

CHAPTER XXVII.

ASSAULTS—KIDNAPPING—OBSTRUCTING OFFICERS AND
OTHERS IN THE EXECUTION OF THEIR DUTY.

ARTICLE 309.

ASSAULT AND BATTERY AND ASSAULT DEFINED.

[AN ASSAULT is

(a.) ³ an attempt unlawfully to apply any, the least, actual ⁴ force to the person of another directly or indirectly ;

(b.) the act of using a gesture towards another giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid ;

(c.) the act of depriving another of his liberty, in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud.

A battery is an assault whereby any, the least, actual force is actually applied to the person of another, or to the dress worn by him, directly or indirectly.

Provided that such acts as are reasonably necessary for the common intercourse of life, are not assaults or batter-

¹ Draft Code, ss. 203-206.

² S. D. Art. 241.

³ [See Article 52 for a definition of an attempt.

⁴ 1 Russ. Cr. (5th ed.) 956; 1 Hawk. P. C. 100. A most elaborate definition of "force" is given in the Indian Penal Code, s. 350, as the foundation for a definition of assault, s. 351. The definition is almost more mathematical than legal. It begins thus: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other," &c. &c. It is impossible not to ask why, if force is to be defined, motion should be left undefined. It is, I think, hardly too great a demand on the candour of a reader to suppose that he will see that a man who withdraws a chair on which a person is about to sit down, causing him thereby to fall to the ground; or who whips a horse on which he is sitting, and so makes him run away with his rider; or who breaks a hole in ice in front of a skater, and so causes him to fall into the water—"applies actual force to his person indirectly." *R. v. Harmer*, 17 U. C. Q. B. 555; *Ex parte Dubuc*, 2 L. N. 334.

ries if they are done for the purpose of such intercourse only and with no greater force than the occasion requires. No mere words can in any case amount to an assault.

Illustrations.

The following are cases of assault and battery:—

- (1.)¹ A cut B's dress whilst B is wearing it, but without touching or intending to touch any part of B's person.
- (2.)² A sets a dog at B, which bites B.
- (3.)³ A man professing to act as a medical adviser fraudulently induces a girl to allow him to undress her, by falsely alleging that it is necessary for medical reasons to do so.
- (4.)⁴ A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act.
- (5.)⁵ A induces B to permit him to have connection with her, by pretending to be her husband.

The following are cases of assault without battery:—

- (6.)⁶ A strikes at B with a stick without hitting him.
 - (7.)⁷ A aims a pistol at B which A knows is not loaded, but which B believes to be loaded.
- In the following cases no assault or battery is committed:—
- (8.) A lays his hand on B, to attract his attention.
 - (9.) A, falling down, catches hold of B to save himself.
 - (10.) A crowd of people, going into a theatre, push and are pushed against each other.]
 - (11.)⁸ A and B in a hostile manner stand in front of C's horses and carriage and detain him.
 - (12.)⁹ A, with intent to cause such collision, opens a railway switch whereby two trains comes into collision, occasioning severe injury to a person on one of the trains.

¹ *R. v. Day*, 1 Cox. C. C. 207.

² Russ. Cr. 958, gives several cases of this sort.

³ *E. v. Rosinski*, 1 Russ. Cr. 959; and see *R. v. Case*, 1 Den. 530.

⁴ *R. v. Lock*, L. R. 2 C. C. R. 10, and see *R. v. Barnett*, L. R. 2 C. C. R. 81.

⁵ *R. v. Williams*, 3 C. & P. 286.

⁶ *Hawk. P. C.* 110.

⁷ *E. v. George*, 9 C. & P. 483.] In the case of *R. v. Cronan*, 24 U. C. C. P. 106, a pistol loaded with powder and wadding was discharged at the person assaulted.

⁸ *R. v. McElligot and Meyers*, 3 O. R. 535.

⁹ *In re Lewis*, 6 Ont. P. R. 236.

ARTICLE 310.

ASSAULT WITH INTENT TO COMMIT RAPE.

¹ Every one who assaults any woman or girl with intent to commit rape is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding seven years and not less than two years.

² ARTICLE 311.

INDECENT ASSAULTS ON FEMALES.

³ Every one who commits any indecent assault upon any female, is guilty of a misdemeanor and liable to imprisonment for any term less than two years, and to be whipped.

⁴ ARTICLE 312.

INDECENT ASSAULTS ON MALES.

⁵ Every one is guilty of a misdemeanor, and liable to ten years' imprisonment, who assaults any person with intent to commit sodomy; or who, being a male, indecently assaults any other male person.

¹ R. S. C. c. 162, s. 38. An assault with intent to commit rape, is an attempt to commit rape within R. S. C. c. 174, s. 183; *John v. R.* 15 Can. S. C. 384.

² S. D. Art. 245 (c).

³ R. S. C. c. 162, s. 41; 24 & 25 Vict. c. 100, s. 52. See also 43 & 49 Vict. c. 69, s. 4. Although it is an offence to carnally know, or attempt to carnally know, a girl under the age of twelve years, even if she consents, there can be no conviction for an indecent assault if she consents, and that too, it appears, although the assault may be an attempt to carnally know the girl. See Art. 325 note. This unsatisfactory state of the law as to the consent of young persons has been remedied in England both as to boys and girls by the Act 43 & 44 Vict. c. 45, by which it is enacted that it shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency. A similar statute could, with advantage, be passed in Canada.

⁴ S. D. Art. 242.

⁵ R. S. C. c. 157, s. 2; 24 & 25 Vict. c. 100, s. 62. As to sodomy and attempt to commit sodomy, see Arts. 213, 214. The consent of a boy to the act of indecency will prevent it from amounting to an assault; *R. v. Laprise*, 3 L. N. 139, following *R. v. Wollaston*, 12 Cox, 180. See notes to Arts. 311 and 325.

¹ ARTICLE 313.

ASSAULTS CAUSING ACTUAL BODILY HARM.

² Every one who commits any assault which occasions actual bodily harm, is guilty of a misdemeanor, and liable to three years' imprisonment.

³ ARTICLE 314.ASSAULTS WITH INTENT TO COMMIT INDICTABLE OFFENCES
—ASSAULTS ON PEACE OFFICERS,⁴ ETC.

⁵ Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who

(a.) assaults any person with intent to commit any indictable offence; or

(b.) assaults, resists or wilfully obstructs any revenue or peace officer, or any officer seizing trees, logs, timber or other products thereof, in the due execution of his duty, or any person acting in aid of such officer; or

(c.) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence; or

(d.) assaults, resists or wilfully obstructs any person in

¹ S. D. Art. 244.

² R. S. C. c. 162, s. 35; 24 & 25 Vict. c. 100, s. 47. A husband who knowing that he is suffering from gonorrhoea has intercourse with his wife, who is ignorant of the fact, and who would not have consented thereto had she been aware of his condition, does not commit an assault upon her within the meaning of this Article; *R. v. Clarence*, L. R. 22 Q. B. D. 23.

³ S. D. Art. 245 (a) and (b).

⁴ The following are instances of assaults on peace officers:—*R. v. Morrison*, 3 R. L. 525; *R. v. McDonald*, Allen 440; *R. v. Shannon*, 23 N. B. R. 12; *R. v. Lantz*, 19 N. S. R. 1. In *Morrison's* case it was held that the advocates who advised the defendant to resist the execution of the writ even by force was not liable to indictment therefor.

⁵ R. S. C. c. 162, s. 34; 24 & 25 Vict. c. 100, s. 38. See 23 Vict. (P. C.) c. 29, s. 5, as to assaults on railway constables appointed under that Act; and R. S. U. c. 33, s. 56 as to assaults on constables on Government railways. As to obstructions of peace officers acting in aid of masters of vessels, see R. S. C. c. 74, s. 124 and c. 75, s. 43. As to assaults involving or for the purposes of intimidation, see Arts. 613-615. As to assaults on clergymen engaged in religious duties, see Art. 212. As to assaults with intent to rob see Art. 287.

the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure.

ARTICLE 315.

CONVICTS ASSAULTING OFFICERS OF A PENITENTIARY.

¹ Every convict confined in any penitentiary, who assaults any officer or servant employed therein, is guilty of an aggravated assault and liable to imprisonment in the said penitentiary for a term not exceeding two years.

² ARTICLE 316.

ASSAULTING OR OBSTRUCTING OFFICERS OF THE CUSTOMS.

³ Every one is guilty of felony and liable to imprisonment for life⁴ who under any pretence, either by actual assault, force or violence, or by threats of such assault, force or violence, in any way resists, opposes, molests or obstructs any officer of customs or any person acting in his aid or assistance in the discharge of his duty under the authority of any law relating to customs, trade or navigation.

ARTICLE 317.

ASSAULTING OR OBSTRUCTING OFFICERS OF THE
INLAND REVENUE.

⁵ Every one is guilty of felony, and liable to imprisonment for any term not exceeding five years and not less than six months,⁶ who, under any pretence, either by

¹ R. S. C. c. 182, s. 56; 5 & 6 Vict. c. 29, s. 21; 6 & 7 Vict. c. 26, s. 18.

² S. D. Art. 247.

³ R. S. C. c. 32, s. 213.

⁴ Art. 17.

⁵ R. S. C. c. 34, ss. 99, 98.

⁶ "Unless a greater penalty is otherwise provided by law."

actual assault, force or violence, or by threats of such assault, force or violence, in any way resists, oppresses, molests or obstructs any officer of Inland Revenue, or any person acting in his aid or assistance, in the discharge of his or their duty under the authority of *The Inland Revenue Act*.

Every one who obstructs, impedes or interferes with any officer of Inland Revenue, or any person assisting such officer in the discharge of his duty, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding two years and not less than six months.

¹ ARTICLE 318.

ASSAULTING RECEIVERS OF WRECK.

² Every one is guilty of a misdemeanor, and liable on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a fine of four hundred dollars or to six months' imprisonment, who assaults any receiver of wreck, or any person acting as such receiver, in the exercise of his duty for the preservation or assistance of any vessel that is wrecked, stranded or in distress, or of wreck, or assaults any person acting by command of such receiver in the exercise of his duty.

¹ S. D. Art. 243.

² R. S. C. c. 81, s. 37; 24 & 25 Vict. c. 100, s. 37. As to the definition of wreck, see Art. 427.

There are many other special provisions against obstructing officers and others in the discharge of their duty. See the following:—

- C. S. C. c. 68, s. 63. (Servants of joint stock companies for transmission of timber.)
- R. S. C. c. 35, ss. 95, 98, 99. (Mail carriers.)
- R. S. C. c. 28, s. 63. (Officers of government railways.)
- R. S. C. c. 54, s. 137. (Dominion land surveyors.)
- R. S. C. c. 67, s. 19. (Officers enforcing *The Chinese Immigration Act*.)
- R. S. C. c. 69, ss. 36, 37, 38. (Officers enforcing *The Animal Contagious Diseases Act*.)
- R. S. C. c. 81, ss. 6, 22. Persons acting under *The Wrecks and Salvage Act*.)
- R. S. C. c. 94, s. 4. (Persons making seizure under *The Fishing by Foreign Vessels Act*.)
- R. S. C. c. 103, s. 39. (Cullers.)
- R. S. C. c. 104, s. 46. (Inspectors of weights and measures.) *R. v. Dunning*, 14 O. R. 60.
- 51 Vict. (D.) c. 29, s. 36. (Inspecting engineer of any railway.)
- 51 Vict. (D.) c. 31, s. 6 (2). (Officers charged with duty of carrying the Submarine Telegraph Cable Convention into effect.)

ARTICLE 319.

KIDNAPPING.

¹ Every one is guilty of felony, and liable to seven years' imprisonment, who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent,

(a.) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(b.) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(c.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

Upon the trial of any offence under this section, the non-resistance, of the person so kidnapped or unlawfully confined, thereto, shall not be a defence, unless it appears that it was not caused by threats, duress or force or exhibition of force.

ARTICLE 320.

ASSAULTS COMMITTED WITHIN TWO MILES OF THE PLACE WHERE ANY PUBLIC MEETING OR POLL IS HELD.

² Every one who is convicted of a battery, committed within the distance of two miles of the place appointed for the holding of any public meeting and during any part of the day whereon any such meeting has been appointed to be held, is liable to a penalty not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months, or to both.

¹ R. S. C. c. 162, s. 46. The intent applies to the seizure and confinement as well as to the kidnapping; *Cornwall v. R.*, 33 U. C. Q. B. 106.

² R. S. C. c. 152, s. 4. It will be observed that the punishment is less than that to which the offender is liable on conviction on indictment for a common assault, and that the provision is superfluous.

¹ Every one who is convicted of a battery, committed during any day whereon any election, or any poll for any election, of a member to serve in the House of Commons of Canada, or under *The Canada Temperance Act*, is begun, holden or proceeded with, within the distance of two miles of the place where such election or such poll is begun, holden or proceeded with, is guilty of an aggravated assault.

² ARTICLE 321.

COMMON ASSAULTS.

³ Every one who commits a common assault is guilty of a misdemeanor, and liable, if convicted upon an indictment, to one year's imprisonment, and on summary conviction, to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labor.

¹ R. S. C. c. 8, s. 77, c. 166 s. 69.

² S. D. Arts. 245, 248, 252.

³ R. S. C. c. 162, s. 36; 24 & 25 Vict. c. 100, ss. 47, 42.

CHAPTER XXVIII.

¹ RAPE—CARNALLY KNOWING CHILDREN—ABORTION.² ARTICLE 322.

DEFINITION OF CARNAL KNOWLEDGE.

³ CARNAL knowledge means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation.

⁴ ARTICLE 323.

DEFINITION OF RAPE.

⁵ Rape is the act of having carnal knowledge of a

¹ [Draft Code, Part XX, ss. 207-11.]

² S. D. Art. 253 A.

³ [R. S. C. c. 174, s. 225. 24 & 25 Vict. c. 100, s. 63, and see *R. v. Cox*, 1 Moody 337, and *R. v. Allen*, 9 C. & P. 31, decided on the earlier enactment, 9 Geo. 4, c. 31, s. 111.]

⁴ S. D. Art. 254.

⁵ [See the cases in the Illustrations, and see 1 Russ. Cr. 858, &c. A late decision *R. v. Flattery* (46 L. J. (M.C.) 120), has thrown much uncertainty over the law. The prisoner was convicted of rape for having procured connection with a girl by falsely pretending that the act was necessary for a surgical or medical purpose, "the prosecutrix making but feeble resistance, believing that the prisoner was treating her medically." Two of the judges laid stress upon the resistance as negating consent to sexual connection, though not to the act done or supposed to be done. The Court, however, almost, though not altogether, overruled the principle said in *R. v. Barror* (L. R. 1 C. C. R. 158) to be "established by a class of cases" (*R. v. Jackson*, R. & R. 487; *R. v. Clarke*, Dear. 307; *R. v. Saunders*, 8 C. & P. 235; *R. v. Williams*, 8 C. & P. 280) "that where consent is obtained by fraud the act done does not amount to rape." Hardly any of these cases seem to have been cited in the argument, though *R. v. Barror* was. In *R. v. Flattery*, as in *R. v. R. Fletcher*, the Statute of Westminster 2nd, 13 Edw. 1, c. 34, was referred to as giving a "definition of rape." I do not see how the statute can be treated as defining rape at all. The words are "purveu est que si homme, ravise femme, espouse, damoiselle, ou autre femme desoremes, par la ou ele ne se est assentue, ne avaut ne apres, eit jugement, &c., e ensement par la ou home ravist femme, &c., a force tut seit ke ele se assento apres." In the Latin version the words "rapuit ubi nec ante nec post consenserit." This cannot be a definition of rape because it contains the word "rape." If however it is taken as being a definition, it implies that there may be cases of rape in which the woman consents, for the]

[woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given the act¹ does not² amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act.

³ A husband (it is said) cannot commit rape upon his wife by carnally knowing her himself, but he may do so if he aids another person to have carnal knowledge of her.

⁴ A boy under fourteen years of age is conclusively presumed to be incapable of committing rape.

[punishment is confined to cases of rape where there is no consent before or after. The latter part of the enactment which speaks of consent after the fact appears inapplicable to rape in the modern sense of the word. When the crime is over how can a person consent to it? Had it not been for Coke's comments (2nd Inst. 180, 433, 3rd Inst. 60), I should have thought that the words applied rather to abduction than to what we mean by rape, especially as the statute contains provisions as to the ravishment of wards, in which the word "rapuit" is used, but I cannot think that the legislature intended to lay down any definition at all. Their language implies that the crime was then well known, and so does Coke's comment. The Act was repealed by 9 Geo. 4, c. 31, s. 1.] As to the necessity of resistance on the woman's part see *R. v. Ficks*, 15 U. C. C. P. 379.

¹[See *R. v. Dee*, Irish C. C. R., reported in *Law Times* Jan. 24, 1884.

²The effect of the Criminal Law Amendment Act (48 & 49 Vict. c. 69, s. 4) appears to be that *R. v. Flattery* is no longer law, though it was recognized as having created doubts as to *R. v. Barron, &c.*, which doubts are declared to have been well founded, but I think the point doubtful.]

By 48 & 49 Vict. c. 69, s. 4, after reciting that doubts had been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is enacted and declared that every such offender is guilty of rape. [The doubts referred to were founded on the cases of *R. v. Flattery, R. v. Barron, &c.*, noticed in the last note.] In *R. v. Francis*, 13 U. C. Q. B. 116, *R. v. Jackson, R. & R.* 487, and *R. v. Clarke, Dear.* 397 were followed.

³[1 Hale, P. C. 629. Hale's reason is that the wife's consent at marriage is irrevocable. It may be doubted however whether the consent is not confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted at least of an indecent assault. Hale gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of the clause for which *Lord Castlehaven's Case* (3 St. Tr. 402) is an authority.

⁴1 Hale, P. C. 630. See *R. v. Groombridge*, 7 C. & P. 583. The presumption extends to cases of assault with intent to ravish. See *R. v. Phillips*, 8 C. & P. 733. The occasional incorrectness of this presumption is shown by *R. v. Read*, 1 Den. 377. The presumption is founded, I believe, on the notion that a boy under fourteen cannot be a father, and could not thus inflict what was regarded as the principal injury involved in rape.

Illustrations.

(1.) ¹ A has connection with B, a woman who at the time of the connection is in a state of insensibility. A has ravished B.

(2.) ² A has connection with B, an idiot, who by reason of her idiocy submits, but does not permit the act. A has ravished B.

(3.) ³ A has connection with B, an idiot, who permits the act from mere sexual instinct, but without understanding its nature. A has not ravished B.]

⁴ ARTICLE 324.⁵ PUNISHMENT FOR RAPE.

Every one who commits rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years.

⁶ ARTICLE 325.

CARNALLY KNOWING CHILDREN UNDER TEN.

⁷ Every one who unlawfully and carnally knows and abuses any girl under the age of ten years, is guilty of

¹ [*R. v. Camplin*, 1 Den. C. C. 69.

² *R. v. R. Fletcher*, Bell, C. C. 63; referring to the definition given in Westm. 2, c. 34.

³ *R. v. C. Fletcher*, L. R. 1 C. C. R. 39. In *R. v. Borratt* (L. R. 2 C. C. R. 81), in which the facts are similar to those in the case of *R. Fletcher*, the judges said that there was no inconsistency between the cases of *R. Fletcher* and *C. Fletcher*.] *R. v. Connolly*, 26 U. C. Q. B. 317.

⁴ S. D. Art. 255.

⁵ R. S. C. c. 162, s. 37; 24 & 25 Vict. c. 100, s. 48. As to assaults with intent to commit rape and indecent assaults on women, see Arts. 310, 311.

⁶ S. D. Art. 255.

⁷ R. S. C. c. 162, s. 39; 24 & 25 Vict. c. 100, s. 50. See also 48 & 49 Vict. c. 69, s. 3. On an indictment for committing the offences defined in Articles 325 and 326, or of attempting to commit such offences, the fact that the girl consented is immaterial; (1 Russ. Cr. 875, 876; *R. v. Connolly*, 26 U. C. Q. B. 317; *R. v. Paquet*, 9 Q. L. R. 351; though it is different where the indictment charges an assault; for while the child cannot by law consent to have connection so as to make that connection no offence yet where the essence of the offence charged is an assault (and there can be no assault unless it be against consent) this attempt though a criminal offence is not an assault, and the indictment must be for an attempt to commit a felony if the child is under ten, and for an attempt to commit a misdemeanor if the child is between the ages of ten and twelve; *R. v. Martin*, 9 C. & P. 217.

felony, and liable to imprisonment for life, or for any term not less than five years.

¹ ARTICLE 326.

CARNALLY KNOWING CHILDREN BETWEEN TEN AND
TWELVE.

² Every one who unlawfully and carnally knows and abuses any girl above the age of ten years and under the age of twelve years is guilty of a misdemeanor, and liable to seven years' imprisonment.

³ ARTICLE 327.

ATTEMPTING TO HAVE CARNAL KNOWLEDGE OF A GIRL
UNDER TWELVE.

⁴ Every one who attempts to have carnal knowledge of any girl under twelve years of age is guilty of a misdemeanor, and liable to imprisonment for any term less than two years and to be whipped.

⁵ ARTICLE 328.

ABORTION.

⁶ Every one is guilty of felony, and liable to imprisonment for life,

(a.) who, being a woman with child, with intent to procure her own miscarriage, unlawfully administers, or permits to be administered, to herself any poison or other noxious thing, or unlawfully uses, or permits to be used on herself, any instrument or other means whatsoever with the like intent; or

¹ S. D. Art. 256.

² R. S. C. c. 162, s. 40; 24 & 25 Vict. c. 100, s. 51.

³ S. D. Art. 245 (c.)

⁴ R. S. C. c. 162, s. 41; 24 & 25 Vict. c. 100, s. 52.

⁵ S. D. Art. 236 (j), (k).

⁶ R. S. C. c. 162, s. 47; 24 & 25 Vict. c. 100, s. 53.

(b.) who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes¹ to be taken by her any poison or other noxious² thing, or unlawfully uses any instrument or other means whatsoever with the like intent.

³ ARTICLE 329.

SUPPLYING INSTRUMENTS TO PROCURE ABORTION.

⁴ Every one is guilty of a misdemeanor, and liable to two years' imprisonment, who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, [even if the intention so to use the same exists only in his own mind, and is not entertained by the woman whose miscarriage he intends to procure).]

¹ [A person who gives another a drug to be taken in the absence of the giver "causes it to be taken," and, it would seem, "administers" it, though absent when it is taken; *R. v. Wilson*, D. & B. 127, and cases referred to in the argument; also *R. v. Farrow*, D. & B. 164.]

² A thing not otherwise noxious may be noxious if administered in excess, but some things are so commonly noxious (arsenic, *c.g.*) that perhaps the administration even of a quantity too small to do harm might be held to constitute the offence punished by this section if there were an intent to procure a miscarriage. See *R. v. Cramp*, L. R. 5 Q. B. D. 307; also *R. v. Isaacs*, L. & C. 220, and *R. v. Hennah*, 13 Cox, C. C. 547.]

³ S. D. Art. 239 (c).

⁴ R. S. C. c. 162, s. 48; 24 & 25 Vict. c. 100, s. 59. To supply a thing which is not noxious with the intent mentioned is not within the section; *R. v. Isaacs*, L. & C. 220. A, with intent to procure abortion, supplied B, a pregnant woman, with two bottlesful of Sir James Clarke's Female Pills, with direction to take twenty-five at a dose, and that it would have that effect. In that number of pills there was sufficient oil of savin, an article used to procure abortion, to be greatly irritating to a pregnant woman and perhaps to cause an abortion. Held, that A supplied a noxious thing within the statute; *R. v. Stitt*, 30 U. C. C. P. 30.

⁵ *R. v. Hillman*, L. & C. 343.

CHAPTER XXIX.

CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—
BIGAMY—ABDUCTION.¹ ARTICLE 330.² DEFINITION AND PUNISHMENT OF BIGAMY.

³ EVERY one is guilty of the felony called bigamy and liable to seven years' imprisonment who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewhere.

⁴ [The expression "being married" means being legally married. The word "marries" means goes through a form of marriage which the ⁵ law of the place where such form is used recognizes as ⁶ binding, whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the ⁷ bigamy, have been insufficient to constitute a binding marriage.]

Nothing in this Article extends to—

(a.) ⁸ any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty

¹ S. D. Art. 257.

² [2 Hist. Cr. Law, 430.]

³ R. S. C. c. 161, s. 4; [24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations. See note to Article 34.

⁴ See Illustration (2).

⁵ *Burt v. Burt*, 29 L. J. (Probate) 133.

⁶ See Illustration (3).

⁷ See Illustration (4).

⁸ The Act does extend to a subject of Her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland; *R. v. Topping*, Dear. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.]

resident in Canada and leaving the same with intent to commit the offence;

(b.) ¹ any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and who was not known by such person to be living within that time;

(c.) any person who, at the time of such second marriage, was divorced from the bond of the first marriage; or

(d.) any person whose former marriage has been declared void by the sentence of any court of competent jurisdiction.

³ A person who marries again during his wife's or her husband's lifetime, but in the honest belief on reasonable grounds that she or he is dead, is not guilty of bigamy.

¹ [The burden of proving such knowledge is upon the prosecutor when (but not until, *R. v. Jones*, L. R. 11 Q. B. D. 118) the fact that the parties have been continually absent for seven years has been proved. (*R. v. Curgenven*, L. R. 1 C. C. R. 1.)] See also *R. v. Pierce*, 13 O. R. 226; *R. v. McQuiggan*, 2 L. C. R. 340; *R. v. Fontaine*, 15 L. C. J. 141; *R. v. Dwyer*, 27 L. C. J. 291; *R. v. Debay*, 3 G. & O. 540; *R. v. Smith*, 14 U. C. Q. B. 565. Clause (a) is within the legislative authority of the Parliament of Canada; *R. v. Brierly*, 14 O. R. 525.

² [A divorce *à vinculo matrimonii* pronounced by a foreign court between persons who have contracted marriage in England, and who continued to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause; *R. v. Lolley*, R. & R. 237. The decision does not refer to domicile, but this qualification appears from later cases to be required. See *Harvey v. Farnie*, L. R. 5 P. D. 153, and 6 P. D. 35; also in 8 App. Cas. 43, where *R. v. Lolley* is explained as above by Lord Selborne at p. 54, and Lord Blackburn at p. 59. *Harvey v. Farnie* was the converse of *R. v. Lolley*. It recognized a Scotch divorce as dissolving a marriage between people domiciled in Scotland at the time of the divorce, though the marriage took place in England, the wife being domiciled at the time of the marriage in England. The cases on the effect of foreign judgments on marriage are collected in 2 Sm. L. C. 865-71, 8th Edition.] A decree of divorce obtained in a foreign court may be impeached by extrinsic evidence showing that such court had no such jurisdiction or that such decree was obtained by fraud; *R. v. Wright*, 1 P. & B. 363.

[A question as to the exact time at which a person can be said to be divorced may arise. In 1 Hale. P. C. 694, a case is mentioned in which a person marrying after sentence of divorce, but pending an appeal, was held to be within a similar proviso in 1 Ja. 1, c. 11. In *R. v. Hale*, tried at the Leeds summer assizes, 1875, a woman pleaded guilty to a charge of bigamy before Lindley, J., she having married after the decree nisi was pronounced, but before it became absolute, which it afterwards did. The judge's attention, however, was not directed to the passage in Hale.]

³ *R. v. Tolson*, L. R. 23 Q. B. D. 163. See Article 34, note, p. 40.

Illustrations.

[(1.) ¹ A marries B, a person within the prohibited degrees of affinity, and during B's lifetime marries C. A has not committed bigamy.

(2.) ² A marries B, and during B's lifetime, goes through a form of marriage with C, a person within the prohibited degrees of affinity. A has committed bigamy.

(3.) ³ A marries B in Ireland, and during B's lifetime goes through a form of marriage with C in Ireland which is invalid, because both A and C are Protestants, and the marriage is performed by a Roman Catholic priest. A commits bigamy.

(4.) ⁴ A, married to C, marries B in C's lifetime by banns, B, the (woman) being married, for purposes of concealment, under a false name. A has committed bigamy.

(5.) ⁵ A, married to B, marries C in B's lifetime, in the colony of Victoria.

In order to show that A committed bigamy it must be proved that the form by which he was married was one recognized as a regular form of marriage by the law in force in Victoria.

⁶ ARTICLE 331.

PRINCIPALS IN SECOND DEGREE IN BIGAMY.

⁷ Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy.

⁸ ARTICLE 332.SOLEMNIZATION OF MARRIAGE WITHOUT LAWFUL
AUTHORITY.

⁹ Every one is guilty of a misdemeanor and liable to a fine or to two years' imprisonment or to both who,

¹ [*R. v. Chadwick*, 11 Q. B. 205.]

² *R. v. Brazen*, 1 C. & K. 144; *R. v. Allen*, L. R. 1 C. C. R. 367.

³ *R. v. Allen*, *ubi. sup.* pp. 373-5, disapproving of *R. v. Fanning*, 17 Ir. C. L. 239.

⁴ *R. v. Penson*, 5 C. & P. 412. In *R. v. Rea*, the prisoner at the bigamous marriage (before the registrar) gave a false Christian name, and was held to be rightly convicted.

⁵ *Burt v. Burt*, 29 L. J. (Probate) 133.]

⁶ S. D. Art. 258.

⁷ [*R. v. Brazen & Webb*, 1 C. & K. 144.]

⁸ S. D. Arts. 259, 260.

⁹ R. S. C. c. 161, s. 1.

(a.) without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage ; or

(b.) procures any person to solemnize any marriage, knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony.

ARTICLE 333.

FEIGNED MARRIAGES.

¹ Every one who procures a feigned or pretended marriage between himself and any woman, and every one who knowingly aids and assists in procuring such feigned or pretended marriage, is guilty of a misdemeanor and liable to two years' imprisonment.

ARTICLE 334.

SOLEMNIZATION OF MARRIAGE CONTRARY TO LAW.

² Every one is guilty of a misdemeanor and liable to a fine or to one year's imprisonment who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the Province in which the marriage is solemnized.

³ ARTICLE 335.

ABDUCTION WITH INTENT TO MARRY.

⁴ Every one is guilty of felony, and liable to fourteen years' imprisonment, who, with intent to marry or

¹ R. S. C. c. 161, s. 2. The prosecution must be commenced within one year after the offence is committed.

² R. S. C. c. 161, s. 3. The prosecution must be commenced within two years after the offence is committed.

³ S. D. Art. 261.

⁴ R. S. C. c. 162, s. 42; 24 & 25 Vict. c. 100, s. 53.

carnally know any woman, or with intent to cause any woman to be married or carnally known by any person,

(a.) from motives of lucre takes away or detains against her will any such woman of any age who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin, or one of the presumptive next of kin to any one having such interest; or

(b.) ¹ fraudulently allures, takes away or detains any such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her; or

(c.) ² by force takes away or detains against her will any woman of any age.

³ Every one convicted of any offence defined in clauses (a.) or (b.) is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place, such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information, at the instance of the Attorney General for the Province in which the property is situate, appoints.

¹ [The meaning of the words "possession" and "fraudulently" was considerably discussed in *R. v. Burrell*, L. & C. 354; but as the court differed on the facts of the case, no definite conclusion was arrived at.] It need not be shown that the accused knew that the woman was an heiress or had such an interest; *R. v. Kaytor*, 1 Dor. Q. B. 364.

² R. S. C. c. 162, s. 48; 24 & 25 Vict. c. 100, s. 54.

³ *R. v. Wakefield*, 2 Lew. 279; *R. v. Perry*, 1 Russ. Cr. (4 ed.)

¹ ARTICLE 336.

ABDUCTION OF GIRLS UNDER SIXTEEN.

² Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, [who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

The taking must be a taking under the power, charge, or protection of the taker, but it is immaterial whether the girl is taken with her own consent, or at her own suggestion, or against her will.

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is cannot exercise control over her, for some purpose inconsistent with the objects of such control. A taking for a time only may amount to abduction.

If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person.

The fact that the offender supposes, in good faith and on reasonable grounds, that the girl is more than sixteen years of age, is immaterial; but (it seems) it is necessary that he should either know, or have reason to believe, that she was under the lawful care or charge of her father, mother, or some other person.

¹ S. D. Art. 262.

² R. S. C. c. 112, s. 44; [24 & 25 Vict. c. 100, s. 55, as explained by the case referred to in the illustrations. See also 48 & 49 Vict. c. 69, s. 7.] A girl employed as a barmaid at a distance from her father's house is not in his possession; *R. v. Henkers*, 16 Cox, C. C. 257. A, a girl under the age of sixteen, who was with her father's consent under the care of B, her uncle, was allowed by B to dine at the house of C, who was married to B's sister. C took A for a drive, and remained over night with her at a hotel, where he debauched her. The next day he left her at B's. Held, that B had the lawful care of A, and that she was unlawfully taken out of his possession by C; *R. v. Mondelet*, 21 L. C. J. 154.

Illustrations.

- (1.) ¹ A and B, two girls under sixteen, run away from home together. Neither abducts the other.
- (2.) ² A persuades B, a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A has abducted B.
- (3.) ³ A, a lady, persuades B, a girl under sixteen, to leave her father's house, and come to A's house for a short time, for the purpose of going to the play with her. A has not abducted B.
- (4.) ⁴ A, a girl, under sixteen, asks B, by whom she has been seduced, to elope with her, which he does. B commits abduction.
- (5.) ⁵ A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C.
- (6.) ⁶ A takes B, a girl under sixteen, out of her father's possession believing her upon good grounds to be eighteen. A has abducted B.
- (7.) ⁷ A meets B, a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces her, takes her back to the place where he found her, and there leaves her. She returns home. A was not aware at the time that B had a father or mother living. A has not abducted B.]

ARTICLE 337.

STEALING CHILDREN UNDER FOURTEEN.

⁹ Every one is guilty of felony, and liable to seven years' imprisonment, who

(a.) [unlawfully, either by force or fraud, leads, or takes away, or decoys or entices away, or detains, any child, under the age of fourteen years; or

(b.) receives or harbors any such child, knowing it to have been so dealt with,

with intent to deprive any parent or guardian, or other person having the lawful care or charge of such child, of

¹ [*R. v. Meadon*, 1 C. & K. 399, as explained by note to *R. v. Kipp*, 4 Cox, C. C. 168; and *R. v. Manbiletow*, Dears. C. C. 162.

² *R. v. Timmins*, Bell, 276.

³ Founded on a dictum of Crompton, J. in *R. v. Timmins*.

⁴ *R. v. Biswell*, 2 Cox, C. C. 279; and see *R. v. Robin*, 1 C. & K. 456.

⁵ *R. v. Hopkins*, Car. & Mar. 254.

⁶ *R. v. Prince*, L. R. 2 C. C. R. 154.

⁷ *R. v. Hibbert*, L. R. 1 C. C. R. 184.]

⁸ S. D. Art. 268.

⁹ R. S. C. c. 162, s. 45: 24 & 25 Viet. c. 100, s. 56.

[the possession of it, or with intent to steal any article about or upon the person of such child.

This Article does not apply to any person who gets possession of any child, or takes any child out of the possession of any one who has lawful charge of it, if such person either claims a right to the possession of the child, or (if it is an illegitimate child) is its mother or claims to be its father.]

CHAPTER XXX.

OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS.

¹ ARTICLE 338.

NEGLECTING TO PROVIDE FOOD, ETC., FOR CHILDREN.

² [EVERY one commits a misdemeanor who, being the parent or master, or mistress, of any child of tender years and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other ³ necessaries for such child, so as thereby to injure the health of such child.]

⁴ ARTICLE 339.

ABANDONING CHILDREN UNDER TWO YEARS OF AGE.

⁵ Every one is guilty of a misdemeanor and liable to three years' imprisonment who unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured.

[The words "abandoned" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing

¹ S. D. Art. 264.

² [*Friend's Case*, R. & R. 20; *R. v. Ryland*, L. R. 1 C. C. R. 99. It is necessary to prove actual injury to the child's health; *R. v. Phillipot*, Doar. 179, and *R. v. Hogan*, 2 Den. 277; and that the defendant actually has, not merely that he might get from the relieving officer, the means of providing for the child; *R. v. Chandler*, Dear. 453.] See Art. 307.

³ [It is doubtful whether this includes medical attendance as regards any one but a parent who is under a statutory obligation to provide it; *R. v. Downes*, L. R. 1 Q. B. D. 25.]

⁴ S. D. Art. 266.

R. S. C. c. 162, s. 20; 24 & 25 Vict. c. 100, s. 27. See Arts. 279 (II. 6), 307.

[with it calculated to leave it exposed to risk without protection.]

Illustrations.

(1.) ¹ B, A's wife, living apart from A, leaves C their child, nine months old, lying in the road outside A's door. A, knowing its position, lets it lie there from 7 P.M. till 1 A.M. A's mother, D, knowing the child is there, and being in her house, acts in the same way as A. A has abandoned and exposed C, but D has not, as she was under no legal obligation to take charge of C.

(2.) ² A sends B, her child five weeks of age, packed up in a hamper as a parcel, by railway to C, B's putative father, giving directions to the clerk to be very careful of the hamper, and send it by the next train. The child reaches C safely. A has abandoned and exposed B.]

¹ [*R. v. White*, L. R. 1 C. C. R. 311.]

² [*R. v. Fulkingham*, L. R. 1 C. C. R. 222.]

CHAPTER XXXI.

* LIBELS ON PRIVATE PERSONS.

¹ ARTICLE 340.

DEFINITION OF LIBEL.

[THE word "libel" means

(a.) the offence defined in this Article.

(b.) anything by the publication of which the offence is committed.

² Every one commits the misdemeanor called libel who maliciously publishes defamatory matter of any person, or body of persons definite and small enough for its individual members to be recognized as such, in or by means of anything capable of being a libel in the second sense of the word.

The publication of a libel on the character of a dead

* See Appendix Note X.

¹ S. D. Art. 267.

² [The best modern statement on the law of libel is by Lord Blackburn in *Capital and Counties Bank v. Henty*, L. R. 7 App. Cas. 769-788. See also my *History of the Criminal Law*, vol. ii. pp. 298-335 and 1 Hawk. P. C. 512. As to what can be a "libel" see Article 341. As to "publishes," see Article 343; "maliciously," see Article 344.

As to libels on the dead, see *R. v. Topham*, 4 T. R. 126; also *R. v. Labouchere*, L. R. 12 Q. B. D. 322-4. In February, 1887, I tried the case of *R. v. Emsor* at the assizes at Cardiff. The case was of a newspaper libel on a political opponent who had been dead for three years. It led to an assault by the dead man's sons upon his supposed libeller. I directed an acquittal on the ground that no evidence was offered to show that the libel in any way referred to any living person. I ought to have added, but I did not do so clearly, that there was no evidence that the defendant wished to provoke the sons of the deceased. It was not even stated that he knew of their existence. I thought that an actual intent to injure (I should have added) or to provoke or annoy the sons was essential to the offence, and that a mere tendency to provoke, or constructive intention inferred from the fact that the libel was calculated to hurt the feelings of, any surviving relations of the deceased was not enough. I have altered the wording of this Article accordingly.] And see *R. v. Carr*, 82 L. T. 100.

A wife cannot take criminal proceedings against her husband for defamatory libel; *R. v. The Lord Mayor of London*, L. R. 16 Q. B. D. 772.

[person is not a misdemeanor unless it is intended to injure or provoke living persons.

Illustrations.

(1.) ¹ A religious society called the S. Nunnery, consisting of certain nuns and other persons, may be libelled though no individual is specially referred to.

(2.) ² A libel may be published against "certain persons lately arrived from Portugal and living near Broad Street," though no particular person is mentioned or referred to.

³ ARTICLE 341.

THINGS CAPABLE OF BEING LIBELS.

⁴ Any words or signs conveying defamatory matter marked upon any substance, and anything which by its own nature conveys defamatory matter, may be a libel in the second sense of the word before mentioned. Words spoken can in no case be a libel, although they may convey defamatory matter.

Illustration.

A letter or passage in a book or newspaper, words written on a wall, a picture, a gallows set up before a man's door, may be a libel.

⁵ ARTICLE 342.

DEFAMATORY MATTER.

⁶ Defamatory matter is matter which, either directly or by insinuation or irony, tends to expose any person to hatred, contempt or ridicule.

¹ [*R. v. Gathercole*, 2 Lew. 237.]

² [*R. v. Osborne*, 2 Keb. 230; 2 Barnard. 138, 166.]

³ S. D. Art. 268.

⁴ [3 Russ. Cr. p. 178; 1 Hawk. P. C. 542; Folkard's Starkie, 151. As to cases in which words spoken amount to a criminal offence, see Articles 74, 121, 207.]

⁵ S. D. Art. 269.

⁶ [Folkard's Starkie, 156, 157.] See *Connick v. Wilson*, 2 Kerr, 496 & 617; *Andrews v. Wilson*, 3 Kerr 86; *Carvill v. McLeod*, 4 All. 332; *Hall v. Carty*, James 379. It is not libellous to write of a man that his outward appearance is more like an assassin than an honest man; *Lang v. Gilbert*, 4 All. 445.

Illustrations.

[The following are instances of defamatory matter :—

¹ A question suggesting that illegitimate children were born and murdered in a nunnery.

² "A adds to his other vices ingratitude";

³ "A will not play the fool or the hypocrite" (meaning that he would);

⁴ "A has the itch, and smells of brimstone";

⁵ An imputation that A (a clergyman) poisoned foxes in a hunting country and hung them by the neck, and was himself hung in effigy for so doing.

⁶ ARTICLE 343.

PUBLICATION DEFINED.

⁷ To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to the person libelled, or any other person, ⁸ provided that if the person making the publication shews that he did not know, and had no opportunity of knowing, the contents of the libel, or that the newspaper or other publication of which it forms part is likely to contain libellous matter, his act is not deemed to amount to a publication.

⁹ A libel published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not only by the person who actually sells or exhi-

¹ [*R. v. Gathercole*, 2 Lew. C. C. 255.]

² [*Cox v. Lee*, L. R. 4 Ex. 284.]

³ 1 Hawk. P. C. 543.

⁴ [*Villars v. Monsley*; Holt on libel, 216, 2 Wils. 403.]

⁵ [*R. v. Cooper*, 8 Q. B. 533. I think it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another "his name is A," meaning that his real name was A, and that the name of B, by which he passed, was falsely assumed, would not this be a libel?]

⁶ S. D. Art. 270.

⁷ [*R. v. Burdett*, 4 B. & Ald. 95. A libel published to the person libelled is a misdemeanour, because it tends to a breach of the peace, but it is not actionable, as it cannot injure the reputation of the person libelled.] See also *R. v. Adams*, L. R. 22 Q. B. D. 66, where the conviction of the defendant for having published to a young woman of virtuous character a defamatory libel by sending to her address a letter in which he proposed that she should for a sum of money surrender her chastity to him, was sustained.

⁸ [*Emmens v. Pottle*, L. R. 16 Q. B. D. 354.] *R. v. Judd*, 37 W. R. 143.

⁹ [Cases in Folkard's *Starkie*, 427-8; and especially *R. v. Almon*, 5 Burr. 2686.]

[bits it, but also by his master if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

¹ Provided that whenever, upon the trial of any person for the publication of a libel, evidence has been given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, the defendant may prove,] and if proved it shall be a good defence, [that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

² If the proprietor of a newspaper or other periodical work gives general authority to an editor to manage the paper, it is a question of fact whether the proprietor authorized the editor to publish the libel which is the subject of the indictment or information. Authorization is not to be presumed from the mere fact that the general control of the paper was left to the editor, but may be inferred from circumstances shewing that the proprietor permitted the editor to publish libels, or was indifferent as to whether libels were published by him or not.

Illustrations.

(1.) ³ A delivers to B an open letter, of which A is the author, containing matter defamatory of C. A has published a libel.

(2.) ³ A posts to B a sealed letter, of which A is the author, and which contains a libel on C. It seems that the posting of the letter is in itself a publication (*quere*).

(3.) ³ The postman delivers to B the letter mentioned in the last illustration. The postman has not published the letter, but A has.

(4.) A bookseller's shopman sells a libellous book over the counter in

¹ R. S. C. c. 163, s. 5. [6 & 7 Vict. c. 96, s. 7. Probably the effect of such proof would be to excuse the master, though the Act does not say so. See *H. v. Almon* as to the rule before the statute.] The words "and if proved it shall be a good defence" are not in the Act of the United Kingdom.

² [*R. v. Holbrook*, L. R. 4 Q. B. D. 42.]

³ All these illustrations are founded on *R. v. Burdett*, 4 B. & Ald. 95. (1.) is assumed by all the judges; (2.) is doubted by Bayley, J., p. 153; (3.) is given by Best, J., p. 126.]

[the ordinary course of business; both the shopman and the bookseller have published the libel.

¹ ARTICLE 344.

WHEN A LIBEL IS MALICIOUS.

²The publication of a libel is malicious in every case which does not fall within the provisions of some one or more of the six Articles next following.

³ ARTICLE 345.

PUBLICATION OF THE TRUTH.

⁴The publication of a libel is not a misdemeanor if the defamatory matter is true, and if the publisher can shew that it was for the public benefit that such matter should be published.

Illustration.

⁵A writes of B, "Many years ago B committed immoral acts." The imputation is true. This is not a libel if the publisher can shew that it was for the public benefit that it should be published.

¹ S. D. Art. 271.

² [In *Bromage v. Prosser*, 4 B. & C. 247, which is a leading case on the subject, Bailey, J., says: "Malice . . . in its legal sense means a wrongful act done intentionally and without just cause or excuse." From the nature of the case the publication of a libel must be an intentional act. The next six Articles sum up the different states of fact which have been held to constitute "just cause or excuse" for publishing libels. In *Bromage v. Prosser* and many other cases, much is said of malice in law and malice in fact, of privileged publications, etc., etc.; but a sufficiently simple and intelligible result has at last been reached by very circuitous roads. See Appendix, Note X.]

³ S. D. Art. 272.

⁴ [Effect of 6 & 7 Vict. c. 96, s. 6.] R. S. C. c. 163, s. 4; but it must be pleaded that the defamatory matter is true and that it was for the public benefit that such matter should be published; *R. v. Mowlan*, 19 U. C. Q. B. 521; *R. v. Lawrie*, 11 R. L. 184; *R. v. Hickson*, 3 L. N. 139.

⁵ [*R. v. Newman*, 1 E. & B. 558; and see Dear. 85.]

¹ ARTICLE 346.PUBLICATION OF MATTER HONESTLY BELIEVED
TO BE TRUE.

² [The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or in manner what is reasonably sufficient for the occasion,³ and provided that the person who publishes is not in fact actuated in so doing by any indirect motive.

When the existence of the relation establishing the duty has been proved, the burden of proving that the statement was not honestly believed to be true, and that the defendant was in fact actuated by some indirect motive, (both or either), is upon the prosecutor.

Illustrations.

(1.) ⁴ A being asked the character of B, who had been in his service, by C, who is about to engage B as a servant, writes of B in a letter to C, the words "B is a drunkard and a thief." If A honestly and on reasonable grounds believes that B is a drunkard and a thief, though in fact he is neither, this is not a libel.

If A published this letter in a newspaper it would be a libel.

As soon as the circumstances under which the letter was written are

¹ S. D. Art. 273.

² [See Folcard's *Starkie*, ch. xii. 249-291. I have gone carefully through these forty-two pages twice or more, and I cannot see that they contain anything beyond this principle and rather obvious illustrations of it expressed in a very complicated way. The leading case on the subject is *Harrison v. Bush*, 5 E. & B. 344-348.

³ *Clark v. Molyneux*, L. R. 3 Q. B. D. 37.

⁴ Many cases as to giving characters to servants are collected and abstracted in Folcard's edition of *Starkie*, pp. 250-7.]

[proved or appear the burden of proving that A did not honestly and on reasonable grounds believe B to be a drunkard and a thief is upon B in a prosecution or action by B.

(2.) ¹ A, the private secretary of a general, being directed by the general to give an inspecting officer information as to the discipline of a body of troops, writes a letter to the inspector, in which he says that B, who had formerly commanded the troops, attempted to excite a mutiny when he was removed from his command. This is not a libel, though false, if A honestly believed it to be true, and if it was relevant to the subject on which A was directed to report.

(3.) ² A writes a letter containing matter defamatory of B to C, A's mother-in-law, who is about to marry B. If A in good faith believes the imputations to be true, this is not a libel although the imputations are false.

(4.) ³ The mate of a ship writes a letter to A accusing the captain, B, of drunkenness and misconduct. A (who has nothing to do with the matter) forwards the letter to the owner of the ship believing the accusation to be true and thinking himself morally bound to report it. The accusation was in fact false. It is uncertain whether A has or has not libelled B.

(5.) A complains to the Privy Council of the conduct of a public officer whom the Privy Council has power to remove. If the statement is made with express malice it is libellous.⁴

⁵ ARTICLE 347.

FAIR CRITICISM.

⁶ The publication of a libel is not a misdemeanor if the defamatory matter consist of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

⁷ A fair comment is a comment which is either true, or

¹ *Beaton v. Skene*, 5 H. & N. 838. This was an action for verbal slander, but the principle is the same.

² *Todd v. Hawkins*, 8 C. & P. 88.

³ *Cochran v. Richards*, 2 C. B. 569. The judges in this case were equally divided, Tindal, C.J., and Erle, J., thought the letter was not a libel; Coltman, J., and Cresswell, J., thought it was.

⁴ *Proctor v. Webster*, L. R. 16 Q. B. D. 112.]

⁵ S. D. Art. 274.

⁶ [Folkard's *Starkie*, ch. xi, pp. 223-248.

⁷ *Hunter v. Sharpe*, 4 F. & F. 983; Folkard's *Starkie*, 232.] Upon an indictment for libel published in a newspaper at the defendant's instance, it was held not to be a defence that the editor of the newspaper (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress publication, but wrote a reply, which was also inserted in such newspaper; *R. v. McElderry*, 19 U. C. Q. B. 168.

[which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care and on reasonable grounds.

¹ Every person who takes a public part in public affairs submits his conduct therein to criticism.

² Every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement to public criticism.

³ Every person who takes part in any dramatic performance, or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.

Illustrations.

(1.) ⁴ A, by direction of the Lords of the Admiralty, publishes to the world at large an official report made to the Lords of the Admiralty by B, which report contains matter defaming the character of C as a naval architect. C, having submitted to the Lords of the Admiralty proposals and plans for converting wooden ships of war into armoured ships of war, and the official report being part of a collection of papers intended to give the public information as to the construction of ships of war, and the publication being made in good faith, A has not libelled B.

(2.) ⁵ A publishes a caricature of B, an author, intended to convey the impression that his books are dull and ridiculous. A has not libelled B.

(3.) ⁶ B exhibits a picture at the annual exhibition of the Royal Academy. A writes a criticism on the pictures so exhibited, and calls B's picture "a mere daub." If this expresses A's honest opinion, A has not libelled B.

(4.) ⁷ B publishes an advertisement about a bag sold by him and called "the Bag of Bags." A publishes a criticism on the advertisement, say-

¹ [Illustration (1).]

² Illustrations (2), (3), and (4).

³ *Dibdin v. Bostock*, 1 Esp. 23.

⁴ *Henwood v. Harrison*, L. R. 7 C. P. 606.

⁵ *Carr v. Hood*, 1 Camp. 364; Folkard's Starkie, 225-7; and see *Tabart v. Tipper*, 1 Camp. 363. *Carr v. Hood* is a strong case, because the caricature ridiculed not only the book but the author. It is one thing to say, "This book is absurd," another to say, "You are an absurd person because you have written this absurd book." This decision would cover (within limits) common political caricatures.

⁶ *Thompson v. Shackell*, 1 M. & M. 187; Folkard's Starkie, 228.

⁷ *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; Folkard's Starkie, 231.]

[ing, "The title is very silly, very slangy, and very vulgar." This may be a libel if it is meant to convey an imputation of B's way of managing his business, but is not a libel if it is only an expression of A's honest opinion as to the title given by B to his bag.

¹ ARTICLE 348.

PARLIAMENTARY PROCEEDINGS AND FAIR COMMENTS
THEREON.

² It is not a misdemeanor to publish such of the reports, papers, votes or proceedings of] the Senate or House of Commons or of any Legislative Council, Legislative Assembly or House of Assembly as such Senate, House, Council or Assembly deems [fit or necessary to be published; or

³ any extract from or abstract of such report, paper, votes or proceedings, if it is shewn by the party accused that such extract or abstract was published *bonâ fide* and without ⁴ malice; or

⁵ a fair report of any debate in either House of Parliament, though any such publication may contain matter defamatory of the character of individuals; ⁶(SUBMITTED) provided that the publisher is not actuated in making the publication by any indirect motive.]

¹ S. D. Art. 275.

² R. S. C. c. 11, ss. 6, 7; c. 163, ss. 6, 7. [3 & 4 Vict. c. 9, ss. 1, 2. The Act contains directions as to proof of reports, &c.; see also *Stockdale v. Hansard*, 9 A. & E. 1. The existence of a narrower privilege than that conferred by the statute, viz., the privilege of publishing libellous papers to members of Parliament for their use, was never disputed. See *Lake v. King*, 1 Wms. Saunders, 137.]

³ R. S. C. c. 11, s. 8; c. 163, s. 8. 3 & 4 Vict. c. 9, s. 3.

⁴ [The word "malice" must here have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parliamentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B's character, and so publishes both *bonâ fide* and with malice. It is absurd to say that he is indictable, yet if he is not, what is the sense of the word "malice"? It seldom has any meaning except a misleading one. It refers not to intention, but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill will, but an ill will which it is immoral to feel. No one would describe legitimate indignation as "malice." The word is entirely avoided in the Indian Penal Code.]

⁵ *Wason v. Walter*, L. R. 4 Q. B. 73.

⁶ Analogy of *Stevens v. Sampson*, L. R. 5 Ex. Div. 58.]

¹ ARTICLE 349.

REPORTS OF PROCEEDINGS OF PUBLIC MEETINGS.

² It is a misdemeanor for any person to publish any report of the proceedings of a public meeting if it contains matter defamatory of the character of individuals, even though the report is fair and accurate and the object of publication is to give information to the public, and not to injure the person to whom the defamatory matter relates.

³ ARTICLE 350.

PUBLICATION IN A COURT OF JUSTICE.

[It is not a misdemeanor for a judge, counsel, witness or party to publish anything whatever in a judicial proceeding before a court of competent jurisdiction, or in the discharge of any military duty, even if the person publishing knows the matter published to be false, and publishes it in order to injure the person to whom it relates.

Illustrations.

- (1.) ⁴ A, before justices of the peace, exhibits articles of the peace against B, containing false and scandalous charges against B, in order to cause B to be bound over to good behaviour. This is not a libel.
- (2.) ⁵ A in an action between himself and B, falsely and maliciously swears an affidavit, charging C with fraud. The affidavit is not a libel.

¹ S. D. Art. 275 A.

² *Davison v. Duncan*, 7 E. & B. 231. By 44 & 45 Vict. c. 60, s. 2, the law in England is changed so far as it relates to the publication in a newspaper of any such report which is now privileged, if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate and published without malice, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor. See also 45 Vict. (Ontario) c. 9; 50 Vict. (Man.) c. 22.

³ S. D. Art. 276.

⁴ *Cutler v. Dixon*, 4 Co. 14 b.

⁵ This is stated most strongly and explicitly in *Munster v. Lamb*, L. R. 11 Q. B. D. 588; *Henderson v. Broomhead*, 4 H. & N. 569, 576; see, too, *Davkins v. Lord Rolobdy*, L. R. 8 Q. B. 255, and authorities cited there. Compare *Seuma v. Netherclift*, L. R. 1 C. P. Div. 540, for an illustration of the same principle as regards slander.]

[(3.) ¹ A, a military witness before a military court of inquiry as to the conduct of B, makes in reference to the subject of that inquiry certain written statements affecting B, which are false to A's knowledge, and are intended to injure B. This is not a libel.

(4.) ² A being the military superior of D, and being as such under a military duty to make a report on B's conduct to C, their common superior, makes a report which he knows to be false in order to injure B. The report is not a libel.

³ ARTICLE 351.

FAIR REPORTS OF PROCEEDINGS OF COURTS.

⁴ The publication of a fair report of the proceedings of a court of justice is not a libel merely because it defames the character of any private person; but such a publication may be an offence under Articles 121, 128, 207, or 218.

A report is said to be fair when it is substantially accurate, and when it is either complete or condensed in such a manner as to give a just impression of what took place, but this Article does not extend to comments made by the reporter, or to reports of observations made by persons not entitled to take part in the proceedings.

Reports of ex parte proceedings are within this Article if they are of a judicial nature, and proceedings before a magistrate under 11 & 12 Vict. c. 42] R. S. C. c. 174, ss. 30-50, 57-91, [held with open doors, and with a view to the committal for trial of a suspected person, are judicial.

⁵ Provided in all the cases aforesaid that the publisher is not actuated in making the publication by an indirect motive.

Illustrations.

(1.) ⁶ A publishes in a newspaper a fair report of the examination of a

¹ [Dawkins v. Lord Rokeby, L. R. 7 H. L. 744.]

² [Dawkins v. Lord Paulet, L. R. 5 Q. B. 94. Dissientiente Cockburn, C.J. I should doubt whether this law would be extended beyond the case of military duty.]

³ S. D. Art. 277.

⁴ [Curry v. Walter, 1 B. & P. 525; Hoare v. Silverlock, 9 C. B. 20; Lewis v. Levy, E. B. & E. 553. Usill v. Hales, L. R. 3 C. P. D. 319.]

⁵ Stevens v. Sampson, L. R. 5 Ex. Div. 53.

⁶ Ryalls v. Leader, L. R. 1 Ex. 295, 300.]

[debtor before the registrar of a Bankruptcy Court. The examination contains irrelevant statements defaming B, who is a stranger to the proceedings. This is not a libel on B.

(2.) ¹ A having been convicted of publishing a blasphemous libel, B publishes the trial, the blasphemous matter being given in full. B publishes a blasphemous libel.

(3.) ² A publishes a report of proceedings for perjury against B, and omits certain parts of the cross-examination of the witnesses. This raises a question for the jury whether the effect of the omission is to make the report partial and inaccurate.

(4.) ³ A, in the last illustration, begins his report with an account of the proceedings out of which the charge of perjury against B arose, and observes, "Evidence was given by C and D which entirely negatived B's story." This statement is not within the Article.

(5.) ⁴ A publishes in a newspaper an account of proceedings before a magistrate against B. The report contains a statement by the magistrate's clerk that B's alleged conduct was exceedingly improper under any circumstances. This observation is not within this Article.

(6.) ⁵ A publishes a fair report in a newspaper of a proceeding against B for perjury at a police court, which proceeding ended in the dismissal of the charge against B. This publication is not a libel.

(7.) ⁶ A publishes in a newspaper a fair report of statements of a defamatory kind, made before a magistrate extra-judicially, with a view to asking his advice. This publication may be a libel, as there is no judicial proceeding.]

⁷ ARTICLE 352.

PUNISHMENT FOR LIBEL.

⁸ Every one is liable to a fine not exceeding six hundred dollars or to imprisonment for any term less than two years, or to both, who

(a.) publishes, or threatens to publish, any libel upon any other person ; or

(b.) directly or indirectly threatens to print or publish, or proposes to abstain from, or offers to prevent the

¹ *R. v. Carlile*, 3 B. & Ald. 167.

² *Lewis v. Levy*, E. B. & E. 551.

³ *Lewis v. Levy*, E. B. & E. 539.

⁴ *Delegal v. Highley*, 3 Bing. N. C. 960, 961.

⁵ *Lewis v. Levy*, E. B. & E. 537; see, on the other hand, *Duncan v. Thwaites*, 3 B. & C. 556.

⁶ *McGregor v. Thwaites*, 3 B. & C. 24.]

⁷ S. D. Art. 278.

⁸ R. S. C. c. 163, s. 1; 6 & 7 Vict. c. 95, s. 3.

printing or publishing of any matter or thing touching any other person,

with intent

(i.) to extort any money, or security for money, or any valuable thing from such or any other person; or

(ii.) to induce any person to confer upon or procure for any person any appointment or office of profit or trust.

¹ Every one is liable to a fine not exceeding four hundred dollars or to imprisonment for any term less than two years, or to both, who maliciously publishes any defamatory libel knowing it to be false,

² or [if he does not know it to be false], to a fine not exceeding two hundred dollars or to one year's imprisonment, or to both.

¹ R. S. C. c. 163, s. 2; 6 & 7 Vict. c. 96, s. 4.

² R. S. C. c. 163, s. 3; 6 & 7 Vict. c. 96, s. 5. [The words bracketed are not in the Act, but are required to complete the sense.]

* PART VI.

OFFENCES AGAINST RIGHTS OF PROPERTY AND
RIGHTS ARISING OUT OF CONTRACTS AND
OFFENCES CONNECTED WITH TRADE.

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| <p>CHAP. XXXII.—PROPERTY—POSSESSION—ABORTATION—BAILMENT.</p> <p>CHAP. XXXIII.—THINGS CAPABLE OR NOT OF BEING STOLEN.</p> <p>CHAP. XXXIV.—THEFT IN GENERAL.</p> <p>CHAP. XXXV.—EMBEZZLEMENT BY CLERKS AND SERVANTS.</p> <p>CHAP. XXXVI.—ROBBERY AND EXTORTION BY THREATS.</p> <p>CHAP. XXXVII. — BURGLARY, HOUSE-BREAKING, ETC.</p> <p>CHAP. XXXVIII.—PUNISHMENT OF THEFTS AND OFFENCES RESEMBLING THEFT COMMITTED IN RESPECT OF PARTICULAR THINGS, IN PARTICULAR PLACES, BY PARTICULAR PERSONS—RECEIVING GOODS UNLAWFULLY OBTAINED.</p> <p>CHAP. XXXIX.—OBTAINING PROPERTY BY FALSE PRETENCES AND OTHER CRIMINAL FRAUDS, AND DEALINGS WITH PROPERTY.</p> <p>CHAP. XL.—FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF PUBLIC COMPANIES—FALSE ACCOUNTING.</p> | <p>CHAP. XLI.—RECEIVING.</p> <p>CHAP. XLII.—FORGERY IN GENERAL.</p> <p>CHAP. XLIII.—PUNISHMENT OF PARTICULAR FORGERIES—OFFENCES RESEMBLING FORGERY AND ACTS PREPARATORY TO THE COMMISSION OF FORGERY.</p> <p>CHAP. XLIV.—FORGERY OF TRADE MARKS—FRAUDULENT MARKING OF MERCHANDISE — OFFENCES RESPECTING PATENTED ARTICLES, INDUSTRIAL DESIGNS AND THE MARKING OF TIMBER.</p> <p>CHAP. XLV.—PERSONATION.</p> <p>CHAP. XLVI.—OFFENCES RELATING TO THE COIN.</p> <p>CHAP. XLVII. — ADVERTISING COUNTERFEIT MONEY.</p> <p>CHAP. XLVIII.—MALICIOUS INJURIES TO PROPERTY.</p> <p>CHAP. XLIX.—CRUELTY TO ANIMALS.</p> <p>CHAP. L.—OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.</p> <p>CHAP. LI. — ADULTERATION OF FOOD.</p> |
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*3 Hist. Cr. Law, ch. xxviii. 121-176.]

CHAPTER XXXII.

PROPERTY—POSSESSION—ASPORTATION—BAILMENT.

² ARTICLE 353.OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS
ARISING OUT OF CONTRACTS.

[THE violation of rights of property and rights arising from contracts is a crime in the cases specified in this part.

Such violation may be :

- (i.) By taking away property from the owner without his consent
 - (a.) by violence to his person or habitation ;
 - (b.) without such violence.
- (ii.) By persuading the owner by fraud to transfer his rights of property.
- (iii.) By the misappropriation of property entrusted by the owner to the offender.
- (iv.) By acts calculated to defraud, whether they actually defraud or not ; that is to say—
 - (a.) Forgery.
 - (b.) Personation.
 - (c.) Coining and uttering bad money.
- (v.) By wilful and malicious mischief done to property.
- (vi.) By breaches of certain kinds of contract and interference in certain cases with freedom of trade.

¹ [This and the following chapter have I fear a somewhat abstract appearance, but it is impossible to understand the provisions of the Larceny Act without a knowledge of the doctrines which it presupposes—that is to say, the doctrine as to the definition of theft, and as to things capable of being stolen. The definition of theft turns on the doctrine of possession (see Appendix Note XI.), and this is unintelligible except in relation to the doctrine of property.]

² S. D. Art. 279.

¹ ARTICLE 354.

PROPERTY IN MOVABLE THINGS.

² [A person who has a right as against the world at large to do with or to any movable thing anything which the law does not specifically forbid him to do with or to it, and the right to prevent all other persons from doing therewith or thereto anything whatever which they are not specifically authorized to do, either by law or by his consent, is said to be the general owner of that thing, and that thing is said to be his property, although he may have limited the above-mentioned rights respecting it as regards particular persons by contract.

³ ARTICLE 355.

POSSESSION.

A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

A movable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word "servant" here includes any person acting as a servant for any particular purpose or occasion.

The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account.

If a servant receives anything for his master from a third person, not being a fellow-servant, he has the

¹ S. D. Art. 230.

² [2 Austin, Jurisprudence, 878, 965.]

³ S. D. Art. 281. [See Appendix Note XI.]

[possession as distinguished from the custody of it, until he has put it into his master's possession by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant who delivered it delivered it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master.

If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so receives it, and not in his custody merely.

Illustrations.

(1.) ¹ A, the master of a house, gives a dinner party, the plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants.

(2.) ² A assigns the goods in his house to trustees for the benefit of his creditors. The trustees leave him undisturbed and do not in any way interfere with the goods. A and not the trustees is in the possession of the goods.

(3.) ³ A produces a receipt stamp, and gets B to write a receipt on it in A's presence as for money paid by A to B. The stamp is in A's not B's possession.

(4.) ⁴ A buys a bureau from B at a sale with money in a secret drawer of the existence of which neither A nor B is aware. The money is not in B's possession (though the bureau which contains it is) because B cannot be presumed to intend to act as the owner of it when he discovers it.

(5.) ⁵ A is clerk to B, a banker, money is paid to A on B's account, A

¹ [Founded on 1 Hale. P. C. 506.

² *R. v. Pratt*, Douc. 360.

³ *R. v. John Smith*, 2 Den. 449.

⁴ *Cartwright v. Green*, 8 Ves. 405; *Merry v. Green*, 7 M. & W. 623.

⁵ *Bazeley's Case*, 2 Leach 835. This case led to the first Act against embezzlement by clerks and servants. No opinion was publicly delivered in it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argu-

[keeps it for a short time, and then puts it into the till. The money is in A's possession till it is put into the till, when it passes into B's possession, though A may have the custody of it.

(6.) ¹ B leaves a watch with its maker to be regulated. A writes to the maker to send the watch to B at a certain post-office. A then goes to the post-office, and pretending to be B, gets the watch. As soon as the watch reaches the post-office addressed to B, it is in B's possession, as the post-master, as regards the letter and watch, is the servant of the owner.

(7.) ² B being prevented by a crowd from getting near the pay-place at a railway station, hands a sovereign to A, who is close to it, to pay for her ticket, and give her the change. The sovereign is in B's possession, but in A's custody.

(8.) ³ B sends his servant A with a cart of B's to fetch coals for B from C. A receives the coals from C, carries them in sacks on his back to the cart, puts them into the cart, and drives it back to B. The cart is throughout in B's possession, but in A's custody. The coals are in A's possession whilst he is carrying them on his back to the cart, but as soon as they are deposited in the cart they are in the possession of B, though both coals and cart continue to be in the custody of A.

(9.) ⁴ A, B's servant, obtains by false pretences B's money from C, another of B's servants. The money after such obtaining is still in B's possession.

(10.) ⁵ A, B's servant, obtains by false pretences from C, B's cashier, the property in coins which belonged to B till C gave them to A. The possession of the coins is in A.

(11.) ⁶ A, B, and C are all servants to D. D's customers pay money to C, who pays it to A, who pays it to B. B, A, and C, each keep separate accounts of their receipts and payments, so as to be checks on each other. Money of D's paid by C to A is in A's possession, and not merely in his custody.

ARTICLE 356.

SPECIAL OWNER.

⁸ Every person to whom the general owner of a mov-

¹ [*R. v. Kay*, D. & B. 235. See Bramwell, B's, remarks on this case in *R. v. Middleton*, L. R. 2 C. C. R. 58.

² *R. v. G. Thompson*, L. & C. 225.

³ *R. v. Reid*, Dent. 158, 257.

⁴ *R. v. Cooke*, L. R. 1 C. C. R. 295; and see *R. v. Robins*, Dent. 418.

⁵ *R. v. H. Thompson*, L. & C. 233.

⁶ *H. v. Masters*, 1 Den. C. C. 332. Mr. Groaves disapproves of this decision, and thinks that in such a case the money would be in the master's possession as soon as the first servant received it on his account. *R. v. Murray* 1 Moody 276, perhaps favors this view, but the whole doctrine of possession is so arbitrary and unreal that it is hard to say that one view is better or worse than another.]

⁷ S. D. Art. 232.

⁸ [*R. v. Vincent*, 2 Den. 464.]

[able thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake.

¹ ARTICLE 357.

POSSESSOR SPECIAL OWNER AS AGAINST STRANGER.

Every person who has obtained by any means the possession of any movable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.

Illustrations.

- (1.) ² A finds a bezoar-stone in the street and shows it to B, a jeweller, to ascertain its value. B keeps it. A has a right to the stone as against B.
 (2.) ³ A steals B's watch. C picks A's pocket of the watch. C steals from A.

⁴ ARTICLE 358.

TAKING AND CARRYING AWAY.

A thing is said to be taken and carried away when every part of it is moved from that specific portion of space which it occupied before it was moved (although the whole of it may not be moved from the whole of the space which it occupied), and when it is severed from any person or thing to which it was attached in such a manner that the taker has, for however short a time, complete control of it. An animal is said to be taken and driven or led away when it is caused to move from the place where it was before.

¹ S. D. Art. 283.

² [*Armory v. Dlamiric*, 1 Sm. L. C. 385.

³ Founded on 1 Hale, P. C. 507.]

⁴ S. D. Art. 281.

Illustrations.

(1.) ¹ A removes a parcel from one end of a waggon to another. This is a taking and carrying away.

(2.) ² A lifts a sword partly out of its scabbard. A has taken and carried away the sword.

(3.) ³ A causes a horse to be led out of a stable for him to mount. A has led away the horse.

(4.) ⁴ A, a postman, instead of delivering a letter in due course, or bringing it back in his pouch, which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away.

(5.) ⁵ A snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterwards. A has taken and carried away the earring.

(6.) ⁶ Goods are tied to a string, one end of which is fastened to the bottom of a counter. A takes and carries them as far as the string will permit. A has not carried away the goods.

(7.) ⁷ A has gas-pipes in his house running through a meter, such pipes being his property. In order to prevent the gas from passing through the meter he puts a connecting pipe between the pipe leading to, and the pipe leading from, the meter, and so diverts the gas from its proper course. This is a taking and carrying away of the gas.

⁸ ARTICLE 359.

BAILMENT DEFINED.

When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as pledge by the person to whom the delivery is made, or that it may be

¹ [*Costel's Case*, 1 *Lea*, 235.

² *R. v. Watch*, 2 *Russ. Cr.* 126 (from MS. of Bayley, J.). An odd point would arise if the sword and scabbard were merely twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

³ *R. v. Pitman*, 2 *C. & P.* 423.

⁴ *R. v. Poynton*, *L. & C.* 247.

⁵ *Lapier's Case*, 1 *Lea*, 320; *R. v. Simpson*, *Dears.* 421. In this case a watch and chain snatched out of one button-hole caught in another.

⁶ 2 *East*, *P. C.* 555.

⁷ *R. v. White*, *Dear.* 203.]

⁸ *S. D. Art.* 235.

[carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made, shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; and the person to whom it is made is called the bailee. ¹]

¹ [*Coggins v. Bernard*, 1 Sm. L. C. 201, for bailment in general. For the application of the doctrine to criminal law, *R. v. Hussey*, L. & C. 58. It seems that a married woman may be a bailee; *R. v. Robson*, L. & C. 93. Since the Married Women's Property Act (33 & 34 Vict. c. 93) it would seem clear that in many cases she can. See also 45 & 46 Vict. c. 75, ss. 12, 16.

CHAPTER XXXIII.

¹ THINGS CAPABLE OR NOT OF BEING STOLEN.² ARTICLE 360.

THINGS CAPABLE OF BEING STOLEN.

[THINGS are or are not capable of being stolen according to the provisions contained in this chapter.

³ ARTICLE 361.

MOVABLE THINGS—LAND—THINGS FIXED TO LAND.

⁴ All movable things are capable of being stolen whether they are naturally movable or whether they were, before being severed therefrom, a part of, or built upon, or growing out of, or fixed in a permanent manner to, the soil of the earth.

The soil of the earth itself cannot be stolen by removing landmarks, building so as to make permanent encroachments, or other means of the same kind.

Things growing out of, built upon, permanently attached to, or forming part of, the soil, cannot be stolen whilst they continue to be so attached to it or to form part of it, or by the act of severance, ⁵ except in the cases provided for in Articles 410, 411, 412, 413, 416, 418, 419 and 433.

⁶ ARTICLE 362.

TITLE-DEEDS AND CHUSES IN ACTION.

⁷ Documents which in any way relate to the title of

¹ [3 Hist. Cr. Law, ch. xxviii. pp. 121-176.]

² S. D. Art. 236.

³ S. D. Art. 237.

⁴ [2 Russ. Cr. 209-17.

⁵ See also Article 370, para. (3).]

⁶ S. D. Art. 238.

⁷ [2 Russ. Cr. 217-33.]

[real property, and documents which constitute evidence of any right of action against any person, are not capable of being stolen, unless they fall within the terms of Article 398 or 400; but documents of title to chattels and tokens which represent them are capable of being stolen.

Illustrations.

(1.)¹ An unstamped written agreement for building cottages under which work has been and is being carried on is not capable of being stolen.

(2.)² A pawnbroker's ticket is capable of being stolen.

³ ARTICLE 363.

WATER—GAS—ELECTRICITY.

⁴ Running or standing water is not capable of being stolen ⁵ unless (it seems) it is stored in pipes or reservoirs for the purpose of sale or use, in which case it is capable of being stolen, although money penalties are provided for an improper use of it.

⁶ Gas is capable of being stolen.

⁷ Electricity is capable of being stolen.

¹ *R. v. Watts*, Dear. 326.

² *R. v. Morrison*, Bell, C. C. 158. It has been held that a railway ticket is capable of being stolen: *R. v. Boulton*, 1 Den. 508. In *R. v. Kilham* (L. R. 1 C. C. R. 264) it is said that "the reasons for this decision do not very clearly appear." It is, indeed, very hard to reconcile the decision with the established principle as to "choses in action" for what is a railway ticket except evidence of a contract by the railway to carry the holder? See Art. 406.

³ S. D. Art. 289.

⁴ ["Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein;"] (Blackstone, 1 Steph. Com. 173, 5th ed.). As to water in standpipes, see *Ferens v. O'Brien*, L. R. 11 Q. B. D. 21.

⁵ Would a man who drew a pail of water out of a reservoir covering many acres be guilty of theft? Hardly, I should think.

⁶ *R. v. Firth*, L. R. 1 C. C. R. 172; *R. v. White*, Dear. 203.

⁷ 45 & 46 Vict. c. 56, s. 23, and see S. D. Art. 327 (f).] It will be observed that this proposition rests upon a statute not in force in Canada, and it may be questioned if it would be maintained in the absence of a statute.

¹ ARTICLE 364.

TAME ANIMALS AND WILD ANIMALS IN CAPTIVITY.

[(a.) ² The following animals are capable of being stolen at common law :

Tame animals, whether originally wild or not, birds, bees, and silkworms kept respectively for food, labor, or profit, their young and their produce ;

Hawks kept for sport ;

Wild animals in a state of captivity kept for food or profit, ³ but not wild animals kept in a state of captivity for curiosity.

(b.) The following animals are the subject of larceny by statute :

⁴ Dogs, birds, beasts, and other animals ordinarily kept in a state of confinement, or for any domestic purpose (or for any lawful purpose of profit or advantage).

(c.) ⁵ Animals of a base nature are not capable of being stolen either at common law or by statute unless they are ordinarily kept in a state of confinement, or for any domestic purpose, (or for any lawful purpose of profit or advantage) in which case they are the subjects of larceny by statute.

⁶ An animal capable of being stolen, whatever may be its nature, does not cease to be capable of being stolen because it is permitted at certain times to wander abroad.

¹ S. D. Art. 290.

² [2 Russ. Cr. 233-4 (5th ed.).

³ 2 Russ. Cr. 238 (5th ed.).]

⁴ R. S. C. c. 184, s. 9. 24 & 25 Vict. c. 86, ss. 18 and 21. The words in parentheses are not in the English Act. See Articles 408, 409 and Article 381.

⁵ [Coke, 3rd Inst. 108-9; 2 Russ. Cr. 233-9. Ferrets, so far as I know, are the only animals to which (c) has been applied in modern times. In *R. v. Searing*, R. & R. 350. "It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for 9s. The judges were of opinion (in 1818) that ferrets though tame and saleable could not be the subject of larceny." I know not whether a ferret would fall within (b) or not. It is necessary to mark the distinction between animals which are the subject of larceny at common law and those which are the subject of larceny by statute, because it is recognized in several statutes. See Articles 408, 409.]

Illustrations.

[1.] ¹ The milk of a cow, the wool on a sheep's back, honey in a hive, are the subjects of larceny at common law.

[2.] ² Young partridges or pheasants reared under a domestic fowl are regarded as tame, and as such are the subjects of larceny at common law till they become wild.

[3.] ³ Deer in a paddock, rabbits in a hutch, are the subjects of larceny at common law. Bears or monkeys kept in dens are the subjects of larceny by statute.

[4.] ⁴ Young partridges reared under a common hen do not cease, so long as they are practically under the dominion of their owner, to be the subjects of larceny at common law because they are allowed to wander abroad.

[5.] ⁵ Pigeons in a dovecot are the subjects of larceny at common law although they are allowed to fly about.

⁶ ARTICLE 365.

WILD ANIMALS LIVING AND DEAD.

⁷ Living wild animals in the enjoyment of their natural liberty, whether they have escaped from confinement or not, are not capable of being stolen although they may be game, and although it may be an offence to pursue or kill them ; ⁸ but the dead body of such an animal is capable of being stolen, and it becomes the property of the person on whose ground the animal dies.⁹

¹ [2 Russ. Cr. 233-4 (5th ed.).

² *R. v. Shickle*, L. R. 1 C. C. R. 158 ; *R. v. Corn*, 10 Cox. C. C. 23.

³ 2 Russ. Cr. 238-4, 238 (5th ed.).

⁴ *R. v. Shickle*, L. R. 1 C. C. R. 158.

⁵ *R. v. Cheafor*, 2 Den. 361. It has not, however, been decided that pigeons can be stolen whilst actually flying about apparently at liberty. I suppose the question would turn on the knowledge of the offender that the pigeons were tame.]

⁶ S. D. Art. 291.

⁷ [2 Russ. Cr. 236 (5th ed.).

⁸ Oysters are the subject of larceny by statute ; see Art. 410 ; but they can hardly be called "living wild animals."

⁹ *Blades v. Higgs*, 11 H. L. C. 621 ; 34 L. J. (C.P.) 286. But see *R. v. Townley*, L. R. 1 C. C. R. 315, and Art. 370, third paragraph.]

¹ ARTICLE 366.

DEAD BODIES.

² [The dead body of a human being is not capable of being stolen.]

³ ARTICLE 367.

THINGS ABANDONED.

⁴ Things of which the ownership has been abandoned are not capable of being stolen.

Illustrations.

- (1.) ⁵ To convert treasure trove before office found is not theft.
- (2.) ⁶ To convert wreck of the sea is not theft (if the owner is unknown).
- (3.) ⁷ To convert goods absolutely lost to the owner, and as to which there is no reasonable ground for believing that the owner can be found, is not theft.

⁸ ARTICLE 368.

THINGS OF NO VALUE.

⁹ Things of no value to any one are not capable of being stolen, but things valuable to no one but the owner are capable of being stolen.

Illustration.

⁹ The paper and stamps of the notes of a firm of country bankers which have been paid by the London correspondent and which are capable of being re-issued by the country bankers may be stolen, because they are valuable to the country bankers (as saving the expense of printing new notes), though to no one else.

¹ S. D. Art. 292.

² [*R. v. Raynes*, 2 East, P. C. 652. Can skeletons and anatomical preparations of parts of dead bodies, or which formerly formed parts of bodies when living, be stolen?—teeth, for instance, intended to be used as false teeth.]

³ S. D. Art. 293.

⁴ 2 East, P. C. 606-7.

⁵ 3 Inst. 108. It is however a misdemeanor. See Art. 476.

⁶ 1 Hawk. P. C. 149, s. 38. This must be understood of wreck of the sea unclaimed, and not of wreck forming part of or belonging to a vessel in distress, as to stealing which see Article 427. Penalties for various offences as to wreck are contained in 17 & 18 Vict. c. 104, s. 477-9 (the Merchant Shipping Act, 1854)]. See Articles 444, 445, and 578. But see *R. v. Martin*, 3 G. & O. 124, as to larceny of wrecked goods under R. S. C. c. 164, s. 35, Article 396.

⁷ The law as to finding property is more fully stated in Article 373.]

⁸ S. D. Art. 294.

⁹ [*Clarke's Case*, 2 Lea. 1036.]

CHAPTER XXXIV.

* THEFT IN GENERAL.

¹ ARTICLE 369.

DEFINITION OF THEFT.

² [THEFT is the act of dealing, from any motive whatever, unlawfully and without claim of right with anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof. Provided that the offences defined in Article 447 do not amount to theft.]

The ways in which theft can be committed are specified in Articles 370 to 374, both inclusive. In those Articles the word "convert" means such a conversion as is hereinbefore specified.

A claim of right may be founded on a mistake of law.

Illustrations.

(1.) ³ A takes B's horse from his stable and backs him down a coal-pit a mile off, in order to prevent the horse from being identified in the trial of C for stealing it. A steals B's horse.

(2.) ⁴ A, a post-office clerk, drops two letters down a water-closet in order that a mistake which he had made in sorting them might not be discovered. A steals the letters.

(3.) ⁵ A, a servant, gets B's letters from the post-office, and destroys one of them written to B by C, A's mistress, making inquiries of B as to A's character, delivering the rest. A steals the letter.

* [8 Hist. Cr. Law, ch. xxviii, p. 121-176.]

¹ 8 D. Art. 295.

² [R. v. *Holloway*, 1 Den. 379.

³ R. v. *Calbage*, R. & R. 292; 2 Russ. Cr. 205.

⁴ *Wynn's Case*, 1 Den. 365.

⁵ R. v. *Jones*, 1 Den. 188.]

[(4.) ¹ A, puddler, throws an iron axle into his furnace in order to increase the apparent amount of iron puddled therein, on which A's wages depend. The axle, worth 5s., is destroyed, though the iron of which it is composed, and which is much less valuable, remains for the owner. A has stolen the axle.

(5.) ² A, without his master's leave, takes his master's corn to feed his master's horses.] This is theft.

[(6.) ³ A gleans corn, not having, but believing himself to have, a legal right to do so. This is not theft.

(7.) ⁴ B, a game-keeper, takes snares set by A, a poacher, and a dead pheasant caught therein. A, honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B by threats to return them. This is not robbery, and if no violence was used would not be theft.

(8.) ⁵ A, believing that B owes him £11, and seeing B receive £7, knocks down B and tries to get the £7 out of his pocket, saying "Pay me the eleven sovereigns you owe me." This is not robbery, and if no violence were used would not be theft.

(9.) ⁶ The ore in a mine belongs to adventurers, and is to be excavated by tributers. One set of tributers are to be paid a larger sum in the pound than the other set for the ore excavated by them. The ore excavated by each set is placed in a heap by itself. A, one of the tributers, moves a quantity of ore from the heap to be paid for at the lower to the heap to be paid for at the higher rate. A has not stolen the ore.

(10.) ⁷ Workmen in the glove trade are paid according to the number of gloves finished by them. A (a workman) takes gloves from his master's warehouse and puts them in the place where the newly-finished gloves are put to be counted, so as to increase the apparent number of newly-finished gloves, and with intent fraudulently to obtain payment for the gloves so removed from the warehouse. This is not theft.

(11.) ⁸ B uses many bags in his trade, and is supplied with them by C. A, B's servant, takes old bags supplied by C to B from B's house, and puts them in a place outside B's house, where new bags were habitually put by C. C, by concert with A, claims payment for the bags from B as for bags newly supplied. A is guilty of theft, and C is an accessory before the fact.

¹ [*R. v. Richards*, 2 Russ. Cr. 256-7. This case is not altogether easy to reconcile with *R. v. Webb*; see Illustration (9).]

² [*R. v. Moritt*, R. & R. 307.] This is not theft in England since the passing of 26 & 27 Vict. c. 103.

³ [2 Russ. Cr. 364-5, commenting on Woodfall, Landlord and Tenant.] See also *R. v. Hornemans*, 4 P. & B. 529.

⁴ [*R. v. Bull*, 3 C. & P. 400.

⁵ [*R. v. Boden*, 1 C. & K. 355.

⁶ [*R. v. Webb*, 1 Moody 431. By 24 & 25 Vict. c. 96, s. 39, which re-enacts an earlier Act passed in consequence of this decision, this is now felony; see Article 447.

⁷ [*R. v. Poole*, D. & B. 345; *R. v. Holloway*, 1 Den. 370, is similar in principle.

⁸ [*R. v. Manning*, Dougl. 21; *R. v. Hall*, 1 Den. 381, is very like this case.]

¹ ARTICLE 370.

THEFT BY TAKING AND CARRYING AWAY—ROBBERY.

² [Theft may be committed by taking and carrying away without the consent of the owner (even if he expects and affords facilities for the commission of the offence), anything which is not in the possession of the thief at the time when the offence is committed,³ whether it is in the possession of any other person or not.

If the thing taken and carried away is on the body or in the immediate presence of the person from whom it is taken, and if the taking is by actual violence intentionally used to overcome or to prevent his resistance, or by threats of injury to his person, property or reputation, the offence is robbery.

⁴ If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away is one continuous act, such taking and carrying away is not theft (except in the cases provided for in Articles 410, 411, 412, 413, 416, 418, 419 and 433.) It seems that the taking and carrying away are deemed to be continuous if the intention to carry away after a reasonable time exists at the time of the taking.

Illustrations.

(1.) ⁵ A finds lost property, knowing who the owner is, and converts it. This is theft.

(2.) ⁶ A, a trespasser, finds a dead rabbit lying in a wood, of which he is not the owner, and converts it. This is theft.

¹ S. D. Art. 296.

² Cases in Illustrations.

³ [Property in no one's possession is said to be constructively in the possession of its owner. The object of this fiction is to satisfy a supposed necessity for showing that the taking in theft must be a taking out of some one's possession.

⁴ *R. v. Townley*, L. R. 1 C. C. R. 315.

⁵ See Article 376 on "Finding."

⁶ *Blades. v. Higgs*, 11 H. L. C. 621.]

[3.] ¹ A carpenter finds nine hundred guineas in a bureau lent to him to repair, and converts them. This is theft.

(4.) ² A finds iron dropped from some canal boat or other, at the bottom of a canal, from which the water has been let off, and converts it. This is theft.

(5.) ³ A instigates B, C's servant, to help A to steal money in C's desk. B tells his master, C. C, in order to detect A, tells B to go on with the business, and so arranges matters as to give A and B opportunities to break open the desk and take the money. This is theft in A.

(6.) ⁴ A snatches a bundle from B's hand, and runs away with it. This is theft, and not robbery, as the violence used was only to get possession of the bundle.

(7.) ⁵ A, at a mock auction, knocks down goods to B, who has not bid for them, pretending that she has. On B's offering to go, A says she shall not be allowed to go unless she pays for the goods knocked down to her, which she does. This is theft at least, and perhaps robbery.

(8.) ⁶ A snatches at a sword worn by B. A and B struggle for the sword, and A gets it. This is robbery.

(9.) ⁷ A, in cutting the string by which a basket is tied, with intent to steal it, accidentally cuts the wrist of the owner, who at the same moment tries to seize and keep it. The cut causes the owner to withdraw her hand, and the thief gets the basket. This is theft, but not robbery, because the actual violence was not intentional.

(10.) ⁸ A, B, and C surround D in such a way as to make resistance by D practically useless, and take his watch, without actual force or threat. This is robbery.

(11.) ⁹ A mob of seventy persons demands money of a person, threat-

¹ [*Cartwright v. Green*, 8 Ves. 405.

² *R. v. Rowe*, Bell. C. C. 93. In this case, Pollock, C.B., said the company had "sufficient possession to maintain an indictment for larceny." The "possession" in question could scarcely be called actual.

³ *R. v. Eggington*, 2 East, P. C. 666. This was similarly decided by the Romans, "illud quaesitum est cum Titius servum Mævii sollicitaverit, ut quasdam res domino subriperet et ad eum perferret, et servus id ad Mævium pertulerit. Mævius autem dum vult Titium in ipso delicto deprehendere, permisit servo quasdam res ad eum perferre, utrum furti an servi corrupti iudicio teneatur Titius an neutro? Et cum nobis super hac dubitatione suggestum est et antiquorum prudentium super hoc altercationes perspeximus quibusdam neque furti, neque servi corrupti actionem præstantibus, quibusdam furti tantummodo; nos huiusmodi calliditati obviam eantes per nostram decisionem sanximus non solum furti actionem sed et servi corrupti contra eum dari."—Institutes, iv. i. 8.

⁴ Six cases all to this effect are collected in 2 Russ. Cr. 90.

⁵ *R. v. McGrath*, L. R. 1 C. C. R. 205. The case of *R. v. Morgan*, Deur. 395, is somewhat similar; see, too, *R. v. Lonell*, L. R. 8 Q. B. D. 185, which is to the same effect.

⁶ *Davie's Case*, 2 East, P. C. 709.

⁷ *R. v. Edwards*, 1 Cox, C. C. 32; 2 Russ. Cr. 90.

⁸ *Hughes's Case*, 1 Lewin, 301.

⁹ *Simon's Case*, 2 East, P. C. 731.]

[ening, if he refuses, to tear his mow of corn and level his house; he gives it. This is robbery.

(12.) ¹ A compels B to give him money, by threatening to accuse A of an infamous crime. This is robbery.

(13.) ² A rips lead off a church, to the roof of which it is fixed, and carries it away. This is not theft at common law though it is by statute.

(14.) ² A cuts down timber or growing crops and carries them away immediately. This is not theft at common law, though it is by statute.

(15.) ³ A, a poacher, kills a number of rabbits, hides them in a ditch on the ground of the owner of the soil on which they were killed, and returns several hours afterwards and carries them away, having all along intended to do so at his convenience. This is not theft.]

(16.) ⁴ Against the wall of a passage leading from the street to certain assembly rooms, the lessor of the rooms places an "automatic box" so constructed that upon a penny piece being dropped into a slit of the box and a knob being pushed according to directions inscribed on the box, a cigarette is ejected. A drops into the slit a brass disc instead of a penny, and pushing the knob thereby obtains a cigarette. This is theft.

⁵ ARTICLE 371.

THEFT BY A SERVANT.—EMBEZZLEMENT.

[Theft may be committed by converting, without the consent of the owner, anything of which the offender has received the custody as the servant of the owner, or in order that the thing may be used by the offender for some special temporary purpose in the presence or under the immediate control of the owner or his servant.

⁶ When a clerk, or servant, or person employed in the capacity of a clerk or servant, converts anything received by him from another person for his master or employer, he is deemed to have stolen it, but his offence is commonly called embezzlement, and is distinguished from

¹ See cases collected in 2 Russ. Cr. 99-104. Some distinctions arise upon this which I do not notice, because this most odious crime is now dealt with specially by statute. See Article 388.

² See authorities collected 2 Russ. Cr. (5th ed.) 209-10.]

³ *R. v. Townley*, L. R. 1 C. C. R. 315.]

⁴ *R. v. Hande*, 16 Cox C. C. 188.

⁵ S. D. Art. 297.

⁶ [See Chapter xxxv.]

[theft for the purposes and in the manner mentioned in Chapter XXXV.

Illustrations.

- (1.) ¹ A carter converts to his own use a cart which he is driving for his master. He commits theft.
- (2.) ² A is employed by B to take pigs to C to be looked at, and to bring them back to B, whether C wishes to buy them or not. A sells the pigs to some one else, and keeps the money. This is theft.
- (3.) ³ A sheriff's officer, in possession of goods under a writ of *fi. fa.*, sells part of them. This is theft, as such a person is in the position of a servant.
- (4.) ⁴ A guest at a tavern carries off a piece of plate set before him to drink from. This is theft, because A had only a permission to use the plate for a special limited purpose.

⁵ ARTICLE 372.

THEFT BY A FALSE PRETENCE.

Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion.⁶

Illustrations.

- (1.) ⁷ A fraudulently persuades B to allow A to take two silver ewers to shew to A's master, to choose one if he pleased. A sells the ewers and keeps the money. This is theft.
- (2.) ⁸ A, by pretending to be B, fraudulently obtains B's goods from C, a carrier, to whom they were entrusted by B. This is theft, as the carrier transferred the possession only.

¹ [*Robinson's Case*, 2 East, P. C. 565.

² *R. v. Harvey*, 9 C. & P. 353.

³ *Eastall's Case*, 3 Russ Cr. 311.

⁴ 1 Hale, P. C. 508.]

⁵ S. D. Art. 298.

⁶ [*R. v. Hollis*, L. R. 12 Q. B. D. 25, is the last case on this subject.

⁷ *R. v. Davenport*, 2 Russ. Cr. 147.

⁸ *R. v. Longstreeths*, 2 Russ. Cr. 149-50; 1 Moody 137. There are a great number of other cases to the same effect. *R. v. McKale*, e.g., L. R. 1 C. C. R. 125.]

(3.) ¹ A fraudulently bargains with B for the purchase by A of goods for ready money, and fraudulently induces B to let A have the goods, pretending that he is then about to pay B the price. A then takes away the goods, and does not pay the price. This is theft, as in such cases the purchaser does not mean to transfer the property till the money is paid.

(4.) ² A fraudulently obtains goods and money from a shopkeeper by pretending to give him diamonds for them. This is not theft, as the shopkeeper means to transfer the property in the goods.

(5.) ³ A fraudulently induces B to give her ten sovereigns to conjure with, promising to bring back the ten sovereigns and £170, to which A says B is entitled. A carries off the ten sovereigns. If the ten sovereigns were to be returned, this is theft. If not, it is not theft, but is obtaining money by false pretences.

(6.) ⁴ A, B's wife, by a forged order gets money standing to B's credit at B's bankers. This is not theft from the bankers, as the cashier had a general authority to part with the banker's money, and meant to do so.]

(7.) ⁵ A at a race meeting makes a bet with B, the money for which B backs a particular horse being deposited with A, who obtains possession thereof fraudulently, never intending to repay it in any event, while B parts with the money with the intention that in the event of the horse winning it is to be repaid to him. This is theft, as there is no contract by which the property in the money can pass.

(8.) ⁶ A, for the purpose of keeping up a false pretence that he is the owner of certain land, of which he has the title, by the promise that the same will be immediately returned, induces B, who has purchased from the real owner, to hand him, on the delivery of the deed at the solicitor's office, certain moneys and notes purporting to represent the consideration expressed in the deed. A at the time intends to keep, and does keep, the moneys and notes. A commits theft.

ARTICLE 373.

THEFT BY TAKING ADVANTAGE OF A MISTAKE.

[Theft may be committed by ⁸ converting property which the general or special owner has given to the offender under a mistake which the offender has not

¹ [Four cases to this effect are stated in 2 Russ. Cr. 157-9.

² *R. v. Bunce*, 1 F. & F. 523. The offence would be obtaining goods by false pretences.

³ *R. v. Bunce*, 1 F. & F. 523.

⁴ *R. v. Prince*, L. R. 1 C. C. R. 154.]

⁵ *R. v. Buchmaster*, L. R. 20 Q. B. D. 182.

⁶ *R. v. Ewing*, 21 U. C. Q. B. 523.

⁷ S. D. Art. 299.

⁸ [*R. v. Middleton*, L. R. 2 C. C. R. 38. Perhaps "by knowingly accepting with intent to convert" would be a more accurate way of expressing the effect of this case.]

[caused, but which he knows to be such at the time when it is made, and of which he fraudulently takes advantage.

¹ But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it.

Illustrations.

(1.) ² A having to receive ten shillings from a post-office savings bank, produces to the clerk a warrant for that amount. The clerk referring by mistake to another letter of advice, puts on the counter £8 16s. 10d., which A takes away. This is theft.

(2.) ³ A gives a cabman a sovereign for a shilling. The cabman, seeing that it is a sovereign, keeps it. This is theft of the sovereign. If he does not discover the mistake at once, but subsequently, it is doubtful whether he commits theft or not.

(3.) ⁴ A receives a letter containing a cheque. The letter is addressed, and the cheque is payable, to another person of the same name as A. A receives the letter innocently, but, on discovering the mistake made, converts the cheque to his own use. This is not theft.

(4.) ⁵ A buys a bureau at a public auction, and finds in it property not intended to be sold, which he converts to his own use. This is theft.

¹ [*R. v. Ashwell* (L. R. 16 Q. B. D. 190) was reserved in consequence of the expression of doubt in the text. Keogh meaning to lend Ashwell a shilling, put into his hand a coin which at the time each believed to be a shilling. It was a sovereign, and Ashwell found out this an hour afterwards and kept it. The question whether this was larceny or not was twice argued, the last time before fourteen judges of whom I was one. Seven thought that it was, and seven that it was not larceny, and the result was that the conviction stood. In *R. v. Flowers* (L. R. 16 Q. B. D. 643), the facts of which appear to me not distinguishable from those in *R. v. Ashwell*, several of the judges who affirmed the conviction of Ashwell explained that they did not mean by that decision to throw doubt on the rule that an innocent taking succeeded by a fraudulent misappropriation is not larceny. *R. v. Ashwell* must therefore be regarded as at most an authority for a case precisely similar in all its circumstances, but even this is not clear. No doubt in *A. G. v. Windson* (8 H. L. C. 363) Lord Campbell treated *R. v. Millis* as an authority binding on the House, though it was decided in a case of equality of votes by the help of the maxim "presumitur pro neganti"; but I doubt whether this would apply to *R. v. Ashwell*. The Court being equally divided no judgment was given, and therefore the conviction was not quashed, but I do not see what more can be said. The maxim "presumitur pro neganti," it might surely be argued, would apply, if at all, to the view which negated Ashwell's guilt. For myself I doubt its application to the case. On the whole there is strong evidence of the correctness of my opinion that the matter is doubtful, and I have accordingly left my statement as it was.

² *R. v. Middleton*, L. R. 2 C. C. R. 38.

³ Per eight Judges in *R. v. Middleton*, L. R. 2 C. C. R. at p. 45.

⁴ *R. v. Mucklow*, 1 Mood. C. C. 160; *R. v. Davies*, Dear. 640.

⁵ *Merry v. Green*, 7 M. & W. 623. There was a question in this case whether the bureau]

¹ ARTICLE 374.

THEFT BY BAILEES.

² [Theft may be committed by the conversion by a bailee of the thing bailed, but this does not extend to any offence punishable on summary conviction.]

³ This Article applies to bailments to infants incapable of entering into a contract of bailment by reason of infancy (and it is submitted to bailments upon a void, and perhaps upon an illegal, consideration.)

⁴ ARTICLE 375.

BY AND FROM WHOM THEFT MAY BE COMMITTED.

Theft may be committed by a general owner to the prejudice of a special owner upon a chattel in which both general and special ownership exist.

⁵ Theft may be committed by a member of a ⁶ co-partner-

[was not sold with its contents. *Cartwright v. Green*, 4 Ves. 405, is almost precisely similar. I am unable to distinguish these cases from those on which Illustration (3) is founded. It is remarkable that in the judgments, and apparently in the argument (which is not reported), in *R. v. Millston*, no notice is taken of any of these cases, nor are the cases about the bureau referred to in *R. v. Dwyer*, which was decided, without argument, solely on the authority of *R. v. Mucklow*. *Cartwright v. Green* is not referred to in *R. v. Mucklow*, which was decided before *Merry v. Green*. *Merry v. Green* does not refer to *R. v. Mucklow*. The result is that the cases appear to contradict each other. This is also the view of Mr. Justice Cave in his judgment in *R. v. Ashwell*.]

¹ S. D. Art. 300.

² R. S. C. c. 164, s. 4; [24 & 25 Viet. c. 93, s. 3. For a recent instance of this offence, see *R. v. Orendum*, 46 L. J. (M. C.) 123. For a case in which it was doubtful whether or not there was evidence of a bailment, see *R. v. De Banks*, L. R. 13 Q. B. D. 29. See also *R. v. Ashwell*; *R. v. Wynn*, 16 Cox C. C. 231; *R. v. Trecedy*, 23 U. C. Q. B. 120; *R. v. Stewart*, 43 U. C. Q. B. 574; *R. v. Lebauf*, 9 L. C. J. 245; *Gould v. Cowan*, 17 L. C. R. 48. A deposited money with B, "en attendant le paiement qu'il pourrait faire d'une même somme à C." B did not pay C, but appropriated the money to his own use. Held, that he did not commit theft, not being bound to pay the same pieces of money, but a similar sum to C; *R. v. Berthoume*, 3 M. L. R. 143.

³ [*R. v. MacDonald*, L. R. 15 Q. B. D. 323.]

⁴ S. D. Art. 301.

⁵ R. S. C. c. 164, s. 58. 31 & 32 Viet. c. 116, s. 1.

⁶ [A co-partnership means an association for profit. A Christian Young Men's Society is not a co-partnership, though its members may be joint beneficial owners: *R. v. Robson*,

[ship, or by one of two or more beneficial owners of any money, goods, effects, bills, notes, securities, or other property, to the prejudice of the other co-partners or beneficial owners.

¹ Theft may be committed by a member of a corporation to the prejudice of that corporation upon a thing which is the property of the corporation.

² A married woman cannot commit theft upon things belonging to her husband.

If any other person assists a married woman in dealing with things belonging to her husband in a manner which would amount to theft in the case of other persons, ³ such dealing is not theft ⁴ unless the person so assisting commits or intends to commit adultery with the woman ⁵ in which case he, but not she, commits theft.⁶ But this exception does not apply to the case of an adulterer or person intending to commit adultery, who assists a married woman to carry away her own wearing apparel only from her husband.

⁷ It is doubtful whether the mere presence and consent of a married woman on an occasion when some person deals with her husband's goods in a way which would

L. R. 16 Q. B. D. 140.] In *R. v. Loiczenbruck*, 18 L. C. J. 212, Ramsay, J., expressed the opinion that an indictment for larceny or embezzlement would not lie against a partner under 32 & 33 Vict. (D.) c. 21, s. 38 (R. S. C. c. 164, s. 58). The opinion however does not appear to be well founded. See Tusch, Can. Crim. Acts 405, and cases there cited. *R. v. Smith*, 11 Cox, C. C. 511; *R. v. Balls*, 12 Cox, C. C. 96; *R. v. Butterworth*, 12 Cox, C. C. 132; *R. v. Rudge*, 13 Cox, C. C. 17.

¹ [Roscoe's Crim. Ev. 8th ed. 652. This is Mr. Roscoe's inference from 1 Hale, P. C. 513, and appears to be correct.

² 1 Hale, P. C. 514.] See 45 & 46 Vict. c. 75, s. 12.

³ [*Harrison's Case*, 2 East, P. C. 552.

⁴ *R. v. Avery*, Bell, 150.

⁵ *R. v. Tolfree*, 1 Mood. 243; *R. v. Thompson*, 1 Den. 549; *R. v. Tollett*, Car. & Mar. 112; *R. v. Featherstone*, Dear. 369; *R. v. J. Mutters*, L. & C. 511. A note to this case, 516-19, collects and reviews all the authorities on the subject. These cases were all decided before the Married Women's Property Act, 45 & 46 Vict. c. 75, ss. 12-16.

⁶ *R. v. Fitch*, D. & B. 187.

⁷ *R. v. Avery*, Bell, C. C. 153. I submit that the wife's presence and consent in such a case would be no excuse. See the history of the growth of the doctrine in note to *R. v. Mutters*.]

[otherwise amount to theft excuses such person if he acts as a principal in the matter, and not as her assistant.

Illustrations.

(1.) ¹ A bails goods to B for exportation, upon which A would become entitled to an exemption from a duty on the goods of 2s. 6d. a pound. B gives a bond to the Crown for exportation, and sends the goods in his barge to a ship to be exported. A, to get the goods duty free, takes them from B's barge. A has stolen the goods from B, and it seems it would have been larceny if no bond had been given by B.

(2.) ² A gives his servant goods to carry to a certain place. A then disguises himself and robs his servant in order to charge the hundred with the robbery. This is robbery.

³ ARTICLE 376.

⁴ FINDING GOODS.

A finder of lost goods who converts them commits theft if at the time when he takes possession of them he intends to convert them, knowing who the owner is, or having reasonable grounds to believe that he can be found ;

Such a conversion is not theft,

(a.) if at the time when the finder takes possession of the goods he has not such knowledge or grounds of belief as aforesaid, although he acquires them after taking possession of the goods, and before resolving to convert them ; or

(b.) if he does not intend to convert the goods at the time when he takes possession of them, whether he has

¹ [*R. v. Wilkinson*, 2 Russ. Cr. 243.]

² Foster, 1234. I have not met with any case in which a man has been convicted of theft for stealing a pledge (his own property) from a pawnbroker; but no doubt such an act would be theft. Before 31 & 32 Vict. c. 118, s. 2, a case occurred in which a part owner was convicted of stealing money from another part owner, in whose special custody it was, and who was solely responsible for its safety, the money being the property of a co-operative store; *R. v. Webster*, L. & C. 77. The same point was decided, as to the property of a friendly society in *R. v. Burgess*, L. & C. 299.]

³ S. D. Art. 302.

⁴ [3 Hist. Cr. Law, 170.]

[such knowledge or grounds of belief or not at any time.

If the circumstances are such as to lead the finder reasonably to believe that the owner intended to abandon his property in the goods, the finder is not guilty of theft in converting them.

Illustrations.

(1.) ¹ A finds a bank note, accidentally dropped on the floor of his shop. He picks it up, intending to keep it for himself, whoever the owner might be, believing at the time that the owner could be found. This is theft.

(2.) ² A, a carpenter, to whom a bureau was entrusted to mend, finds money in it, the existence of which was obviously unknown to the owner of the bureau. A appropriates the money. This is theft, as A knew to whom the bureau belonged.

(3.) ³ A finds iron in the bottom of a canal, from which the water had been let off, and appropriates it. This is theft, as the fact that the iron was in the canal raised a presumption that it had fallen from a canal boat and that therefore the canal company had a special property in it.

(4.) ⁴ A finds a sovereign in the road, and picks it up, intending to keep it, whoever the owner might be, but not knowing who he was, and having no reason to believe he could be found. This is not theft.

(5.) ⁵ A finds a bank note in the road, with no mark upon it, and no circumstance to indicate who was the owner, or that he might be found. Next day he hears who the owner is, and after that changes the note and keeps the money. This is not theft.

(6.) ⁶ A finds a bank note in the road with the owner's name upon it, and takes it, intending at the time to return it to the owner, but afterwards changes his mind and keeps it for himself. This is not theft.

(7.) ⁷ A finds an apple, which appears to have been thrown away in

¹ [*R. v. Moore*, L. & C. 1.

² *Carterright v. Green*, 8 Ves. 405; see, too, *Murray v. Green*, 7 M. & W. 623.

³ *R. v. Rowe*, Bell, C. C. 93. This case was decided on the question of the possession of the canal company, but it illustrates the principle as to finding also.

⁴ *R. v. Glyde*, L. R. 1 C. C. R. 139.

⁵ *R. v. Thurborn*, 1 Dou. 337.

⁶ *Preston's Case*, 2 Den. 353. The illustration does not represent the actual facts in *Preston's Case*, but a state of facts which the Court said might have existed and upon which the jury might have convicted him under the terms in which the very able judge who tried the case (the late M. D. Hill, Recorder of Birmingham) directed them.

⁷ Per Rolfe, B., in *R. v. Peters*, 1 C. & K. 245; and see the summing up of Cockburn, C. J., in *R. v. Glyde*, L. R. 1 C. C. R. 140-1. In some of the cases on this subject a distinction is taken between property absolutely lost, and property only mislaid; see *R. v. West*, Dear. 402. It would appear, however, that the only real difference is that in the latter]

[a road, and eats it. If a reasonably believed that the apple had been abandoned by its owner, this is not theft.

¹ ARTICLE 377.

CONVERSION AFTER A TAKING AMOUNTING TO TRESPASS.

If a person takes into his custody any chattel belonging to any other person in a way which constitutes an actionable wrong to that person and afterwards converts it, he commits theft, although he may not have intended to convert it when he took it into his custody.

Illustrations.

(1.) ² A, having a flock of lambs in a field, drives them out, and negligently drives away with them a lamb belonging to B which happened to be there. At the time of driving away the lamb A does not intend to convert it, but afterwards, on discovering what had happened, he sells the lamb and keeps the money. This is theft.

(2.) ³ A takes home B's umbrella from a club by mistake, and having afterwards found out that it is B's, converts it. A commits theft.

⁴ ARTICLE 378.

CONVERSION AFTER INNOCENT TAKING.

If a person innocently in any way not referred to in any of the preceding Articles, has the possession of any chattel, and converts such chattel, he does not commit theft, although such chattel may have been entrusted to him by the owner, or may be the proceeds of something which was entrusted to him by the owner for the owner's

[case the finder must know that the owner may be found. The distinction was useful as a step towards modifying the generality of the rule laid down by the old text writers: see e.g. 1 Hawkins, P. C. 142. "One who finds such goods as I have lost and converts them to his own use, *animo furandi*, is no felon."]]

¹ S. D. Art. 303.

² [R. v. Riley, Dear, 149.

³ Per Pollock, C.B., and Parke, B., in *Riley's Case*, p. 156; see the question of Martin, B., in *Preston's Case*. 2 Den. 359.]

⁴ S. D. Art. 304.

[benefit, or for the benefit of some person other than the person so entrusted, unless such conversion falls within the provisions of Chapter XL. or Article 383.

Illustrations.

(1.) ¹ A assigns his goods by deed to trustees for the benefit of his creditors. The trustees do not take possession, but leave A's possession undisturbed. A makes away with the goods, intending to deprive his creditors of them. This is not theft.

(2.) ² B's house being on fire, A takes B's goods to A's house for protection, B acquiescing as to some of them. A's intention at the time is to keep them for B, but A afterwards changes his mind and converts them. This is not theft.

(3.) ³ B gives his broker A a cheque to buy Exchequer bills. A buys Exchequer bills for B with part of the proceeds of the cheque and absconds with the rest. This is not theft.

(4.) ⁴ B, a boy unable to read, finds a cheque and gives it to A, asking A to tell him what it is. A, on various false pretences, withholds it from B in hopes of getting a reward from the owner. A has not stolen the cheque.

(5.) ⁵ A, the acting treasurer of a local Church Missionary Society, whose duty it is to deposit or invest the moneys received by him on account of the society, converts them. This is not theft.

(6.) ⁶ A is the treasurer of a money club, the nature of which is that certain persons deposit a weekly sum and are liable to fines in default. Loans might be made on interest to the members at A's discretion. The total amount, including interest on the loans, but subject to small deductions, to be divided amongst the members at the end of the year. A converts the balance in his hands at the end of the year. This is not theft.

¹ *It. v. Pratt*, Deane, 360.

² *Leigh's Case*, 2 East, P. C. 694-5. This case seems to shew that if A were to find a bank note for £1000, which he knew to be B's, and were to take it up intending to give it to B, and were afterwards to be tempted to go to a gaming house and were there to stake and lose it, he would not commit theft, and I believe that such is the law.

³ *Walsh's Case*, 2 Lea, 1054. *Walsh's Case* was the occasion of the first of a series of statutes now represented by 24 & 25 Vict, c. 96, ss. 75, 79. See chapter XL.

⁴ *R. v. v. Gardner*, L. & C. 243.

⁵ *R. v. Gavett*, 8 Cox, C. C. 308, and 2 Russ. Cr. 136-7. This would not even now be an offence. As the offender had not to pay over or return the specific coins entrusted to him, he was not a bailee; and as there was no express trust of the money created by an instrument in writing, he was not within the fraudulent trustee clauses of the Larceny Act.

⁶ Nor is it any offence at all. *It. v. Hussell*, L. & C. 58.] See Art. 433.

¹ ARTICLE 379.

OBTAINING BY FALSE PRETENCES NOT THEFT.

[It is not theft to persuade any person by fraud to transfer the property of any chattel to any person, though such an act may be an offence under Chapter XXXIX.]

² ARTICLE 380.

TEMPORARY TAKING IS NOT THEFT.

³ It is not theft to deal with anything in any of the ways in which theft can be committed with the intention only to obtain the temporary use thereof, and not with the intention to convert it permanently to the use of some person other than the owner; but if a thing is so dealt with with the intention of totally depriving the owner of his property in it, the returning of the goods after a temporary use of them will not prevent the act from amounting to larceny.

Illustrations.

(1.) ⁴ A takes B's horse without B's leave, rides about on it to find some cattle, and then turns it loose on the common. This is not theft.

(2.) ⁵ A rides B's horse, without B's leave, to a place thirty miles off, and leaves him at an inn, saying he will call for him. A does not call for the horse, but pursues his journey on foot. The jury must consider whether A meant permanently to deprive B of his horse, or only to make that particular journey on him. In the first case A's act is theft, in the second, not.

⁶ ARTICLE 381.

TAKING TAME ANIMAL WANDERING NOT THEFT.

⁷ It seems that it is not theft to take and carry away an

¹ S. D. Art. 305.

² S. D. Art. 306.

³ [See Illustrations, and for the latter part of the Article note to *R. v. Pheasant*, 9 C. & P. 554, and *R. v. Trebilcock*, Dears. & B. C. C. 453.]

⁴ 1 Hale, P. C. 509.

⁵ *R. v. Phillips*, 2 East, P. C. 662; *R. v. Addis*, 1 Cox, C. C. 78, is to the same effect.]

⁶ S. D. Art. 307.

⁷ [1 Hawkins, P. C. p. 149, ch. 19, s. 40.]

[animal which, though really tame, is wandering at a distance from its habitation as if it were wild, and when it is not known to be tame by the person who takes and carries it away.]

¹ ARTICLE 382.

EVIDENCE AS TO THEFT.

The inference that property alleged to have been stolen has in fact been stolen may be drawn from other facts than the fact that it is identified by a witness.

The inference that an accused person has stolen property, or has received it knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession.

Illustration.

(1)² A is seen coming out of a lower room in a warehouse in the London Docks, in the floor above which a quantity of pepper is deposited, some being loose on the floor. A's pockets are full of pepper. On being stopped he throws down the pepper, and says, "I hope you will not be hard upon me." A may be convicted of stealing the pepper, although no pepper was missed from the warehouse and the pepper on A was not otherwise identified than by being shown to be similar to that in the warehouse.]

¹ S. D. Art. 308.

² [*R. v. Burton*, Dear. 282. In this case Maule, J., characteristically remarked. "If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

As to the rule as to recent possession of stolen goods, many cases have been decided on the subject (see 2 Russ. Cr. 275-81), but they seem to me to come to nothing but this, that every case depends on its own circumstances, and that the nature of the thing stolen, the length of the interval between the theft and the possession, and the behavior of the accused may all vary the force of the evidence indefinitely. The unexplained possession of a single stolen coin by a shopkeeper doing a large business in whose till it was found ten minutes after the theft, would prove nothing. The finding of a lost will ten years after its loss, locked up in the strong box of a careful person deeply interested in its temporary concealment, and peculiarly jealous of his strong box, would prove a great deal. Between these extremes there may be infinite degrees in the weight of such evidence.]

CHAPTER XXXV.

¹ EMBEZZLEMENT BY CLERKS AND SERVANTS.² ARTICLE 383.

EMBEZZLEMENT BY CLERKS AND SERVANTS—WHO ARE SERVANTS.

³ [WHEN a clerk or servant, or person employed in the capacity of a clerk or servant, commits theft by converting any chattel, money, or valuable security delivered to or received, or taken into possession by him for or in the name or on account⁴ of his master or employer, his offence is called embezzlement.

Such a conversion is not a criminal offence (except in the cases hereinafter specially provided for) unless the person who converts stands to the owner of the property converted in the relation of a clerk or servant, or person employed in the capacity of a clerk or servant.

⁵ It is a question for a jury whether a person accused of embezzlement is a clerk or servant or not.

⁶ A clerk or servant is a person bound either by an ex-

¹ [3 Hist. Cr. Law, 151-6. Cf. Draft Code, ss. 249, 250, 258.]

² S. D. Art. 309.

³ [Founded on 24 & 25 Vict. c. 96, s. 68. See Art. 429.] R. S. C. c. 164, s. 52; *R. v. Paquet*, 2 L. N. 140; *R. v. Charest*, 9 L. N. 114; *R. v. Torple*, 3 R. & C. 596. An assistant overseer appointed under 59 Geo. 3, c. 12, s. 7, but not for the purpose of collecting or receiving money, cannot be convicted of embezzlement as a clerk or servant of the inhabitants within 24 & 25 Vict. c. 96, s. 68; *R. v. Cotey*, 16 Cox, C. C. 226. This decision is however questioned in a note at p. 230 of the report, as being difficult to reconcile with *R. v. Hall*, 1 Moo. C. C. 474. A school trustee whose duty does not require or authorize him to receive the money of the Board of Trustees cannot embezzle such moneys; *Ferris v. Irwin*, 10 U. C. C. P. 116.

⁴ [For an instance in which money was received in the name of one person and on the account of another, see *R. v. Thorpe*, D. & B. 562.

⁵ Bramwell, B., doubted as to this in *Walker's Case*, D. & B. 602; but see *R. v. Negus*, L. R. 2 C. C. R. 34; *R. v. Tite*, L. & C. 33; *R. v. May*, L. & C. 13.

⁶ *R. v. Negus*, L. R. 2 C. C. R. 37 (judgment of Blackburn, J.); *R. v. Tite*, L. & C. 33.]

[press contract of service or by conduct ¹ implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.

A man may be a clerk or servant

² although he was appointed or elected to the employment in respect of which he is a clerk or servant by some other person than the master whose orders he is bound to obey ;

³ although he is paid for his services by a commission or share in the profits of a business ;

⁴ although he is a member of any co-partnership, or is one of two or more beneficial owners of the ⁵ property embezzled ;

⁶ although he is the clerk or servant of more masters than one ;

⁷ although he acts as clerk or servant only occasionally, or only on the particular occasion on which his offence is committed.

⁸ But an agent or other person who undertakes to transact business for another, without undertaking to obey his orders, is not necessarily a servant

because he receives a salary ; or

because he has undertaken not to accept employment of a similar kind from any one else ; or

because he is under a duty (statutory or otherwise) to account for money or other property received by him.

It seems that in order that a clerk or servant may be within the meaning of this Article it is necessary that the objects of his service should not be criminal, but a man

¹ [*E. v. Foulkes*, L. R. 2 C. C. R. 152.]

² Illustration (1).

³ Illustrations (2) and (3).

⁴ 31 & 32 Viet. c. 116, s. 1.] R. S. C. c. 164, s. 58.

⁵ ["Money (goods, or effects, bills, notes, securities) or other property."] The words in parentheses are not in the Canadian Act.

⁶ [Illustration (3).

⁷ Illustration (4).

⁸ Illustrations (6)—(9).]

[may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy.

Illustrations.

(1.) ¹ A, elected collector of rates by the vestry of a parish, and having to obey a committee of management, is the servant of the committee of management.

(2.) ² A was cashier and collector to B at a salary of £150 a year, besides 12½ per cent on the profits of the business. A was not to be responsible for losses and had no control over the management of the business. A was a servant to B.

(3.) ³ A took orders for B and collected money for him according to a journey book given to him by B, showing the sums to be received and the persons from whom they were due. A was paid by a commission. A was clerk to B, though he was principally employed by C, D, and others.

(4.) ⁴ A was employed by B to go on messages when A had nothing else to do, and B was to give A whatever B chose. A was B's servant.

(5.) ⁵ A, a drover, was employed by B, a farmer, on one single occasion to drive a cow and calf to a person to whom they were sold, and to bring back the money. A was B's servant.

(6.) ⁶ A, the master of a charity school, on one particular occasion consents to get a subscription to the funds of the school, at the request of B the treasurer of the committee of management by which A was appointed, and which managed the school. It was no part of A's duty as master to collect any subscriptions. In getting the subscription A was not the servant of B.

(7.) ⁷ A, a drover, is employed by B, a grazier, to drive oxen to London, to sell them on the road, if possible, and to take those remaining unsold to a salesman in Smithfield. A is not B's servant.

(8.) ⁸ B engaged A, who kept a refreshment house at Birkenhead, to get orders for manure manufactured by B. A was not bound to give any definite amount of time or labor to the purpose. The manure was sent

¹ [*R. v. Callahan*, 8 C. & P. 154. See now 12 & 13 Vict. c. 103, s. 15, which applies also to assistant overseers; *R. v. Cullum*, L. R. 2 C. C. R. 29; and see *R. v. Jenson*, 1 Moo. C. C. 434.]

² *McDonald's Case*, L. & C. 85.

³ *R. v. Carr*, R. & R. 198. A doubt was expressed as to this last point referred to in this illustration in *R. v. Goodbody*, 8 C. & P. 665; but *R. v. Batty*, 2 Moo. C. C. 257, and *R. v. Tite*, L. & C. 29, uphold *R. v. Carr* and recognize the principle that a man may be servant to several persons at once.

⁴ *R. v. Spencer*, R. & R. 299.

⁵ *R. v. Hughes*, 1 Moo. C. C. 370.

⁶ *R. v. Nettleton*, 1 Moo. C. C. 259.

⁷ *R. v. Goodbody*, 8 C. & P. 665. The difference between this case and *R. v. Hughes* in illustration (5) lies in the power of sale.

⁸ *R. v. Walker*, D. & B. 600.]

[to stores under A's control, and of which he was tenant, though B paid the rent, and was forwarded by A to the customers. A was paid £1 a year salary and a commission. A was B's agent, not his servant.

(9.) ¹ A was engaged by B to solicit orders. He was to be paid by commission. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other person than B. A was not B's servant.

(10.) ² The treasurer of a friendly society under 18 & 18 Vict. c. 63, is not the servant of the trustees of the society, though by sec. 22 he is bound before seven days after being required by the trustees (in whom the money is vested by sec. 18) to account to the trustees.

(11.) ³ A parish clerk is not a servant, because he is not under the orders of any particular person.

(12.) ⁴ The chamberlain of the commons of a corporation chosen and sworn in at a court, but whose duty it is to superintend the commons and to receive certain duties which he kept till the end of the year, when his accounts were audited and the balance paid over to his successor, is not a servant, because he holds a distinct office, and is not bound to pay at any time.

(13.) ⁵ The servant of a trade union may be convicted of the embezzlement of its funds, although some of its rules are void as being in restraint of trade.

(14.) ⁶ The servant of a society, the members of which took an unlawful oath under 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society.

¹ *R. v. Negus*, L. R. 2 C. C. R. 34.

² *R. v. Tyree*, L. R. 1 C. C. R. 177. A treasurer would appear, as a rule, to be rather a banker than a servant, but every case depends on its special circumstances. In *R. v. Murphy*, 4 Cox, C. C. 101, the prisoner was both clerk and treasurer (see the explanation of this case given in *R. v. Tyree*). In *R. v. Welch* (1 Den. 190), the circumstances were very similar to those of *R. v. Tyree*, and Coleridge, J., appears to have been satisfied that the prisoner was a servant, and did not reserve the point. It is singular that this case is not referred to in *R. v. Tyree*.

³ *R. v. Burton*, 1 Moody 237, explained in *Williams v. Stott*, 3 Tyrw. 688; 1 Cr. & M. 675.

⁴ *Williams v. Stott*, 3 Tyrw. 688; 1 Cr. & M. 675.

⁵ *R. v. Stainer*, L. R. 1 C. C. R. 230. In the argument on this case both sides assumed that if the society was criminal the conviction could not be sustained. Cockburn, C.J., said, "It is unnecessary to consider how far the criminal purposes of a society might affect its title to property." As stolen property may be stolen from the thief who stole it (1 Hale, P. C. 507), the question might deserve consideration if it ever arose. *R. v. Hunt*, in the next illustration, is in point, but it is only a *visi prius* decision.] See Art. 483 note.

⁶ [*R. v. Hunt*, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ.]

¹ ARTICLE 384.

THE PROPERTY EMBEZZLED MUST BE THE MASTER'S.

[The offence of embezzlement cannot be committed by the appropriation of property which does not belong to the master of the alleged offender, although such property may have been obtained by such alleged offender by the improper use of the property entrusted to him by his master, but property which does belong to the master of the offender may be embezzled, although the offender received it in an irregular way.

Illustrations.

(1.) ² B, the high bailiff of a county court, appointed A a bailiff. By rules of practice it was A's duty to pay over moneys levied by him to the registrar. A received certain money and appropriated it, the money being the money of the registrar and not B's, whose servant (if any one's) A was. This was not embezzlement.

(2.) ³ A railway company contracted with B to deliver the railway's coals in the railway's carts, B finding horses and carmen, but the terms of the contract were such as to make the carmen, after receiving the money, answerable to the railway. A, a carman, received money for coals and appropriated it. This was not embezzlement, as the money was not the money of B, but of the railway company.

(3.) ⁴ A, a bargeman, was forbidden by B, his master, to take a cargo on his barge on part of a particular voyage. A took the cargo, appropriated the freight to himself, and denied the receipt of it when questioned by his master. The person from whom he took the cargo and freight knew of no one in the transaction except A. This was not embezzlement, as the freight did not belong to B.

(4.) ⁵ A, entrusted with a cheque for B, gets it cashed by a friend, and not, as was the regular course, at a bank, and appropriates the proceeds. This is embezzlement.

¹ S. D. Art. 310.

² [*R. v. Glover*, L. & C. 466.

³ *R. v. Beaumont*, Dear. 270. The circumstances of this case are at first sight identical with those of *R. v. Thorne*, D. & B. 562, in which the conviction was affirmed; but the special terms of the contract, I suppose, make the difference. It is singular that *R. v. Beaumont* is not referred to in *R. v. Thorne*, otherwise than in a note by the reporter at the end of the case.

⁴ *R. v. Cullum*, L. R. 2 C. C. R. 28.

⁵ *R. v. Gale* 46 L. J. (M. C.) 134.]

¹ ARTICLE 385.DISTINCTION BETWEEN EMBEZZLEMENT AND OTHER
KINDS OF THEFT.

[The distinction between the embezzlement by a clerk or servant and other kinds of theft is, that in other kinds of theft the property stolen is taken out of the possession of the owner, whereas, in embezzlement by a clerk or servant the property embezzled is converted by the offender whilst it is in the offender's possession on account of his master and before that possession has been changed into a mere custody.]

Illustrations.

(1.) ² A, B's servant, has authority to take orders, but none to send out goods from B's shop. A takes an order for pickles and treacle, enters in his master's book an order for pickles only, takes from the shop and delivers to the customer both pickles and treacle, and keeps the price of the treacle. This is a theft of the treacle, as A had no authority to deliver it, but it is not an embezzlement of the price, as it was not received on B's account, but in fraud.

(2.) ³ A, a clerk to a navy tailor, goes on board a man-of-war with clothes delivered to him by his master to sell to the marine artillerymen on board. He afterwards enters as a seaman on another ship, carrying off the clothes. A commits theft, and not embezzlement.

(3.) ⁴ A, the manager of a branch bank, has in his office a safe, the property of the bank, and of which the bank manager keeps the key at the head office. A's duty is to put money received during the day into this safe. He takes part of it out of the safe and applies it to his own purposes. This is theft, and not embezzlement.

(4.) ⁵ A's duty is to get bills accepted and discounted for his master. A having got a bill accepted for his master, lays it with other bills on his master's desk. He then takes it from his master's desk, gets it cashed, and appropriates the money. This is theft.

¹ S. D. Art. 311.

² *R. v. Wilson*, 9 C. & P. 27. The prisoner having been indicted for embezzlement escaped.

³ *R. v. Hawkins*, 1 Don. C. C. 584.

⁴ *R. v. Wright*, D. & B. 431.] *R. v. Hennessy*, 35 U. C. Q. B. 603.

⁵ [*Chippchase's Case*, 2 Lea. 699.]

[(5.) ¹ A receives from his master B, dock warrants enabling him to get property from the docks, and is induced by B to carry the property to London. A on the road appropriates part of the property. This is theft.

(6.) ² A, B's servant, is sent by B to fetch 240 quarters of oats, which B has purchased, and which are lying on a vessel in the Thames. Whilst the oats are being measured into B's barge, A causes five quarters to be put up in sacks and set aside, the rest being loose. A then sells the sacks of oats for his own benefit from the vessel, and before they were put into the barge.³ This is theft.

(7.) ⁴ A, B's servant, gets plate for his master from a silversmith, puts it in B's plate-chest, and then takes it out and appropriates it. This is theft. ⁵ (If he appropriates it before he puts it into the plate-chest, he commits embezzlement.)

(8.) ⁶ A, B's servant, receives from C, a fellow-servant, £3 of B's money, and appropriates 10s. to his own use. This is not embezzlement (but is theft).

(9.) ⁷ A, a banker's clerk, whose business it is to receive notes over the counter and put them in a drawer, receives a note for £100 from the servant of a customer, and appropriates it to himself without putting it into the drawer. This is not theft at common law, but is embezzlement.

⁸ ARTICLE 386.

EVIDENCE AS TO EMBEZZLEMENT.

⁹ The inference that a prisoner has embezzled property by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner; or

¹ [R. v. *Norval*, 1 Cox, C. C. 95; 2 Russ. Cr. 313.

² *Abraham's Case*, 2 East, P. C. 569.

³ 2 Russ. Cr. 314.

⁴ Per Coleridge, J., in *R. v. Watts*, 2 Den. 14.

⁵ A dictum of Wilde, C.J., in *R. v. Watts* seems to say the opposite, but if this were so, the whole distinction between embezzlement and theft would be taken away (as no doubt it ought to be as a matter of common sense). See Mr. Groaves' remarks on Wilde, C.J.'s dictum and on the whole case of *R. v. Watts*, 2 Russ. Cr. (4 ed.) 399, notes (b) and (e).

⁶ *R. v. Murray*, 2 Russ. Cr. (5th ed.) 314; 5 C. & P. 145; 1 Moody, 276.

⁷ *Bazeley's Case*, 2 Lea. 835; 2 East, P. C. 571. This case occasioned the passing of the 39 Geo. 3, c. 85, now re-enacted in substance by 24 & 25 Vict. c. 96, s. 68.] R. S. C. c. 164, s. 52.

⁸ S. D. Art. 312.

⁹ [These facts are the common evidence of embezzlement given in every instance, and require no illustration. That the non-payment is only by way of delay, the false accounting a mistake, &c., are common topics of defence.] *R. v. Cummings*, 16 U. C. Q. B. 15.

[from the fact that he has not accounted for the money or other property which he has received ; or from the fact that he has falsely accounted for it ; or from the fact that he has absconded ; or
¹ from the fact that upon the examination of his accounts there appeared a general deficiency unaccounted for ;
² but none of these facts constitutes in itself the offence of embezzlement, nor is the fact that the alleged offender rendered a correct account of the money or other property entrusted to him inconsistent with his having ³ embezzled it.]

¹ [*R. v. Grove*, 1 Moody, 447 ; 2 Russ. Cr. 377. The authority of this case, decided by eight judges to seven, has been doubted. See *R. v. Moul*, Dear, 626, 639 ; see, too, *R. v. Lambert*, 2 Cox, C. C. 300 ; *R. v. Lloyd Jones*, 3 C. & P. 288 ; *R. v. Chapman*, 1 C. & K. 119 ; *R. v. King*, 12 Cox, C. C. 73 ;] *R. v. Glass*, 1 L. N. 41.

² [*R. v. Hodgson*, 3 C. & P. 422 ; *R. v. Winnall*, 5 Cox, C. C. 326. Mr. Greaves' note on this case disapproves of the summing-up of Erle, J., on what appears to me to be a misconception of its purport. Mr. Greaves' view that the fraudulent conversion constitutes the offence, and that everything else is only evidence of it is obviously correct ; but I think that Erle, J., did not mean to say anything inconsistent with this. Wilful false accounting is now a substantive offence. See 38 & 39 Vict. c. 24, s. 2, and S. D. Article 352.

³ *R. v. Guelder*, Bell, C. C. 284 ; *R. v. Lister*, D. & B. 118.]

CHAPTER XXXVI.

¹ ROBBERY AND EXTORTION BY THREATS.² ARTICLE 387.

ROBBERY.

³ EVERY one is guilty of felony and liable to imprisonment for life who,

(a.) being armed with an offensive weapon or instrument, robs, or assaults with intent to rob, any person ;

(b.) together with one or more other person or persons robs, or assaults with intent to rob any person ; or

(c.) robs any person, and at the time of, or immediately before, or immediately after, such robbery, wounds, beats, strikes or uses any other personal violence to any person.

⁴ Every one is guilty of felony and liable to fourteen years' imprisonment who robs any person.

⁵ Every one is guilty of felony and liable to three years' imprisonment who assaults any person with intent to rob.

⁶ ARTICLE 388.

EXTORTION BY THREATS.

Every one is guilty of felony and liable to imprisonment for life, in cases (a.), (b.) and (c.) and for two years' in case (d.) who

¹ [8 Hist. Cr. Law, 149-150. Draft Code, Part XXVII., ss. 283-296.

² S. D. Art. 313. For definition of robbery, and illustrations as to the nature of the force and violence involved, see Article 370.]

³ R. S. C. c. 164, s. 34; 24 & 25 Vict. c. 96, s. 43.

⁴ R. S. C. c. 164, s. 32; 24 & 25 Vict. c. 96, s. 40.

⁵ R. S. C. c. 164, s. 33; 24 & 25 Vict. c. 96, s. 42.

⁶ S. D. Art. 314.

(a.) ¹sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing,

(i.) demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing;

(ii) ²accusing or threatening to accuse or cause to be accused any other person of any crime punishable by law with death, or imprisonment for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit any rape, or of any infamous crime as herein defined, with a view or intent, in any of such cases, to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security or other valuable thing from any person ;

(b.) ³accuses, or threatens to accuse, either the person to whom such accusation or threat is made or any other person, of any of the infamous or other crimes herein mentioned, with the view or intent, in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing ;

(c.) ⁴with intent to defraud or injure any other person, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony or infamous crime, as herein defined, compels or induces any person to execute, make, accept, indorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix his name,

¹ R. S. C. c. 173, s. 1; 24 & 25 Vict. c. 96, s. 41. The words "without any reasonable or probable cause" apply to the demand not to the menaces; *R. v. Mason*, 24 U. C. C. P. 53.

² R. S. C. c. 173, s. 3; 24 & 25 Vict. c. 96, s. 46.

³ R. S. C. c. 173, s. 4; 24 & 25 Vict. c. 96, s. 47. An attempt to compel a person by threats to buy a mare is within this section; *R. v. Redman*, L. R. 1 C. C. R. 12.

⁴ R. S. C. c. 173, s. 5; 24 & 25 Vict. c. 96, s. 48.

or the name of any other person or of any company, firm or co-partnership, or the seal of any body corporate, company or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security ;

(d.) ¹ with menaces or by force, demands any property, chattel, money, valuable security or other valuable thing of any person, with intent to steal the same, whether the thing demanded is received or not.

² The crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said crime, and every attempt or endeavor to commit the said crime, and every solicitation, persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the said crime, is deemed to be an infamous crime within the meaning of this Article.

³ Every species of parting with any letter herein mentioned to the end that it may come, or whereby it comes, into the hands of the person for whom it is intended is deemed a sending of such letter.

⁴ It is immaterial whether the menaces or threats hereinbefore mentioned are of violence, injury or accusation, to be caused or made by the offender or by any other person.

¹ R. S. C. c. 173, s. 2; 24 & 25 Vict. c. 96, s. 45. [*R. v. Oyden* (L. & C. 288) shows what sort of menaces fall within this section. A obtained five shillings from B by pretending to be a bailiff, and threatening to distrain. It was held that his guilt depended on the question whether or not he made the threat in such a way as to "unsettle B's mind, and take away from his acts that element of free voluntary action which alone constitutes consent."] A demand with menaces of money actually due is not a demand with intent to steal: *R. v. Johnson*, 14 U. C. Q. B. 569. [*R. v. Robertson*, L. & C. 483. In that case it was held that a policeman who said he would lock a man up for speaking to a prostitute unless he received five shillings used a "menace," notwithstanding his having no power to do so.]

² R. S. C. c. 173, s. 3 (2); 24 & 25 Vict. c. 96, s. 46.

³ R. S. C. c. 173, s. 3 (3). This provision is not in the English Act.

⁴ R. S. C. c. 173, s. 6; 24 & 25 Vict. c. 96, s. 49.

CHAPTER XXXVII.

¹ BURGLARY, HOUSEBREAKING, ETC.² ARTICLE 389.

DEFINITIONS.

[IN this chapter the following words are used in the following senses:—

³ Night means the interval between nine of the clock at night and six of the morning.

House means a permanent building in which the owner, or the tenant, or any member of the family habitually sleeps at night.

⁴ If a building is so constructed as to consist of several parts having no internal communication between each other, and if these parts are occupied and habitually slept in by different tenants, they may constitute separate dwelling-houses.

⁵ A building occupied with and within the same curtilage with any dwelling-house, is deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication either immediate or by means of a covered and inclosed passage leading from the one to the other, but not otherwise.

¹ [3 Hist. Cr. Law. 150. Draft Code, Part XXVIII, ss. 297-308.]

² S. D. Art. 315.

³ R. S. C. c. 164, s. 2 (b). [24 & 25 Vict. c. 96, s. 1. It may be worth while to observe that the expressions "nine of the clock," "six of the clock," indicate mean as opposed to solar time, but a question might arise as to whether they mean local mean time or the mean time commonly observed at any given place. London time, or, as it is called, railway time, is now very generally observed, and there is a difference of more than twenty minutes between London and Cornwall. Local mean time is the natural meaning.]

⁴ The cases and authorities on this subject are collected in Archbold, 518-520, but there is so little principle in the matter, and each case depends so much on its peculiar circumstances, that I have not thought it advisable to give illustrations.]

⁵ R. S. C. c. 164, s. 36; 24 & 25 Vict. c. 96, s. 53.

[The word "break" means

(a.) the breaking of any part, internal or external, of the building itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar flap, or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney;

(b.) obtaining an entrance into the house by any threat or artifice used for that purpose, or by collusion with any person in the house.

The word "enter" means the entrance into the house of any part of the offender's body, or of any instrument held in his hand for the purpose of intimidating any person in the house, or of removing any goods, but does not include the entrance of part of an instrument used to break the house open.

Illustration.

¹ A opens a sash window, puts a crowbar under a shutter three inches inside the window, and tries to break open the shutter, but was not within the sash window. Here there is a breaking, but no entry.]

² ARTICLE 390.

ROBBING PLACES OF WORSHIP—BURGLARY.

Every one is guilty of felony and liable to imprisonment for life who

[(a.) ³ breaks and enters any church, chapel, meeting-house or other place of divine worship, and commits any felony therein; or

(b.) ⁴ breaks and enters any dwelling-house by night with intent to commit a felony therein. The offence in this case is called burglary.]

¹ [*R. v. Hunt*, 1 Moo. 183; and see *R. v. Roberts*, 2 East, P. C. 437.]

² S. D. Art. 316.

³ R. S. C. c. 164, s. 35; 24 & 25 Vict. c. 96, s. 50.

⁴ R. S. C. c. 164, ss. 37, 38; [24 & 25 Vict. c. 96, s. 52 for punishment; 2 Russ. Cr. 2 (6th ed.) for definition.]

¹ ARTICLE 391.

HOUSEBREAKING AND COMMISSION OF FELONY.

² Every one is guilty of felony and liable to fourteen years' imprisonment [who breaks and enters and commits any felony in any dwelling-house or any building being within the curtilage of any dwelling-house and occupied therewith (but not being part thereof within Article 389), or any schoolhouse, shop, warehouse, or counting-house.]

³ ARTICLE 392.

ENTERING DWELLING-HOUSE WITH INTENT.

⁴ Every one is guilty of felony and liable to seven years' imprisonment [who breaks and enters any of the buildings mentioned in Articles 390 or 391, or who by night enters any dwelling-house with intent in either case to commit felony therein.]

⁵ ARTICLE 393.

BREAKING OUT AFTER COMMITTING FELONY.

⁶ [Every one who, being in any of the buildings mentioned in Articles 390 or 391, commits a felony therein, and breaks out of the same, is guilty of felony, and is liable to the same punishment as if he had broken in and committed felony therein. If such building is a dwelling-house, and the offence is committed at night, the offender commits burglary.]

Every one who enters any dwelling-house with intent to commit a felony therein, and breaks out of the same by night, is guilty of burglary.]

¹ S. D. Art. 317.

² R. S. C. c. 164, ss. 40, 41; 24 & 25 Vict. c. 96, ss. 55, 56.

³ S. D. Art. 318.

⁴ R. S. C. c. 164, ss. 39, 42; 24 & 25 Vict. c. 96, ss. 54, 57.

⁵ S. D. Art. 319.

⁶ R. S. C. c. 164, ss. 35, 37, 40, 41; 24 & 25 Vict. c. 96, ss. 50, 51, 55, 56.

¹ ARTICLE 394.BEING FOUND IN POSSESSION OF HOUSEBREAKING
INSTRUMENTS.

² Every one is guilty of a misdemeanor and liable for the first offence to three years' imprisonment, or if he has previously been convicted of felony or of such misdemeanor to ten years' imprisonment, who is found by night,

(a.) ³ armed with any dangerous or offensive weapon or instrument whatever with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein ;

(b.) having in his possession, without lawful excuse (the proof of which excuse lies upon him), any picklock key, ³ crow, jack, bit, or other implement of house-breaking ; (or any match or combustible or explosive substance ;)⁴

(c.) having his face blackened or otherwise disguised with intent to commit any felony ;

(d.) in any dwelling-house or other building whatsoever, with intent to commit any felony therein.

¹ S. D. Art. 320.

² R. S. C. c. 164, ss. 43, 44 ; 24 & 25 Vict. c. 96, ss. 58, 59.

³ [A common key may be such an instrument : *R. v. Oldham*, 2 Den. 472. Maule and Crosswell, J.J., were both of opinion that there should be a comma between "picklock" and "key." *R. v. Oldham*, however, makes this unimportant.]

⁴ The words in parentheses are not in the English Act.

CHAPTER XXXVIII.

¹ PUNISHMENT OF THEFTS AND OFFENCES RESEMBLING
THEFT COMMITTED IN RESPECT OF PARTICULAR
THINGS, IN PARTICULAR PLACES, BY PAR-
TICULAR PERSONS—RECEIVING GOODS
UNLAWFULLY OBTAINED.

² ARTICLE 395.

PUNISHMENT FOR STEALING THINGS FOR WHICH NO
SPECIAL PUNISHMENT IS PROVIDED.

³ EVERY one who commits simple larceny, or any felony made punishable by *The Larceny Act* in the same manner as simple larceny, is guilty of a felony, and liable to seven years' imprisonment, if no punishment is otherwise specially provided.⁴

⁵ The offender is liable to ten years' imprisonment if he has been previously convicted of a felony, either summarily or upon indictment.

ARTICLE 396.

PUNISHMENT FOR APPROPRIATING PROPERTY WITH INTENT
TO DEFRAUD, FOR WHICH NO SPECIAL PUNISH-
MENT IS PROVIDED.

⁶ Every one who, unlawfully and with intent to de-

¹ [3 Hist. Cr. Law, 146-60, Draft Code, Part XXV.]

² S. D. Art. 321.

³ R. S. C. c. 164, s. 5; 24 & 25 Vict. c. 96, s. 4. Sir James Fitz-James Stephen in Note (2) to Article 321, states that the thefts falling under this provision "appear to be the simple larceny referred to in 24 & 25 Vict. c. 96, ss. 33 and 36;" but refers to Hale's definition (1 Hale, 503) of simple larceny as being larceny without violence or putting in fear. See also Bish. Cr. Law, Vol. 1, s. 566, Vol. 2, s. 757, where the term is used to exclude compound larcenies which are defined to be larcenies committed under circumstances of aggravation such as larcenies from the person, the dwelling-house, the shop, robbery and the like.

⁴ "Except in the cases hereinafter otherwise provided for," that is by *The Larceny Act*; but the effect would be the same if the special provision was contained in any other Act.

⁵ R. S. C. c. 164, s. 6; 24 & 25 Vict. c. 96, s. 7.

⁶ R. S. C. c. 164, s. 85. See *H. v. McDonald*, decided under C. S. C. c. 92, s. 72, which

fraud, by taking, by embezzling, by obtaining by false pretences, or in any other manner whatsoever, appropriates to his own use or to the use of any other person, any property whatsoever, so as to deprive any other person temporarily or absolutely of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person has therein, is guilty of a misdemeanor, and liable to seven years' imprisonment.

If the value of such property exceeds two hundred dollars, the offender is liable to fourteen years' imprisonment.

ARTICLE 397.

ADDITIONAL PUNISHMENT WHEN VALUE OF PROPERTY EXCEEDS TWO HUNDRED DOLLARS.

¹ Every one who is convicted of an offence against *The Larceny Act* by stealing, embezzling, or obtaining by false pretences any property whatsoever, the value of which is over two hundred dollars, is liable to seven years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence.

² ARTICLE 398.

VALUABLE SECURITIES.

³ Every one who steals, or for any fraudulent purpose destroys, cancels, obliterates or conceals the whole or any part of any ³ valuable security, other than a document of

however, was not in the same terms as s. 85: *R. v. Warner*, 7 R. L. 116; *R. v. Horseman*, 4 P. & B. 529; *R. v. Martin*, 3 G. & O. 124. For the definition of "property" see s. 2 (e). *Ante* p. 6. It includes stamps issued by authority of Parliament or a Legislature. See also as to stealing stamps intended to be affixed to certificates issued under *The Gas Inspection Act*, R. S. C. c. 101, s. 45.

¹ R. S. C. c. 164, s. 86.

² S. D. Art. 323.

³ R. S. C. c. 164, s. 12; 24 & 25 Vict. c. 96, s. 27. The word "conceals" is not in the English Act. For definition of the expression valuable security, see R. S. C. c. 164, s. 2 (d.) *ante* p. 7.

title to land, commits felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of the like value with the share, interest, or deposit to which the security so stolen relates, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.

¹ ARTICLE 399.

TESTAMENTARY INSTRUMENTS.

² Every one is guilty of felony and liable to imprisonment for life who, either during the life of the testator or after his death, steals or, for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any will, codicil or other testamentary instrument, whether the same relates to real or personal property, or to both.

³ ARTICLE 400.

DOCUMENT OF TITLE TO LANDS.

⁴ Every one is guilty of felony and liable to three years' imprisonment who steals or, for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any document of title to lands.

⁵ ARTICLE 401.

OFFENDERS AGAINST PROVISIONS OF ARTICLES 399, 400,
NOT LIABLE TO CONVICTION IN CERTAIN CASES.

⁶ No person is liable to be convicted of any felony

¹ S. D. Art. 324 (a.)

² R. S. C. c. 164, s. 14; 24 & 25 Vict. c. 96, s. 29. For definition of "testamentary instrument" see R. S. C. c. 164, s. 2 (c.) *ante* p. 6.

³ S. D. Art. 327 (a.)

⁴ R. S. C. c. 164, s. 13; 24 & 25 Vict. c. 96, s. 23. For definition of "document of title to lands," see R. S. C. c. 164, s. 2 (b.) *ante* p. 5.

⁵ S. D. Art. 323; but the provision does not apply to that Article which represents 24 & 25 Vict. c. 96, s. 27. It applies to the felonies mentioned in ss. 23, 29.

⁶ R. S. C. c. 164, s. 14 (3); 24 & 25 Vict. c. 96, s. 29.

mentioned in Articles 399, 400, by any evidence whatever, in respect of any act done by him, if he has, at any time previously to his being charged with such offence, first disclosed such act, on oath, in consequence of any compulsory process of any court, in any action, suit or proceeding *bonâ fide* instituted by any person aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

¹ ARTICLE 402.

JUDICIAL OR OFFICIAL DOCUMENTS.

² Every one is guilty of felony and liable to three years' imprisonment who steals or, for any fraudulent purpose, takes from its place of deposit, for the time being, or from any person having the custody thereof, or unlawfully and maliciously cancels, obliterates, injures or destroys the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever, of or belonging to any court of justice,³ or relating to any cause or matter, begun, depending or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office.

¹ S. D. Art. 327 (b.)

² R. S. C. c. 164, s. 15; 24 & 25 Vict. c. 96, s. 30. The 26th section of the statute C. S. C. c. 92 contained the words "any notarial minute or the original of any other authentic Act." This was held not to include an authentic copy of an Act or deed passed before a notary; *R. v. McGinnis*, 7 L. C. J. 311.

³ The Police Court of the City of Toronto is a Court of Justice within R. S. C. c. 164, s. 15, and it is a felony to maliciously destroy a record thereof; *R. v. Mason*: 22 U. C. C. P. 248.

ARTICLE 403.

STEALING POST LETTERS, ETC.—STOPPING MAILS WITH
INTENT TO ROB OR SEARCH—ISSUING MONEY
ORDERS FRAUDULENTLY.

¹ Every one is guilty of felony and liable as a maximum punishment to imprisonment for life in cases (a), (b), (c), (d) (e), (h), (i) and (j); for seven years in case (k), and for five years in cases (f) and (g), who does any of the following acts, that is to say:—

² (a) steals, embezzles, secretes or destroys any post letter³ containing any chattel, money or valuable security;⁴

⁵ (b) steals from or out of a post letter³ any chattel, money or valuable security;⁴

⁶ (c) steals a post letter bag;⁷

¹ R. S. C. c. 35, ss. 79-85, 88. The minimum punishment only is given in ss. 83, 84, 85 (h.), (i.) and (j.)

² R. S. C. c. 35, s. 79.

³ The expression "post letter" means any letter transmitted or deposited in any post office to be transmitted by the post or delivered through the post, or deposited in any letter box put up anywhere under the authority of the Postmaster-General to be transmitted or delivered through the post;—and a letter shall be deemed a post letter from the time of its being so deposited or delivered at a post office, to the time of its being delivered to the person to whom it is addressed; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office; and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed. R. S. C. c. 35, s. 2 (i.)

⁴ The expression "valuable security" includes the whole or any part of any tally, order or other security or document whatsoever entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada, or of the United Kingdom, or of any British colony or possession, or of any foreign country, or in any fund or stock of any body corporate, company or society in Canada or elsewhere, or to any deposit in any savings' bank, or the whole or any part of any debenture, deed, bond, post office money order, bank note, bill, note, cheque, warrant or order or other security for the payment of money, or for the delivery or transfer of any goods, chattels or valuable thing, whether in Canada or elsewhere. Id. s. 2 (m.)

⁵ Id. s. 80.

⁶ Id. s. 81.

⁷ The expression "post letter bag" includes a mail bag or box, or packet or parcel, or other envelope or covering in which mailable matter is conveyed, whether it does or does not actually contain mailable matter. Id. s. 2 (k.)

¹ (*d*) steals a post letter from a post letter bag, or from any post office,² or from any officer or person employed in any business of the Post Office of Canada, or from a mail;³

⁴ (*e*) stops a mail with intent to rob or search the same;

⁵ (*f*) steals, embezzles, secretes or destroys any post letter;

⁶ (*g*) unlawfully opens any post letter bag, or unlawfully takes any letter out of such bag;

⁷ (*h*) receives any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing, taking, secreting or embezzling whereof is hereby declared to be felony, knowing the same to have been feloniously stolen, taken, secreted or embezzled;

⁸ (*i*) steals, embezzles or secretes any parcel sent by parcel post, or any article contained in any such parcel;

⁹ (*j*) unlawfully issues any money order with a fraudulent intent; or—

¹⁰ (*k*) steals, purloins, embezzles or obtains by any false pretence any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag, or aids or assists therein.

The minimum term of imprisonment is limited in cases (*a*), (*b*), (*c*), (*d*), (*e*) and (*h*) to five years; in cases (*f*), (*g*), (*j*) to three years, and in case (*k*) to two years.

¹ R. S. C. c. 35, ss. 81, 2 (*h*.)

² The expression "post office" means any building, room, street letter box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched. Id. s. 2(*l*.)

³ The expression "mail" includes every conveyance by which post letters are carried, whether it is by land or by water. Id. s. 2(*o*.)

⁴ Id. s. 81.

⁵ Id. s. 79.

⁶ Id. s. 82.

⁷ Id. s. 84.

⁸ Id. s. 83.

⁹ Id. s. 85. As to a postmaster or other person authorized to issue money orders issuing any such order before he receives the money payable therefor, see Art. 411 (*a*.)

¹⁰ Id. s. 88.

ARTICLE 404.

STEALING MAILABLE MATTER OTHER THAN POST LETTERS.

¹ Every one is guilty of a misdemeanor, and liable to five years' imprisonment ² who steals or for any purpose embezzles or secretes any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter, ³ not being a post letter sent by mail.

ARTICLE 405.

ELECTION DOCUMENTS.

⁴ Every one is guilty of a felony, and liable to a fine, in the discretion of the court, or to seven years' imprisonment, or to both fine and imprisonment, who steals, or unlawfully (or maliciously), either by violence or stealth, takes from any person having the lawful custody thereof, or from its lawful place of deposit for the time being, or aids, counsels or assists in so stealing or taking, any writ of election, or any return to a writ of election, or any (indenture) poll-book, voters' list, certificate, affidavit or report, or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to dominion, provincial, municipal or civic elections.

ARTICLE 406.

RAILWAY TICKETS.

⁵ Every one is guilty of felony, and liable to imprison-

¹ R. S. C. c. 35, s. 90.

² Art. 17.

³ The expression "mailable matter" includes any letter, packet, parcel, newspaper book or other thing which by *The Post Office Act*, or by any regulation made in pursuance of it, may be sent by post; R. S. C. c. 35, s. 2 (j.)

⁴ R. S. C. c. 8, s. 102; c. 164, s. 56. The words in parentheses are not in R. S. C. c. 8, s. 102.

⁵ R. S. C. c. 154, s. 15.

ment for any term less than two years, who steals any railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamer or other vessel.

¹ ARTICLE 407.

CATTLE.

² Every one is guilty of felony, and liable to fourteen years' imprisonment, who

(a.) steals any cattle; or

(b.) wilfully kills any animal with intent to steal the carcase, skin or any part of the animal so killed, provided the offence of stealing such animal is felony.

³ ARTICLE 408.

DOGS, BIRDS, BEASTS AND OTHER ANIMALS.

⁴ Every one who

(a.) steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, or for any lawful purpose of profit or advantage, not being the subject of larceny at common law; or

(b.) wilfully kills any such dog, bird, beast or animal, with intent to steal the same, or any part thereof,

Is liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the dog, bird, beast or other animal, or to one month's imprisonment with hard labor.

Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable to three months' imprisonment with hard labor.

¹ S. D. Arts. 322, 325 (a.)

² R. S. C. c. 164, ss. 7, 8; 24 & 25 Vict. c. 96, ss. 10, 11. For definition of cattle, see R. S. C. c. 164, s. 2 (f) *ante* p. 3.

³ S. D. Art. 328 (a), (d.)

⁴ R. S. C. c. 164, s. 9; 24 & 25 Vict. c. 96, ss. 18, 21.

¹ ARTICLE 409.

PIGEONS.

² Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon under such circumstances as do not amount to larceny at common law, is liable, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird.

³ ARTICLE 410.

OYSTERS.

⁴ Every one is guilty of felony, and liable to seven years' imprisonment, who steals any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such.

Every one is guilty of a misdemeanor, and liable to three months' imprisonment, who unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such fishery.

Nothing herein applies to any person fishing for or catching any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only.

¹ S. D. Art. 328 (f.)

² R. S. C. c. 164, s. 10; 24 & 25 Vict. c. 96, s. 23.

³ S. D. Arts. 327 (e), 328 (g.)

⁴ R. S. C. c. 164, ss. 11, 5; 24 & 25 Vict. c. 96, s. 25. As to injuring or disturbing oyster beds contrary to *The Fisheries Act*, see R. S. C. c. 95, s. 21 (6.)

¹ ARTICLE 411.

THINGS FIXED TO BUILDINGS OR IN LAND.

² Every one is guilty of felony and liable to seven years' imprisonment who steals, or rips, cuts, severs or breaks, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground.³

⁴ ARTICLE 412.

TREES IN PLEASURE GROUNDS, ETC., OF FIVE DOLLARS' VALUE—TREES ELSEWHERE OF TWENTY-FIVE DOLLARS' VALUE.

⁵ Every one is guilty of felony and liable to seven years' imprisonment who steals, or cuts, breaks, roots up or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or

¹ S. D. Art. 327 (c).

² R. S. C. c. 164, ss. 17, 5; 24 & 25 Vict. c. 96, s. 31.

³ [The words "burial ground" were added to do away with a doubt expressed by Baron Bramwell (*R. v. Jones*, D. & B. 558) as to whether a churchyard was a "public place" within 7 & 8 Geo. 4. c. 29, s. 44. The other judges did not share this doubt. The present enactment does not absolutely remove it, as there are many churchyards which are not burial grounds. However, the case of *R. v. Jones*, distinctly decided the point.] An offender against this and the next two Articles cannot be convicted on any evidence disclosed by him on oath in consequence of the compulsory process of any court in any action instituted by any person aggrieved: R. S. C. c. 164, s. 20 (2).

⁴ S. D. Art. 327 (d).

⁵ R. S. C. c. 164, ss. 18, 5; 24 & 25 Vict. c. 96, s. 32. [The section is re-arranged for the sake of brevity. The change also represents the sense, for it has been held that in estimating the damage done the value of several trees injured at the same time may be put together; *R. v. Shepherd*, L. R. 1 C. C. R. 118.]

any underwood, if the value of the article or articles stolen, or the amount of the injury done, exceeds the sum of twenty-five dollars; or exceeds the sum of five dollars if the article or articles stolen or damaged grows in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house.

¹ ARTICLE 413.

TREES OF THE VALUE OF TWENTY-FIVE CENTS.

² Every one who steals, or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable, on summary conviction, to three months' imprisonment with hard labor.

Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of felony, and liable to seven years' imprisonment.

ARTICLE 414.

RECEIVING STOLEN TREES EXCEEDING IN VALUE TEN DOLLARS.

³ Every one is guilty of a misdemeanor and liable to the same punishment as the principal offender, who receives or purchases any tree or sapling, or any timber

¹ S. D. Art. 323 (*h.*)

² R. S. C. c. 164, ss. 19, 5; 24 & 25 Vict. c. 96, s. 83.

³ R. S. C. c. 164, s. 20. See Chapter XLI, p. 330.

made therefrom, exceeding in value the sum of ten dollars, knowing the same to have been stolen or unlawfully cut or carried away.

ARTICLE 415.

TIMBER FOUND ADRIFT.

¹ Every one is guilty of a misdemeanor and liable to seven years' imprisonment

(a.) who, without the consent of the owner thereof,

(i.) takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream or lake; or

(ii.) wholly or partially defaces or adds, or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes or causes or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber; or

(b.) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log or other description of lumber.

² ARTICLE 416.

FENCES—STYLES—GATES.

³ Every one who steals, cuts or breaks or throws down, with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a

¹ R. S. C. c. 164, ss. 87, 5. See Art. 597.

² S. D. Art. 328 (i).

³ R. S. C. c. 164, s. 21; 24 & 25 Vict. c. 93, s. 34.

fence, or any stile or gate, or any part thereof respectively, is liable, on summary conviction, to a penalty not exceeding twenty dollars, over and above the value of the article or articles so stolen or the amount of the injury done.

Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labor.

¹ ARTICLE 417.

FAILING TO SATISFY JUSTICE THAT POSSESSION OF TREE, ETC., IS LAWFUL.

² Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is liable, on summary conviction, to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises.

³ ARTICLE 418.

ROOTS, PLANTS, ETC., GROWING IN GARDENS, ETC.

⁴ Every one who steals or destroys, or damages with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground,

¹ S. D. Art. 328 (j).

² R. S. C. c. 184, s. 22; 24 & 25 Vict. c. 96, s. 35. "Cordwood" is not the whole or any part of a tree within the statute; *R. v. Cuswell*, 33 U. C. Q. B. 303.

³ S. D. Art. 328 (k).

⁴ R. S. C. c. 104, ss. 23, 5; 24 & 25 Vict. c. 96, s. 36. *McDonald v. Cameron*, 4 U. C. Q. B. 1.

nursery ground, hot-house, green-house or conservatory, is liable, on summary conviction, to a penalty not exceeding twenty dollars, over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with or without hard labor.

Every one who, having been convicted of any such offence, afterwards commits any such offence, is guilty of felony, and liable to seven years' imprisonment.

¹ ARTICLE 419.

ROOTS, PLANTS, ETC., GROWING ELSEWHERE THAN IN
GARDENS, ETC.

² Every one who steals, or destroys or damages with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, pleasure ground, or nursery ground, is liable, on summary conviction, to a penalty not exceeding five dollars, over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with hard labor.

Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable to three months' imprisonment with hard labor.

³ ARTICLE 420.

ORES OF METALS.

⁴ Every one is guilty of felony and liable to imprisonment for any term less than two years who steals,⁵ or

¹ S. D. Art. 328 (D).

² R. S. C. c. 164, s. 24; 24 & 25 Vict. c. 96, s. 37.

³ S. D. Art. 327 A.

⁴ R. S. C. c. 164, s. 25; 24 & 25 Vict. c. 96, s. 33. For other offences respecting metals, see Arts. 446, 447 and 448.

⁵ The possession, contrary to the provisions of any law in that behalf, of any smelted

severs with intent to steal the ore of any metal, or any quartz, lapis calaminaris, manganesc, or mundic, or any piece of gold, silver or other metal, or any wad, black cawlk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, from any mine, bed or vein thereof respectively.

It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging.

ARTICLE 421.

THINGS UNDER SEIZURE.

¹ Every one who, whether pretending to be the owner or not, secretly or openly, and whether with or without force or violence, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention, steals such property, and is guilty of felony and liable to be punished accordingly.

² ARTICLE 422.

STEALING FROM THE PERSON.

³ Every one is guilty of felony and liable to fourteen

gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or laborer actively engaged in or on any mine, is *primâ facie* evidence that the same has been stolen by him; R. S. C. c. 164, s. 30.

¹ R. S. C. c. 164, s. 50. *R. v. Fearman*, 10 Q. R. 600, decided under 43 Vict. (D) c. 28, s. 66. See with respect to things seized under *The Customs Act*, R. S. C. c. 32, s. 212, and under *The Inland Revenue Act*, R. S. C. c. 34, s. 100. The punishment in the latter case is three years' imprisonment; no term is mentioned in R. S. C. c. 32, s. 212. It is also a felony to break locks, &c., or unlawfully abstract any spirits, or other goods manufactured in bond, or materials for the manufacture thereof from any place where they are retained under the supervision of an officer of the Inland Revenue; R. S. C. c. 34, s. 94.

² S. D. Art. 325 (b.)

³ R. S. C. c. 164, s. 32; 24 & 25 Vict. c. 96, s. 40.

years' imprisonment who steals any chattel, money or valuable security from the person of another.

¹ ARTICLE 423.

STEALING IN DWELLING HOUSES.

² Every one is guilty of felony and liable to fourteen years' imprisonment who

(a) steals in any dwelling house any chattel, money or valuable security to the value in the whole of twenty-five dollars or more; or,

(b) steals any chattel, money or valuable security in any dwelling house, and by any menace or threat puts anyone therein in bodily fear.

³ ARTICLE 424.

STEALING IN MANUFACTORIES, ETC.

⁴ Every one is guilty of felony and liable to fourteen years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials mixed with each other or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place.

ARTICLE 425.

FRAUDULENTLY DISPOSING OF GOODS ENTRUSTED FOR MANUFACTURE.

⁵ Every one is guilty of a misdemeanor, and liable to

¹ S. D. Art. 325 (c.)

² R. S. C. c. 164, s. 45, 46; 24 & 25 Vict. c. 96, ss. 60, 61.

³ S. D. Art. 325 (d.)

⁴ R. S. C. c. 164, s. 47; 24 & 25 Vict. c. 96, s. 62.

⁵ R. S. C. c. 164, s. 48; 6 & 7 Vict. c. 40, s. 2.

imprisonment for any term less than two years, when the offence is not within the next preceding Article, who, having been entrusted with for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so entrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, sells, pawns, purloins, secretes, embezzles, exchanges or otherwise fraudulently disposes of the same, or any part thereof.

ARTICLE 426.

STEALING FROM SHIPS, WHARVES, ETC.

² Every one is guilty of felony and liable to fourteen years' imprisonment who

(a.) steals any goods or merchandize in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or

(b.) steals any goods or merchandize from any dock, wharf or quay, adjacent to any such haven, port, river, canal, creek or basin.

³ ARTICLE 427.

STEALING WRECK.

⁴ Every one is guilty of felony and liable to seven years' imprisonment who steals any wreck.⁵

¹ S. D. Art. 325 (e), (f)

² R. S. C. c. 164, s. 49; 24 & 25 Vict. c. 96, s. 63.

³ S. D. Art. 325 (g.)

⁴ R. S. C. c. 81, s. 36 (c.); 24 & 25 Vict. c. 86, s. 64.

⁵ The expression "wreck" includes cargo, stores and tackle of any such vessel and of all parts of the vessel separated therefrom, and also the property of shipwrecked persons; R. S. C. c. 81, s. 2 (4)

ARTICLE 428.

STEALING THINGS DEPOSITED IN INDIAN GRAVES IN
BRITISH COLUMBIA.

¹ Every one who, in British Columbia, steals, or without the sanction of the Lieutenant Governor of the Province, cuts, breaks, destroys, damages or removes any image, bones, article or thing deposited in or near any Indian grave, or induces or incites any other person so to do, or purchases any such article or thing after the same has been so stolen, or cut or broken, destroyed or damaged, knowing the same to have been so acquired or dealt with, is liable, on summary conviction, for a first offence, to a penalty not exceeding one hundred dollars, or to three months' imprisonment, and for a subsequent offence, to the same penalty and to six months imprisonment with hard labor.

² ARTICLE 429.

CLERKS AND SERVANTS.

³ Every one is guilty of felony and liable to fourteen years' imprisonment who, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant,

(a.) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or

(b.) fraudulently embezzles any chattel, money or valuable security, or any part thereof, delivered to or received or taken into possession by him, for or in the name or on the account of his master or employer, although such chattel, money or security was not received

¹ R. S. C. c. 164, s. 96.

² S. D. Art. 325 (h).

³ R. S. C. c. 164, ss. 51, 52; 24 & 25 Vict. c. 96, ss. 67, 68.

into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant or other person so employed.

¹ ARTICLE 430.

PUBLIC SERVANTS.

² Every one is guilty of felony and liable to fourteen years' imprisonment who, being employed in the public service of Her Majesty, or of the Lieutenant Governor or government of any province of Canada, or of any municipality,

(a.) steals any chattel, money or valuable security belonging to or in the possession or power of Her Majesty, or of such Lieutenant Governor, government or municipality, or entrusted to or received or taken into possession by him by virtue of his employment; or ¹

(b.) being entrusted, by virtue of such employment, with the receipt, custody, management or control of any chattel, money or valuable security,³ embezzles any chattel, money or valuable security entrusted to or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently applies or disposes of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever except for the public service, or for the service of such Lieutenant Governor, government or municipality.

¹ S. D. Art. 325 (6).

² R. S. C. c. 104, ss. 53, 54; 24 & 25 Vict. c. 95, ss. 69, 70.

³ For any such offence any officer, clerk, or servant of any Government Savings' Bank (R. S. C. c. 121, s. 19) or of certain savings' banks in Ontario and Quebec (R. S. C. c. 122, s. 32) are liable to imprisonment for life. Every officer of the post office embezzles public money if he converts it to his own use, or invests or lends it. His neglect or refusal to pay over or transfer or disburse such moneys when required so to do by the Postmaster General is *prima facie* evidence of embezzlement. Every one who advises or participates in such embezzlement commits a misdemeanor and is liable to a fine equal to the amount of money embezzled and to imprisonment for a term not exceeding seven years and not less than three months; R. S. C. c. 35, s. 105. Any militiaman who leaves Canada with any article of public clothing or other public or corps property in his possession is guilty of embezzlement; R. S. C. c. 41, s. 56.

ARTICLE 431.

PUBLIC SERVANTS REFUSING TO DELIVER UP CHATTELS,
MONEYS, OR BOOKS, ETC., LAWFULLY DEMANDED
OF THEM.

¹ Every one who, being employed in the public service of Her Majesty or of the lieutenant governor or government of any province of Canada, or of any municipality, and entrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it, is guilty of a fraudulent embezzlement thereof, and liable to fourteen years' imprisonment.

ARTICLE 432.

BANK OFFICERS AND SERVANTS.

² Every one is guilty of felony, and liable to imprisonment for life or for any term not less than two years, who, being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, secretes, embezzles or absconds with, any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects entrusted to him as such cashier, assistant cashier, manager, officer, clerk, or servant, whether the same belongs to the bank or belongs to any person, body corporate, society or institution, and is lodged with such bank.

¹ R. S. C. c. 164, s. 55. As to such offences committed by postmasters, see R. S. C. c. 35, s. 101: and by members of the North West Mounted Police Force in respect of clothing, arms, etc., when dismissed or discharged, R. S. C. c. 45, s. 22.

² R. S. C. c. 164, s. 59; *R. v. Cummings*, 16 U. C. Q. B. 15, and *R. v. Glass*, 1 L. N. 41, are instances of embezzlement by clerks of banks. Section 59 is, in The Revised Statutes, included with the provisions relating to frauds by agents, bankers or factors, and is one of the twelve sections mentioned in s. 71 and of the thirteen sections mentioned in s. 72 of that chapter. It will be observed, however, that the offence is a felony and not a misdemeanor. See Art. 477.

¹ ARTICLE 433.

TENANTS AND LODGERS.

² Every one who steals any chattel or fixture let to be used by him, or her, in or with any house or lodging, whether the contract has been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, is guilty of felony, and liable to imprisonment for any term less than two years ; and

if the value of such chattel or fixture exceeds the sum of twenty-five dollars, is liable to seven years' imprisonment.

ARTICLE 434.

BRINGING STOLEN PROPERTY INTO CANADA.

³ Every one who brings into Canada, or has in his possession therein, any property stolen, embezzled, converted or obtained by fraud or false pretences in any other country, in such manner that the stealing, embezzling, converting or obtaining it in like manner in Canada would, by the laws of Canada, be a felony or misdemeanor, knowing it to have been so stolen, embezzled or converted, or unlawfully obtained, is guilty of an offence of the same nature and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada.

¹ S. D. Art. 326.

² R. S. C. c. 164 s. 57; 24 & 25 Vic. c. 96, s. 74. As to the fraudulent removal of goods by tenants, contrary to 11 Geo. 2, c. 19, s. 4, to prevent distress, see *R. v. Lackie*, 7 O. R. 431.

³ R. S. C. c. 164, s. 88; 24 & 25 Vict. c. 96, s. 114. *R. v. Hill*, 5 All. 630, in which it was held that there must be evidence that the goods were stolen according to the law of the place where the act was committed, was decided under R. S. N. B. c. 158, s. 8, which differed materially from the provision on which this Article is founded. See note, p. 632, in which *R. v. Hennessey*, 35 U. C. Q. B. 608 is cited.