 1285, which is as follows: "If a man from henceforth do ravish a woman married, maid, or other, where she did not consent neither before nor after, he

[1] 1 Hale P. C. 626, 627.

[2] 2 Inst. 181, where Lord Coke says: "Here it shall be taken for her age of consent; that is, twelve years old, for that is her age of consent to marriage." And see 1 Bishop Mar. & Div. § 148 et seq.

[3] As to the meaning of the word trespass, see Vol. I. § 625.

[4] 1 Hale P. C. 627.

[5] For the entire statute, see ante, § 874, note.

shall have judgment of life and of member. [This clause refers particularly to the now obsolete semi-civil proceeding by appeal.[1]] 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 [that is, of life and member [2]] if he be attainted at the king's suit, and there the king shall have the suit." [3]

§ 1112. **Stat. Eliz.** — By 18 Eliz. c. 7, § 4, it is, "for plain declaration of law," enacted, "that, if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy."

§ 1113. **How Rape defined.** — The effect of these several statutes will be more or less considered in subsequent parts of this chapter. But what is material in this connection is to consider what, according to these statutes, is the true definition of the felony of Rape. The following is, in substance, what is found in most of the books: [4] —

**Common Form of Definition.** — Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly and against her will.[5]

[1] 2 Inst. 433, 434.

[2] The meaning of which is, that "he shall be attainted of felony." 2 Inst. 434.

[3] Says Lord Coke: "Hereby it appeareth, that the first clause is to be intended of the suit of the party, this branch providing expressly for the suit of the king;" that is, for proceeding by indictment or information. 2 Inst. 434.

[4] And see Vol. I. § 554.

[5] **East.** — "Rape is the unlawful carnal knowledge of a woman by force and against her will." 1 East P. C. 434.

**Lord Coke**, in the 2d Institute, presents the following from the Mirror: "Rape is when a man hath carnal knowledge of a woman by force, and against her will." 2 Inst. 180. In the 3d Institute: "Rape is felony by the common law [the reader has seen, in the text, that this is not quite accurate], declared by Parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will [see as to children between the ages of ten and twelve, post, § 1133], or of a woman-child under the age of ten years with her will, or against her will, and the offender shall not have the benefit of clergy." 3 Inst. 60.

**Lord Hale**, referring to the place, 3d Inst. just cited, defines: "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will." 1 Hale P. C. 628.

**Hawkins.** — "It seems that rape is an offence in having unlawful and carnal knowledge of a woman by force and against her will." 1 Hawk. P. C. Curw. ed. p. 122, § 2.

**Blackstone.** — Rape is "the carnal knowledge of a woman forcibly and against her will." 4 Bl. Com. 210.

**Russell.** — "Rape has been defined to be the having unlawful and carnal





§ 1114. **Definition compared with Statute.** — This definition is, in the main, in accord with the statute — namely, Westm. 2 [1] — which had created and given limits to the felony. But, as to the mental condition of the woman at the time when the ravishment is committed, it departs from the statutory terms. Where the statute has "did not consent," it is in this definition "against her will;" and, under various circumstances, there is a great difference between the act done "against the will" of the woman, and the same act, simply, "where," to use the exact words of the statute, "she did not consent." [2]

§ 1115. **Corrected Form of the Definition.** — We shall have no occasion to inquire for the source of the old error. It may have arisen from copying definitions which existed anterior to the statute of Westm. 2, or from the mere accident of overlooking its exact words or not distinguishing them from the differing ones of the earlier statute of Westm. 1.[3] If the former supposition is correct, then the statute, enlarging the common law, should have led writers to enlarge the definition; if the latter, still the error remains obvious. Let us, therefore, bring the definition to the statutory terms; thus, — Rape is a ravishment by a man, of a woman, with force where she does not consent. Still the old form may be well enough if corrected at the point where, in sense, it departs from the statute; thus, — Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly, where she does not consent. And late English authorities sustain this correction of the definition.[4] If the carnal abuse of female chil-

knowledge of a woman by force and against her will." 1 Russ. Crimes, 3d Eng. ed. 675.

[1] Ante, § 1111.

[2] In Commonwealth v. Burke, 105 Mass. 376, the learned judge who delivered the opinion of the court undertakes to show, that the two expressions, "against her will" and "where she did not consent," mean exactly the same thing. This is a simple question of the significance of terms in the English language. To the minds of some people, there is a marked difference; if, to others, the expressions appear identical in meaning, the opinion is one not unlawful for them to hold. The question does not seem to require, or admit of, argument.

[3] Ante, § 1109.

[4] Reg. v. Camplin, 1 Den. C. C. 89, 1 Cox C. C. 220, 1 Car. & K. 746; Reg. v. Ryan, 2 Cox C. C. 115; Reg. v. Fletcher, Bell C. C. 63, 71, 8 Cox C. C. 131. In the last-cited case, Lord Campbell, C. J. said: "The question is, what is the real definition of the crime of rape, whether it is the ravishing of a woman *against her will*, or *without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. Camplin's Case seems to me really to settle what the proper definition is, and the decision in that case rests upon the authority of an act of Parliament. The statute of Westminster 2, c. 34, defines the crime to be where 'a man do ravish a woman, married, maid, or

dren is to be deemed rape, — and the question is merely one of name, — then the definition needs enlarging to meet also this case.

## II. *The Man who commits the Offence.*

§ 1116. **Physical Capacity.** — Rape can be committed only where there is a physical capability in the direct perpetrator.[1] But we shall see, by and by,[2] that one not capable may become guilty of it, as a principal offender, by abetting another who is.

§ 1117. **Under Fourteen years.** — According to the English doctrine, a boy under fourteen is conclusively presumed to be incapable, whatever be the real fact.[3] It is so, also, in North Carolina.[4] The reason is, that puberty does not often develop itself at an earlier period; and so this rule works justice in most cases, while its conclusive nature prevents those indecent disclosures which tend to the corruption of public virtue.[5] In this country generally, the rule has been little discussed; but some courts have held, that it is to be received only to establish a *prima facie* case, which may be overthrown by actual testimony.[6] We can

other, *where she did not consent, neither before nor after.*' [As we have seen, ante, § 1111, 1114, this statement is not precisely accurate. The consent given afterward would avail the ravisher on a proceeding by appeal, but not on an indictment.] We are bound by that definition, and it was adopted in Camplin's Case, acted upon in Ryan's Case, and subsequently in a case before my brother Willes. It would be monstrous to say, that, if a drunken woman returning from market lay down and fell asleep by the roadside, and a man, by force, had connection with her, whilst she was in a state of insensibility, and incapable of giving consent, he would not be guilty of rape." [Held not to be rape, in People *v.* Quin, 50 Barb. 128; but held to be rape in Commonwealth *v.* Burke, 105 Mass. 376.] And Martin, B., observed: "I am quite content to take the definition of rape as we find it in the statute." See also, post, § 1120–1124 and notes. Now, as this statute is a part of the common law of our States, the definition needs rectifying here as much as it did in England. **Massachusetts View.** — In Commonwealth *v.* Burke, supra, Gray, J., who delivered the opinion of the court (see, ante, § 1114, note), was of opinion that "where she did not consent," in Westm. 2, meant the same thing as "against her will" in Westm. 1. The effect of the opinion is, that the amended definition is correct for those who can see a difference in the two forms of expression; while yet, in truth, "against her will" does not mean *against*, but *without* her will.

[1] Nugent *v.* The State, 18 Ala. 521.

[2] Post, § 1153.

[3] Vol. I. § 373, 554, 746; Reg. *v.* Philips, 8 Car. & P. 736; Reg. *v.* Jordan, 9 Car. & P. 118; Reg. *v.* Brimilow, 9 Car. & P. 366, 2 Moody, 122; Rex *v.* Groombridge, 7 Car. & P. 582.

[4] The State *v.* Sam, Winston No. 1, 300. The point of the case was, that the boy cannot be guilty of the attempt. And see Vol. I. § 746.

[5] See 1 Bishop Mar. & Div. § 146.

[6] Vol. I. § 373; Williams *v.* The State, 14 Ohio, 222; Hiltabiddle *v.* The State, 35 Ohio State, 52; People *v.* Croucher, 2 Wheeler Crim. Cas. 42; People *v.* Randolph, 2 Parker C. C. 174. See The State *v.* Handy, 4 Harring. Del. 566.





hardly suppose the instances of physical capability exhibited at an earlier age than fourteen years, in a boy, sufficiently numerous to call for the abolition of a technical rule so well adapted as this to prevent those particular statements of indecent things which wear away the nice sense of the refined, placed, by the Maker, in the human mind as one of the protections of its virtue.

## III. *The Woman on whom the Offence is committed.*

§ 1118. **Age.** — Woman's physical nature is earlier developed than man's. Therefore legal puberty is fixed in her at twelve, where in him it is fourteen.[1] But puberty of the female is not essential in rape; though, at the common law, the question was a little in doubt when she was under ten. Plainly enough, however, the girl is never too young, provided this offence is in fact committed on her.[2]

§ 1119. **Unchaste Woman.** — This offence may be committed as well on a woman unchaste, or a common prostitute, as on any other female.[3] In matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented.[4]

**Wife.** — But a husband does not become guilty of rape by forcing his wife to his own embraces; though, if he is present abetting another man who forces her, he does.[5]

## IV. *The Kind of Force necessary.*

§ 1120. **Question complicated with that of Consent.** — The question of the force necessary complicates itself with that of the consent which prevents the act from being rape. Thus, —

[1] 1 Bishop Mar. & Div. § 143–146.

[2] 1 Hale P. C. 630, 631; Rex *v.* Brasier, 1 Leach, 4th ed. 199, 1 East P. C. 435, 1 Gab. Crim. Law, 833, 4 Bl. Com. 214; Reg. *v.* Neale, 1 Car. & K. 591, 1 Den. C. C. 36; 1 Hawk. P. C. Curw. ed. p. 122, § 4; Hays *v.* People, 1 Hill, N. Y. 351; Stephen *v.* The State, 11 Ga. 225; Reg. *v.* Rearden, 4 Fost. & F. 76. See Stat. Crimes, § 211; Sydney *v.* The State, 3 Humph. 478. Under the differing forms of our statutes, this question may be the one way or the other according to their terms. And see Fizell *v.* The State, 25 Wis. 364; Blackburn *v.* The State, 22 Ohio State, 102; Stat. Crimes, § 487.

[3] 1 Hawk. P. C. Curw. ed. p. 122, § 7; Pleasant *v.* The State, 15 Ark. 624; Rex *v.* Barker, 3 Car. & P. 589; Pleasant *v.* The State, 8 Eng. 360; Wright *v.* The State, 4 Humph. 194; Higgins *v.* People, 1 Hun, 307.

[4] Crim. Proced. II. § 965, 966; Woods *v.* People, 55 N. Y. 515; Reg. *v.* Hallett, 9 Car. & P. 748.

[5] 1 Hale P. C. 629. See ante, § 1116, 1117; post, § 1135.

**Fraud.** — We shall see, under our next sub-title, that, if a consent to the connection is given, it protects the man on a charge of rape, even if he obtained it by some fraud. Now, were the law not so, but were the consent thus procured void *as consent*, still, where it exists, there is probably not the force which is an ingredient in rape.[1] Yet, —

**Force involved in the Act.** — Wherever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the *force* which the law demands as an element of the crime. For example, —

§ 1121. **Connection with Idiotic Woman.** — A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape in the man.[2] But, if she is so idiotic as to be absolutely incapable of consent or dissent, and the man does not suppose he has her consent, the connection with her is rape.[3] If more of force were required than is involved in the carnal act, this could not be so. Again, —

**Woman Unconscious from Drink.** — "If," said the learned judge to the jury in one case, the woman "was in a state of unconsciousness at the time the connection took place, whether it was produced by the act of the prisoner or by any act of her own, any one having connection with her would be guilty of rape. If she was in a state of unconsciousness, the law assumes that the connection took place without her consent, and the prisoner is guilty of the crime charged."[4] An illustration of this occurs where she is so drunk as not to know what is done.[5]

## V. *The Consent which will prevent the Act from being Rape.*

§ 1122. **Condition of the Authorities.** — Most of the cases on this head arose when it was supposed the carnal act must be "against the will" of the woman, instead of being simply "without her consent."[6] The consequence has been, that, in some instances,

[1] And see Kelly v. Commonwealth, 1 Grant, Pa. 484; Lewis v. The State, 30 Ala. 54; People v. Royal, 53 Cal. 62; McNair v. The State, 53 Ala. 453; The State v. Riggs, 1 Houst. Crim. 120; and various cases cited post, § 1122–1124.

[2] Post, § 1123; Reg. v. Fletcher, Law Rep. 1 C. C. 39; Bloodworth v. The State, 6 Baxter, 614; The State v. Atherton, 50 Iowa, 189, 191.

[3] The State v. Tarr, 28 Iowa, 397; Reg. v. Barratt, Law Rep. 2 C. C. 81, 12 Cox C. C. 498; Reg. v. Fletcher, Bell C. C. 63; Reg. v. Connolly, 26 U. C. Q. B. 317. See post, § 1122–1124 and note; Reg. v. Ryan, 2 Cox C. C. 115.

[4] Reg. v. Ryan, supra.

[5] Commonwealth v. Burke, 105 Mass. 376; ante, § 1115, note.

[6] Ante, § 1114, 1115.





the act has been held not to be rape where the result would have been the other way if the amended definition had been in the minds of the judges. But we cannot absolutely reject all these cases as authorities. Moreover, in many of our States, the statutes define rape in the terms of the old common-law definition.

**Will overcome by Fraud.** — Where the woman consents in fact to the connection, it is not rape in the man, though he obtained her consent by persuasion or even by fraud.[1] Thus, —

**Personating Husband.** — A man who gets into bed with a married woman, meaning she shall believe him to be her husband, does not commit rape when, so mistaking, she admits him to connection.[2] But if she is asleep, and he knows it, she can give no consent; then a connection with her, thus unconscious, will be rape, within a principle above stated.[3] Again, —

**Trick of Medical Practitioner.** — If a medical practitioner represents to a woman that a copulation is necessary as a part of his treatment of her case, and she consents through faith in his representation, the act is not rape. Though her consent was obtained by fraud, still she consented.[4] But if she consents to a surgical operation, and he has connection while she thinks he is performing it, this is rape.[5]

**Woman's Will opposed.** — It is plain, that, in the ordinary case, where the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. And though she objects verbally, if she makes no outcry and no resistance, she by her conduct consents, and the carnal act is not rape in the man.[6] Some of the cases, both old and modern, are quite too favorable to the ravishers of female virtue, and ought not to

[1] The State v. Burgdorf, 53 Misso. 65; Clark v. The State, 30 Texas, 448; Walter v. People, 50 Barb. 144.

[2] Reg. v. Clarke, Dears. 397, 18 Jur. 1059, 29 Eng. L. & Eq. 542; Rex v. Jackson, Russ. & Ry. 487; Reg. v. Williams, 8 Car. & P. 286; Reg. v. Saunders, 8 Car. & P. 265; Reg. v. Barrow, Law Rep. 1 C. C. 156 (questioned in Reg. v. Flattery, infra); Reg. v. Francis, 13 U. C. Q. B. 116; Wyatt v. The State, 2 Swan, Tenn. 394; Lewis v. The State, 30 Ala. 54. And see Sullivant v. The State, 3 Eng. 400; Commonwealth v. Fields, 4 Leigh, 648; People v. Bartow, 1 Wheeler Crim. Cas. 378. But see The State v. Shepard, 7 Conn. 54; Anonymous, 1 Wheeler Crim. Cas. 381, note. As to the Scotch law, see Fraser's Case, Arkley, 329; Reg. v. Sweenie, 8 Cox C. C. 223.

[3] Ante, § 1121; Reg. v. Mayers, 12 Cox C. C. 311, 4 Eng. Rep. 559; Reg. v. Young, 14 Cox C. C. 114. This distinction has not always been in the mind of the court, as see cases in last note, and Reg. v. Lock, Law Rep. 2 C. C. 10, 12 Cox C. C. 244.

[4] Don Moran v. People, 25 Mich. 356; Walter v. People, 50 Barb. 144. See ante, § 36.

[5] Reg. v. Flattery, 2 Q. B. D. 410.

[6] Reynolds v. People, 41 How. Pr. 179.

be followed, on this question of resistance. Thus, in New York, where a man had locked his servant girl of fourteen in a barn and had connection with her, a verdict against him for rape was set aside because the judge at the trial had refused to charge the jury, that, to convict him, they must be satisfied she "resisted the defendant to the extent of her ability," though he did tell them that "the act must have been done by force and against her will and resistance." Said the learned judge in the Court of Appeals: "The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking resistance must be dangerous or absolutely useless, or there must be dread or fear of death."[1] In various other cases it is stated, in pretty distinct terms, that the will of the woman must oppose the act, and that any inclination favoring it is fatal to the prosecution.[2] The latter terms are, under the facts of the ordinary case, not repugnant to good doctrine; and the strong, New York view might not be very objectionable in a barbarous age; but, in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched yet not to preserve her virtue, on pain of being otherwise deemed a prostitute instead of the victim of an outrage, — is asking too much of virtue and giving too much to vice. The *text of the law*, we have seen,[3] and, it is believed, the better judicial doctrine, requires only that the case shall be one in which the woman "did not consent." Her resistance must not be a mere pretence, but in good faith.[4]

[1] People v. Dohring, 59 N. Y. 374, 382, opinion by Folger, J. An instruction, that the woman must make what seemed to her every available endeavor to prevent the ravishment would be unobjectionable in legal principle. If she did not in fact consent, she would do this. But, if her refusal to consent was honest, and she was in "dead earnest" therein, she might resort to remonstrance, to promises, or to a variety of other means, rather than to an expenditure of physical strength which she knew would be useless.

[2] Reg. v. Hallett, 9 Car. & P. 748. The State v. Murphy, 6 Ala. 765; Pleasant v. The State, 8 Eng. 360; Woodin v. People, 1 Parker C. C. 464; People v. Morrison, 1 Parker C. C. 625, 643; Pollard v. The State, 2 Iowa, 567. And see Charles v. The State, 6 Eng. 389; Strang v. People, 24 Mich. 1; Don Moran v. People, 25 Mich. 356.

[3] Ante, § 1111; Reg. v. Jones, 4 Law Times, N. S. 154; Commonwealth v. McDonald, 110 Mass. 405; The State v. Cross, 12 Iowa, 66; Crockett v. The State, 49 Ga. 185; The State v. Shields. 45 Conn. 256.

[4] Reg. v. Rudland, 4 Fost. & F. 495.





**Consent during Part of Act.** — There are intimations, in some of the cases, that a consent given during any part of the intercourse will prevent the act being rape.[1] If it is given after the assault, but before the penetration, it will;[2] but, on principle, when the offence has been made complete by penetration,[3] no remission by the woman or consent from her, however quickly following, can avail the man.[4] And the statute of Westm. 2 is express, that the liability to punishment shall remain "although she consent after."[5]

§ 1123. **Woman non compos.** — We have seen,[6] that, if the woman is *non compos*, and so neglects to oppose because she has no intelligent will, the intercourse with her, when there is nothing which may be called for the purpose a consent, is rape.[7] But even such a woman, unless indeed the idiocy is very profound, may consent.[8] And, if the capacity to consent exists, it must in some way appear that she did not consent, or the connection with her will not be rape.[9] But this will depend much on the circumstances of the case, and the want of consent may sufficiently appear from the nature and extent of the idiocy itself.[10] As to what is a consent, by a woman of weak mind or idiotic, it must, on principle, in her case the same as in that of any other female, be a yielding of the will, and not of the mere animal instincts. But there is probably no decision to this exact proposition; and some cases indicate that the concurrence of the woman's mere animal passions with the act will prevent its being rape.[11]

§ 1124. **Young Girl.** — If the girl is very young,[12] and of mind

[1] Commonwealth v. McDonald, supra; Brown v. People, 36 Mich. 203; Whittaker v. The State, 50 Wis. 518. See Reg. v. Page, 2 Cox C. C. 133.

[2] Reg. v. Hallett, 9 Car. & P. 748.

[3] Post, § 1132.

[4] Vol. I. § 733.

[5] Ante, § 1111. And see post, § 1125, note.

[6] Ante, § 1121.

[7] Vol. I. § 261; Rex v. Ryan, 2 Cox C. C. 115; The State v. Crow, 10 West. Law Jour. 501.

[8] Reg. v. Pressy, 10 Cox C. C. 635; Reg. v. Ryan, 2 Cox C. C. 115.

[9] Reg. v. Fletcher, Law Rep. 1 C. C. 39.

[10] The State v. Tarr, 28 Iowa, 397; Reg. v. Connolly, 26 U. C. Q. B. 317; Reg. v. Barratt, Law Rep. 2 C. C. 81, 12 Cox C. C. 498; Reg. v. Ryan, 2 Cox C. C. 115. And see Reg. v. Pressy, 10 Cox C. C. 635.

[11] Reg. v. Fletcher, Law Rep. 1 C. C. 39; Reg. v. Fletcher, Bell C. C. 63; Reg. v. Connolly, 26 U. C. Q. B. 317; McNamara's Case (Scotch), Arkley, 521, 524. And see Reg. v. Ryan, supra. Where, in Michigan, the woman was of mature years, of good size and strength, yet in a state of *dementia*, — not idiotic, but approaching toward it, — and the man used no fraud or force, it was adjudged not rape. Crosswell v. People, 13 Mich. 427. See The State v. Atherton, 50 Iowa, 189.

[12] Not now speaking of carnal abuse, post, § 1133.

not enlightened on the question, this consideration will lead the court and jury to demand less clear opposition than in the case of an older and intelligent female, or even lead them to convict where there was no apparent opposition.[1] So, —

**Making Drunk.** — Where the prisoner had given a girl, thirteen years of age, liquor to excite her; and, on her becoming drunk, had violated her while she was insensible to what he did; he was held to have committed rape.[2] But, we have seen,[3] this case does not extend to the verge of the law; it would be equally rape though the female had been of mature years, and the defendant had not administered the liquor.

§ 1125. **Consent through Fear.** — A consent induced by fear of personal violence is no consent; and, though a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape by having the unlawful intercourse.[4]

§ 1126. **Ether or Chloroform.** — The subject of rape has given rise to many questions of medical jurisprudence, not within the scope of these volumes. One of these relates to the effects of ether and of chloroform, as deadening the sensibilities, impairing the will, incapacitating the woman truly to note and afterward describe what is done, and the like. Of cases of considerable interest on this question, there are two, — the one, where ether was charged to have been administered, occurring in Pennsylvania, and the other, an Ohio case, where the alleged agent was chloroform.[5] It is doubtless sound legal doctrine, and is not denied, that, as laid down by Lawrence, J., in the Ohio case,[6] where a woman has chloroform, for example, given her by a man to bring about with her a carnal intercourse to which she would

[1] Reg. *v.* Case, Temp. & M. 318, 1 Den. C. C. 580, 4 New Sess. Cas. 347, 14 Jur. 489, 19 Law J. N. S. M. C. 174, 1 Eng. L. & Eq. 544; Stephen *v.* The State, 11 Ga. 225; The State *v.* Cross, 12 Iowa, 66; Reg. *v.* Jones, 4 Law Times, N. S. 154. And see Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* Lock. Law Rep. 2 C. C. 10, 12 Cox C. C. 244; Reg. *v.* Page, 2 Cox C. C. 133.

[2] Reg. *v.* Camplin, 1 Den. C. C. 89, 1 Car. & K. 746.

[3] Ante, § 1121.

[4] Pleasant *v.* The State, 8 Eng. 860; Reg. *v.* Hallett, 9 Car. & P. 748; Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* Jones, 4 Law Times, N. S. 154. In Wright *v.* The State, 4 Humph. 194, the court held the following instruction to the jury to be correct in all its parts: "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterward forced against her will."

[5] Whart. & Stil. Med. Jur. 2d ed. § 443, 459.

[6] The State *v.* Green, Ib. § 459.





not otherwise consent, then, if she "had the capacity to hear, feel, and remember, and a capacity to speak and forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the *will* faculty, or the *judgment* and *reflective* faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape."

## VI. *The Carnal Knowledge necessary.*

§ 1127. **In Brief.** — There must be penetration; there need not be emission. But the following explanations are desirable.

**Emission — (Sodomy and Rape).** — The question, in rape, has been decided differently by different tribunals. According to Lord Hale, this ingredient is not necessary;[1] and there appears to have been no contrary adjudication at the time he wrote. But Lord Coke had said, that emission is essential in sodomy, so decided "in the case of Stafford, who was attainted in the King's Bench and executed;"[2] adding: "In rape there ought to be penetration and emission of seed."[3] But, though writers generally assume that rape and sodomy stand on common ground, reflection may suggest differences. In a subsequent case, the English judges were divided on the question, whether emission is essential even in sodomy.[4]

§ 1128. **Early English Decisions on Emission.** — Mr. East has collected, and stated at length, the authorities on this question down to the time he wrote; and we need not restate them.[5] His conclusion appears just, that, until Hill's Case was decided, in 1781,

[1] 1 Hale P. C. 628.

[2] Stafford's Case, cited 12 Co. 37.

[3] Case of Buggery, 12 Co. 36, 37. In 3 Inst. 59, Lord Coke states, that penetration is necessary both in sodomy and rape; emission alone not being enough. He makes no mention of emission as essential. Therefore some have inferred that he did not himself yield to the doctrine indicated in the report.

[4] Duffin's Case, 1 East P. C. 437. And see, as to sodomy, post, § 1131.

[5] 1 East P. C. 436–440.

long after the settlement of this country, the current of authority was clear against its necessity.[1]

**Common Law of our States.** — This being so, the common law of these States must, on general principles, be understood to be the same; while the later English cases cannot bind us.

**Later English Decisions.** — In Hill's Case, decided, we have seen, in 1781, the majority of the English judges held emission to be indispensable, "on the ground, that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence. The others denied that definition; and also observed, that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party."[2]

**The Proof.** — According to all opinions, penetration is *prima facie* proof of emission;[3] but the cases in which the question of emission has arisen, have developed circumstances rebutting this presumption.

§ 1129. **Stat. 9 Geo. 4.** — In 1828, legislation interfered in England, providing by 9 Geo. 4, c. 31, § 18, that, "whereas, upon trials for the crimes of buggery and rape, and of carnally abusing girls, &c., offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes," "it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."[4]

**How construed.** — It was once doubted, whether the effect of this statute was not to make penetration simply *prima facie* evidence;[5] but the construction was afterward settled, that it renders emissions unnecessary to the constitution of the offence.[6]

[1] So, in the Scotch case of Robertson, 1 Swinton, 93, 104, stated post, § 1130, Lord Moncreiff said: "When we look at the English law, there is no doubt that there was a period when a majority of the judges gave a contrary decision [that is, decided emission to be necessary]; some of the ablest men that ever sat on the bench dissenting. But when we look back to Coke and Hale, we see that the old law of England was different. And the new act restores it to what it was in their times."

[2] Hill's Case, 1 East P. C. 439; s. P. Rex *v.* Burrows, Russ. & Ry. 519.

[3] 1 East P. C. 440.

[4] 1 Russ. Crimes, 3d Eng. ed. 682. The present statute, however, is 24 & 25 Vict. c. 100, § 63, but to the same effect.

[5] That it did not, see Rex *v.* Russell, 1 Moody & R. 122.

[6] Rex *v.* Cox, 1 Moody, 337, 5 Car. & P. 297; Brook's Case, 2 Lewin, 267; Reg. *v.* Allen, 9 Car. & P. 31; Rex *v.* Jennings, 4 Car. & P. 249, 1 Lewin, 93; Rex *v.* Cozins, 6 Car. & P. 351.





§ 1130. **Scotch Law as to Emission.** — This question arising in Scotland, the judges, with great force of reasoning, held unanimously that penetration alone is enough. Said Lord Mackenzie: "What is the essence of the crime? Dishonor by violence — not the danger of impregnation, as to which no question is ever asked. Is a woman dishonored or not, by a forcible entry of her person? This has never been doubted in any country of Europe." And further on he adds: "I cannot see why there must be emission, if impregnation is not necessary. It adds nothing to the wickedness, — or to the injury."[1]

**Impregnation.** — That the danger of offspring did not enter into the old idea of this crime appears in the exploded notion,[2] that impregnation shows such consent by the woman as prevents the intercourse from being rape.[3]

§ 1131. **American Doctrine as to Emission.** — We have seen, that, in principle, emission should be deemed unnecessary in our States; because such was the law of England when, as colonies, the older ones were settled.[4] But we have not many decisions on the question. One case leaves it doubtful;[5] one holds emission unnecessary in sodomy;[6] while another decides, that it is unnecessary in rape.[7] In North Carolina, emission was adjudged to be essential in the offence of carnally abusing a girl under the age of ten years;[8] but a statute promptly corrected the error, and made this ingredient unimportant.[9] The Ohio court, on little or no consideration of the question, held emission to be necessary,[10] and afterward affirmed the doctrine on the ground of *stare decisis;* but intimated, that, if the question were new, the decision would be the other way.[11]

§ 1132. **Penetration.** — Penetration, the authorities agree, is necessary. Even emission, without it, is not enough.[12] In the Scotch case, above referred to, Lord Meadowbank said: "I am of opinion, that, to constitute the crime of rape, it is sufficient

[1] Robertson's Case, 1 Swinton, 93.

[2] 1 Hawk. P. C. Curw. ed. p. 122, § 8.

[3] And see the reasoning in Pennsylvania *v.* Sullivan, Addison, 143.

[4] Ante, § 1128.

[5] The State *v.* Le Blanc, 1 Tread. 354.

[6] Commonwealth *v.* Thomas, 1 Va. Cas. 307.

[7] Pennsylvania *v.* Sullivan, Addison, 143.

[8] The State *v.* Gray, 8 Jones, N. C 170.

[9] The State *v.* Hargrave, 65 N. C. 466.

[10] Williams *v.* The State, 14 Ohio, 222.

[11] Blackburn *v.* The State, 22 Ohio State, 102; Noble *v.* The State, 22 Ohio State, 541.

[12] 3 Inst. 60; 1 Hale P. C. 628; Audley's Case, 3 Howell St. Tr. 401, 403; Fitzpatrick's Case, 3 Howell St. Tr. 419.

that there be *full* penetration; for in grown women it is necessary that the penetration be *full* — otherwise it is *conatus*."[1] But the English and American courts hold, that nothing more than *res in re*, without regard to extent, is required.[2] Even, according to the doctrine now settled in England, the fact of the hymen not being ruptured is only presumptive evidence against penetration; which may be sufficient without.[3]

VII. *Carnal Abuse of Children.*

§ 1133. **Old English Statutes.** — There are English statutes, the early ones — as 18 Eliz. c. 7, § 4, already cited[4] — being probably common law in this country,[5] making the carnal knowledge of female children under ten years, though consenting, felony;[6] and, by the older statute of Westm. 1 (3 Edw. 1), c. 13, also given in a previous section,[7] such carnal knowledge is an indictable misdemeanor where the consenting girl is "within age," which is twelve years.[8] Thus, —

**Common-law Doctrine in our States.** — Though we have almost no direct decisions to guide us, yet, according to established principles, the common law of this country makes the unlawful carnal knowledge of a girl who consents, while between ten and twelve years old, indictable as misdemeanor; below ten, indictable probably as felony; if not, then indictable as misdemeanor.

**Statutes in our States.** — The whole subject has been regulated by legislation in many, perhaps all, of the States.[9] It is discussed in "Statutory Crimes."[10]

[1] Robertson's Case, 1 Swinton, 93.

[2] 3 Inst. 59; The State *v.* Le Blanc, 1 Tread. 354; Reg. *v.* Lines, 1 Car. & K. 393; The State *v.* Hargrave, 65 N. C. 466; Stat. Crimes, § 494.

[3] Reg. *v.* Hughes, 2 Moody, 190, 9 Car. & P. 752 (overruling Rex *v.* Gammon, 5 Car. & P. 321); Rex *v.* Russen, 1 East P. C. 438; Reg. *v.* Jordan, 9 Car. & P. 118; Reg. *v.* McRue, 8 Car. & P. 641.

[4] Ante, § 1112.

[5] And see The State *v.* Dick, 2 Murph. 388; Stephen *v.* The State, 11 Ga. 225.

[6] 1 Hale P. C. 630; 1 Russ. Crimes, 3d Eng. ed. 693; Reg. *v.* Day, 9 Car. & P. 722.

[7] Ante, § 1109.

[8] 1 Hale P. C. 626, 631; 1 East P. C. 460. And see Reg. *v.* Lines, 1 Car. & K. 393; People *v.* McDonald, 9 Mich. 150.

[9] See Commonwealth *v.* Bennet, 2 Va. Cas. 235; Commonwealth *v.* Fields, 4 Leigh, 648; Dennis *v.* The State, 5 Pike, 230. See Vol. I. § 37, note; post, § 1136.

[10] Stat. Crimes, § 480, 483-494.





VIII. *Remaining and Connected Questions.*

§ 1134. **Felony or Misdemeanor.** — We have seen,[1] that anciently in England rape was felony, then misdemeanor. Finally, it was made again felony by Westm. 2, c. 34; and this statute became common law in the colonies.[2] Therefore it is felony under the unwritten law of our States. In Missouri, it is, or was, misdemeanor; it was so even when, during slavery, it was committed by a slave, — punished, in the slave, by castration.[3]

§ 1135. **Persons assisting.** — Where rape is felony, and *a fortiori* where it is misdemeanor, if there are persons present abetting the direct perpetrator, they are principals with him in guilt.[4] Consequently, —

**Boy — Woman — Husband.** — A boy under the age of puberty, or a woman, or a husband in respect of his own wife, may become guilty as principal in the second degree of this offence of rape.[5]

§ 1136. **Attempts.** — An attempt to commit a rape is a common-law misdemeanor, on principles explained in the preceding volume.[6] The offender's intent must be specific, to proceed to violence if necessary,[7] or otherwise do what will be rape in law.[8] He must have attained the age of puberty, or be deemed in law physically capable.[9] How far he must proceed in the execution of his intent was somewhat considered in the preceding

[1] Ante, § 1108 et seq.

[2] 1 Hale P. C. 627; 3 Inst. 60; 1 East P. C. 435; Mears *v.* Commonwealth, 2 Grant, Pa. 385. As to North Carolina, see The State *v.* Dick, 2 Murph. 388.

[3] Nathan *v.* The State, 8 Misso. 631. In North Carolina, the attempt by a slave on a white woman was punished capitally. Sydney *v.* The State, 3 Humph. 478. See, as to Arkansas, Dennis *v.* The State, 5 Pike, 230.

[4] Vol. I. § 607 et seq.

[5] 1 East P. C. 446; 1 Hawk. P. C. Curw. ed. p. 123, § 10; Audley's Case, 3 Howell St. Tr. 401; Reg. *v.* Crisham, Car. & M. 187; Rex *v.* Folkes, 1 Moody, 354; Rex *v.* Gray, 7 Car. & P. 164.

[6] Vol. I. § 723 et seq.

[7] Vol. I. § 729, 733; Rex *v.* Lloyd, 7 Car. & P. 318; Commonwealth *v.* Fields, 4 Leigh, 648; Pefferling *v.* The State, 40 Texas, 486; Reg. *v.* Dungey, 4 Fost. & F. 99, 102; Outlaw *v.* The State, 35 Texas, 481; Commonwealth *v.* Merrill, 14 Gray, 415; Joice *v.* The State, 53 Ga. 50; Taylor *v.* The State, 50 Ga. 79; Carter *v.* The State, 35 Ga. 263. And see Alexander *v.* Blodgett, 44 Vt. 476.

[8] For example, if one simply gets into bed with a woman intending to have carnal connection with her while asleep and unconscious, this is an attempt to commit rape; because the having of the connection in these circumstances would be rape. Reg. *v.* Mayers, 12 Cox C. C. 311, 4 Eng. Rep. 559. Ante, § 1122.

[9] Vol. I. § 373, 746. See Charles *v.* The State, 6 Eng. 389.

volume.[1] A plain case occurs where the law requires emission to constitute the offence; then, if there is penetration and no emission, it is an assault with intent to commit rape.[2] In New York, one decoying a girl under ten, and standing before her indecently exposed, was held to be guilty of assault with intent to commit rape.[3]

[1] Vol. I. § 733, 762. And see Kelly *v.* Commonwealth, 1 Grant, Pa. 484.
[2] Blackburn *v.* The State, 22 Ohio State, 102.
[3] Hays *v.* People, 1 Hill, N. Y. 351, opinion by Cowen, J. And see People *v.* McDonald, 9 Mich. 150. Some difficulties occur, on questions of this sort, where a girl so young consents. See Stat. Crimes, § 491–493.





# CHAPTER XXXVII.

## RECEIVING STOLEN GOODS.[1]

§ 1137. **How anciently.** — The receiver of stolen goods was anciently guilty of only a misprision or a compounding of felony; but afterward, under an old English statute, he became an accessory after the fact to the thief.[2]

**Modern Legislation.** — Later legislation, in England and in our States, has made this offence a substantive one.[3]

**Embezzled — False Pretences.** — Some of the statutes embrace in their terms, not only stolen goods, but goods embezzled,[4] obtained by false pretences,[5] and the like.[6]

§ 1138. *The Intent:* —

**Know the Goods stolen.** — The person receiving the stolen goods must, as the statutes declare, know them to have been stolen.[7] The knowledge of the theft need not be such as one acquires who witnesses it; but, in the words of Bramwell, B., "it is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner believe" the goods had been stolen.[8]

**Personal Gain.** — It is not required, to complete the offence,

[1] For matter relating to this title, see Vol. I. § 567, 694, 699, 785, 789, 974, 976. For the pleading, practice, and evidence, see Crim. Proced. II. § 980 et seq. And see Stat. Crimes, § 345, 878, note.
[2] Vol. I. § 699.
[3] Turner *v.* The State, 40 Ala. 21; The State *v.* Minton, Phillips, 196; Shriedley *v.* The State, 23 Ohio State, 130; Bieber *v.* The State, 45 Ga. 569; People *v.* Shepardson, 48 Cal. 189; Sellers *v.* The State, 49 Ala. 357; Barber *v.* The State, 34 Ala. 213.
[4] Post, § 1141; People *v.* Stein, 1 Parker C. C. 202.
[5] Reg. *v.* Goldsmith, Law Rep. 2 C. C. 74, 12 Cox C. C. 479; Reg. *v.* Wilson, 2 Moody, 52.
[6] And see Reg. *v.* Silversides, 3 Q. B. 406; Hadley *v.* Perks, Law Rep. 1 Q. B. 444.
[7] Huggins *v.* The State, 41 Ala. 393; Rex *v.* Densley, 6 Car. & P. 399; People *v.* Levison, 16 Cal. 98; Copperman *v.* People, 56 N. Y. 591; Andrews *v.* People, 60 Ill. 354.
[8] Reg. *v.* White, 1 Fost. & F. 665. And see Reg. *v.* Wood, 1 Fost. & F. 497; Reg. *v.* Adams, 1 Fost. & F. 86.

that the receiver should act from motives of personal gain: if his object is to aid the thief, this is enough.[1] Nor is it material whether or not a consideration passes between the thief and receiver.[2] Still the intent must be, in some way, fraudulent or corrupt.[3] But —

**Reward from Owner.** — It is enough if the object is to get from the owner a reward for restoring the goods to him.[4]

§ 1139. *The Act of Receiving:* —

**Under Control of Receiver.** — The leading doctrine here is, that the goods must come under the control of the receiver; yet the control need not be manual.[5] For instance, —

**Hands of one under Command.** — If they are in the hands of a person whom he can command in respect of them, they may be deemed to have been received.[6] And where one allowed a trunk of stolen goods to be sent on board a vessel in which he had taken passage, he was held to have received them.[7] But, —

**Personal Possession.** — If the alleged receiver has no control over the person in whose custody the goods are, they must, to complete the offence, pass into his personal possession.[8] And, —

**Receiving.** — Besides possession, there must be something which may be deemed a receiving of the goods.[9]

§ 1140. *The Property as having been Stolen:* —

**Must have been stolen.** — It is merely a truism, that there can

[1] Rex v. Davis, 6 Car. & P. 177; Rex v. Richardson, 6 Car. & P. 335; Commonwealth v. Bean, 117 Mass. 141; The State v. Rushing, 69 N. C. 29.

[2] Hopkins v. People, 12 Wend. 76.

[3] People v. Johnson, 1 Parker C. C. 564; Rice v. The State, 8 Heisk. 215; People v. Avila, 43 Cal. 196; Gandolpho v. The State, 33 Ind. 439; The State v. St. Clair, 17 Iowa, 149; Reg. v. Pascoe, 4 New Sess. Cas. 66, 2 Car. & K. 927.

[4] People v. Wiley, 3 Hill, N. Y. 194. As to receiving, in Michigan, see People v. Reynolds, 2 Mich. 422.

[5] Huggins v. The State, 41 Ala. 393; Reg. v. Miller, 6 Cox C. C. 353.

[6] Reg. v. Smith, Dears. 494, 6 Cox C. C. 554, 33 Eng. L. & Eq. 531, 24 Law J. N. S. M. C. 135, 1 Jur. N. S. 575, where it appears that even they need not have passed out of the hands of the thief, provided the receiver controls them in his hands.

[7] The State v. Scovel, 1 Mill, 274. And see Reg. v. Wiley, 2 Den. C. C. 87, 1 Eng. L. & Eq. 567.

[8] Reg. v. Hill, 3 New Sess. Cas. 648, 1 Den. C. C. 453, Temp. & M. 150, 13 Jur. 545, 18 Law J. N. S. M. C. 199.

[9] Jones v. The State, 14 Ind. 346. And see Faunce v. People, 51 Ill. 311; Reg. v. Woodward, Leigh & C. 122, 9 Cox C. C. 95; The State v. St. Clair, 17 Iowa, 149; Upton v. The State, 5 Iowa, 465.





be no receiving of stolen goods which have not been stolen.[1] For example, —

**Principal of Second Degree.** — If the person accused is an aider at the fact[2] of the original larceny, — in other words, a principal of the second degree, — he cannot be holden as a receiver.[3] And, —

**Remain stolen.** — To render this offence of receiving possible, the goods must retain their character of stolen at the time of the receiving. Thus, —

**After Possession by Owner.** — If the goods have been recovered by the owner, then have passed back to the thief otherwise than by a fresh larceny, they are not now in the hands of the latter as stolen. So that a receiving of them from him who was the original thief does not, however wickedly meant, constitute the offence of receiving stolen goods.[4] Again, —

**Received from Thief, not from Receiver.** — In like manner, if the goods have been transferred from the thief to a guilty receiver, it is but a truism, that the latter is a receiver, not a thief. In his hands, therefore, and as to him, the goods are not stolen. Their character, in his hands, is derived from his offence, not the offence of the wrong-doer who had them before him. So that one who receives them from him, however wickedly, is not guilty of receiving stolen goods.[5] This doctrine should not be misunderstood; for there may be various receivings from intermediate innocent agents and the like, which are not, within this rule, receivings from the receiver, but rather from the thief.[6]

[1] Reg. v. Debruiel, 11 Cox C. C. 207; The State v. Taylor, 25 Iowa, 273; Commonwealth v. White, 123 Mass. 430; Reg. v. Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397; Hey v. Commonwealth, 32 Grat. 946.

[2] See Vol. I. § 648–654.

[3] Reg. v. Gruncell, 9 Car. & P. 365; Reg. v. Smith, Dears. 494, 33 Eng. L. & Eq. 531; Reg. v. Perkins, 2 Den. C. C. 459, 5 Cox C. C. 554; The State v. Smith, 37 Misso. 58; Reg. v. Coggins, 12 Cox C. C. 517, 6 Eng. Rep. 342. See Conner v. The State, 25 Ga. 515. See also Reg. v. Kelly, 2 Car. & K. 379. As to receiving goods from a slave, in Virginia, see Smith v. Commonwealth, 10 Leigh, 695.

[4] Reg. v. Dolan, Dears. 436, 1 Jour. N. S. 72, 29 Eng. L. & Eq. 533, overruling Reg. v. Lyons, Car. & M. 217; Reg. v. Hancock, 14 Cox C. C. 119. And see Reg. v. Schmidt, Law Rep. 1 C. C. 15; United States v. De Bare, 6 Bis. 358.

[5] The State v. Ives, 13 Ire. 338; United States v. De Bare, 6 Bis. 358, 362. And see Cassells v. The State, 4 Yerg. 149; Wright v. The State, 5 Yerg. 154; Reg v. Dring, Dears. & B. 329; Reg. v. Reardon, Law Rep. 1 C. C. 31, 10 Cox C. C. 241.

[6] Commonwealth v. White, 123 Mass. 430; Rex v. Missingham, 1 Moody, 257.

**Possible Exceptions and Qualifications.** — It is impossible that a work like this should contain nothing which may not be contrary to some statute in some State. And there may be States under whose statutes a receiver from a receiver would be indictable as a receiver also. There are

**Thief's Consent.** — A taking from the thief without his consent is not within this statute,[1] but is an original larceny.[2]

**Original Larceny Statutory.** — Though the thing stolen was not the subject of larceny at the common law, if it was made such by a statute, still the receiving of it is a receiving of stolen goods.[3]

§ 1141. *Embezzled Goods:* —

**Embezzlement a Separate Offence.** — If, as under statutory forms existing in some States, embezzlement is an offence distinct from larceny, and the statute of receiving has merely the words "stolen goods," plainly, in principle, the receiving of embezzled goods is not within the latter prohibition.[4] But —

**Embezzlement as Larceny.** — We have seen,[5] that, by the terms of most of the statutes against embezzlement, the offender "shall be deemed to have feloniously stolen" the thing embezzled. If, therefore, one guiltily receives the embezzled goods, he is within statutes against receiving "stolen" goods.[6] Again, —

**Robbery and Burglary.** — Goods taken by robbery and burglary are stolen goods; so, in reason, these statutes apply to them.[7]

§ 1142. *Husband and Wife:* —

**Joint receiving.** — It is possible for husband and wife to be guilty of a joint receiving; but they will not be, under all circumstances in which they would be jointly liable if single.[8] One case even apparently holds, that married persons cannot jointly commit this offence; but, if it does, it may be deemed to be over-

States in which a receiver is a statutory accessory after the fact. Commonwealth v. Finn, 108 Mass. 466, 468; Minor v. The State, 58 Ga. 551. Compare with Vol. I. § 699, 700. He is nowhere such at common law. Now, at common law, there can be an accessory before the fact to an accessory before, and an accessory after to an accessory before. Vol. I. § 677, 698. But whether there can be an accessory after to an accessory after I should not, on my present examinations, like to say. If there can, it does not necessarily follow, yet possibly under some forms of the statute it may, that a receiver from a receiver is, by the statute, like the receiver from the thief, an accessory after. And there may be other interesting questions on this subject, under particular statutes.

1 Reg. v. Wade, 1 Car. & K. 739.

2 Ante, § 781.

3 Reg. v. Deane, 10 U. C. Q. B. 464; post, § 1141, note.

4 Ante, § 1137, 1140.

5 Ante, § 327.

6 Reg. v. Frampton, Dears. & B. 585; ante, § 327. In England, later legislation (24 & 25 Vict. c. 96, § 91) has expressly placed goods embezzled and otherwise feloniously obtained on the same ground with stolen goods in respect of this offence. See, as to this, Reg. v. Smith, Law Rep. 1 C. C. 266. As said in the last section, the statutes against receiving include statutory larcenies. And see Reg. v. Craddock, 2 Den. C. C. 31; ante, § 761; Stat. Crimes, § 139, 140.

7 And see People v. Shepardson, 48 Cal. 189; Shriedley v. The State, 23 Ohio State, 130; Reg. v. Wardroper, Bell C. C. 249, 8 Cox C. C. 284.

8 Reg. v. Wardroper, Bell C. C. 249, 8 Cox C. C. 284.





ruled.[1] And it is lacking in some of the elements[2] which would render it a complete authority for this proposition.[3] According to general principles, as explained in the first volume,[4] proof of a mere joint receiving, and no more, would be inadequate to convict the wife, while still it would justify a conviction of the husband. But if the evidence went further and showed affirmatively, that the wife, being the more active one, was in no way influenced by the husband, plainly, in principle, she might be convicted jointly with him. Moreover, since a wife may commit larceny separately from her husband, he may guiltily receive the stolen goods from her.[5] But she cannot commit the offence of a receiver by receiving from him.[6] So it has been adjudged; at least, the facts must be very strong to make her guilty.

**Receiving from Wife.** — Since a wife cannot commit larceny of her husband's goods,[7] a third person cannot become a guilty receiver from her;[8] though, as we have seen,[9] in some circumstances his act will amount to a larceny by him.

§ 1142 *a*. *Larcenies abroad:* —

**Not within the Statutes.** — The statutes of receiving do not extend to larcenies committed abroad,[10] except where their terms are express to this effect.[11] But —

**Subsequent Theft at Home.** — Where, by statute or by the judicial rulings on the common law, it is a domestic larceny to bring into the State with felonious intent goods stolen abroad,[12] then, after they have been thus stolen also at home, they are within the general provisions against receiving.[13]

1 By the case last cited.

2 See Bishop First Book, § 393.

3 Reg. v. Matthews, 1 Den. C. C. 596; s. c. nom. Reg. v. Mathews, 1 Eng. L. & Eq. 549.

4 Vol. I. § 359, 362, 363.

5 Reg. v. McAthey, Leigh & C. 250; Reg. v. Dring, Dears. & B. 329; Reg. v. Woodward, Leigh & C. 122, 9 Cox C. C. 95.

6 Reg. v. Brooks, Dears. 184, 14 Eng. L. & Eq. 580; Reg. v. Wardroper, Bell C. C. 249, 8 Cox C. C. 284.

7 Ante, § 872.

8 Reg. v. Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397.

9 Ante, § 873, 874.

10 Reg. v. Debruiel, 11 Cox C. C. 207.

11 People v. Goldberg, 39 Mich. 545.

12 Vol. I. § 137-142.

13 Commonwealth v. Andrews, 2 Mass. 14; Commonwealth v. White, 123 Mass. 430.

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For RELIGIOUS WORSHIP, see DISTURBING MEETINGS.
RESCUE, see PRISON BREACH, &c.
RESISTING OFFICER, see OBSTRUCTING JUSTICE AND GOVERNMENT

# CHAPTER XXXVIII.

## RIOT.[1]

§ 1143. Introduction.
1144–1146. The Persons committing the Act.
1147–1151. The Nature of the Act.
1152. The Intent.
1153–1155. Remaining and Connected Questions.

§ 1143. **How defined.** — A riot is such disorderly conduct, in three or more persons assembled and actually accomplishing an object, as is calculated to terrify others.[2]

[1] For matter relating to this title, see Vol. I. § 422, 534, 537, 540, 632, 658, 795. See this volume, AFFRAY; ROUT; UNLAWFUL ASSEMBLY. For the pleading, practice, and evidence, see Crim. Proced. II. § 992 et seq. And see Stat. Crimes, § 539–542.

[2] Blackstone's definition is in Vol. I. § 534. Other definitions are: —

**Hawkins.** — "A riot seems to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." 1 Hawk. P. C. Curw. ed. p. 513, § 1. And see The State *v.* Cole, 2 McCord, 117, 119; The State *v.* Connolly, 3 Rich. 337.

**Lord Coke.** — Riot "in the common law signifieth when three or more do any unlawful act, as to beat any man, or to hurt him in his park, chase, or warren, or to enter or take possession of another man's land, or to cut or destroy his corn, grass, or other profit, &c." 3 Inst. 176.

**Russell** — speaking of riots, routs, and unlawful assemblies, says: "The distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make *a motion to execute*; and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute*." 1 Russ. Crimes, 3d Eng. ed. 266. He adopts, however, Hawkins's definition of riot, deeming it substantially correct.

**By Statute in Indiana.** — "If three or more persons shall actually do an unlawful act of violence, either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot." The State *v.* Scaggs, 6 Blackf. 37; Bankus *v.* The State, 4 Ind. 114. In the latter case, the defendants had been parties to what was called a "charivari," or mock serenade, and it was held that they were rightly convicted of riot. Perkins, J., observed: "A great noise in the night-time, made by the human voice, or by blowing a trumpet, is a nuisance to those near whom it is made. The making of such a noise,





**How the Chapter divided.** — We shall consider, I. The Persons committing the Act; II. The Nature of the Act; III. The Intent; IV. Remaining and Connected Questions.

### I. *The Persons committing the Act.*

§ 1144. **How Many.** — A riot requires the concurrence of three or more persons.[1] If two perform any act, however tumultuous, their offence is not riot.[2] By statutes in Illinois[3] and Georgia,[4] however, two are sufficient. And during slavery, two free white men and a negro slave might, under common-law rules, jointly become guilty of riot.[5]

§ 1145. **Wife.** — Though the wife of a conspirator cannot be counted as one of the needful two in conspiring,[6] it does not exactly follow that she may not be one of the required three in riot. The question does not appear to be decided.

§ 1146. **Inactive Persons encouraging Active Ones.** — Perhaps there are cases in which what is done by one of three persons is enough to make him partaker of their guilt,[7] while yet his activity is not such as to constitute him one of the necessary three in a riot; so that, if there had been three active ones, the four would all be rioters in law, while, for the want of the fourth, all escape. A doctrine like this, where two of the three were inactive, seems to

therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is, by the statute of 1843, a riot." p. 116. See also Sloan *v.* The State, 9 Ind. 565; Hardebeck *v.* The State, 10 Ind. 459.

**By Statute in Illinois.** — Similar to Indiana. Dougherty *v.* People, 4 Scam. 179. "In our criminal code, a riot is defined to be the doing of an unlawful act by two or more persons with force or violence against the person or property of another, with or without a common cause of quarrel, or even do a lawful act in a violent and tumultuous manner." R. S. c. 30, § 117. Breese, J., in Bell *v.* Mallory, 61 Ill. 167, 168.

**By Statute in Georgia.** — Similar to Illinois. It is where "two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner." Rachels *v.* The State, 51 Ga. 374; Davenport *v.* The State, 38 Ga. 184; Reed Ga. Crim. Law, 341.

[1] See post, § 1146; Commonwealth *v.* Gibney, 2 Allen, 150.

[2] Vol. I. § 534; Turpin *v.* The State, 4 Blackf. 72; Reg. *v.* Ellis, Holt, 636; The State *v.* Allison, 3 Yerg. 428; Rex *v.* Scott, 3 Bur. 1262; Rex *v.* Sudbury, 12 Mod. 262; Commonwealth *v.* Edwards, 1 Ashm. 46.

[3] Dougherty *v.* People, 4 Scam. 179; Bell *v.* Mallory, 61 Ill. 167.

[4] Rachels *v.* The State, 51 Ga. 374.

[5] The State *v.* Jackson, 1 Speers, 13; The State *v.* Thackam, 1 Bay, 358; The State *v.* Calder, 2 McCord, 462.

[6] Ante, § 187.

[7] Post, § 1153.

have been maintained.[1] But, in Maine, the court decided, that, if two persons do the physical mischief while a third is present abetting them, the offence may amount to a riot.[2]

### II. *The Nature of the Act.*

§ 1147. **Apprehension of Danger.** — The leading doctrine under this sub-title is, that the act must be calculated to create apprehension of danger in the minds of persons other than the rioters. Therefore, —

**Beating One.** — Where three or more innocently assemble, and some of them fall upon one of the company, doing no more than simply this, what they do is not a riot.[3]

**"Terror of People."** — Whether the indictment should allege that the thing done was to the terror of the people, is a question not for this volume.[4] But the Massachusetts court held, that, if it charges an assembling "with force and arms," and acts of violence committed by the rioters, the further allegation of terror is unnecessary. And Parker, J., spoke approvingly of Lord Holt's "distinction founded in good sense;" namely, "that, in indictments for that species of riots which consist in going about armed, &c., without committing any act, the words aforesaid are necessary; because the offence consists in terrifying the public; but, in those riots in which an unlawful act is *committed*, the words are useless."[5] But this proposition only gives force to the general doctrine, that the gist of the offence is the terror created in persons pursuing their lawful callings.

**Private Enterprise.** — It is said, in some of the books, that the enterprise of the rioters must be of a private nature, in distinction from a public;[6] but this doctrine cannot be maintained. For example, —

[1] Scott *v.* United States, Morris, 142. And see Hardebeck *v.* The State, 10 Ind. 459.

[2] The State *v.* Straw, 33 Maine, 554.

[3] Reg. *v.* Soley, 2 Salk. 594, 595; Anonymous, 6 Mod. 43. See, under the Georgia statute, Rachels *v.* The State, 51 Ga. 374. And see Newby *v.* Territory, 1 Oregon, 163; The State *v.* Kempf, 26 Misso. 429.

[4] Crim. Proced. II. § 997.

[5] Commonwealth *v.* Runnels, 10 Mass. 518, 520, referring to Reg. *v.* Soley, 11 Mod. 117. And see Rex *v.* Hughes, 4 Car. & P. 373; Rex *v.* Cox 4 Car. & P 538.

[6] The State *v.* Brooks 1 Hill, S. C. 361; The State *v.* Cole, 2 McCord, 117. Hawkins says: "It seems agreed, that the injury or grievance complained of and intended to be revenged or remedied by such an assembly must relate to some private quarrel only; as the enclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons no way concerning the public; for wherever the intention of such an assembly is to redress public grievances, as to pull down all enclosures in general, or to reform religion, or to remove evil counsellors from the king, &c., if they attempt with force to execute such their intentions, they are, in the eye of the law, guilty of levying war against the king, and consequently of high treason." 1 Hawk. P. C. Curw. ed. p. 515, § 6. **Treason — Riots less than.** — That there can be, in this country, riots of the general sort alluded to in the latter part of this quotation, not amounting to treason, is plain in principle; nor can the proposition as one of American law be overthrown by authority from the English books. Russell, after stating, in his text, this doctrine of Hawkins, adds, in a note: "But see, in 2 Chit. Crim. Law, 494, an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking about footballs on Shrove Tuesday at Kingston-upon-Thames. The first count is for riotously kicking about a football in the town of Kingston; and the second, for a common nuisance in kicking about a football in the said town. And in Sir Anthony Ashley's Case, 1 Rol. 109, Coke, C. J., said that the *stage-players* might be indicted for a riot and unlawful assembly; and see Dalt. Just. c. 136 (citing Rol. R.), that, if such players by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. tit. Riots, &c., A. 8." 1 Russ. Crimes, 3d Eng. ed. 267, note.





**Opposing Course of Justice.** — A riot may be committed in opposing the course of justice of the country.[1]

§ 1148. **How many terrified.** — Not more than one need be terrified. Therefore, in South Carolina, when two white persons and a negro slave went together to where a man was at work; upon their arrival, one of the whites cut a club in the presence of the rest, used threatening language to the man, and commanded his associates to cut up some house-logs the man had prepared, which command they executed, — this was held to be a riot.[2] And where rioters went in a frolic at midnight to a stable, and shaved the horse's tail of the owner, making such noise as aroused and alarmed the family, they were held to be properly convicted; the objection that the injury was confined to only one family being overruled.[3]

§ 1149. **Unlawfulness of Act.** — The act of the rioters need not be such as, if performed by one, would be unlawful. Whether lawful or unlawful, if it is done by three or more in a turbulent

[1] Pennsylvania *v.* Morrison, Addison, 274. See also Rex *v.* Fursey, 6 Car. & P. 81.

[2] The State *v.* Jackson, 1 Speers, 13.

[3] The State *v.* Alexander, 7 Rich. 5. See also Pennsylvania *v.* Cribs, Addison, 277; The State *v.* Batchelder, 5 N. H. 549. And see Commonwealth *v.* Taylor, 5 Binn. 277; Bankus *v.* The State, 4 Ind. 114; ante, § 1143, note.

manner, calculated to excite terror, it is a riot.[1] An illustration of this doctrine has already been given under the titles Forcible Entry and Detainer, and Forcible Trespass.[2] On the other hand, Hawkins observes: "It is possible for more than three persons to assemble together, with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a competent number of people assemble together, in order to carry off a piece of timber to which one of the company hath a pretended right, and afterwards do carry it away without any threatening words, or other circumstances of terror. And from the same ground it seems also to follow, that persons assembled together in a peaceful manner to do a thing prohibited by statute, as to celebrate mass, &c., and afterwards peacefully performing the thing intended, cannot be said to be rioters; for there seems to be no reason why an assembly should become riotous barely for doing a thing contrary to the statute, any more than for doing a thing contrary to common law."[3]

§ 1150. **Object of the Assembling — (Distinguished from Affray — From Unlawful Assembly — Joining with Rioters).** — When persons assemble lawfully, they have not the criminal purpose necessary in riot. And this has led to the idea, expressed or implied in some cases, that the original object of the coming together must be riotous, or in some way criminal.[4] But a combination, lawful in the first instance, can be rendered unlawful by subsequent acts; and then what is done may be a riot.[5] Hawkins states the doctrine thus: "It seems agreed, that, if a number of persons, being met together at a fair or market or churchale or any other

[1] 1 Hawk. P. C. Curw. ed. p. 515, § 7; Kiphart *v.* The State, 42 Ind. 273; The State *v.* Blair, 13 Rich. 93. And see The State *v.* Boies, 34 Maine, 235; The State *v.* York, 70 N. C. 66; Bell *v.* Mallory, 61 Ill. 167; The State *v.* Hughes, 72 N. C. 25; Reg. *v.* Casey, Ir. Rep. 8 C. L. 408; Davenport *v.* The State, 38 Ga. 184; Darst *v.* People, 51 Ill. 286; Samanni *v.* Commonwealth, 16 Grat. 543.

[2] Ante, § 490, 497, 500, 501, 504, 505, 519; Henderson *v.* Commonwealth, 8 Grat. 708; Rex *v.* Stroude, 2 Show. 149; Rex *v.* Wyvill, 7 Mod. 286; Douglass *v.* The State, 6 Yerg. 525.

[3] 1 Hawk. P. C. Curw. ed. p. 515, § 5.

[4] Anonymous, 6 Mod. 43 The State *v.* Stalcup, 1 Ire. 30. In the latter case it was held, that, if an assembly is originally lawful, — as, upon summons, to assist an officer in the execution of lawful process,— subsequent illegal conduct will not make the persons rioters. Said the court: "Such an assembly cannot be considered an unlawful assembly. But, we think, an unlawful assembly is a constituent and necessary part of the offence of a *riot*. It must precede the unlawful act which consummates the offence of riot."

[5] Reg. *v.* Soley, 2 Salk. 594, 595; The State *v.* Cole, 2 McCord, 117; The State *v.* Snow, 18 Maine, 346.





lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it: because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it. Yet it is said, that, if persons innocently assembled together do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy as if their first coming together had been on such a design: however, it seems clear, that, if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or enclosure, or do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. Also it seems to be certain, that, if a person seeing others actually engaged in a riot, do join himself unto them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose; inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself unto them with an intention to second them in the execution of their unlawful enterprise; and it would be endless as well as superfluous to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design thereof."[1] It is the doctrine of the law, beyond dispute, that a riot is an unlawful assembly carried to the extent of actually doing the thing contemplated;[2] but the result does by no means follow, that there must be a space of time intervening between the existence of the mere unlawful assembly and no more, and its proceeding to perpetrate the ulterior act. If an assembly, however innocent the original purpose

[1] 1 Hawk. P. C. Curw. ed. p. 514, § 3.

[2] Post, § 1151. And see the first note to this section.

of the coming together, does riotous things, then all persons present and concurring in the things constitute themselves, by the fact itself, an unlawful assembly; and not the less so because the hand moves simultaneously with the moving of the mind.

§ 1151. **How much must be done — (Distinguished from Unlawful Assembly, continued — From Rout).** — Precisely how much must be done by assembled rioters to complete the offence, is not clear on the authorities. This question relates only to the name of the crime, not to the crime itself. Because, as we shall see under a subsequent title,[1] a mere coming together to commit a riot is indictable as an unlawful assembly; and, as we shall see also,[2] an act, performed by the unlawful assembly, makes it a rout. And the name by which the evil conduct is called, is of no consequence, other than as concerns the mere language of the law. The general proposition in riot is, that the thing contemplated must be accomplished.[3]

## III. *The Intent.*

§ 1152. **Whether premeditated.** — Russell says: "The violence and tumult must in some degree be premeditated."[4] But this proposition seems to be an inference drawn from authorities not well understood; while, on principle, no reason appears for it. And —

**Frolic.** — Persons who actually intend only a frolic may, nevertheless, commit a riot.[5]

## IV. *Remaining and Connected Questions.*

§ 1153. **Misdemeanor or Felony.** — Riot is misdemeanor, not felony.[6] But there may be circumstances in which a statute has elevated it to the higher degree.[7]

**Abetting.** — One may become guilty as a rioter, by countenancing those who commit the act, while doing nothing personally.[8] But

[1] Post, UNLAWFUL ASSEMBLY.

[2] Post, ROUT.

[3] Rex *v.* Birt, 5 Car. & P. 154; Reg. *v.* Vincent, 9 Car. & P. 91; ante, § 1148 and notes. Contra, Lord Holt, in Reg. *v.* Soley, 11 Mod. 115. See 1 Russ. Crimes, 3d Eng. ed. 266, note.

[4] 1 Russ. Crimes, 3d Eng. ed. 268.

[5] The State *v.* Alexander, 7 Rich. 5.

[6] Rex *v.* Fursey, 6 Car. & P. 81.

[7] Rex *v.* Fursey, supra. See Rex *v.* Thanet, 1 East P. C. 408.

[8] Vol. I. § 632, 658; Williams *v.* The State, 9 Misso. 268; Rex *v.* Hunt, 1 Keny. 108. And see Treat *v.* Jones, 28 Conn. 334.





where the judge told the jury, that, "in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance are, in presumption of law, participants, and that the obligation is cast upon a person so circumstanced to prove his non-interference." the court of review held this instruction to be erroneous.[1] There must be, if not an active assistance, a readiness to assist,[2] or such counselling as renders one liable according to general principles stated in the preceding volume.[3]

§ 1154. **Conviction for a Minor Offence — Former Jeopardy.** — Some things under these heads have been decided; but we need only refer to the preceding volume,[4] and to the cases.[5]

§ 1155. **Attempts.** — It has been already noted[6] that, out of a particular form of attempted riot, the law has created the separate offence of unlawful assembly; and, when this form of attempt has made a step of further progress, still another name is given it, namely, rout. It seems quite possible there should be other kinds of indictable attempt to commit riot; but the question appears not to have arisen in any of the reported cases.

[1] The State *v.* McBride, 19 Misso. 239. See Vol. I. § 720, 721; Reg. *v.* Atkinson, 11 Cox C. C. 330.

[2] Pennsylvania *v.* Craig, Addison, 190.

[3] Vol. I. § 628 et seq., 646-722; Reg. *v.* Sharpe, 3 Cox C. C. 288.

[4] Vol. I. § 794, and the chapter throughout and the accompanying chapters.

[5] Commonwealth *v.* Kinney, 2 Va. Cas. 139; The State *v.* Townsend, 2 Harring. Del. 543; Shouse *v.* Commonwealth, 5 Barr, 83; Rex *v.* Hemings, 2 Show. 93; Rex *v.* Heaps, 2 Salk. 593; Rex *v.* Hughes, 4 Car. & P. 373; Rex *v* Cox, 4 Car. & P. 538.

[6] Ante, § 1151.

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For RIVER, see WAY.
ROAD, see WAY.

## CHAPTER XXXIX.

### ROBBERY.[1]

§ 1156, 1157. Introduction.
1158–1165. The Larceny.
1166–1173. The Violence.
1174–1176. The Fear.
1177, 1178. What is deemed the Person.
1179–1182. Remaining and Connected Questions.

§ 1156. **How defined.** — Robbery is larceny committed by violence from the person of one put in fear.[2]

§ 1157. **How the Chapter divided.** — We shall consider, I. The

[1] For matter relating to this title, see Vol. I. § 329, 358, 361, 438, 471, 567, 582, 635, 748, 985, 1055, 1063, 1064. See this volume, ASSAULT; LARCENY; LARCENY COMPOUND. For the pleading, practice, and evidence, see Crim. Proced. II. § 1001 et seq. And see, as to both law and procedure, Stat. Crimes, § 363, 381, 517–530.

[2] And see The State *v.* Gorham, 55 N. H. 152. Some other definitions are the following: —

**Lord Coke.** — "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever." 3 Inst. 68.

**Lord Hale.** — "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P. C. 532.

**Hawkins.** — "Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear." 1 Hawk. P. C. Curw. ed. p. 212.

**East.** — "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C. 707.

**Blackstone.** — "The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242.

**Lord Mansfield.** — "A felonious taking of property from the person of another by force." Rex *v.* Donolly, 2 East P. C. 715, 725.

**By Statute in Ohio.** — "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatsoever, with intent to steal or rob, every," &c. Turner *v.* The State, 1 Ohio State, 422.

**Other States.** — As to Massachusetts, see Commonwealth *v.* Humphries, 7 Mass. 242. As to Georgia, see Long *v.* The State, 12 Ga. 293. As to New Hampshire, see The State *v.* Gorham, supra. As to Kentucky, see Taylor *v.* Commonwealth, 3 Bush, 508; Commonwealth *v.* Tanner, 5 Bush, 316. As to Missouri, see The State *v.* Howerton, 59 Misso. 91. As to Kansas, see The State *v.* Barnett, 3 Kan. 250. And see, as to various States, Stat. Crimes, § 519–530.





Larceny; II. The Violence; III. The Fear; IV. What may be deemed the Person; V. Remaining and Connected Questions.

#### I. *The Larceny.*

§ 1158. **Robbery is Compound Larceny.** — Robbery, we have seen,[1] is a mere compound larceny. It consists of the same Larceny treated of in a previous chapter, aggravated by what is to be described in those parts of this chapter which follow the present sub-title. Thus, —

§ 1159. **What the Indictment charges.** — The indictment for robbery charges a larceny,[2] together with the aggravating matter which makes it, in the particular instance, robbery. For example, the property is described the same as in an indictment for larceny;[3] the ownership is in the same way set out,[4] and so of the rest. Then, —

**Aggravation not proved.** — If the aggravating matter is not proved at the trial, the defendant may be convicted of the simple larceny.[5]

§ 1160. **Subjects of Statutory Larceny only.** — It is a principle of interpretation explained in another connection, that whatever is newly created by statute has the same incidents as if it had existed at the common law.[6] Therefore, if a statute makes it larceny to steal a thing not the subject of larceny at the common law, then it becomes, by legal consequence, a robbery to take this thing forcibly from the person of one put in fear. This plain proposition seems never to have been disputed, and on it many cases proceed.[7]

§ 1161. **Asportation.** — Again, in robbery, as in simple larceny, there must be an asportation. Consequently, if the one assaulted merely drops the thing, the other, who is apprehended before he takes it up, does not commit robbery.[8] And, says Lord Hale, "if

[1] Ante, § 892.

[2] Crim. Proced. II. § 1002; Matthews *v.* The State, 4 Ohio State, 539.

[3] Brennon *v.* The State, 25 Ind. 403; McEntee *v.* The State, 24 Wis. 43.

[4] Commonwealth *v.* Clifford, 8 Cush. 215; Smedly *v.* The State, 30 Texas, 214; People *v.* Vice, 21 Cal. 344; Crews *v.* The State, 3 Coldw. 350; Crim. Proced. II. § 1007.

[5] Vol. I. § 1055; The State *v.* Jenkins, 36 Misso. 372.

[6] Stat. Crimes, § 139.

[7] For example, Rex *v.* Cannon, Russ. & Ry. 146; McEntee *v.* The State, 24 Wis. 43; Reg. *v.* Hemmings, 4 Fost. & F. 50; The State *v.* Carro, 26 La. An. 377. And see the form of indictment, 3 Chit. Crim. Law, 807, 808.

[8] Rex *v.* Farrell, 1 Leach, 4th ed. 322,

A have his purse tied to his girdle, and B assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery; because no taking. But if B take up the purse; or, if B had the purse in his hand, and then the girdle break, and striving lets the purse fall to the ground, and never takes it up again; this is a taking and robbery."[1]

§ 1162. **Value.** — Moreover, the thing taken must, as in simple larceny, be valuable, yet need be only of the minutest value; as, where it was a piece of paper, alleged to be worth one penny, robbery was held to be committed.[2]

§ 1162 *a.* **Felonious Intent.** — There must be the same felonious intent as in simple larceny. Thus, —

**Mere Battery.** — If one commits a mere battery on another, with no intent to steal, this is not robbery.[3] And, —

**Compelling Payment.** — If a man by violence compels a debtor to pay what he owes, this is not robbery.[4]

§ 1163. **Giving back the Thing.** — After the taking has been effected, the crime is not purged by giving back the thing taken.[5] In like manner, —

**Offering Pay.** — The offer of money to the injured person, less than the value of the goods, will not make the taking of them less criminal.[6]

§ 1164. **Giving to Robber under Compulsion.** — We considered in the first volume the two cases, of money given by a woman assaulted to preserve her chastity;[7] and, of one writing an order under compulsion.[8] Though the person assaulted delivered with his own hand to the assailant the thing taken, the taking may still be robbery.[9]

§ 1165. **"Personal Property."** — Bank-notes are "personal property," within the robbery statute of Ohio.[10]

note; s. c. nom. Farrel's Case, 2 East P. C. 557; ante, § 797.

[1] 1 Hale P. C. 533, referring to 3 Inst. 69; Dalt. Just. c. 100; Cromp. 35.

[2] Rex *v.* Bingley, 5 Car. & P. 602; ante, § 768.

[3] Murphy *v.* People, 5 Thomp. & C. 302, 3 Hun, 114; The State *v.* Curtis, 71 N. C. 56. And see Jordan *v.* Commonwealth, 25 Grat. 943, 948.

[4] Reg. *v.* Hemmings, 4 Fost. & F. 50. And see People *v.* Vice, 21 Cal. 344; ante, § 849. But it is an offence under an Iowa statute. The State *v.* Hollyway, 41 Iowa, 200.

[5] 1 Hale P. C. 533; Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557; ante, § 796; Vol. I. § 208 *a.*

[6] Rex *v.* Simons, 2 East P. C. 712; Rex *v.* Spencer, 2 East P. C. 712. And see 1 Hawk. P. C. Curw. ed. p. 215, § 13; ante, § 845.

[7] Vol. I. § 329.

[8] Vol. I. § 748.

[9] 1 Hale P. C. 533.

[10] Turner *v.* The State, 1 Ohio State, 422.





## II. *The Violence.*

§ 1166. **Actual or Apprehended.** — There must be, in robbery, either actual violence inflicted on the person robbed; or such demonstrations or threats, and under such circumstances, as to create in him reasonable apprehension of bodily injury.

§ 1167. **Actual Violence — (Snatching).** — According to East, the taking unawares or snatching of a thing from the hand or head of one is not robbery, "unless there be some previous struggle for the possession."[1] But in the later editions of Hawkins, it is said to be robbery "to snatch a basket of linen suddenly from the head of another."[2] The true doctrine is, that the snatching will be robbery, if the article is so attached to the person or clothes as to create resistance, however slight, not otherwise. And where a watch was fastened to a steel chain passing round the owner's neck, one who snatched it away, breaking the chain, was held to be guilty of this offence. "For the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for the purpose."[3] To snatch a pin from a lady's head-dress, so violently as to remove with it a part of the hair from the place where it was fixed,[4] or to force an ear-ring from her ear,[5] is robbery; but not, to snatch property merely from another's hand.[6]

§ 1168. **Taking after Previous Disabling.** — Plainly, if the robber has, in any way, disabled his victim, a simple taking then from the person is sufficient. And, —

**Officer Handcuffing.** — Where a bailiff handcuffs his prisoner, under pretence of conducting him more safely to prison, but really to rob him; then, if he takes money from the disabled prisoner's pocket, the offence is robbery.[7] So, —

**Seizing by Throat.** — If one seizes another by the cravat, then forces him against the wall, then abstracts his watch from his

[1] 2 East P. C. 708.

[2] 1 Hawk. P. C. Curw. ed. p. 214, § 9.

[3] Rex *v.* Mason, Russ. & Ry. 419. And see The State *v.* Broderick, 59 Misso. 318; The State *v.* McCune, 5 R. I. 60; The State *v.* John, 5 Jones, N. C. 163.

[4] Rex *v.* Moore, 1 Leach, 4th ed. 335.

[5] Rex *v.* Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557, 708.

[6] Rex *v.* Baker, 1 Leach, 4th ed. 290, 2 East P. C. 702; Rex *v.* Macauley, 1 Leach, 4th ed. 287; Rex *v.* Robins, 1 Leach, 4th ed. 290, note; Bonsall *v.* The State, 35 Ind. 460; Shinn *v.* The State, 64 Ind. 13. See Mahoney *v.* People, 5 Thomp. & C. 329, 3 Hun, 202. Contra, under the Iowa statute. The State *v.* Carr, 43 Iowa, 418.

[7] Rex *v.* Gascoigne, 1 Leach, 4th ed. 280, 2 East P. C. 709.

pocket even without his knowledge, this graver form of larceny is committed.[1]

§ 1169. **Apprehended Violence.** — It is sufficient, in this offence, that, instead of inflicting actual violence, the wrong-doer creates in his victim a reasonable apprehension of it, and thus secures his object. One adequate method is by assault.[2] And, where money was given to one of a mob in a time of riot, on his coming to the house and begging in a manner which implied menace if it were not given, the getting of it was held to be robbery.[3]

§ 1170. **Apprehension Reasonable.** — The menace must be of a kind to excite reasonable apprehension of danger. Nothing short will do.[4] Moreover, —

**Taking while Fear continues.** — Though the apparent danger need not be immediate and the taking is not required to be on the instant, the goods must be parted with while the fear continues, and not after time has elapsed, especially in the robber's absence, for it to be removed.[5] And —

**Giving under Compelled Oath.** — Lord Hale says: "If thieves come to rob A, and, finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath; for the fear continued, though the oath bound him not."[6]

§ 1171. **Apprehended Destruction of the Habitation.** — A real or apparent exception to the general doctrine of this sub-title is seen in some English cases, as follows. Where the threat was by a rioter, to tear down corn and the dwelling-house, the giving under fear of it was deemed to constitute the taker a robber.[7]

[1] Commonwealth *v.* Snelling, 4 Binn. 379. Of a like sort is Mahoney *v.* People, 5 Thomp. & C. 329, 3 Hun, 202. **Drunkenness.** — See, where the taking was from a drunken man, Brennan *v.* The State, 25 Ind. 403.

[2] 1 Hale P. C. 533; 1 Hawk. P. C. Curw. ed. p. 214, § 7. Under some circumstances, the obtaining of money by assault will be robbery, though the assailed person is not put in fear. The State *v.* Gorham, 55 N. H. 152.

[3] Rex *v.* Taplin, 2 East P. C. 712.

[4] Long *v.* The State, 12 Ga. 293; 2 East, P. C. 713; 1 Hawk. P. C. Curw. ed. p. 214, § 8.

[5] Long *v.* The State, 12 Ga. 293; Rex *v.* Jackson, 1 East P. C. Add. XXI., 1 Leach, 4th ed. 193, note, 2 Ib. 618, note; 1 Hawk. P. C. Curw. ed. p. 213, § 1.

[6] 1 Hale P. C. 532. Hawkins appears to be of the opinion, that such an oath, operating on a mistaken man's conscience, is itself a force which makes the transaction robbery. 1 Hawk. P. C. Curw. ed. p. 213, § 1; but Lord Hale's reason — namely, that the fear continues — is a better one, and doubtless where this reason does not apply, the consequence does not follow.

[7] Rex *v.* Simons, 2 East P. C. 731 See Rex *v.* Gnosil, 1 Car. & P. 304.





Even where the danger was not immediate, but it was threatened to bring a mob from a neighboring town then in a state of riot, and burn down the house, and the goods were parted with through fear that this consequence would follow a refusal, but not otherwise from apprehension of personal danger, the crime was held to be committed.[1] The reasons on which these cases proceed are not clear in the reports of them; but East asks, "if the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers."[2] However this may be, the dwelling-house is a different thing in the law from mere property. Besides, one without habitation is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him.

§ 1172. **Charge of Sodomy.** — But the English cases make one real exception to the general doctrine. They hold that, if a man to extort money from another, threatens to bring against him a charge of sodomy, and, through fear of this charge, whether well[3] or ill founded, and the loss of reputation following, the accused person parts with his property, the taking is robbery. There is clearly no foundation of principle for this exception; and, though it is well established in the actual adjudications of the English tribunals, perhaps also of our own,[4] it can only be regarded as an excrescence on the law.

§ 1173. **Other Threats of Prosecution.** — In no other case will a threat of prosecution justify the fear necessary in robbery;[5]

[1] Rex *v.* Astley, 2 East P. C. 729; Rex *v.* Brown, 2 East P. C. 731.

[2] 2 East P. C. 731, note.

[3] Rex *v.* Gardner, 1 Car. & P. 479, Littledale, J., observing: "If he was guilty, the prisoner ought to have prosecuted him for it, and not have extorted money from him."

[4] 1 Hawk. P. C. Curw. ed. p. 215, § 10; Rex *v.* Knewland, 2 Leach, 4th ed. 721, 730; Rex *v.* Jones, 2 East P. C. 714, 715, 1 Leach, 4th ed. 139; Rex *v.* Harrold, 2 East P. C. 715; Rex *v.* Stringer, 2 Moody, 261; Rex *v.* Fuller, Russ. & Ry. 408; Rex *v.* Donnally, 1 Leach, 4th ed. 193; s. c. nom. Rex *v.* Donally, 2 East P. C. 713, 783; Rex *v.* Egerton, Russ. & Ry. 375; Rex *v.* Hickman, 2 East P. C. 728, 1 Leach, 4th ed. 278; Rex *v.* Elmstead, 1 Russ. Crimes, 3d Eng. ed. 894; Long *v.* The State, 12 Ga. 293; People *v.* McDaniels, 1 Parker C. C. 198; Britt *v.* The State, 7 Humph. 45. Some of the above cases go only to the point, that it is robbery to extort money by means of a charge of sodomy, leaving the question open, whether the fear relates to physical consequences of a prosecution, or to the loss of character. Other cases decide, that it need only be of the loss of character.

[5] Britt *v.* The State, 7 Humph. 45; Rex *v.* Newton, Car. Crim. Law, 3d ed. 285; Rex *v.* Knewland, 2 Leach, 4th ed. 721; s. c. Rex *v.* Wood, 2 East P. C. 732; Long *v.* The State, 12 Ga. 293; Reg. *v.* Henry, 2 Moody, 118. Obtaining money from a woman, by a threat to accuse her

because a man in the hands of the law is not legally presumed to be in danger of bodily harm. Still —

**Threat as Misdemeanor.** — The getting of money from one under the threat to indict him for perjury has been deemed to be a criminal misdemeanor, though not robbery; for, said Lord Holt, "if a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie."[1]

## III. *The Fear.*

§ 1174. **General Doctrine stated.** — Force and fear are, in this offence, usually connected; therefore, in the last sub-title, we obtained some views pertaining to this. In general terms, the person robbed must be, in legal phrase, put in fear. But, —

**Force supplying Place of Fear.** — If force is used, there need be no other fear than the law will imply from it; there need be no fear in fact. It is sometimes said, that there must be either force or fear, not necessarily both.[2] The better form of the proposition is, that, where there is no actual force, there must be actual fear; but, where there is actual force, the fear is conclusively inferred by the law.[3] And, within this distinction, an assault, without a battery, is probably to be deemed actual force.[4]

**In Absence of Force, Fear in Fact.** — Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear.[5] But the exciting of an actual fear, without the employment of force, is adequate.[6]

§ 1175. **Time of the Fear.** — The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offence is not robbery.[7]

husband of an indecent assault, is not robbery. Rex *v.* Edwards, 5 Car. & P. 518; s. c. nom. Rex *v.* Edward, 1 Moody & R. 257.

[1] Reg. *v.* Woodward, 11 Mod. 137. And see post, § 1201.

[2] Commonwealth *v.* Snelling, 4 Binn. 379; McDaniel *v.* The State, 8 Sm. & M. 401, 418; The State *v.* Cowan, 7 Ire. 239; Commonwealth *v.* Humphries, 7 Mass. 242; Rex *v.* Frances, 2 Comyns, 478; Long *v.* The State, 12 Ga. 293; McDaniel's Case, 19 Howell St. Tr. 745, 806. And see Seymour *v.* The State, 15 Ind. 288.

[3] See also Rex *v.* Reane, 2 Leach, 4th ed. 616.

[4] Vol. I. § 438; The State *v.* Gorham, 55 N. H. 152.

[5] Rex *v.* Reane, 2 East P. C. 734, 2 Leach, 4th ed. 616. And see 2 East P. C. 665, 666.

[6] Commonwealth *v.* Brooks, 1 Duvall, 150; The State *v.* Howerton, 58 Misso. 581; Glass *v.* Commonwealth, 6 Bush, 436.

[7] Rex *v.* Harman, 2 East P. C. 736.





§ 1176. **Intent to Prosecute Robber.** — The relinquishment of the property, not through actual fear, but for the purpose of prosecuting the robber, is considered in the first volume.[1]

## IV. *What may be deemed the Person.*

§ 1177. **Taking must be from Person.** — Since robbery is an offence as well against the person as the property, the taking must be, in the language of the law, from the person.[2]

**What this means.** — The meaning of this legal phrase is, not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that will suffice.[3]

§ 1178. **Personal Protection.** — Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the personal presence extends. "If a thief," says Lord Hale, "come into the presence of A; and, with violence and putting A in fear, drives away his horse, cattle, or sheep;" he commits robbery.[4] The better expression is, that —

**Presence.** — A taking in the presence of an individual (of course, there being a putting in fear) is to be deemed a taking from his person.[5]

[1] Vol. I. § 438.

[2] Stegar *v.* The State, 39 Ga. 583; Kit *v.* The State, 11 Humph. 167.

[3] And see ante, § 898, 902.

[4] 1 Hale P. C. 533.

[5] Rex *v.* Frances, 2 Comyns, 478; s. c. nom. Rex *v.* Francis, 2 Stra. 1015, Cas. temp. Hardw. 113. In United States *v.* Jones, 3 Wash. C. C. 209, 216, the learned judge employed a form of expression somewhat different, but meaning the same thing. He said: "It is objected, that the taking must be *from the person.* The law is otherwise; for, if it be in the presence of the owner, — as, if by intimidation he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up, — it is robbery." Mr. East puts the doctrine thus: "In robbery, it is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head." 2 East P. C. 707. "Or," adds Hawkins, "robs my servant of my money before my face." 1 Hawk. P. C. Curw. ed. p. 214, § 5. See also Turner *v.* The State, 1 Ohio State, 422; Rex *v.* Fallows, 5 Car. & P. 508.

### V. *Remaining and Connected Questions.*

§ 1179. **Felony.** — Robbery is a common-law felony, "amongst the most heinous felonies." [1] The collateral consequences are such as the first volume discloses. Let us look at some of them here.

§ 1180. **Offenders combining.** — "In some cases," says Hawkins, "a man may be said to rob me, where in truth he never actually had any of my goods in his possession: as, where I am robbed by several of one gang, and one of them only takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enterprise; nay, though they miss of the first intended prize, and one of them afterwards ride from the rest, and rob a third person in the same highway without their knowledge, out of their view, and then return to them, — all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing." [2] This consequence comes from the doctrine, that all present and assisting; or near enough to assist, if called on, and lending their mental concurrence to the act; are principal offenders, either of the first or second degree.[3] And we have seen,[4] that one thus assenting need be present only during such part of the entire transaction as constitutes a complete offence.[5]

§ 1181. **Attempts.** — An attempt to commit robbery is, the same as other like attempts, indictable as misdemeanor. Having examined the general doctrine of Attempt in the preceding volume, we need here only refer to that discussion [6] and to the authorities, some of which are under statutes, others are pure expositions of the common law.[7]

[1] 3 Inst. 68.
[2] 1 Hawk. P. C. Curw. ed. p. 213, § 4.
[3] Vol. I. § 648–654.
[4] Vol. I. § 649.
[5] As to the subject-matter of this section under the United States statute against robbing the mail, see United States *v.* Mills, 7 Pet. 138.
[6] Vol. I. § 723 et seq.
[7] Rex *v.* Mills, 1 Leach, 4th ed. 259, 1 East P. C. 397; Rex *v.* Lee, 1 Leach, 4th ed. 51; Rex *v.* Mackey, 1 East P. C. 399; Anonymous, 2 East P. C. 662; Reg. *v.* Stringer, 1 Car. & K. 188, 2 Moody, 261; Rex *v.* Thomas, 1 Leach, 4th ed. 330; Rex *v.* Parfait, 1 Leach, 4th ed. 19, 1 East P. C. 416; The State *v.* Bruce, 24 Maine, 71; People *v.* Woody, 48 Cal. 80; Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268.





§ 1182. **Second Jeopardy.** — For the effect of a previous jeopardy,[1] the reader is referred to the preceding volume.[2]

**Robbery in Dwelling-house.** — Lord Hale mentions some early English statutes against robbery from the person of one in his dwelling-house;[3] but they can have little practical force here, even if technically they are a part of our common law.

**In Highway.** — There are statutes in North Carolina and in some of the other States against robbing people "in or near" a highway.[4]

[1] Roberts *v.* The State, 14 Ga. 8; The State *v.* Lewis, 2 Hawks, 98; The State *v.* Brannon, 55 Misso. 63; The State *v.* Pitts, 57 Misso. 85.
[2] Vol. I. § 978 et seq.
[3] 1 Hale P. C. 548; Stat. Crimes, § 525.
[4] The State *v.* Anthony, 7 Ire. 234; Stat. Crimes, § 525, 526.

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For ROBBING MAIL, see ante, § 904, note.

## CHAPTER XL.

### ROUT.[1]

§ 1183. **How defined.** — Rout is an unlawful assembly which has performed some act toward the commission of a riot.[2]

§ 1184. **Related to Riot — to Unlawful Assembly.** — Constituting, therefore, a part of the offence of riot,[3] and being an unlawful assembly to which some step toward a riot is added, the offence of rout is necessarily, in the main, treated of under those two titles. Little need be added here.

§ 1185. **The Act — (Attempting Prize-fight).** — The act which, performed by an unlawful assembly, makes it a rout, may be illustrated by a South Carolina case which holds, that, if the requisite number of persons meet, stake money, and propose to engage in a prize-fight, they commit a rout.[4]

§ 1186. **How Many.** — Not less than three assembled persons are sufficient to commit this offence.[5]

[1] For matter relating to this title, see Vol. I. § 534. See this volume, AFFRAY; RIOT; UNLAWFUL ASSEMBLY. Also, Stat. Crimes, § 539–542, 560. For the pleading, practice, and evidence, see Crim. Proced. II. RIOT.

[2] Hawkins says: "A rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof. But by some books the notion of a rout is confined to such assemblies only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c." 1 Hawk. P. C. Curw. ed. p. 516, § 8.

[3] Ante, § 1148, note, 1151, 1155.

[4] The State v. Sumner, 2 Speers, 599.

[5] Vol. I. § 534; post, § 1257.

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For SABBATH-BREAKING, see LORD'S DAY.
SALE OF LIQUOR, see Stat. Crimes.
SCOLD, see COMMON SCOLD, Vol. I. § 1101 et seq.
SCRIPTURES, REVILING, see BLASPHEMY AND PROFANENESS.
SEDUCTION, see Stat. Crimes.





## CHAPTER XLI.

### SELF-MURDER.[1]

§ 1187. **Whether Offence at Common Law.** — The discussions of the first volume have shown, that self-murder, or suicide, is a common-law felony. But, as no penalty other than the forfeiture of goods, and of personalty generally, which was the common-law punishment,[2] can be inflicted on him who has murdered himself, and as forfeitures for crime are not practised in our States, this offence is not punishable with us.[3] Still it is a question whether or not there are with us collateral offences based on the idea that self-murder is a common-law felony.

**Principal of Second Degree.** — If, under the common law, as administered in England when this country was settled, one advises another to kill himself, and he does it in the presence of the adviser, the latter becomes guilty of murder, probably as principal of the second degree, but at all events as principal. And it is the same in our States.[4]

**Accessory before the Fact.** — But as suicide is felony, not misdemeanor, if it is committed in the adviser's absence, the latter, at the common law, goes free of punishment; because the principal, being dead, cannot be first convicted.[5]

**Attempt — (Self-Mayhem).** — If one attempts to commit self-murder, is he therefore indictable for misdemeanor, the same as though the attempt were on a third person? There would seem to be no ground for distinguishing the common law of England and our States on this head. And by the common law as admin-

[1] For matter relating to this title, see Vol. I. § 259, 510, 615, 652, 968. See this volume, DUELLING; HOMICIDE FELONIOUS.

[2] 1 Hawk. P. C. c. 27, § 7, 8.

[3] See the sections above referred to; also Commonwealth v. Bowen, 13 Mass. 356; Reg. v. Alison, 8 Car. & P. 418; Rex v. Dyson, Russ. & Ry. 523; Rex v. Ward, 1 Lev. 8; Hales v. Petit, 1 Plow. 253, 260, 261; Rex v. Hughes, 5 Car. & P. 126; Rex v. Russell, 1 Moody, 356; Reg. v. Burgess, Leigh & C. 258.

[4] Vol. I. § 510, 652; Commonwealth v. Dennis, 105 Mass. 162.

[5] Vol. I. § 652; Reg. v. Leddington, 9 Car. & P. 79.

istered in England, this is an indictable misdemeanor.[1] On the like principle, one is indictable at the common law who inflicts mayhem on himself.[2] But, —

**Attempt under Statutes.** — Where common-law offences do not prevail, the result under statutes may be different. Thus, in Hawaii, the Penal Code defines and provides a punishment for murder, then declares an attempt to do the act punishable; and the court held, that suicide is not murder under the former provision, therefore an attempt to commit it does not fall within the latter.[3] And in Massachusetts, though there are common-law offences in this State, the court holds, contrary to what would probably be the doctrine in some other States under like statutes,[4] that, because attempts have been fully legislated upon, they have ceased to be cognizable at common law; consequently, and by force of reasoning similar to what prevailed in Hawaii, an attempt to commit suicide is not punishable.[5]

**Accidental Killing in Attempted Suicide.** — One who, in attempting to take his own life, accidentally kills another who is interfering to prevent it, commits thereby an indictable homicide.[6]

[1] Reg. v. Burgess, Leigh & C. 258, 9 Cox C. C. 247; Reg. v. Doody, 6 Cox C. C. 463.

[2] Rex v. Wright, 1 East P. C. 396, 1 Hale P. C. 412, Co. Lit. 127 a.

[3] Rex v. Ahsee, 2 Am. Law Rev. 794. See also Reg. v. Burgess, Leigh & C. 258, 9 Cox C. C. 247.

[4] Stat. Crimes, § 154-162.

[5] Commonwealth v. Dennis, 105 Mass. 162. And see Blackburn v. The State, 23 Ohio State, 146, 163.

[6] Commonwealth v. Mink, 123 Mass. 422.

For SELLING ADULTERATED MILK, see Stat. Crimes.
SELLING LIQUOR, see Stat. Crimes.





# CHAPTER XLII.

## SEPULTURE.[1]

§ 1188. **Offences against Right of Burial.** — According to what was set down in the first volume,[2] to sell a dead body for dissection,[3] or otherwise to refuse burial,[4] is indictable at the common law. Also —

**Inquest of Coroner.** — Preventing a coroner from holding an inquest over a dead body, where an inquest is required by law, as by burying it prematurely, is indictable.[5]

**Disinterring.** — It is the same of disinterring a buried corpse.[6] In an English case, the defendant had removed, without leave, the bodies of some deceased relatives from a dissenters' burial-place, and he was held to be punishable criminally; though his motive, being to bury them elsewhere, was good.[7]

§ 1189. **Defacing Tomb.** — Lord Coke says: "Concerning the building or erecting of tombs, sepulchres, or monuments for the deceased, in church, chancel, common chapel, or churchyard, in a convenient manner, it is lawful; for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection. And the defacing of them is punishable by the common law."[8]

[1] For matter relating to this title, see Vol. I. § 468, 506. For the pleading, practice, and evidence, see Crim. Proced. II. § 1009 et seq.

[2] Vol. I. § 506.

[3] Reg. v. Feist, Dears. & B. 590, 8 Cox C. C. 18; Vol. I. § 506.

[4] One is not indictable for refusing to bury a relative, if he has not the means to bury him; though he declines to borrow money offered for the purpose. Reg. v. Vann, 2 Den. C. C. 325, 5 Cox C. C. 379, 8 Eng. L. & Eq. 596.

[5] Vol. I. § 468.

[6] Vol. I. § 506. And see McNamee v. People, 31 Mich. 473.

[7] Reg. v. Sharpe, Dears. & B. 160, 7 Cox C. C. 214, 40 Eng. L. & Eq. 581. **Wife's Power over Husband's Body.** — The Pennsylvania court held, that a wife has no control over the body of her deceased husband after its burial; but with the burial her duty to it terminates, and the disposition of it thereafter belongs to the next of kin. Wynkoop v. Wynkoop, 6 Wright, Pa. 293.

[8] 3 Inst. 202.

§ 1190. **Statutory Offences.** — There are some statutes relating to these subjects; but a particular discussion of them is not necessary.[1]

[1] Rex *v.* Duffin, Russ. & Ry. 365; Commonwealth *v.* Slack, 19 Pick. 304; Commonwealth *v.* Loring, 8 Pick. 370; The State *v.* McClure, 4 Blackf. 328; Tate *v.* The State, 6 Blackf. 110; Winters *v.* The State, 9 Ind. 172; Commonwealth *v.* Goodrich, 13 Allen, 546; Commonwealth *v.* Viall, 2 Allen, 512; Phillips *v.* The State, 29 Texas, 226; Reg. *v.* Feist, Dears. & B. 590, 8 Cox C. C. 18; Commonwealth *v.* Wellington, 7 Allen, 299. And see Rousseau *v.* Troy, 49 How. Pr. 492. **The General Question.** — On the general question of sepulture, the reader is referred to Mr. Moak's note to In re Bettison, 12 Eng. Rep. 654, embracing a wide collection of authorities.

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For SHOP-BREAKING, see BURGLARY.
SHOWS, see PUBLIC SHOWS, Vol. I. § 1145 et seq.
SLANDER, see LIBEL AND SLANDER.





# CHAPTER XLIII.

## SODOMY.[1]

§ 1191. **How defined.** — Sodomy is a carnal copulation, by human beings, with each other against nature, or with a beast.[2]

**Common Law — Statutes.** — We have seen,[3] that it is an offence at the common law. It is such also under the common law of Scotland.[4] It is the same in most of our States; but, in Texas, where a statute provides that no person shall be punished for an offence not expressly defined by the law of the State, the majority of the court held the following not to be adequate: "If any person shall commit, with mankind or beast, the abominable and detestable crime against nature, he shall be deemed guilty of sodomy."[5] Consequently sodomy in this State is not punishable.[6] And it is not punishable in Iowa.[7]

§ 1192. **With Fowl.** — Russell says: "An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term 'beast;' and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt."[8]

§ 1193. **Consent — Husband and Wife — Men and Boys.** — Unlike rape, sodomy may be committed between two persons, both of whom consent: so it may be between husband and wife:[9] s two men, or a boy and a man, can commit it; and, whichever is the pathic, both may be indicted.[10]

[1] For matter relating to this title, see Vol. I. § 503, 767. And see Stat. Crimes, § 242. For the pleading, practice, and evidence, see Crim. Proced. II. § 1013 et seq.

[2] Vol. I. § 503.

[3] Vol. I. § 503.

[4] Mackenzie Crim. Law, 1, 1, 8; also 1, 15, 4.

[5] Fennell *v.* The State, 32 Texas, 378.

[6] Frazier *v.* The State, 39 Texas, 390. See The State *v.* Campbell, 29 Texas, 44.

[7] Estes *v.* Carter, 10 Iowa, 400.

[8] 1 Russ. Crimes, 3d Eng. ed. 698, referring to Rex *v.* Mulreaty, a manuscript case, by Bayley, J.

[9] Reg. *v.* Jellyman, 8 Car. & P. 604.

[10] Reg. *v.* Allen, 1 Den. C. C. 364, Temp. & M. 55, 2 Car. & K. 869, 13 Jur.

§ 1194. **Penetration — Emission.** — The question of the penetration and emission necessary was discussed under the title Rape.[1] A penetration of the mouth is not sodomy.[2]

§ 1195. **Attempt.** — A solicitation to commit this offence is indictable as an attempt;[3] and there may be other forms of the attempt,[4] — as, assault with the intent.[5]

§ 1196. **Felony or Misdemeanor.** — There is doubt, whether, under the common law of this country, sodomy is felony or misdemeanor, — as to which, see the first volume.[6]

108, 18 Law J. n. s. M. C. 72; 1 East P. C. 480.

[1] Ante, § 1127–1132.

[2] Rex v. Jacobs, Russ. & Ry. 331.

[3] Vol. I. § 767; Reg. v. Rowed, 6 Jur. 396; Rex v. Hickman, 1 Moody, 34.

[4] Reg. v. Eaton, 8 Car. & P. 417; Davis v. The State, 3 Har. & J. 154.

[5] Reg. v. Lock, Law Rep. 2 C. C. 10, 12 Cox C. C. 244. And see Anonymous, 1 B. & Ad. 382; Reg. v. Middleditch, 1 Den. C. C. 92.

[6] Vol. I. § 503.

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For STOLEN GOODS, see Receiving Stolen Goods.





# CHAPTER XLIV.

## SUBORNATION OF PERJURY.[1]

§ 1197. **Is Perjury.** — As already explained,[2] subornation of perjury is, in its essence, but a particular form of perjury itself. Thus, —

**How defined.** — Hawkins says: "Subornation of perjury, by the common law, seems to be an offence of procuring a man to take a false oath amounting to perjury, who actually takes such oath.[3] But —

**Attempt.** — "It seemeth clear, that, if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment."[4] In other words, the unsuccessful incitement is an indictable attempt.[5] There appears to have been a period in our law, when the unsuccessful solicitation was deemed to be subornation of perjury itself; for, as such, it and other indictable attempts corruptly to influence a witness are treated of in some of the old books.[6]

§ 1198. **Procedure.** — There have been some peculiarities of procedure, relating to subornation of perjury; how it is now is shown in "Criminal Procedure."[7] Except for them, there would

[1] For matter relating to this title, see Vol. I. § 468, 974, 975; ante, § 1056. And see Stat. Crimes, § 568. For the pleading, practice, and evidence, see Crim. Proced. § 1019 et seq.

[2] Ante, § 1056; United States v. Dennee, 3 Woods, 39.

[3] And see United States v. Wilcox, 4 Blatch. 393; Commonwealth v. Smith, 11 Allen, 243; Stewart v. The State, 22 Ohio State, 477; ante, § 1056.

[4] 1 Hawk. P. C. Curw. ed. p. 435, § 9, 10.

[5] Ante, § 1056; Reg. v. Clement, 26 U. C. Q. B. 297; Vol. I. § 468.

[6] As, for example, in Tremaine's Pleas of the Crown, Rex v. Margerum, Trem. P. C. 168; Rex v. Tasborough, Trem. P. C. 169; and other entries following. Indeed, not one of the entries for subornation of perjury, given in this book, is for the full offence within the modern definitions.

[7] Crim. Proced. II. § 1019 et seq.

seem never to have been any propriety in ranking this as a separate offence.[1]

§ 1199. **Statutes.** — In our several States, there are statutes on this subject; but they do not require consideration here.[2]

[1] Ante, § 1056.

[2] For the statute of Maine and its constructions, see The State *v.* Joaquin, 69 Maine, 218.

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For SUICIDE, see SELF-MURDER.
SUNDAY, see LORD'S DAY.
SWEARING, see BLASPHEMY AND PROFANENESS.





# CHAPTER XLV.

## THREATENING LETTERS AND THE LIKE.[1]

§ 1200. **Early English Statutes.** — Blackstone says: "By the statute 9 Geo. 1, c. 22, amended by statute 27 Geo. 2, c. 15, knowingly to send any *letter*, without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. 5, c. 6."[2]

**Later English Statutes.** — There have been various later enactings and revisings of statutes on this subject in England; as, 7 & 8 Geo. 4, c. 29, § 8;[3] 7 Will. 4 & 1 Vict. c. 87, § 7;[4] 10 & 11 Vict. c. 66, § 1;[5] and 24 & 25 Vict. c. 96, § 45[6] and 47.[7]

**How in our States.** — None of the English enactments appear to be common law with us. But, in some of our States, if not all, there are statutes modelled more or less after the English ones.

**Interpretations of the Statutes.** — The discussions in "Statutory Crimes" will explain, not only the principles on which these statutes are interpreted, but the meanings of their leading terms. In this place, we need only refer to some of the cases.[8]

[1] For matter relating to this title, see Vol. I. § 562, 767; ante, § 407; Stat. Crimes, § 228, 242, 315. For the pleading, practice, and evidence, see Crim. Proced. II. § 1024 et seq.

[2] 4 Bl. Com. 144.

[3] Reg. *v.* Miard, 1 Cox C. C. 22.

[4] Reg. *v.* Taylor, 1 Fost. & F. 511.

[5] Reg. *v.* Jones, 5 Cox C. C. 226.

[6] Reg. *v.* Robertson, Leigh & C. 483, 10 Cox C. C. 9; Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268.

[7] Reg. *v.* Redman, Law Rep. 1 C. C. 12, 10 Cox C. C. 159.

[8] *American Cases.* — The State *v.* Bruce, 24 Maine, 71; People *v.* Griffin, 2 Barb. 427; Biggs *v.* People, 8 Barb. 547; Robinson *v.* Commonwealth, 101 Mass. 27; Commonwealth *v.* Carpenter, 108 Mass. 15; Commonwealth *v.* Moulton, 108 Mass. 307; Commonwealth *v.* Dorus, 108 Mass. 488; Brabham *v.* The State, 18 Ohio State, 485; The State *v.* Morgan, 3 Heisk. 262; Commonwealth *v.* Murphy, 12 Allen, 449; Shifflet *v.* Commonwealth, 14 Grat. 652; People *v.* Braman, 30 Mich. 460.

*English Cases.* — Those cited in previ-

**Threats other than by Letter.** — There may be mischievous threats other than by letter; and to these some of the statutes extend, and some of the cases cited to the last note.

§ 1201. **At Common Law.** — Extortion[1] is a species of common-law threat. And there are threats by persons not officers, indictable at the common law.[2] Statutes have so far covered the ground that the courts have not had occasion to define the limits of the common-law doctrine.

**Under National Government.** — A threat, and especially a threatening letter, is doubtless in some circumstances an offence against the law of nations. But our United States tribunals have not the jurisdiction to administer this law,[3] without express authority from some act of Congress.[4]

**The Intent.** — The intent, both under the unwritten law and under the statutes, must be evil. Thus, —

**Demanding Money due.** — If one demands, by a threat, money which he honestly believes to be due, he does not commit this offence.[5] But, —

**Guilty or not.** — If the threat is to accuse of crime, and the object is to extort money, it is immaterial whether the person threatened is guilty or not; for in either case there is an attempt to pervert justice.[6]

ous notes to this section; also Reg. *v.* Smith, Temp. & M. 214, 1 Den. C. C. 510, 2 Car. & K. 882, 14 Jur. 92, 19 Law J. N. S. M. C. 80; Rex *v.* McDermod, Jebb, 118; Reg. *v.* Grimwade, 1 Den. C. C. 30, 1 Car. & K. 592; Reg. *v.* Jones, 1 Den. C. C. 218, 2 Car. & K. 398; Rex *v.* Robinson, 2 Leach, 4th ed. 749, 2 East P. C. 1110; Rex *v.* Pickford, 4 Car. & P. 227; Rex *v.* Boucher, 4 Car. & P. 562; Reg. *v.* Wagstaff, Russ. & Ry. 398; Reg. *v.* Hamilton, 1 Car. & K. 212; Rex *v.* Paddle, Russ. & Ry. 484; Rex *v.* Jepson, 2 East P. C. 1115; Rex *v.* Hammond, 2 East P. C. 1119, 1 Leach, 4th ed. 444; Rex *v.* Heming, 2 East P. C. 1116, 1 Leach, 4th ed. 445, note; Reg. *v.* Burridge, 2 Moody & R. 296; Reg. *v.* Coghlan, 4 Fost. & F. 316; Reg. *v.* Richards, 11 Cox C. C. 43; Reg. *v.* Chalmers, 10 Cox C. C. 450; Reg. *v.* McDonnell, 5 Cox C. C. 153; Reg. *v.* Carruthers, 1 Cox C. C. 138; Reg. *v.* Hendy, 4 Cox C. C. 243; Reg. *v.* Redman, Law Rep. 1 C. C. 12; Reg. *v.* Menage, 3 Fost. & F. 310; Skinner *v.* Kitch, Law Rep. 2 Q. B. 393, 10 Cox C. C. 493.

*Canada.* — Reg. *v.* Johnson, 14 U. C. Q. B. 569.

[1] Ante, § 390 et seq.

[2] Vol. I. § 562, 762.

[3] Vol. I. § 190–208.

[4] See United States *v.* Worrall, 2 Dall. 384.

[5] Reg. *v.* Coghlan, 4 Fost. & F. 316; Reg. *v.* Johnson, 14 U. C. Q. B. 569.

[6] Reg. *v.* Cracknell, 10 Cox C. C. 408; Reg. *v.* Richards, 11 Cox C. C. 43. And see Reg. *v.* Chalmers, 10 Cox C. C. 450.

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For TIPPLING-HOUSE, see Vol. I. § 1113–1117; also Stat. Crimes.





# CHAPTER XLVI.

## TREASON.[1]


§ 1202–1204. Introduction.
1205–1213. The English Treason corresponding to ours.
1214–1236. Treason against the United States.
1254, 1255. Treasons against Individual States.


§ 1202. **Scope of this Chapter.** — In the first volume, are discussed many questions pertaining to the present title. What is said there will not be repeated here. In a manner somewhat fragmentary, we shall here take into review such important questions as remain.

**How the American Authorities.** — The subject of treason has not been much examined in our American courts; and the little judicial matter we have upon it is principally mere *dicta*. There has been but one treason case before the Supreme Court of the United States, and this was only an application for the discharge of a prisoner on *habeas corpus*. He was discharged, and Marshall, C. J., in giving the opinion of the court, where only the question of discharge was in issue, said many things respecting treason;[2] and afterward sitting, with the district judge by his side, in the trial of Aaron Burr, he explained and commented on this opinion at length.[3] There are a few reports of other trials before the lower courts.[4]

[1] For matter relating to this title, see Vol. I. § 177, 226, 347, 348, 358, 861, 869, 422, 437, 440, 456, 611–613, 639, 655, 659, 681–684, 701–704, 717, 759, 772, 967–977. And see Stat. Crimes, § 136, 139, 227, 568. For the pleading, practice, and evidence, see Crim. Proced. II. § 1030 et seq.

[2] Ex parte Bollman, 4 Cranch, 75.

[3] **The Reports of Burr's Trial.** — Of the Trial of Aaron Burr, there are two original and contemporaneous reports, that of Robertson, published at Philadelphia, in two volumes; and that of Carpenter, published at Washington, in three volumes. More recently there has been published at Washington, in one volume, a report condensed from these two, but principally from the former; edited by J. J. Coombs, Esq., who furnished some notes of his own. Of the two original reports, Robertson's is said to be the more accurate; it is the one to which the references are made in this chapter, except where Coombs's is specified.

[4] See "Two Trials of John Fries," &c., by Carpenter, A. D. 1800; United

§ 1203. **How discussed in this Chapter.** — Trials for treason do not often arise; and, when they do, ample time for preparation is given to counsel. It would not, therefore, be judicious to occupy space in tracing, in any minute way, the current of observation — for it really amounts to little else — found in our American reports of treason trials; since each practitioner can do this for himself as well as an author can for him. Yet it will be useful to call to mind some of the principles on which judicial determination ought, in these cases, to proceed. Gentlemen who manage trials for this high offence are generally from the elevated class of practitioners who, more clearly than men of less acquirements, discern the value of this sort of exposition.

§ 1204. **How the Chapter divided.** — We shall consider, I. The English Treason which corresponds to ours; II. Treason against the United States; III. Treasons against Individual States.

**Omitted from this Edition.** — In the third, fourth, and fifth editions, there were two other sub-titles; namely, "The Matter as affected by Ordinances of Secession," and "The Matter as affected by Civil War." It is presumed, that, while this edition is a living book on the shelves of dealers, and, it is hoped, for all time, there will be no practical use for these sub-titles. If the discussion is wanted for other purposes, the country contains sufficient copies of it in the old editions to supply all demands. Therefore those sub-titles are omitted from this edition.

### I. *The English Treason which corresponds to ours.*

§ 1205. **High and Petit.** — Under the ancient English law, treason was of two kinds, high and petit; but in the United States we have, as already seen,[1] no petit treason. Consequently the only kind of old English treason which concerns us, is high treason.

States *v.* Vigol, 2 Dall. 346; United States *v.* Vilato, 2 Dall. 370; United States *v.* Insurgents of Pa., 2 Dall. 335; United States *v.* Stewart, 2 Dall. 343; United States *v.* Mitchell, 2 Dall. 348; United States *v.* Pryor, 3 Wash. C. C. 234; United States *v.* Hoxie, 1 Paine, 265; Western Insurgents, Whart. St. Tr. 102; Northampton Insurgents, Whart. St. Tr. 458; United States *v.* Hanway, 2 Wal. Jr. 139; United States *v.* Bollman, 1 Cranch C. C. 373; United States *v.* Lee, 2 Cranch C. C. 104; United States *v.* Greathouse, 2 Abb. U. S. 364; also a few things of interest may be found in the later legal and other periodicals. And see Carlisle *v.* United States, 16 Wal. 147; Hanauer *v.* Doane, 12 Wal. 347; Shortridge *v.* Macon, 1 Abb. U. S. 58; Culliton *v.* United States, 5 Ct. of Cl. 627.

[1] Vol. I. § 611, 681, 779.





**High Treason anciently.** — Hawkins says: "Before the 25 Edw. 3, c. 2, there was great diversity of opinion concerning high treason; and many offences were taken to be included in it besides those expressed in the said statute: as, the killing of the king's father, brother, or even his messenger; producing the pope's bull of excommunication, and pleading it in disability; refusing to accuse a man in the king's courts, and summoning him to appear and defend himself before a foreign prince; and other such like acts tending to diminish the royal dignity of the Crown."[1]

§ 1206. **Stat. 25 Edw. 3.** — Therefore, long before the settlement of this country, high treason (as well as petit) was defined by 25 Edw. 3, stat. 5, c. 2. There were many particulars; but the only part which concerns us declares it to be high treason "if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably attainted of open deed by the people of their condition."

§ 1207. **Later Legislation.** — Later legislation, in England, somewhat extended the crime of treason there, but not greatly. None of it has any relevancy to the subject of our present inquiries.

§ 1208. **Levying War.** — Hawkins says: "Of high treason concerning the levying of war, &c., and adhering to the king's enemies, &c., I shall consider, First, What acts shall be said to amount to a levying of war against the king; Secondly, What shall be said to be an adherence to the king's enemies. As to the first point, it is to be observed, that not only those who directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases those who in a violent and forcible manner withstand his lawful authority, or endeavor to reform his government, are said to levy war against him; and, therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him. But those who join themselves to rebels, &c., for fear of death, and retire as soon as they dare, seem to be no way guilty of this offence.

§ 1209. **Continued.** — "Those also who make an insurrection in order to redress a public grievance, whether it be a real or pre-

[1] 1 Hawk. P. C. Curw. ed. p. 7, § 1.

tended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion: as, where great numbers by force attempt to remove certain persons from the king; or to lay violent hands on a privy councillor; or to revenge themselves against a magistrate for executing his office; or to bring down the price of victuals; or to reform the law or religion; or to pull down all bawdy houses; or to remove all enclosures in general, &c. But where a number of men rise to remove a grievance to their private interest, — as to pull down a particular enclosure intrenching upon their common, &c., — they are only rioters.

§ 1210. **Continued.** — "In a special verdict, not only those who are expressly found to have been aiding and assisting a rebellious insurrection, but perhaps also those who are only found to have acted in the execution of the intended violence, or to have attended the principal offender from the beginning, though they be not found to have known the design of the rising, shall be adjudged guilty of high treason. But those who are found only to have suddenly joined with them in the streets, and to have flung up their hats and hallooed with them, are guilty of no greater offence than a riot at most.

§ 1211. **Continued.** — "However it is certain, that a bare conspiracy *to levy such a war* cannot amount to this species of treason, unless it be actually levied. Yet it hath been resolved, that a conspiracy to levy war against the king's person may be alleged as an overt act of *compassing his death*, and that in all cases if the treason be actually completed, the conspirators, &c., are traitors as much as the actors; and that there may be a levying of war where there is no actual fighting.

§ 1212. **Adhering to the King's Enemies.** — "As to the second point, namely, What shall be said to be an adherence to the king's enemies, &c., this is explained by the words subsequent, 'giving aid and comfort to them;' from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, &c., or assisting the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the





king's subjects, is clearly within this branch. But there is no necessity expressly to allege, that such adherence was against the king, for it is apparent; yet the special manner of adherence must be set forth. And it is said, that the succoring a rebel fled into another realm is not within the statute, because a 'rebel is not properly an enemy,' and the statute is taken strictly." [1]

§ 1213. **Not well defined.** — It will not compensate us to pursue this subject further in the light of the English text-books and decisions.[2] From the foregoing extracts we see, that, when our country was settled, and afterward when our Constitution was adopted, the English law of treason was not well defined, and especially it was not in all respects drawn according to the dictates of legal principle. Let us, then, see what superstructure was raised in this country on the uncertain foundation of English doctrine.

## II. *Treason against the United States.*

§ 1214. **Constitutional Provision.** — By the Constitution, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.[3] No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work

[1] 1 Hawk. P. C. Curw. ed. p. 11-18, § 23-28.

[2] On that branch of English treason which concerns the levying of war and adhering to the enemy, see Norfolk's Case, 1 Howell St. Tr. 957; Essex's Case, 1 Howell St. Tr. 1333, 1337, 1355; Slingsby's Case, 5 Howell St. Tr. 871; Hewet's Case, 5 Howell St. Tr. 883; Trials of the Regicides, 5 Howell St. Tr. 947, 983; Messenger's Case, 6 Howell St. Tr. 879, 901, note, J. Kel. 70, 75; Freind's Case, 13 Howell St. Tr. 1, 61, note; Vaughan's Case, 13 Howell St. Tr. 485, 530; Gregg's Case, 14 Howell St. Tr. 1371: Dammaree's Case, 15 Howell St. Tr. 521; Purchase's Case, 15 Howell St. Tr. 651, 699; Layer's Case, 16 Howell St. Tr. 93, 312; Hensey's Case, 19 Howell St. Tr. 1341, 1344; Gordon's Case, 21 Howell St. Tr. 485, 499, 644; De la Motte's Case, 21 Howell St. Tr. 687, 808; Watt's Case, 23 Howell St. Tr. 1167, 1191; Hardy's Case, 24 Howell St. Tr. 199; Watson's Case, 32 Howell St. Tr. 1, 431; Brandreth's Case, 32 Howell St. Tr. 755, 865, 889; Frost's Case, 1 Townsend St. Tr. 1, 9 Car. & P. 159; O'Brien's Case, 1 Townsend St. Tr. 469; Story's Case, 8 Dy. 298 *b*; Bensted's Case, Cro. Car. 583; Vaughan's Case, 2 Salk. 634; Axtell's Case, J. Kel. 13; Anonymous, J. Kel. 19; Rex *v.* Tucker, 1 Ld. Raym. 1; Reg. *v.* Davitt, 11 Cox C. C. 676; Reg. *v.* Meaney, Ir. Rep. 1 C. L. 500; s. c. nom. Reg. *v.* Meany, 10 Cox C. C. 506; Reg. *v.* McCafferty, Ir. Rep. 1 C. L. 363, 10 Cox C. C. 603; Reg. *v.* McMahon, 26 U. C. Q. B. 195; Reg. *v.* Lynch, 26 U. C. Q. B. 208; Reg. *v.* School, 26 U. C. Q. B. 212; Reg *v.* Magrath, 26 U. C. Q. B. 385.

[3] And see Vol. I. § 456, 703.

corruption of blood or forfeiture except during the life of the person attainted."[1]

§ 1215. *Statutes :* —

**Revised Statutes.** — In the Revised Statutes, the terms of the treason enactments are somewhat changed. Whether or not any change in the law itself has thereby been wrought it is not proposed here to inquire. As every reader has by him the Revised Statutes, nothing will be copied from them. But it will be convenient to compare them with the —

**Older Enactments.** — They are as follows : —

**Act of 1790.** — It provides : "If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death."[2] By this statute also, misprision of treason is made punishable.[3]

§ 1216. **Act of 1862.** — Thus stood the statutory law until, by act of July 17, 1862, not expressly repealing former acts, the following provisions were added : "Sect. 1. Every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free ; or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free ; said fine shall be levied and collected on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding.

§ 1217. **Continued.** — "Sect. 2. If any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in,

[1] Const. U. S. art. 3, § 3.
[2] Act of April 30, 1790, c. 9, § 1, 1 U. S. Stats. at Large, p. 112.
[3] Vol. I. § 722.





or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have ; or by both of said punishments, at the discretion of the court.

§ 1218. **Continued.** — "Sect. 3. Every person guilty of either of the offences described in this act shall be for ever incapable and disqualified to hold any office under the United States.

§ 1219. **Continued.** — "Sect. 4. This act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person or persons guilty of treason against the United States before the passage of this act, unless such person is convicted under this act."[1]

§ 1220. **Act of July, 1861.** — There were, however, passed the preceding year the following statutes, which it is desirable to consider in this connection : "If two or more persons within any State or Territory of the United States shall conspire together to overthrow, or put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States ; or by force to prevent, hinder, or delay the execution of any law of the United States ; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States ; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States ; each and every person so offending shall be guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States, having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars ; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment."[2]

§ 1221. **Act of Aug. 1861.** — "Sect. 1. If any person shall be guilty of the act of recruiting soldiers or sailors in any State or Territory of the United States to engage in armed hostility

[1] Act of July 17, 1862, § 1–4, 12 U. S. Stats. at Large, c. 195, p. 589.
[2] Act of July 31, 1861, 12 U. S. Stats. at Large, c. 33, p. 284.

against the United States, or who shall open a recruiting station for the enlistment of such persons, either as regulars or volunteers, to serve as aforesaid, shall be guilty of a high misdemeanor, and upon conviction in any court of record having jurisdiction of the offence, shall be fined a sum not less than two hundred dollars nor more than one thousand dollars, and confined and imprisoned for a period not less than one year nor more than five years.

§ 1222. **Continued.** — "Sect. 2. The person so enlisted, or engaged as regular or volunteer, shall be fined in a like manner a sum of one hundred dollars, and imprisoned not less than one nor more than three years."[1]

§ 1223. *American Expositions of Doctrine :* —

**Following the English Law.** — The reader perceives, that the part of the constitutional provision and of the statutes wherein treason is defined, follows in substance the statute of 25 Edw. 3.[2] And it is a general rule in the interpretation of our written laws, that, where a provision employs terms before used in the English law, or even in any other foreign law, such terms are to receive, with us, the foreign meaning. But this rule is not universally binding.[3]

§ 1224. **Following English Expositions.** — In a general way, the rule of adopting the English expositions is applied in the construction of our written law of treason.[4] Still it does not follow, that our courts should adopt every expression of an English judge, or an English text-writer of authority, or even every decision as to the point in controversy, in construing our Constitution and statutes.

[1] Act of Aug. 6, 1861, 12 U. S. Stats. at Large, c. 56, p. 317.

[2] Ante, § 1206.

[3] Stat. Crimes, § 92, 97.

[4] In Burr's Trial, Marshall, C. J., said: "But the term [levying war] is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute in that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward 3, from which it was borrowed." Burr's Trial, Coombs ed. 308.





§ 1225. **Continued.** — There are even, in the English books, some expressions so variant from the common-sense meaning of the words of the statute as to suggest the doubt, whether, in interpreting similar terms in our Constitution, any regard should be paid to the English expositions. Our Constitution emanated from the whole people. Its provisions were scrutinized and approved by men who knew little and cared nothing of those technical distinctions which the English judges had found it necessary, in some instances, to adopt in order to convict of this grave offence persons obnoxious to the government. The tendency of the English courts has always been to enlarge the boundaries of this offence; and with this the popular mind, being the power from which our Constitution received its sanction, has always been in conflict. Moreover, treason, a political crime, deriving its guilt specially from the intent, is always liable to be expanded by the judicial breath; since the judges are almost of course of opposite political views to the accused person. It is a tendency of the mind, under all circumstances, to attribute corrupt motives to men of opposite opinions, especially political opinions; and treason is a crime of motive, more than any other in the catalogue.

§ 1226. **Attempt to prevent Execution of Statute.** — One very peculiar doctrine, understood to prevail in England,[1] and sanctioned to some extent in this country,[2] is, that any violent attempt to prevent the execution, in all cases, of an act of the legislature, not from private motives, but public, is treason. Now, while we cannot doubt that the violence which accompanies such an attempt may be a sufficient overt act, where the treasonable purpose exists, we shall find the conclusion difficult, that an aim thus circumscribed — an ultimate object so far short of what is generally sought by actual "war" — comes within any proper meaning of the phrase "levying war."

§ 1227. **Continued — ("Levying War" — "Adhering to Enemies").** — This question depends on the meaning of the words "levying war." The words "adhering to their enemies, giving them aid and comfort," merely refer to the doctrine of being an aider at

[1] See Rex *v.* Gordon, 2 Doug. 590; Reg. *v.* Frost, 9 Car. & P. 129; ante, § 1208.

[2] 3 Greenl. Ev. § 242 and note; United States *v.* Hoxie, 1 Paine, 265; United States *v.* Hanway, 2 Wal. Jr. 139; United States *v.* Mitchell, 2 Dall. 348.

the fact of a levying of war, as applicable to treason.[1] Now, without undertaking any nice definition of the word "war," one proposition is maintainable; namely, that —

**Meaning of "War."** — It is an attempt, by force, either to subjugate or to overthrow the government against which it is levied. Ordinarily, where the overthrow is not contemplated, a treaty acknowledging rights previously denied is expected. This result of a treaty need not be intended in form, while it must be in substance. Therefore, —

**Opposing Statute.** — If a body of men, under the mistaken notion that a particular statute is in violation of fundamental or constitutional right, should combine to oppose by force its execution everywhere and at all times, and commit the overt act required, they would undoubtedly be guilty of treason, provided their determination was also to resist, by violence, every attempt to bring them to justice, and to continue this course until the government should be compelled to yield to them. But if their intent went no further than to the bare forcible prevention of the execution of the statute, they not meaning to measure power with the government, or to resist any arrest and trial for their conduct, it could not, on any just principle of interpretation, be deemed a "levying of war." Suppose, to show the absurdity of a contrary doctrine, one nation should make a reprisal on another, intending to submit to whatever infliction the nation thus despoiled should itself deem due as punishment; the notion, that the first nation had thereby levied war on the second, would be as absurd as such conduct would itself be ridiculous. If the reprisal were meant, as reprisals are, to extort compensation to which the other government should yield, through fear, without inflicting successful chastisement in return, the case would be different.

§ 1228. **Whether Combination necessary.** — And this leads to a question which is best approached by putting it, — Can one alone,

[1] **Adhering to Rebellion.** — It has been sometimes held, however, that, in a case of rebellion, a person who adheres to the cause of the rebels, giving them aid and comfort, can, as to the mere form of the indictment, be proceeded against only under the former clause for "levying war;" the word "enemies" in the latter clause being construed to mean foreign enemies, and not to include rebel subjects. See the charge of Field, J., and of Hoffman, J., in the Chapman Treason case, pamph., San Francisco, 1863; also, a debate in the United States Senate, July 17, 1862. And see ante, § 1212. But see post, § 1232–1234.





by his own unaided act, without combination, and without a conspiracy of any sort, commit, in point of law, the treason of levying war? The reader will find abundant *dicta* to the effect, that there must be, in this offence, a combination of numbers, accompanied, of course, by a use, actual or threatened, of force.[1] And perhaps some of the *dicta* may approach very near to adjudication, or even be adjudication itself. But if there must be more than one, how many must there be? Are two enough? Are two hundred? That the combination need not be of numbers adequate to overthrow the armies of the government on the field of battle, — so found by the jury as fact, or adjudged by the court as law, — is a plain proposition, lying clear in the entire body of decision and practice on this subject. Must the jury find, that the government actually began to tremble under the coming danger? No. There is no such doctrine.

§ 1229. **What is "Levying War."** — Now, on principle, to constitute a levying of war there must be, in the mind of the guilty persons, an intent either to overthrow the government, or to compel it, through fear, to yield to something to which it would not voluntarily assent.[2] Added to this intent, there must be an array of assembled numbers collected for the purpose of war; or, on the other hand, some act of violence, or some other kind of act, in the nature of war.[3] Yet, —

**One alone.** — Though it may, it is presumed, be legally possible for one man alone to levy war upon his government, we can hardly imagine circumstances in which the jury would be justified in finding him guilty, where no others were shown to have acted with him.

§ 1230. **Intent — Overt Act.** — Plainly, in this offence, the leading element is the warlike intent. In reason, nothing can be a levying of war, where this full intent does not exist. Yet suppose it does exist, there must still be an act, in compliance, not only with the express words of the written law, but also with the

[1] See Ex parte Bollman, 4 Cranch, 75. And in Burr's Trial, Marshall, C. J., distinguishing the point adjudged from the *dicta* of the court, speaks of the exact point decided in Ex parte Bollman as being, "that no treason could be committed because no treasonable assemblage had taken place." Burr's Trial, Coombs ed. 312. Still, seeing that point was necessarily decided with reference to the facts of the particular case, the decision could not, in the nature of things, control such a case as might be imagined, attended by differing circumstances.

[2] Ante, § 1227.

[3] And see, the authorities referred to, Vol. I. § 132.

doctrine of the unwritten, that a mere evil imagining does not constitute a crime.[1]

§ 1231. **The Overt Act — (Conspiring).** — A mere conspiring, with nothing done beyond, is a sufficient act to satisfy the common-law rule.[2] So likewise it is a sufficient "overt act" under most of the English statutory provisions against treason; as, for example, under those which make it treason or felony to compass the death or deposition of the sovereign.[3] But it is not an overt act of "levying war," consequently it is not sufficient under this clause of our statutes against treason.[4] And —

**Assembling.** — A mere assemblage, if not of a warlike character, seems to have been deemed to come short of the "overt act" which is required.[5] In other words, —

**Overt Act defined.** — The "overt act" must be one which, in itself, *pertains to warlike operations*. It must be, in some sense, an act of war; and, in this view, it is to the nature of the act, rather than its magnitude, that inquiry is to be directed.

§ 1232. **Overt Act of adhering to Enemies.** — We have thus far been speaking of "levying war." But when war is levied, the "overt act" of "adhering to the enemies of the country, giving

[1] Vol. I. § 204.

[2] Vol. I. § 432.

[3] Mulcahy *v.* Reg. Law Rep. 3 H. L. 306; Rex *v.* Stone, 6 T. R. 527.

[4] Ante, § 1211; Anonymous, J. Kel. 19, Dalison, 14; Ex parte Bollman, 4 Cranch, 75; Respublica *v.* Carlisle, 1 Dall. 35; United States *v.* Hanway, 2 Wal. Jr. 139; Reg. *v.* Frost, 9 Car. & P. 129.

[5] At the time of the breaking out of the secession war, Sprague, J., in a charge to the grand jury in the district court of the United States at Boston, employed the following language: "It is settled, that, if a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war. But it must be an assemblage in force, a military assemblage in a condition to make war. A mere conspiracy to overthrow the government, however atrocious such conspiracy may be, does not of itself amount to the crime of treason. Thus, if a convention, legislature, junto, or other assemblage entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances, or decrees, even with a view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war." Charge to the Grand Jury, 23 Law Reporter, 705, 707. In the circuit court for the southern district of New York, Smalley, J., said in a charge to the grand jury: "Persons owing allegiance to the United States have confederated together, and with arms, by force and intimidation, have prevented the execution of the constitutional acts of Congress, have forcibly seized upon and hold a custom-house, and post-office, forts, arsenals, vessels, and other property belonging to the United States, and have actually fired upon vessels bearing the United States flag and carrying United States troops. This is a usurpation of the authority of the federal government; it is high treason by levying war. Either one of these acts will constitute high treason." Charge to the Grand Jury, 23 Law Reporter, 597, 599. See also Ex parte Bollman, 4 Cranch, 75





them aid and comfort," may be a different thing. For, in the language of Marshall, C. J., "if war be actually levied, — that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, — all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[1]

§ 1233. **Mere Words of Adhering.** — Still, even in this class of cases, while the opinion has been expressed that words alone are a sufficient act, the better doctrine is, that, unless they are written and used as a writing, they are not. But if so written and used, they are often adequate;[2] as, for instance, where they constitute an intercepted letter to an enemy.[3]

§ 1234. **Adhering defined.** — Said a learned judge: "What amounts to adhering to and giving aid and comfort to our enemies, it is somewhat difficult in all cases to define; but certain it is that furnishing them with arms, or munitions of war, vessels, or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting and encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act. And it is immaterial whether such acts are induced by sympathy with the rebellion, hostility to the government, or a desire for gain."[4]

§ 1235. **Allegiance.** — Under the act of Congress, of 1790, a person, to be guilty of treason, must owe allegiance to the United States. It is the same also under the Revised Statutes.[5] "Allegiance," says Sprague, J., "is of two kinds; that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection is bound to good faith toward our government; and, although an alien, he may be guilty of treason by co-operation either with rebels or foreign enemies.

[1] Ex parte Bollman, 4 Cranch, 75, 126; reaffirmed, Burr's Trial, Coombs ed. 322; Vol. I. § 226.

[2] 3 Inst. 14; 2 Stark. Slander, 166–168; 3 Greenl. Ev. § 240; Foster, 197 et seq.; 1 East P. C. 117 et seq.; Peacham's Case, 8 Howell St. Tr. 368; Challercomb's Case, 3 Howell St. Tr. 368; William's Case, 3 Howell St. Tr. 368; Trials of the Regicides, 5 Howell St. Tr. 947, 983; Frost's Case, 22 Howell St. Tr. 471, 480.

[3] Rex *v.* Jackson, 1 Crawf. & Dix C. C. 149. And see Rex *v.* Stone, 6 T. R. 527; Rex *v.* Hensey, 1 Bur. 642.

[4] Charge of Smalley, J., to the Grand Jury, 23 Law Reporter, 597, 601. See also United States *v.* Pryor, 3 Wash. C. C. 234; Vaughan's Case, 2 Salk. 634.

[5] Ante, § 1215; R. S. of U. S. § 5331.

The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited." [1]

§ 1236. **Questions under Act of 1862.**[2] — Some expositions of this act, especially in its combination with the prior statute of treason, were given in the earlier editions. It is believed, that, since the statutes were revised, those expositions have become unimportant. If the reader finds the fact to be otherwise, he is referred to the fifth edition.

§ 1237–1253. [These sections are omitted for reasons already stated.[3]]

### III. *Treason against the Individual States.*

§ 1254. **In General.** — Treason can be committed as well against a State as the United States.[4] But the same act which is treason against the United States is not necessarily treason against the State.[5] By constitutional or statutory provisions in most of the States, the offence, as against the State, is limited substantially as it is by the Constitution and laws of the United States as to the offence against the General Government.

§ 1255. **As to Minuter Doctrines.** — It is believed not best to occupy the space it would require to thread the minuter doctrines of treason against individual States.[6] The question is constantly diminishing in importance, and not likely often to arise.

[1] Charge to the Grand Jury, 23 Law Reporter, 705, 710. See also United States *v.* Villato, 2 Dall. 370; United States *v.* Wiltberger, 5 Wheat. 76, 97. As to treason by an alien, see Reg. *v.* McCafferty, Ir. Rep. 1 C. L. 363, 10 Cox C. C. 603; Ex parte Quarrier, 2 W. Va. 569; Carlisle *v.* United States, 16 Wal. 147; Rex *v.* Tucker, 1 Ld. Raym. 1.

[2] See, for this act, ante, § 1216–1219. And see United States *v.* Greathouse, 2 Abb. U. S. 364.

[3] Ante, § 1204.

[4] Vol. I. § 177, 456.

[5] And see Ex parte Quarrier, 2 W. Va. 569.

[6] See Respublica *v.* Carlisle, 1 Dall. 35; Respublica *v.* Malin, 1 Dall. 33; Hammond *v.* The State, 3 Coldw. 129; Ex parte Quarrier, 2 W. Va. 569.

For TRESPASS, FORCIBLE, see FORCIBLE TRESPASS.





# CHAPTER XLVII.

## UNLAWFUL ASSEMBLY.[1]

§ 1256. **How defined.** — An unlawful assembly is a congregating of three or more persons to do some unlawful act.[2]

§ 1257. **The Act Meant — (Riot).** — It is generally understood that the act intended must be such as, when done, will amount to riot. But —

**Other Unlawful Act.** — Undoubtedly persons may be indictable for assembling to commit an offence other than riot. Yet whether it is correct in legal language to call their coming together an unlawful assembly, or whether the act is to be regarded as a criminal attempt to do the wrong intended,[3] the books are not clear. The question, being one of mere words, is not important.

§ 1258. **Intent General.** — There need be no specific intent to do a particular mischief. If the assembly is calculated to excite alarm and terror, it is an unlawful assembly.[4]

§ 1259. **Assemblages to defend a Legal Right.** — Hawkins says: "An assembly of a man's friends, for the defence of his person against those who threaten to beat him if he go to such a mar-

[1] For matter relating to this title, see Vol. I. § 534. See this volume, AFFRAY; RIOT; ROUT; and, particularly, ante, § 1143 and note, 1151, 1155. And see Stat. Crimes, § 539–542, 560.

[2] Hawkins. —"An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion towards the execution of it. But this seems to be much too narrow a definition. For any meeting whatsoever, of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly." 1 Hawk. P. C. Curw. ed. p. 516, § 9. Blackstone's definition is given Vol. I. § 534.

[3] See Vol. I. § 728 et seq.

[4] Rex *v.* Blisset, 1 Mod. 13; Rex *v.* Hunt, 1 Russ. Crimes, 3d Eng. ed. 273, Reg. *v.* Neale, 9 Car. & P. 431; Reg. *v.* Vincent, 9 Car. & P. 91; Rex *v.* Cox, 4 Car. & P. 538; Rex *v.* Birt, 5 Car. & P. 154. See also 1 Russ. Crimes, 3d Eng. ed. 272–274.

ket, &c., is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders, to the disturbance of the public peace. Yet an assembly of a man's friends in his own house, for the defence of the possession thereof against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle."[1] We are thus conducted back to the discussions of the first volume concerning the "Defence of Person and Property."[2] What Hawkins here says about an assemblage to defend a man's castle is clearly correct.[3] The other branch of the doctrine of this eminent author doubtless needs some qualification. For plainly there may be circumstances in which a man may receive the assistance of his friends in the defence merely of his person, without exposing them to indictment for an unlawful assembly.

[1] 1 Hawk. P. C. Curw. ed. p. 516, § 10.

[2] Vol. I. § 836 et seq.

[3] Vol. I. § 858, 859, 877.

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For UNLICENSED LIQUOR SELLING, see Stat. Crimes.
UNLICENSED LOTTERIES, &c., see Stat. Crimes.





# CHAPTER XLVIII.

## USURY.[1]

§ 1260. **How in Criminal Law.** — The subject of usury pertains more to the civil department of the law than to the criminal. But, in rare circumstances, and in some of our States, it comes under the animadversion of the criminal courts, therefore a few words relating to it may be important.

**How defined — General Doctrine of Usury.** — Hawkins says: "It seems that usury, in a strict sense, is a contract upon a loan of money to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed, or not. And in a larger sense it seemeth, that all undue advantages taken by a lender against a borrower come under the notion of usury, whether there were any contract in relation thereto or not; as where one, in possession of land made over to him for the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land. But —

**Penalty.** — "It hath been resolved, that an agreement to pay double the sum borrowed, or other penalty, on the non-payment of the principal debt at a certain day, is not usurious; because it is in the power of the borrower wholly to discharge himself by repaying the principal according to the bargain."[2]

§ 1261. **How at Common Law.** — The common law did not make the taking of interest for money indictable, where the rate was not exorbitant; but, where it was, it did.[3] Still the idea prevailed in early times, that, even where the rate was not exorbitant, the taking was contrary to good conscience. And Haw-

[1] For matter relating to this title, see Crim. Proced. I. § 580.

[2] 1 Hawk. P. C. Curw. ed. p. 613, § 1-8. And, to the proposition of the last paragraph, Sumner *v.* People, 29 N. Y. 337, and numerous cases therein cited.

[3] 2 Chit. Crim. Law, 548, note.

kins says, it was formerly supposed that no action would lie to recover such interest; though afterward a contrary doctrine was established.[1]

§ 1262. **Old English Statutes.** — There are, relating to interest and usury, some English statutes early enough in date to be common law in our States;[2] but, —

**American Legislation.** — In probably all the States, the English enactments have been superseded by State legislation. Under the State laws, not enough has been established, and the subject is not of sufficient general importance, to render a particular discussion of it desirable. The few cases which have arisen, whether on the law or the procedure, are referred to in a note.[3]

§ 1263. **Not in all States indictable.** — Generally, in our States, the taking of unlawful interest is only a civil wrong; and, where it is otherwise, the criminal prosecution is seldom resorted to.

[1] 1 Hawk. P. C. Curw. ed. p. 613, § 4-7.

[2] See 1 Hawk. P. C. Curw. ed. p. 614; Reg. v. Dye, 11 Mod. 174; Rex v. Hendricks, 2 Stra. 1234; Lancaster's Case, 1 Leon. 208.

[3] Sumner v. People, 29 N. Y. 337; Curtis v. Knox, 2 Denio, 341; The State v. Tappan, 15 N. H. 91; Gillespie v. The State, 6 Humph. 164; Young v. The Governor, 11 Humph. 147; Livingston v. Indianapolis Insurance Company, 6 Blackf. 133; Murphy v. The State, 3 Head, 249; Bank of Salina v. Henry, 2 Denio, 155; Fielder v. Darrin, 50 N. Y. 437; The State v. Tappan, 15 N. H. 91; McAuly v. The State, 7 Yerg. 526; Wilkins v. Malone, 14 Ind. 153; The State v. Williams, 4 Ind. 234; Merriman v. The State, 6 Blackf. 449; Groves v. The State, 6 Blackf. 489; Crawford v. The State, 2 Ind. 112.

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For VAGRANCY, see Vol. I. § 515, 516, 706.
VERBAL SLANDER, see LIBEL AND SLANDER.
VIOLATION OF SABBATH, see LORD'S DAY.
VOTING, ILLEGAL, see Stat. Crimes.
WAGER, see Stat. Crimes.





# CHAPTER XLIX.

## WAY.[1]

§ 1264, 1265. Introduction.
1266-1271. Kinds of Ways.
1272-1279. Act of Obstruction.
1280. Condition of Repair.
1281-1283. Person or Corporation responsible for Non-repair.
1284-1287. Remaining and Connected Questions.

§ 1264. **Nuisance.** — The obstruction of a public way is a public nuisance.[2] In this aspect, the present chapter would seem to belong among the others on nuisance in the first volume. But the discussion here will take a wider range.

§ 1265. **How the Chapter divided.** — We shall consider, I. The Kinds of Ways of which the Obstruction and Neglect to Repair are indictable; II. The Act of Obstruction; III. The Condition of Repair in which the Way must be put and kept; IV. The Person or Corporation responsible for Non-repair; V. Remaining and Connected Questions.

### I. *The Kinds of Ways of which the Obstruction and Neglect to repair are indictable.*

§ 1266. **Public Ways — (Private).** — The kind of way is seen in the proposition, that the obstruction, as a crime, grows out of the inconvenience suffered by the public. The way, therefore, must be public. Any injury done to a mere private road, over which only individuals have the right to pass, is not a crime.[3]

**Meaning of "Highway."** — The term highway, in legal phrase, denotes all ways of a public nature, such as rivers, wagon-roads,

[1] For matter relating to this title, see Vol. I. § 173-176, 227, 236, 241-245, 341, 419, 531, 792. See NUISANCE, Vol. I. § 1071 et seq. For the pleading, practice, and evidence, see Crim. Proced. II. § 1042 et seq. See also Stat. Crimes, § 156, note, 164, note, 206, 298, 407, 923.

[2] Vol. I. § 531.

[3] Vol. I. § 243-245, 530, 531.

foot-paths, and the like, over which the public are entitled to travel, whether with or without the payment of toll.[1]

§ 1267. **How Way established.** — There are various methods known to the law by which highways are established, not quite uniform in our States, — such as prescription, dedication to the public by the owner of the soil and the acceptance implied in their use, the laying of them out by public authority, legislative grants, and the like. The discussion of these questions is not fully within the scope of this chapter, yet they often become important. Reference to some cases, therefore, is made in the note.[2]

[1] See Angell & Durfee on Highways, § 2; Commonwealth *v.* Wilkinson, 16 Pick. 175; Cleaves *v.* Jordan, 34 Maine, 9, 12; Vantilburgh *v.* Shann, 4 Zab. 740; The State *v.* Atkinson, 24 Vt. 448; People *v.* Kingman, 24 N. Y. 559; Peckham *v.* Lebanon, 39 Conn. 231, 235; Reg. *v.* Saintiff, Holt, 129; Mills *v.* The State, 20 Ala. 86. **Special Meanings.** — The meaning of the word "highway" is not inflexible. Thus, though it is generally as stated in the text, it has been held in North Carolina that a railroad is not a "highway" as the word is used in the Code providing the death penalty for robbery in or near a highway. The State *v.* Johnson, Phillips, 140. So in Alabama, a navigable river is held not to be a highway within the statute against gaming. "Under the existing laws of the United States and of this State," said Rice, C. J., "the navigable rivers within this State are public highways for certain purposes; but it does not follow that they are so for all purposes." **Defined in Alabama.** — He also observed, that, in Mills *v.* The State, supra, a highway was defined to be "a public road; that is, a road dedicated to, and kept by, the public, as contradistinguished from private ways, or neighborhood roads, which are not so kept up." Glass *v.* The State, 30 Ala. 529. **Pent Roads.** — In Vermont, all "pent roads" are public highways, but their use by the public is subject to the right of adjoining proprietors to erect suitable gates or bars to protect their fields and crops. Wolcott *v.* Whitcomb, 40 Vt. 40. **Not worked.** — In Indiana, it is not necessary, in order to constitute a public road a highway, within the act forbidding the obstructions of highways, that it should be worked. The State *v.* Frazer, 28 Ind. 196.

[2] *Alabama.* — Thompson *v.* The State, 21 Ala. 48; Oliver *v.* Loftin, 4 Ala. 240.

*Illinois.* — Martin *v.* People, 13 Ill. 341; Daniels *v.* People, 21 Ill. 439; Martin *v.* People, 23 Ill. 395; Conkling *v.* Springfield, 39 Ill. 98.

*Indiana.* — Hays *v.* The State, 8 Ind. 425; The State *v.* Hill, 10 Ind. 219; The State *v.* Huggins, 47 Ind. 586.

*Iowa.* — Harrow *v.* The State, 1 Greene, Iowa, 439; The State *v.* Snyder, 25 Iowa, 208.

*Kentucky.* — Commonwealth *v.* Abney, 4 T. B. Monr. 477; Commonwealth *v.* Ditto, Hardin, 450; Gedge *v.* Commonwealth, 9 Bush, 61.

*Maine.* — The State *v.* Sturdivant, 18 Maine, 66; The State *v.* Beeman, 35 Maine, 242; The State *v.* Strong, 25 Maine, 297; The State *v.* Kittery, 5 Greenl. 254; The State *v.* Madison, 33 Maine, 267; The State *v.* Bigelow, 34 Maine, 243; The State *v.* Wilson, 42 Maine, 9; Hinks *v.* Hinks, 46 Maine, 423; The State *v.* Noyes, 47 Maine, 189.

*Massachusetts.* — Commonwealth *v.* Weiher, 3 Met. 445; Commonwealth *v.* Belding, 13 Met. 10; Commonwealth *v.* Low, 3 Pick. 408; Commonwealth *v.* Tucker, 2 Pick. 44; Commonwealth *v.* Gowen, 7 Mass. 378; Commonwealth *v.* Fitchburg Railroad, 8 Cush. 240; Commonwealth *v.* Smyth, 14 Gray, 33; Commonwealth *v.* Taunton, 16 Gray, 228.





**Other like Questions.** — There are other questions of a like nature, not within our range of inquiry, while yet the reader may have occasion to look at the cases.[1]

**Way Legal or not.** — In a certain sense, the way must be legal; if it is laid out by officers empowered, the steps required by law must have been taken by them.[2] But there may be defects which cannot be inquired into, or of which a person charged with obstructing it cannot avail himself. These questions depend much upon the varying laws of the States.[3] One is not justified

*Michigan.* — People *v.* Beaubien, 2 Doug. Mich. 256.

*Minnesota.* — Furnell *v.* St. Paul, 20 Minn. 117.

*Missouri.* — Golahar *v.* Gates, 20 Misso. 236.

*New Hampshire.* — The State *v.* Gilmanton, 14 N. H. 467; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Laudaff, 2 Fost. N. H. 588; The State *v.* Canterbury, 40 N. H. 307; The State *v.* Northumberland, 44 N. H. 628.

*New Jersey.* — Perrine *v.* Farr, 2 Zab. 356; Stephens, &c. Co. *v.* Central Railroad, 5 Vroom, 280; The State *v.* Pierson, 8 Vroom, 216.

*New York.* — People *v.* Lawson, 17 Johns. 277; People *v.* Lambier, 5 Denio, 9; Harrington *v.* People, 6 Barb. 607; Fearing *v.* Irwin, 55 N. Y. 486.

*North Carolina.* — The State *v.* Spainhour, 2 Dev. & Bat. 547; The State *v.* Cardwell, Busbee, 245; The State *v.* Marble, 4 Ire. 318.

*Pennsylvania.* — Commonwealth *v.* Cole, 2 Casey, 187; Pennsylvania *v.* Oliphant, Addison, 345; Balliet *v.* Commonwealth, 5 Harris, Pa. 509.

*Rhode Island.* — The State *v.* Richmond, 1 R. I. 49; The State *v.* Cumberland, 6 R. I. 496; The State *v.* Cumberland, 7 R. I. 75.

*South Carolina.* — The State *v.* Huffman, 2 Rich. 617; The State *v.* Duncan, 1 McCord, 404; The State *v.* Lythgoe, 6 Rich. 112; The State *v.* Mobley, 1 McMullan, 44; The State *v.* Gregg, 2 Hill, S. C. 387; The State *v.* Sartor, 2 Strob. 60.

*Tennessee.* — Mankin *v.* The State, 2 Swan, Tenn. 206; Anderson *v.* The State, 10 Humph. 119; Shelby *v.* The State, 10 Humph. 165; Stump *v.* McNairy, 5 Humph. 363; The State *v.* Loudon, 3 Head, 263; Russell *v.* The State, 3 Coldw. 119.

*Vermont.* — The State *v.* Alburgh, 82 Vt. 262; Blodget *v.* Royalton, 14 Vt. 288; The State *v.* Newfane, 12 Vt. 422; The State *v.* Woodward, 23 Vt. 92.

*Virginia.* — Holleman *v.* Commonwealth, 2 Va. Cas. 135; Commonwealth *v.* Howard, 1 Grat. 555.

*Wisconsin.* — Wisconsin River Impr. Co. *v.* Lyons, 30 Wis. 61.

*England.* — Rex *v.* Leake, 2 Nev. & M. 583, 5 B. & Ad. 469; Reg. *v.* East Mark, 11 Q. B. 877; Rex *v.* Richards, 8 T. R. 634; Rex *v.* Cumberworth, 3 B. & Ad. 108; Rex *v.* Wright, 3 B. & Ad. 681; Reg. *v.* Hornsey, 10 Mod. 150; Reg. *v.* Wilts, 6 Mod. 307, Holt, 339; Reg. *v.* Chorley, 12 Q. B. 515; Roberts *v.* Hunt, 15 Q. B. 17; Rex *v.* Morris, 1 B. & Ad. 441; Reg. *v.* Blakemore, 2 Den. C. C. 410, 5 Cox C. C. 513, 9 Eng. L. & Eq. 541; Gerring *v.* Barfield, 16 C. B. N. S. 597; Reg. *v.* Westmark, 2 Moody & R. 305.

[1] The State *v.* Marble, 4 Ire. 318; Commonwealth *v.* Fisher, 6 Met. 433; Commonwealth *v.* Beeson, 3 Leigh, 821; Reg. *v.* Bamber, 13 Law J. N. S. M. C. 13, 8 Jur. 309; Reg. *v.* Hornsea, Dears. 291; The State *v.* Atkinson, 24 Vt. 448; Elkins *v.* The State, 2 Humph. 543; Commonwealth *v.* Alburger, 1 Whart. 469; Martin *v.* People, 13 Ill. 341.

[2] Rex *v.* Sanderson, 3 U. C. O. S. 103; Martin *v.* People, 13 Ill. 341; Pennsylvania *v.* Oliphant, Addison, 345.

[3] The State *v.* Hill, 10 Ind. 219; Commonwealth *v.* Ditto, Hardin, 450; The

in obstructing a highway because it is less than the statutory width.[1]

§ 1268. **Cul de Sac.** — Can a *cul de sac*, being a way which terminates in no other, and ends on private property, be such a highway that to obstruct it is indictable? By some opinions it cannot, because, it is said, as the public has no occasion to use it, its obstruction is of no public detriment.[2] But, on principle, the public may reserve to itself the use of such a way, as sometimes it does of a square,[3] rendering its obstruction punishable for the same reason.[4] However this may be, —

**Public Necessity.** — The question of public necessity may often be important in the evidence, as to whether a particular way is public or not.[5]

§ 1269. **Foot-way, Horse-way, &c.** — Besides the ordinary highways, over which vehicles are driven, there are public foot-ways,[6] horse-ways,[7] and the like,[8] the obstruction of which is in the same manner indictable.

**Public Square.** — So public squares are a sort of public way; and their obstruction is an offence on the like principle.[9]

**Bridge.** — A bridge is ordinarily a part of the way in which it is laid;[10] but sometimes it is subject to special regulations, not necessary to be here described.[11]

State *v.* Madison, 33 Maine, 267; The State *v.* Bigelow, 34 Maine, 243; Stephens, &c., Co. *v.* Central Railroad, 5 Vroom, 280; Commonwealth *v.* Howard, 1 Grat. 555.

[1] The State *v.* Robinson, 28 Iowa, 514.

[2] See Angell & Durfee on Highways, § 27-31; Commonwealth *v.* Tucker, 2 Pick. 44; The State *v.* Duncan, 1 McCord, 404; The State *v.* Lythgoe, 6 Rich. 112; The State *v.* Randall, 1 Strob. 110; The State *v.* Rye, 35 N. H. 368; Rex *v.* Hammond, 10 Mod. 382.

[3] Post, § 1269.

[4] See Danforth *v.* Durell, 8 Allen, 242; People *v.* Kingman, 24 N. Y. 559; The State *v.* Frazer, 28 Ind. 196; People *v.* Jackson, 7 Mich. 432, 449, 450.

[5] Reg. *v.* Hornsey, 10 Mod. 150; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Northumberland, 44 N. H. 628.

[6] Thrower's Case, 1 Vent. 208, 3 Salk. 392.

[7] Rex *v.* St. Weonard, 5 Car. & P. 579; Reg. *v.* Saintiff, Holt, 129.

[8] Peckham *v.* Lebanon, 39 Conn. 231, 235.

[9] The State *v.* Atkinson, 24 Vt. 448; Commonwealth *v.* Bowman, 8 Barr, 202; Rung *v.* Shoneberger, 2 Watts, 23; Commissioners *v.* The State, Riley, 146; The State *v.* Commissioners, 3 Hill, S. C. 149; Commonwealth *v.* Rush, 2 Harris, Pa. 186. See Commonwealth *v.* Eckert, 2 Browne, Pa. 249.

[10] The State *v.* Canterbury, 8 Fost. N. H. 195; Reg. *v.* Saintiff, Holt, 129; Rex *v.* Middlesex, 3 B. & Ad. 201; Rex *v.* Bucks, 12 East, 192.

[11] Attorney-General *v.* Hudson River Railroad, 1 Stock. 526; Commonwealth *v.* Newburyport Bridge, 9 Pick. 142; Rex *v.* Derby, 3 B. & Ad. 147; Rex *v.* Wilts, 6 Mod. 307; Follett *v.* People, 17 Barb. 193; People *v.* Thompson, 21 Wend. 285, 23 Wend. 537; Commonwealth *v.* New Bedford Bridge, 2 Gray, 339; Reg. *v.*





**Ferry.** — The like observations apply to ferries;[1] which, however, are oftener than bridges owned and managed separately from the carriage-ways they connect.

§ 1270. **Turnpike Roads — Railroads — Plank Roads.** — Turnpike-roads,[2] railroads,[3] and plank roads,[4] owned by corporations established for the purpose, are highways, concerning which the same observations may be made as concerning other highways.

**Railroads.** — The doctrines must necessarily be modified somewhat, when applied to railroads; because they are not open to the public in the same manner as other highways; the corporation furnishing the vehicles and motive power.[5]

**Turnpike Roads — (Obstruction — Non-repair).** — An obstruction of a turnpike road is indictable the same as of any other public way.[6] And in general an indictment will lie against the corporation, and sometimes also against individual members,[7] for the non-repair of it.[8] Indeed, this double liability is recognized in many circumstances,[9] — a question depending much on the differing terms of statutes. Whether the town, county, or other like body or person, who is not the owner of the turnpike road, is also indictable, the same as for the non-repair of other public ways in the locality, depends on the terms of the charter. The mere fact,

Kitchener, Law Rep. 2 C. C. 88, 12 Cox C. C. 522; Brown *v.* Preston, 38 Conn. 219; Saugatuck Bridge Co. *v.* Westport, 39 Conn. 337; Clinton Bridge, 10 Wal. 454; The State *v.* Lake, 8 Nev. 276; Rex *v.* Derbyshire, 2 Q. B. 745, 2 Gale & D. 97, 6 Jur. 483; The State *v.* Morris Canal and Banking Co., 2 Zab. 537; Meadville *v.* The Erie Canal, 6 Harris, Pa. 66; The State *v.* Dearborn, 15 Maine, 402. See The Binghampton Bridge, 3 Wal. 51; The State *v.* Whitingham, 7 Vt. 390.

[1] Payne *v.* Partridge, 1 Show. 255. And see, as to ferries, The State *v.* Hudson, 3 Zab. 206; People *v.* Babcock, 11 Wend. 586; Carter *v.* Commonwealth, 2 Va. Cas. 354; Stark *v.* McGowen, 1 Nott & McC. 387; Sparks *v.* White, 7 Humph. 86; Broom, Leg. Max. 2d ed. 559; Hudson *v.* The State, 4 Zab. 718; Parrott *v.* Lawrence, 2 Dillon, 332; Police Jury *v.* Shreveport, 5 La. An. 661, 663; Marks *v.* Donaldson, 24 La. An. 242; The State *v.* Wilson, 42 Maine, 9; Angell & Durfee on Highways, § 46 et seq.

[2] Commonwealth *v.* Wilkinson, 16 Pick. 175; Rex *v.* Netherthong, 2 B. & Ald. 179; Waterford and Whitehall Turnpike *v.* People, 9 Barb. 161; Reg. *v.* Preston, 2 Lewin, 193.

[3] Angell & Durfee on Highways, § 17-23; Rex *v.* Pease, 4 B. & Ad. 30.

[4] Craig *v.* People, 47 Ill. 487.

[5] Angell & Durfee on Highways, § 18; ante, § 1266, note.

[6] Commonwealth *v.* Wilkinson, 16 Pick. 175.

[7] Vol. I. § 424.

[8] Red River Turnpike *v.* The State, 1 Sneed, 474. See The State *v.* Day, 3 Vt. 138. And see the last note to this section.

[9] See Vol. I. § 422; Kane *v.* People, 8 Wend. 203; Canaan *v.* Greenwoods Turnpike, 1 Conn. 1; The State *v.* Patton, 4 Ire. 16. See also Reg. *v.* Sheffield Canal, 4 New Sess. Cas. 25, 14 Jur. 170, 19 Law J. N. S. M. C. 44; The State *v.* Morris Canal and Banking Co., 2 Zab. 537; Meadville *v.* The Erie Canal, 6 Harris, Pa. 66; post, § 1282.

that, by the charter, the corporation is required to keep the road in repair, does not, at least according to some opinions, exonerate from the duty any other body who would, on other principles, be under the obligation. But perhaps this conclusion is derived from the particular words of the statutes on which the question has arisen.[1] On the other hand, the Virginia tribunal took the extreme view, that, where the act of incorporation subjects to a penalty an individual intrusted with the repairing of the road, for the breach of his duty, even the corporation itself is not liable to indictment for non-repair,[2] — a conclusion hardly harmonious with doctrines held elsewhere.[3]

§ 1271. **Rivers.** — Navigable rivers are public highways, subject to the same rules, as far as applicable, as the travelled carriage-ways of the country.[4]

**Harbors, &c.** — The same may be said of harbors and other like waters.[5]

## II. *The Act of Obstruction.*

§ 1272. **In General Terms.** — Any act performed under circumstances showing a criminal intent, whereby any one of the ways enumerated in the foregoing sections, or any other public highway, is in a perceptible manner[6] obstructed, or rendered less commodious, is indictable as a nuisance.[7]

[1] Reg. v. Preston, 2 Lewin, 193; Rex v. Netherthong, 2 B. & Ald. 179; Rex v. Mellor, 1 B. & Ad. 32.

[2] Commonwealth v. Swift Run Gap Turnpike, 2 Va. Cas. 361.

[3] Simpson v. The State, 10 Yerg. 525; Waterford and Whitehall Turnpike v. People, 9 Barb. 161. And see The State v. Thompson, 2 Strob. 12.

[4] Ang. & D. Highways, § 53–75; Chase v. American Steamboat Co., 10 R.I.79; Thompson v. Androscoggin River Impr. Co., 54 N. H. 545; The State v. Thompson, 2 Strob. 12; Rex v. Stanton, 2 Show. 30; Bailey v. Philadelphia, &c., Railroad, 4 Harring. Del. 389; People v. St. Louis, 5 Gilman, 351; Moore v. Sanborne, 2 Mich. 519; Reg. v. Betts, 16 Q. B. 1022, 22 Eng. L. & Eq. 240; Stuart v. Clark, 2 Swan, Tenn. 9; Newark Plank Road v. Elmer, 1 Stock. 754; Rex v. Trafford, 1 B. & Ad. 874. And see Rex v. Grosvenor, 2 Stark. 511; Gunter v. Geary, 1 Cal. 462; Rex v. Clueworth, Holt, 339; Atlee v. Packet Co., 21 Wal. 389; Thunder Bay Co. v. Speechly, 31 Mich. 336; Wisconsin River Impr. Co. v. Lyons, 30 Wis. 61; Cox v. The State, 3 Blackf. 193. What is a navigable river, see Stat. Crimes, § 303.

[5] Rex v. Tindall, 1 Nev. & P. 719, 6 A. & E. 143; Commonwealth v. Alger, 7 Cush. 53; Rex v. Ward, 4 A. & E. 384; People v. Horton, 5 Hun, 516.

[6] **Slight Obstruction.** — The words, "a perceptible," &c., are used because no better occur to me. There seems to be a doctrine, that the obstruction may be too slight for the law's notice; Vol. I. § 227; but the limit of this proposition cannot be clearly defined. See also Reg. v. Russel, 3 Ellis & B. 942, 26 Eng. L. & Eq. 230, 23 Law J. N. S. M. C. 173, 18 Jur. 1022.

[7] Vol. I. § 531; The State v. Merrit, 35 Conn. 314; People v. Horton, 5 Hun,





**Counterbalancing Benefit.** — It was laid down in one or two cases, that, for an obstruction to be indictable, it must not carry with it a counterbalancing benefit to the public.[1] But this doctrine is not sound in principle; and, in point of authority, it is overruled, and the contrary is established.[2] Yet, consistently with the established doctrine, another is held, not perhaps well defined, but something like this: that, if what is done is in pursuance of a general right, and, on the whole, the way is rendered not less advantageous for public use, — as, where the owner of the soil carries into a stream or tide-water a wharf for the benefit of navigation, — it is not indictable; while, if the erection is for some other purpose, and for the private benefit of the riparian owner, it is indictable.[3] Consequently, —

**Opening another Way.** — It does not justify an obstruction that the party opened another way through which travel might pass.[4] But, —

**Conflicting Rights.** — Where there are conflicting rights of way, the one must yield to the other according to the dictates of good sense; as, where a wire cable was laid across a river as a guy on which to run a ferry boat, it was deemed not unlawful, unless actually hazardous to the navigation of the river.[5]

516; San Francisco v. Clark, 1 Cal. 386. And see Beach v. People, 11 Mich. 106; Reg. v. United Kingdom Electric Telegraph, 9 Cox C. C. 137; Commonwealth v. Taunton, 16 Gray, 228.

[1] Rex v. Russell, 6 B. & C. 566; Pilcher v. Hart, 1 Humph. 524, 533.

[2] Vol. I. § 341; Rex v. Ward, 4 A. & E. 384; Respublica v. Caldwell, 1 Dall. 150; People v. Horton, supra; Reg. v. Betts, 16 Q. B. 1022, 22 Eng. L. & Eq. 240. In the last-cited case, which was an indictment for the obstruction of a river, Lord Campbell, C. J., said: "According to the authority of Lord Hale, to that of Lord Tenterden, in Rex v. Russell, 6 B. & C. 566, and to the opinion of this court in Rex v. Ward, 4 A. & E. 384, it is for the jury to say, whether an erection of this kind is a damage to the navigation or not. That the utility of such a work to the neighborhood, or to the public interests generally, may be taken into account as a compensation is a point on which, with great deference, I cannot concur with the majority of the judges who decided Rex v. Russell. The true question is, whether a damage accrues to the navigation in the particular locality; and that is a question for a jury. An indictment would not lie merely for erecting piers in a navigable river; it must be laid '*ad commune nocumentum*,' and whether it was so or not must be decided by the jury." p. 1037 of Q. B. Report.

[3] Atlee v. Packet Co., 21 Wal. 389. And see Rex v. Clueworth, Holt, 339; Beach v. People, 11 Mich. 106; The State v. Wilson, 42 Maine, 9.

[4] Weathered v. Bray, 7 Ind. 706. See post, § 1283.

[5] The Vancouver, 2 Sawyer, 381. Thus, in a case of **Ways Crossing.**—Each must somewhat obstruct the other, yet neither is indictable. So it is in the case of a bridge over a navigable river. Both are highways, and the bridge more or less obstructs the navigation of the river. **States and United States.** — The navigable rivers connecting State with State are, as highways, within the juris-

§ 1273. **Methods of Obstruction.** — The methods of obstruction are numerous. Thus, —

**In Navigable Waters.** — The cutting down of the banks of a river so as to divert its waters,[1] the building improperly of wharves in a harbor,[2] and the making of an unauthorized bridge over a navigable stream,[3] — are severally instances of indictable obstruction.

**In Carriage Ways.** — If a carriage way is laid out of a given width, the public have a right to the use of the whole of it, whether it is worked or not.[4] Then, if a turnpike company erects or maintains a gate after its charter has expired,[5] or, if an individual places a barrier to travel or digs a ditch across the street,[6] or allows the steps to his house [7] or a fence [8] or any other permanent thing [9] to project past the line of the road, or if a man by a mill-dam overflows the highway,[10] or places in the way a bridge without public utility,[11] — in these and other like instances an indictable nuisance is committed. Again, —

dictional power of the United States. See Vol. I. § 174-176. Therefore it is not within the power of a State wholly to obstruct such a river by a bridge. Still, as bridges are often of high public utility, this utility may be set up in some measure, and within limits not well defined, in defence of a charge of obstructing the navigation of a river. And see, on this subject, Mississippi, &c., Railroad *v.* Ward, 2 Black, 485; Works *v.* Junction Railroad, 5 McLean, 425; Woodman *v.* Kilbourn Manuf. Co., 1 Abb. U. S. 158; Avery *v.* Fox, 1 Abb. U. S. 246; Pilcher *v.* Hart, 1 Humph. 524, 533; People *v.* Vanderbilt, 28 N. Y. 396. **Bridge obstructing Navigation.** — If a bridge is built under due authority across a navigable river, still if it is so built as to obstruct navigation more than is reasonably necessary, it is a nuisance, and the subject of indictment. The State *v.* Freeport, 43 Maine, 198. And see post, § 1278.

[1] Rex *v.* Stanton, 2 Show. 30. And see People *v.* St. Louis, 5 Gilman, 351.

[2] Rex *v.* Grosvenor, 2 Stark. 511.

[3] Pennsylvania *v.* Wheeling and Belmont Bridge, 13 How. U. S. 518.

[4] Dickey *v.* Maine Telegraph, 46 Maine, 483; Morton *v.* Moore, 15 Gray, 573; The State *v.* Merrit, 35 Conn. 314; post, § 1277.

[5] Adams *v.* Beach, 6 Hill, N. Y. 271. See The State *v.* Passaic Turnpike, 3 Dutcher, 217; Wroe *v.* The State, 8 Md. 416.

[6] Justice *v.* Commonwealth, 2 Va. Cas. 171; Allen *v.* Lyon, 2 Root, 218; Wales *v.* Stetson, 2 Mass. 143; The State *v.* Yarrell, 12 Ire. 130; The State *v.* Miskimmons, 2 Ind. 440; Beatty *v* Gilmore, 4 Harris, Pa. 463, 469; Kelly *v.* Commonwealth, 11 S. & R. 345; The State *v.* Hunter, 5 Ire. 369.

[7] Hyde *v.* Middlesex, 2 Gray, 267, Commonwealth *v.* Blaisdell, 107 Mass. 234.

[8] Gregory *v.* Commonwealth, 2 Dana, 417; Mosher *v.* Vincent, 39 Iowa, 607.

[9] Reg. *v.* United Kingdom Electric Telegraph, 9 Cox C. C. 137; Garland *v.* Towne, 55 N. H. 55; Reg. *v.* Train, 9 Cox C. C. 180; Commonwealth *v.* Erie and Northeast Railroad, 3 Casey, 339. And see The State *v.* Dover, 46 N. H. 452; Wyman *v.* The State, 13 Wis. 663.

[10] The State *v.* Phipps, 4 Ind. 515. See Prim *v.* The State, 36 Ala. 244.

[11] Rex *v.* West Riding of Yorkshire, 2 East, 342.





**Adjacent Foulness — Things Overhanging.** — "It is a nuisance," says Russell, "to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; . . . and it is said, that the owner of the land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land next adjoining to such land is not bound by the common law so to do, without a special prescription; and it is also said, that the owner of trees, hanging over a highway to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance."[1] Also, —

**Outcries and Loud Noises.** — Within limits not well defined, outcries and loud noises in a public street are indictable nuisances.[2] Moreover, —

**Spring Guns.** — It is a nuisance to endanger travellers by setting spring guns along the way.[3]

**Other Danger avoided.** — When the owner of a mill-dam, to prevent its being broken by a flood, cut it at one end, and so caused an injury to the highway near, which injury would have been as great if the dam had broken by its own weight of waters, he was held, nevertheless, to be indictable.[4]

§ 1274. **Private Use of Public Way.** — Men have no right to use the public ways for their own private benefit, except in a manner not to obstruct their use by the public. They may travel over them to and from their homes, and make such occupancy of them at the point of starting as is necessary, and not inconsistent with the general use; but further they cannot go.[5] Therefore, —

**Carrying on Business in Street.** — In an English case, the court held to be indictable a man who, in a city, habitually had his wagons on one side of the street before his warehouse loading and unloading, for several hours at a time, day and night; one wagon, at least, being usually there, and his goods lying on the

[1] 1 Russ. Crimes, 3d Eng. ed. 347. **Overhanging.** — And see, as to things overhanging, Hyde *v.* Middlesex, 2 Gray, 267; Commonwealth *v.* Goodnow, 117 Mass. 114; post, § 1275.

[2] Commonwealth *v.* Oaks, 113 Mass. 8; The State *v.* Widenhouse, 71 N. C. 279; The State *v.* Hughes, 72 N. C. 25.

[3] The State *v.* Moore, 31 Conn. 479; Vol. I. § 856.

[4] The State *v.* Knotts, 2 Speers, 692.

[5] And see The State *v.* Buckner, Phillips, 558. **Processions.** — As to the rights of processions, see Commonwealth *v.* Ruggles, 6 Allen, 588; The State *v.* Hughes, 72 N. C. 25. **Sidewalks.** — As to obstructions of the sidewalk, see Furnell *v.* St. Paul, 20 Minn. 117; Reg. *v.* Plummer, 30 U. C. Q. B. 41; Reading *v.* Commonwealth, 1 Jones, Pa. 196.

ground ready to be loaded; though, on the opposite side of the street, there was room for carriages to pass two abreast. "The court said, that it should be fully understood that the defendant could not legally carry on any part of his business in the public street, to the annoyance of the public, — that the primary object of the street was for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance, — that, if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."[1] The same has been held of sawing timber in a public street, though done solely to enable the defendant to get it into his yard.[2] And constables obstructing the streets by their sales, commit this offence, there being no necessity for this use.[3] But what is necessary for the individual to do, of the general kind before mentioned, may be done, in order that thus he may the better enjoy the way for its primary purpose, travel.[4]

**Owning the Soil.** — In these and other cases, it is no defence for a man that he owns the fee, subject to the public easement, of the land on which the act of obstruction is done.[5]

[1] Rex *v.* Russell, 6 East, 427, 2 Smith, 424. And see People *v.* Cunningham, 1 Denio, 524; Rex *v.* Cross, 3 Camp. 224; Reg. *v.* Sheffield Gas Co., 22 Eng. L. & Eq. 200; Gerring *v.* Barfield, 16 C. B. N. S. 597; Janesville *v.* Milwaukee, &c., Railroad, 7 Wis. 484; Commonwealth *v.* Capp, 12 Wright, Pa. 53; Sanders *v.* The State, 18 Ark. 198; Commonwealth *v.* New York, &c., Railroad, 112 Mass. 409; Wood *v.* Mears, 12 Ind. 515; Darling *v.* Westmoreland, 52 N. H. 401.

[2] Rex *v.* Jones, 3 Camp. 230, Lord Ellenborough remarking; "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray, into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house: but, if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and, if the street be narrow, he must move to a more commodious situation for carrying on his business."

[3] Commonwealth *v.* Milliman, 13 S. & R. 403. **Military Parade.** — And see, as to the use of the streets for purposes of military parade. Moody *v.* Ward, 13 Mass. 299; Colo *v.* Fisher, 11 Mass. 187. **Fair.** — As to holding a fair or market, Rex *v.* Smith, 4 Esp. 111.

[4] And see Commonwealth *v.* Passmore, 1 S. & R. 217.

[5] The State *v.* Hessenkamp, 17 Iowa, 25; Langsdale *v.* Bonton, 12 Ind. 467 And see Overman *v.* May, 35 Iowa, 89; Shawnee *v.* Beckwith, 10 Kan. 608.





§ 1275. **Collecting People.** — The collecting together of a concourse of people in a street may amount to an indictable obstruction.[1] But —

**Building larger House.** — It is no crime to darken a way by erecting on it a larger house than stood there before.[2]

**Dilapidated House — Overhanging.** — If, however, one having a house on the way suffers it to become dilapidated and likely to fall, he is punishable, on account of the danger to the public.[3] And for the same reason one occupying a house which hangs over a bridge, must keep it in repair; else he is liable to indictment.[4]

§ 1276. **Rule varying with Circumstances.** — Unquestionably some consideration must be given to the nature of the travel contemplated by the authority establishing the road, to whether it is in city or country, and to all other things of like character. In one case the doctrine was laid down, that —

**Too heavy Load.** — An information will lie against a carrier for spoiling the highways by drawing over them an extraordinary weight, contrary to the custom of the realm.[5] And another case holds, that —

**Vessel too large.** — To bring a ship of three hundred tons into Billingsgate dock, which is a dock for only smaller vessels, is a public nuisance; the court observing: "Why may there not be a *common dock* only for small ships as well as a *common pack* and *horse-way;* and, if a man with a cart use such a way so as to plough it and render it less convenient for riders, will not that be a nuisance indictable?"[6]

§ 1277. **Tree or Post.** — We have seen, that, to put a permanent obstruction on any part of a public way, though not the part worked for travel, is indictable.[7] Still it appears that there may

[1] Barker *v.* Commonwealth, 7 Harris, Pa. 412; People *v.* Cunningham, 1 Denio, 524. See Rex *v.* Sarmon, 1 Bur. 516, where an indictment for setting a person in a public footway of London, to deliver out bills of the defendant's business, whereby the way became obstructed, was quashed; the report of the case not showing, however, whether the objection was to the form or substance of the allegation.

[2] Rex *v.* Webb, 1 Ld. Raym. 737.

[3] Reg. *v.* Watts, 1 Salk. 357.

[4] Reg. *v.* Watson, 2 Ld. Raym. 856, 3 Ld. Raym. 18. And see ante, § 1273 and note.

[5] Rex *v.* Edgerly, March, 181 pl. 210.

[6] Reg. *v.* Leech, 6 Mod. 145.

[7] Ante, § 1273.

be circumstances in which a tree or post, standing on the margin of the way, will not be deemed a nuisance.[1] The general doctrine, however, makes every such thing an offence in him who places it there, while yet —

**Duty to repair.** — The corporation, obliged to repair, is not compellable to furnish more than the travelled part for the public use. "The town," it was said in one case, "to enable itself to discharge its obligation to the public, requires the full and entire use of the whole located way." [2]

**Travellers meeting.** — A sort of obstruction occurs where a traveller, meeting another, does not obey the law of the road in turning to the side of the travelled part.[3] The duty and the penalty are generally prescribed by statutes, and the author never met a case involving the question of indictability at the common law.

§ 1278. **Authorized by Statute.** — It is competent for legislation to authorize changes and obstructions in the public ways, and what is thus sanctioned cannot be an indictable nuisance.[4] But if the person goes beyond his authority, or otherwise departs from it, he is indictable; since he cannot rely on a license to do one thing, as a protection for doing another.[5] And if the legislature gives permission to run locomotives on a railway, no indictment can be maintained against the railroad company for the nuisance as tending to frighten horses driven over an adjoining travelled road.[6]

§ 1279. **The Intent.** — The discussions in the first volume will, in a general way, show the intent with which the act of obstruction must be done to be indictable.[7] Damage which comes to

[1] Franklin Turnpike *v.* Crockett, 2 Sneed, 263. See The State *v.* Caldwell, 2 Speers, 162; ante, § 1273.

[2] Commonwealth *v.* King, 13 Met. 115. And, on this point, see further, Commonwealth *v.* Wilkinson, 16 Pick. 175; Lancaster Turnpike *v.* Rogers, 2 Barr, 114; The State *v.* Pollok, 4 Ire. 303.

[3] Commonwealth *v.* Allen, 11 Met. 403.

[4] Butler *v.* The State, 6 Ind. 165; Danville, &c., Railroad *v.* Commonwealth, 23 Smith, Pa. 29; Oliver *v.* Loftin, 4 Ala. 240; The State *v.* Loudon, 3 Head, 263.

[5] Commonwealth *v.* Church, 1 Barr, 105; Renwick *v.* Morris, 7 Hill, N. Y. 575; Reg. *v.* Scott, 2 Gale & D. 729, 3 Q. B. 543; Rex *v.* Morris, 1 B. & Ad. 441; Hogg *v.* Zanesville Canal and Manuf. Co., 5 Ohio, 410; Commonwealth *v.* Erie and Northeast Railroad, 3 Casey, 339; Louisville, &c., Railroad *v.* The State, 3 Head, 523.

[6] Rex *v.* Pease, 4 B. & Ad. 30. And see Commonwealth *v.* Temple, 14 Gray, 69.

[7] And see Tate *v.* The State, 5 Blackf. 73; Prim *v.* The State, 36 Ala. 244.





the road necessarily or accidentally from the lawful use of it, cannot be made the foundation for an indictment.[1]

## III. *The Condition of Repair in which the Way must be put and kept.*

§ 1280. **In General — Varying Circumstances.** — This, in the nature of the subject, does not admit of exact rule. Some considerations mentioned in a previous section [2] apply here; the doctrine being, that the required condition of the way depends on the particular nature and circumstances of the case, and the object for which it is used. The English books say, that one bound by prescription to repair need not put the road in better order than it has been in time out of mind.[3] The revised statutes of Maine require it to be "safe and convenient;" and the courts hold, that the question whether it is so, is one of fact for the jury.[4] It is not sufficient, in discharge of a duty to repair a road, under such a statute, that it is made "safe," it must also be "convenient." [5]

**Whether Entire Width.** — It is held in Maine, that a town is not required to render commodious for travel the entire space laid out for a road; the work may be limited to a sufficient travelled part.[6] But plainly, in compact localities, like our cities and large villages, the entire located way will be required for travel.

**Lighting Bridge.** — The charter of a toll-bridge corporation required that the bridge "shall at all times be kept in good, safe, and passable repair." And it was held that this required the corporation to light the bridge, if the jury find such lighting necessary to the safety and convenience of those passing it at night.[7]

**Paving Cart-way.** — No indictment, says an old English case, lies against a township for not *paving* a cart-way; because the township is under obligation only to repair, not to pave.[8]

[1] Rex *v.* Watts, 2 Esp. 675; Cummins *v.* Spruance, 4 Harring. Del. 315. And see Vol. I. § 829.

[2] Ante, § 1276.

[3] Reg. *v.* Cluworth, 6 Mod. 163; s. c. nom. Reg. *v.* Clueworth, Holt, 339.

[4] Merrill *v.* Hampden, 26 Maine, 234. And see Myers *v.* Springfield, 112 Mass. 489; Hodgkins *v.* Rockport, 116 Mass. 573; Howard *v.* Mendon, 117 Mass. 585, The State *v.* Dover, 46 N. H. 452.

[5] Commonwealth *v.* Taunton, 16 Gray, 228.

[6] Dickey *v.* Maine Telegraph, 46 Maine, 483; ante, § 1277.

[7] Commonwealth *v.* Central Bridge, 12 Cush. 242.

[8] Rex *v.* Marton, Andr. 276.

**Horse-way.** — If the way is merely a horse-way, there is no need of making it fit for carriages to pass over.[1]

**Repairs required on Sunday.** — If a dangerous defect is found in a highway on Sunday, it should be mended at once, or adequate warning be given to travellers.[2]

### IV. *The Person or Corporation responsible for Non-repair.*

§ 1281. **Indictable.** — The doctrine under this sub-title is, that the person, private or official, or corporation, on whom the law casts the duty, is indictable for its neglect.[3] And sometimes this liability is affirmed by statute.[4]

**On whom the Duty.** — At common law, say the cases, the onus of the repair of a bridge, when the obligation arises *ratione tenuræ*, falls ultimately on the owner of the soil, not the occupier;[5] though the occupier may be equally in the first instance liable to the public.[6] Generally, under the common law in England, the inhabitants of the counties are to repair the bridges;[7] but, in many cases, the rule is otherwise by prescription.[8] The common-law liability for the repair of other public ways is, *prima facie*, on the parish in which they are situated;[9] though the rule is here also different, oftentimes, by prescription.[10] It is not clear that this

[1] Rex *v.* St. Weonard, 5 Car. & P. 579. And see Reg. *v.* Stretford, 2 Ld. Raym. 1169; s. c. nom. Reg. *v.* Stratford, 11 Mod. 56.

[2] Flagg *v.* Millbury, 4 Cush. 243.

[3] 1 Russ. Crimes, 3d Eng. ed. p. 351; The State *v.* Murfreesboro, 11 Humph. 217; Commonwealth *v.* Hancock Free Bridge, 2 Gray, 58; Rex *v.* Ireton, Comb. 396; The State *v.* King, 3 Ire. 411; The State *v.* Haywood, 3 Jones, N. C. 399; Hill *v.* The State, 4 Sneed, 443; The State *v.* Landaff, 2 Fost. N. H. 588; The State *v.* Whitingham, 7 Vt. 390.

[4] The State *v.* Chinn, 29 Texas, 497; People *v.* Cooper, 6 Hill, N. Y. 516; The State *v.* Madison, 59 Maine, 538; The State *v.* Kittery, 5 Greenl. 254; The State *v.* Loudon, 8 Head, 263.

[5] Baker *v.* Greenhill, 2 Gale & D. 435, 6 Jur. 710. See Rex *v.* Kerrison, 1 M. & S. 435; Reg. *v.* Bucknell, Holt, 128.

[6] Ante, § 1275, and the cases there cited.

[7] Reg. *v.* Wilts, 6 Mod. 307, Holt, 339; Rex *v.* Oxfordshire, 1 B. & Ad. 289; Rex *v.* Lancashire, 2 B. & Ad. 813; Rex *v.* Devonshire, 2 Nev. & M. 212; Rex *v.* Bucks, 12 East, 192. This part of the common law was never adopted in New Jersey. The State *v.* Hudson, 1 Vroom, 137, 138.

[8] Reg. *v.* Wilts, 6 Mod. 307; Reg. *v* Bucknell, Holt, 128, 7 Mod. 55; Rex *v.* Hendon, 4 B. & Ad. 628; Rex *v.* Northampton, 2 M. & S. 262; Rex *v.* Stoughton, 2 Saund. 157; Rex *v.* Oxfordshire, 16 East, 223.

[9] 1 Russ. Crimes, 3d Eng. ed. 352; Rex *v.* Ragley, 12 Mod. 409; Rex *v.* St. Giles, 5 M. & S. 260.

[10] See Reg. *v.* Barnoldswick, 12 Law J. N. S. M. C. 44; Rex *v.* Clifton, 5 T. R. 498; Roberts *v.* Hunt, 15 Q. B. 17; Reg. *v.* Nether Hallam, 3 Com. Law, 94, 29 Eng. L. & Eq. 200; Rex *v.* Stratford-upon-Avon, 14 East, 348; Rex *v.* Edmonton, 1 Moody & R. 24; Rex *v.* Hayman, Moody & M. 401; Reg. *v.* Bamber, 5 Q. B. 279, Dav. & M. 367; Rex *v.* Ecclesfield, 1 B. & Ald. 348, 1 Stark. 398; Rex *v.* West Riding of Yorkshire, 4 B. & Ald. 623; Reg. *v.* Heage, 1 Gale & D. 548, 2 Q. B. 128, 6 Jur. 367; Reg. *v.* Wilts, Holt, 339; Rex *v.* Leake, 2 Nev. & M. 583, 5 B. & Ad. 469; Reg. *v.* Midville, 4 Q. B. 240, 3 Gale & D. 522.





part of the English common law has, to any extent, been adopted in our States; at all events, the scope for it, with us, is small.

§ 1282. **Statutes.** — Generally, in our States, the question, who is liable for repair, or for the original construction, depends on statutes; and they are so numerous and diverse that we shall not do well to attempt a particular discussion of them. There are circumstances under which an individual and a corporation may be equally indictable for the same neglect.[1] Authorities on various questions under the statutes appear in a note.[2]

§ 1283. **Way which the Owner of the Soil has diverted.** — It is laid down in one of the reports, that, in the language of the book itself, "where a highway lies over an open field, and the owner of the field turns the way to another part of the field for his own convenience, or encloses the field for his own benefit, and leaves a sufficient way besides, he is bound to repair and maintain that way at his own charge, and he must make it passable, though it was founderous before; and, if the way is not sufficient, any passenger may break down the enclosure and go over the land, and justify it till a sufficient way is made."[3]

### V. *Remaining and Connected Questions.*

§ 1284. **Misdemeanor.** — It scarcely need be said, that the offences discussed in this chapter are, at the common law, misdemeanor, not felony.[4]

§ 1285. **Abatement by Private Person.** — This was considered in the preceding volume.[5]

[1] Ante, § 1270. See also, to this proposition, Commonwealth *v.* Piper, 9 Leigh, 657; The State *v.* Halifax, 4 Dev. 345; The State *v.* Nicholson, 2 Murph. 135; The State *v.* Barksdale, 5 Humph. 154; The State *v.* Commissioners, Walk. Missis. 368; Rex *v.* Dixon, 12 Mod. 198; Hill *v.* The State, 4 Sneed, 443.

[2] The State *v.* Gorham, 37 Maine, 451; Follett *v.* People, 2 Kernan, 268; Morris Canal and Banking Co. *v.* The State, 4 Zab. 62; Indianapolis *v.* McClure, 2 Ind. 147; The State *v.* Hogg, 5 Ind. 515.

[3] Anonymous, 3 Salk. 182. And see Rex *v.* Devonshire, 2 Nev. & M. 212; Rex *v.* Flecknow, 1 Bur. 461, 465; Rex *v.* Warde, Cro. Car. 266; Hedgepeth *v.* Robertson, 18 Texas, 858.

[4] The State *v.* Knapp, 6 Conn. 415.

[5] Vol. I. § 828; Dimmett *v.* Eskridge, 6 Munf. 308. See Hopkins *v.* Crombie, 4 N. H. 520, 526.

**Punishment.** — The leading object of prosecuting this class of offences is usually to procure the repair of the way, or abatement of the nuisance; and the court takes this into consideration in awarding its sentence. In one case, the defendant, indicted for non-repair, pleaded guilty, "but the court, before they would set a fine, would be certified by some of the justices of the peace of the neighborhood, that the way was sufficiently repaired."[1] If it is repaired, or the nuisance removed, the fine may, in the discretion of the court, be merely nominal.[2]

**Judgment of Abatement.** — But the judgment may itself direct the abatement of the nuisance;[3] yet this will be omitted if it has been already abated.[4] There is no rule making abatement a necessary part of the judgment under all circumstances.[5]

**Way discontinued.** — In a Vermont case, where a town, after being indicted for the non-repair of a highway, discontinued it, and made another in its place, the court held this proceeding not to preclude a trial on the indictment.[6]

§ 1286. **Further of the Sentence.** — In one case the court having fined the defendant for the non-repair of a bridge, and then learning that it was still out of repair imposed an additional fine on the same proceeding. But the superior tribunal held this to be unauthorized.[7] It might well have delayed sentence; and, if the proper repairs were not in due time made, imposed a heavy penalty.[8]

**Indictment for Continuance.** — Or, a fresh indictment might have been maintained for the continuance of the neglect to repair.[9] Likewise, indictments are sustainable for continuing obstructions in a way.[10]

§ 1287. **Guide-Posts.** — By statute in New Hampshire, "if any town shall neglect to erect or keep in repair [a] guide-post or guide-board at each intersection of the highways therein, they

[1] Reg. *v.* Cluworth, 6 Mod. 163.

[2] Rex *v.* Incledon, 13 East, 164; Reg. *v.* Dunraven, W. W. & D. 577. See Rex *v.* Hertford, Holt, 320; Rex *v.* Chedinfold, Cas. temp. Hardw. 159.

[3] Taggart *v.* Commonwealth, 9 Harris, Pa. 527.

[4] Rex *v.* Incledon, 13 East, 164.

[5] Vol. I. § 824; Rex *v.* West Riding of Yorkshire, 7 T. R. 467.

[6] The State *v.* Fletcher, 13 Vt. 124.

[7] Rex *v.* Machynlleth, 4 B. & Ald. 469.

[8] Reg. *v.* Claxby, 3 Com. Law, 223, 1 Jur. N. S. 710, 30 Eng. L. & Eq. 358.

[9] Rex *v.* Old Malton, 4 B. & Ald. 469, note; Rex *v.* Reynell, 6 East, 315, 2 Smith, 406.

[10] 3 Chit. Crim. Law, 613, 617, 618; Rex *v.* West Riding of Yorkshire, 7 T. R. 467.





shall forfeit for each month's neglect the sum of one dollar." And it is held, that, though there are more intersections than one in the town without guide-posts, only one penalty is incurred for the entire neglect during a month, not one penalty for each neglected intersection.[1]

[1] Clark *v.* Lisbon, 19 N. H. 286. And see The State *v.* Mathis, 30 Texas, 506.

# ANALYTICAL INDEX.

**Note.** — The object of this Index is chiefly to show the order of the discussion; so that one who cannot find a thing in the "Alphabetical Index" may see where to open the volumes, and look for it among the headings of the sections. It does not attempt a reference to every minor topic.

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NOTE. — In the second volume, the attempt to commit each specific offence is treated of in connection with the offence itself. See, in this index, the names of the several offences.

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