CHAPTER IV.

OFFENCES AGAINST THE PERSON.

Murder.—Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the Queen's peace, with malice aforethought, either express, or implied by law, the offence is murder. (*a*)

Malice is a necessary ingredient in, and the chief characteristic of, the crime of murder. (*b*) The legal sense of the word malice as applied to the crime of murder is somewhat different from the popular acceptation of the term. When an act is attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief, the act is malicious in the legal sense. (*c*) In fact, malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (*d*) In general any formed design of doing mischief may be called malice, and, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged of malice prepense and consequently murder. (*e*)

Malice is either express or implied. Express malice is when one person kills another with a sedate, deliberate mind and formed design, and malice is implied by law from any deliberate cruel act committed by one person against another, however sudden. (*f*)

(*a*) Arch. Cr. Pldg. 623.
(*b*) See *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J.
(*c*) Russ. Cr. 667.
(*d*) *McIntyre* v. *McBean*, 13 U.C.Q.B. 542, per *Robinson*, C. J. ; *Poitevin* v. *Morgan*, 10 L. C. J. 97, per *Badgley*, J.
(*e*) Russ. Cr. 667.
(*f*) *Ibid.*

On every charge of murder, where the act of killing is proved against the prisoner, the law presumes the fact to have been founded in malice, until the contrary appears. (*g*) The *onus* of rebutting this presumption, by extracting facts on cross-examination or by direct testimony, lies on the prisoner. (*h*)

Persons present at a homicide may be involved in different degrees of guilt; for where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. A felonious participation in the act without a felonious participation in the design will not make murder. Thus if A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder, but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*i*)

The person committing the crime must be a free agent, and not subject to actual force at the time the act is done. Thus if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder but not B. But a moral force, as a threat of duress or imprisonment, or even an assault to the peril of life, is no legal excuse. (*j*) But if A. commit the act through an irresponsible agent, as an idiot or lunatic, A. is guilty of murder as a principal. (*k*)

Murder may be committed upon any person within the Queen's peace; and consequently to kill an alien enemy within the kingdom, unless in the heat and actual exercise of war, is as much murder as to kill a regular-born British subject. (*l*)

While an infant is in its mother's womb, and until it is actually born, it is not considered such a person as can be

(*g*) *Reg.* v. *McDowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.; *Reg.* v. *Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.
(*h*) *Ibid.*; Russ. Cr. 669.
(*i*) Russ. Cr. 669.
(*j*) *Ibid.*
(*k*) *Ibid.*
(*l*) *Ibid.* 670.

killed within the description of murder. (*m*) If a woman is quick with child and any person strike her, whereby the child is killed, it is not murder or manslaughter. By the 32 & 33 Vic., c. 20, s. 59, the unlawfully administering poison, or unlawfully using any instrument, with intent to procure miscarriage, is made an offence of the degree of felony, and, by s. 60, whoever unlawfully supplies or procures any drugs or other noxious thing for such purpose is guilty of a misdemeanor. A child must be actually born in a living state before it can be the subject of murder, (*n*) and the fact of its having breathed is not conclusive proof thereof. (*o*) There must be an independent circulation in the child before it can be accounted alive. (*p*) But the fact of the child being still connected with the mother by the umbilical cord will not prevent the killing from being murder. (*q*)

The killing may be effected by shooting, poisoning, starving, drowning or any other form of death by which human nature may be overcome. (*r*) But there must be some external violence or corporal damage to the party, and if a person, by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (*s*) But it has been held in the Province of Quebec that death caused from fear arising from menaces of personal violence and assault, though without battery, is sufficient in law to support an indictment for manslaughter. (*t*)

No act whatsoever shall be adjudged murder unless the person die within a year and a day from the time the stroke

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(*m*) Russ. Cr. 670 *et seq.*
(*n*) *Reg.* v. *Poulton*, 5 C. & P. 329.
(*o*) *Reg.* v. *Sellis*, 7 C. & P. 850; 1 Mood. C. C. 850; *Reg.* v. *Crutchley*, 7 C. & P. 814.
(*p*) *Reg.* v. *Enoch*, 5 C. & P. 539; *Reg.* v. *Wright*, 9 C. & P. 754.
(*q*) *Reg.* v. *Crutchley*, *supra*; *Reg.* v. *Reeves*, 9 C. & P. 25; *Reg.* v. *Trilloe*, 2 Mood. C. C. 260; Arch. Cr. Pldg. 625-6.
(*r*) Russ. Cr. 674.
(*s*) *Ibid.*
(*t*) *Reg.* v. *McDougall*, 4 Q. L. R. 350.

was received or cause of death administered, in the computation of which the whole day on which the stroke was administered is reckoned the first. (*u*)

If a man has a disease which, in all likelihood, would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this will constitute murder, for to accelerate the death of a person is sufficient. (*v*) So if a man is wounded, and the wound turns to a gangrene or fever from want of proper applications or from neglect, and the man dies of the gangrene or fever, or if it becomes fatal from the refusal of the party to submit to a surgical operation; (*w*) this is also such a killing as constitutes murder, but otherwise if the death of the party were caused by improper applications to the wound, and not by the wound itself. (*x*)

If a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful but not amounting to felony, the killing is manslaughter. If a man stab at A. and by accident strike and kill B., it is murder; (*y*) and if A., intending to murder B., shoot at and wound C., supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots. (*z*)

When a man has received such a provocation as shows that his act was not the result of a cool, deliberate judgment and previous malignity of heart, but was solely imputable to human infirmity, his offence will not be murder. (*a*) But mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter.

(*u*) Russ. Cr. 700.
(*v*) Arch. Cr. Pldg. 625; *Reg.* v. *Martin*, 5 C. & P. 130.
(*w*) *Reg.* v. *Holland*, 2 M. & Rob. 351; see also *Reg.* v. *Flynn*, 16 W. R. 319.
(*x*) Arch. Cr. Pldg. 625.
(*y*) *Reg.* v. *Hunt*, 1 Mood. C. C. 93; Arch. Cr. Pldg. 635.
(*z*) *Reg.* v. *Smith*, 2 U. C. L. J. 19; Dears. 559; 25 L. J. (M. C.) 29.

though if immediately upon such provocation the party provoked had given the other a box in the ear, or had struck him with a stick or other weapon not likely to kill, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter. (*b*) The giving of repeated blows with a heavy stick would furnish some evidence of malice.

By the light of modern authorities, all questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. (*c*)

P. (the prisoner) and D. (deceased) being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering, a scuffle began. While it was going on D. asked for the axe, and when they let go, P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. When she came back P. was on the deceased choking him. The wife then pulled P. off. P. then got up, pulled off his coat, and went outside and squared himself and asked deceased to come out and fight, and said he was cowardly. Deceased went on to the doorstep and caught hold of the prisoner. They grappled and deceased fell undermost, prisoner on him. While the scuffle was going on D. struck P. twice. On getting up P. kicked him on the side and arm, and then ran across the garden, got over a brush fence into the road and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence towards P., the latter struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time when he fell,

(*a*) See Russ. Cr. 711 *et seq.*
(*b*) *Reg.* v. *McDowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.
(*c*) *Ibid.* 115, per *Draper*, C. J.; *Reg.* v. *Eagle*, 2 F. & F. 827.

and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself." P. and deceased had lived on friendly terms as brothers should, except when under the influence of liquor. It was held that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice, and the jury should have been so directed; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was under the circumstances a question for the jury, and was to be determined by their finding or negativing malice. (*d*)

Killing in a sudden quarrel, where the circumstances afford no ground for inferring malice, generally amounts to manslaughter only, but there are many authorities which establish that, in the case of a sudden quarrel, when the parties immediately fight, there may be circumstances indicating malice in the party killing, when the killing will be murder. (*e*)

A married woman having become pregnant by the prisoner, and having herself unsuccessfully endeavored to procure a poison, in order to produce abortion, the prisoner, under the influence of threats by the woman of self-destruction if the means of producing abortion were not supplied to her, procured for her a poison, from the effects of which, having taken it for the purpose aforesaid, she died. The prisoner neither administered the poison, nor caused it to be administered, nor was he present when it was taken, but he procured and delivered it to the deceased, with a knowledge of the purpose to which the woman intended to apply it, and he was accessory before the fact to her taking it for that purpose. It was held that the prisoner was not guilty of murder. (*f*)

(*d*) *Reg.* v. *McDowell*, 25 U. C. Q. B. 108.
(*e*) *Ibid.* 114, per *Draper*, C. J.
(*f*) *Reg.* v. *Fretwell*, 9 U. C. L. J. 138; L. & C. 161; 31 L. J. (M. C.) 145; see 32 & 33 Vic., c. 20, s. 60.

Where, on an indictment for murder, the evidence of the medical man who examined the body went to show that he had not at all examined the brain, and that he examined the organs of the abdomen without cutting into any of them; that the fact of his having found the common carotid artery and jugular vein severed, left him in no doubt but that such severance had caused the death. Being asked, on cross-examination, if he had examined the cavity of the head—might not such examination have revealed some other cause of death? he replied: "There might have been, but the probabilities are against it."

It was contended that the Crown was bound to give the best evidence the case admitted of as to the cause of death, and that, in the present advanced state of medical science, the Crown should have placed itself, by medical examination of the brain, in a position to negative, beyond all reasonable doubt, the hypothesis of death from any other cause than that alleged; but the court held that the evidence was sufficient to justify a conviction. (*g*)

It was formerly necessary, in an indictment for murder, to set forth the manner in which, or the means by which, the death of the deceased was caused; and where an indictment charged the prisoner, being the mother of an infant of tender age, and unable to take care of itself, with feloniously placing it upon the shore of a river, in an exposed situation, where it was liable to fall into the water, and abandoning it there, with intent that it should perish, by means of which exposure the child fell into the river, and was suffocated and drowned, of which suffocation, etc., the child died; it was held that, to support the indictment, it was necessary to prove that the death was caused by drowning or suffocation. (*h*)

The 32 & 33 Vic., c. 20, s. 6, now provides that it shall not be necessary, in any indictment for murder or manslaughter,

(*g*) *Reg.* v. *Downey*, 13 L. C. J. 193.
(*h*) *Reg.* v. *Fennety*, 3 Allen, 132.

to set forth the manner in which or the means by which the death of the deceased was caused; but it shall be sufficient, in any indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill, and murder the deceased; and it shall be sufficient in any indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.

It is necessary, in an indictment for murder, to state that the act by which the death was occasioned was done feloniously, and especially that it was done of malice aforethought, and it must also be stated that the prisoner murdered the deceased. (*i*)

The word "murder" in the indictment is emphatically a term of art, (*j*) and it would be insufficient, in an indictment for murder, to state that the party did wilfully, maliciously, and feloniously, stab and kill, because it is equally indispensable to use the artificial term "murder" as it is to state that the offence was committed of "malice aforethought." The omission of either one of these expressions would render the prisoner liable to a conviction for manslaughter only. (*k*)

In an indictment for wounding, with intent to murder, the offence must be charged to have been committed by the prisoner wilfully, maliciously, and of his malice aforethought, and judgment would formerly have been arrested where the indictment was defective in this respect. (*l*) Whether such omission would not now be aided by verdict is questionable.

The punishment of murder is death. (*m*) The 32 & 33 Vic., c. 29, s. 106, and following sections, prescribe the manner in which sentence of death is to be executed.

Manslaughter.—The general definition of manslaughter is the unlawful and felonious killing of another, without any malice either express or implied. (*n*) It is of two kinds:—

(*i*) *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J.; see also 32 & 33 Vic., c. 29, s. 27, and sched. A.
(*j*) *Ibid.* 69.
(*k*) *Ibid.* 53.
(*l*) *Kerr* v. *Reg.*, 2 *Rev. Critique*, 238.
(*m*) 32 & 33 Vic., c. 20, s. 1.
(*n*) *Re Anderson*, 11 U. C. C. P. 63, per *Richards*, J.

(1) Involuntary manslaughter, where a man doing an unlawful act, not amounting to felony, by accident kills another, or where a man, by culpable neglect of a duty imposed upon him, is the cause of the death of another. (2) Voluntary manslaughter is where, upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him. (*o*)

Manslaughter is distinguished from murder in wanting the ingredient of malice; and it may be generally stated th at where the circumstances negative the existence of malice, in the legal sense, and the killing is unlawful and felonious, it will amount to manslaughter.

In a case where the deceased, who complained of being robbed, suddenly, and without authority or license, entered the house where the prisoner lodged. The latter was in a bed-room below stairs, not armed with any deadly weapon. but having the fragment of a brick, and the back of a chair, in his hands. Immediately on the entry of the deceased the prisoner retreated up stairs, and the deceased asked the prisoner, who was then at the top of the stairs, if he had got his (deceased's) money, to which the prisoner replied: "If you come bothering me about your money, I will do something to you," and immediately threw out of his hand a piece of iron, several feet long, being the handle of a frying pan, which struck the deceased on the head, and fractured his skull. The whole transaction occupied only a few seconds, and was done in passion. In the opinion of the judges, this was only a case of manslaughter. (*p*)

The general doctrine seems well established, that that which constitutes murder, when of malice aforethought, constitutes manslaughter when arising from culpable negligence. (*q*) And it would seem that the doctrine of con-

(*o*) Arch. Cr. Pldg. 623.
(*p*) *Reg.* v. *Kennedy*, 2 Thomson, 203.
(*q*) *Reg.* v. *Hughes*, 3 U. C. L. J. 153; 29 L. T. Rep. 266; Dears. & B. 248; 26 L. J. (M. C.) 202.

tributory negligence cannot apply so as to justify the prisoner. (*r*)

It is culpable negligence for one who has a right to turn out horses on a common, intersected by public paths, which he knows are unenclosed, to turn out a vicious horse, knowing the propensities of the animal to kick, so that it may kick persons passing along or close to the paths on the common; and where a child, standing upon a common, close to a public path, was kicked by a vicious horse so turned out, and death ensued, the prisoner, who turned him out, was held guilty of manslaughter. It would seem that if the child, at the time she was kicked, had been upon a part of the common more remote from the path, the prisoner's offence would have been the same. (*s*)

And where three persons were guilty of a breach of duty in firing at a mark without taking proper precautions, all three were held guilty of manslaughter, a boy having been killed by a shot from one of them. (*t*)

But in order to render a person liable to the charge of manslaughter for the act of another, there must be some sort of active proceeding on his part. He must incite, procure or encourage the act. And the mere consent to hold stakes for two persons, who have arranged to fight for a wager, cannot be said to amount to such a participation as is necessary to support such a conviction, one of the combatants having died from the effects of the fight. (*u*)

An indictment for manslaughter will not lie against the managing director of a railway company by reason of the omission to do something which the company by its charter was not bound to do, although he had personally promised to do it. (*v*)

The prisoner was convicted on an indictment charging him

(*r*) See *Reg.* v. *Dant*, *infra*; *Reg.* v. *Swindall*, 2 C. & K. 236; *Reg.* v. *Hutchinson*, 6 Cox, 555; but see *Reg.* v. *Berchall*, 4 F. & F. 1087.
(*s*) *Reg.* v. *Dant*, 13 W. R. 663; L. & C. 567; 34 L. J. (M. C.) 119.
(*t*) *Reg.* v. *Salmon*, L. R. 6 Q. B. D. 79.
(*u*) *Reg.* v. *Taylor*, L. R. 2 C. C. R. 147.
(*v*) *Ex parte Brydges*, 18 L. C. J. 141.

with neglecting to provide food and clothing for his child, but omitting specifically to allege his ability to do so. The court held that the ability to provide was implied, and therefore sufficiently averred in the use of the word "neglect." (*w*)

But where, in an indictment of a single woman, the mother of a bastard child, for neglecting to provide it with sufficient food, it was alleged that she neglected her duty, "during all the time aforesaid being able and having the means to perform and fulfil the said duty;" and as to that allegation, the evidence was that she was cohabiting with a man who was not the father, and there was no evidence of her actual possession of means for nourishing the child, but it was proved that she could have applied to the relieving officer of the union, and that if she had done so she would have received relief adequate to the support of the child and herself: it was held that the allegation was not proved, and that the conviction could not be supported. (*x*)

There is a distinction, however, between the cases of children, apprentices and lunatics, under the care of persons bound to provide for them, and the case of a servant of full age; and in charges of causing death by insufficient supply of food or unwholesome lodging in the latter, the jury must be satisfied upon the evidence that the prisoner has culpably neglected to supply sufficient food and lodging to the deceased during a time when, being in the prisoner's service, she was reduced to such an enfeebled state of body and mind as to be helpless, or was under the dominion and restraint of the prisoner, and unable to withdraw herself from his control, and that her death was caused or accelerated by such neglect. (*y*)

The statute imposes a positive duty to provide adequate medical aid when necessary, and if that duty be neglected by a parent, and death ensue from that neglect, the parent is guilty of manslaughter; and this even though the parent may

(*w*) *Reg.* v. *Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.
(*x*) *Reg.* v. *Chandler*, 1 U. C. L. J. 135; Dears. 453; 24 L. J. (M.C.) 109.
(*y*) *Reg.* v. *Smith*, 13 W. R. 816; 1 U. C. L. J. N. S. 164.

have *bona fidé* believed it wrong to call in medical assistance. However this latter consideration might affect the question at common law, the statute is imperative. (*z*)

If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, etc., in the legal execution of his duty, or any person acting in aid of him, whether specially called thereunto or not, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice and the offender will be guilty of murder. (*a*) But the officer must have a legal authority and execute it in a proper manner, and the defendant must have knowledge of that authority and intention; (*b*) otherwise the killing will amount to manslaughter only. (*bb*)

The 32 & 33 Vic., c. 29, s. 2, empowers a constable or peace officer to apprehend, without warrant, any person found committing an offence punishable either by indictment or upon summary conviction. Where a person was supposed to have obtained money by false pretences at 1 p. m. and was not arrested until 10 p. m., it was held that the party was "found committing" the offence at 1 p. m. and might be arrested, when found committing or after a pursuit immediately commenced. But "immediately" means after the commission of the offence and not after its discovery, for the intention of the statute was that the criminal should be apprehended immediately on the commission of the offence. (*c*)

Where an offence was committed in the county of G., and warrants were issued for the arrest of the guilty parties, persons from another county, who came to assist the constable of the county of G. in making arrests, were held entitled to the same protection as the constables. (*d*)

A person found committing an offence against the Larceny

(*z*) *Reg.* v. *Downes*, L. R. 1 Q. B. D. 25.
(*a*) Arch. Cr. Pldg. 640.
(*b*) *Ibid.*
(*bb*) See *Infra.*
(*c*) *Downing* v. *Capel*, L. R. 2 C. P. 461.
(*d*) *Reg.* v. *Churson*, 3 Pugsley, 546.

Act, 32 & 33 Vic., c. 21, may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman* v. *Seneschal*, (*e*) and adopted in *Roberts* v. *Orchard*, (*f*) the person so apprehending honestly believes in the existence of facts which, if they existed, would have justified him under the statute 24 & 25 Vic., c. 96, s. 103. It is not necessary that an offence should have been committed under the statute by any one; but the belief must rest on some ground, and mere suspicion will not be enough. (*g*)

The Police Act (N. B.), 11 Vic., c. 13, s. 22, does not authorize the arrest without warrant of known residents of the place. (*h*)

In *King* v. *Poe*, (*i*) it was left undecided and in doubt whether a magistrate has a right to arrest a person for a misdemeanor committed in his view. Where there has been no breach of the peace, actual or apprehended, a magistrate has no right to detain a known person to answer a charge of misdemeanor, verbally intimated to him, without a regular information before him in his capacity of magistrate, that he may be able to judge whether it charges any offence to which the party ought to answer. (*j*)

A constable may arrest any one for a breach of the peace committed in his presence, not merely to preserve the peace, but for the purposes of punishment. (*k*) Therefore, where a policeman saw a man, who was drunk, assault his wife, and within twenty minutes after took him into custody, it was held that the policeman was justified in so doing, notwithstanding that the man had left the spot, where his wife was saying he should "leave her altogether." (*l*)

(*e*) 11 W. R. 184; 13 C. B. N. S. 392.
(*f*) 12 W. R. 253; 2 H. & C. 768.
(*g*) *Leete* v. *Hart*, 4 U. C. L. J. N. S. 201.
(*h*) *Foley* v. *Tucker*, 1 Hannay, 52.
(*i*) 15 L. T. Rep. N. S. 37.
(*j*) *Caudle* v. *Ferguson*, 1 Q. B. 889; *Rex* v. *Birnie*, 1 M. & R. 160.
(*k*) *Deercourt* v. *Corbishley*, 1 U. C. L. J. 156.
(*l*) *Reg.* v. *Light*, 4 U. C. L. J. 97; Dears. & B. 332; 27, L. J. (M. C.) 1.

A constable may arrest a person without a warrant upon a reasonable charge; that is, upon probable information that he has committed a crime. (*m*)

It would appear that a constable has nothing to do *virtute officii* in a civil proceeding, and he can have no color or pretence for acting without authority specially given by some process. (*n*)

It is the duty of a person arresting any one on suspicion of felony to take him before a justice of the peace as soon as he reasonably can; and the law gives no authority, even to a justice of the peace, to detain a person suspected but for a reasonable time till he may be examined. (*o*) A private person not being by office a keeper of the peace, or a justice or constable, cannot arrest on suspicion of felony without a warrant, but must show a felony actually committed. (*p*)

But if a person is prepared to show that there really has been a felony committed by some one, then he may justify arresting a particular person upon reasonable grounds of suspicion that he was the offender. (*q*) The general rule would seem to be that, at common law, if a felony were actually committed, a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and if a constable had reasonable grounds for supposing that a felony had been committed, and reasonable grounds for assuming that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed. (*r*) Neither a constable nor any other could arrest a person merely on suspicion of his having illegally detained goods. (*s*)

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers and receive the money, and

(*m*) *Rogers* v. *Van Valkenburgh*, 20 U. C. Q. B. 219, per *Robinson*, C. J.
(*n*) See *Brown* v. *Shea*, 5 U. C. Q. B. 143, per *Robinson*, C. J.
(*o*) *Ashley* v. *Dundas*, 5 U. C. Q. B. O. S. 754, per *Sherwood*, J.
(*p*) *Ibid.*; *McKenzie* v. *Gibson*, 8 U. C. Q. B. 100; *Murphy* v. *Ellis*, Stev. Dig. 115.
(*q*) *McKenzie* v. *Gibson*, *supra*, 102, per *Robinson*, C. J.
(*r*) *Hadley* v. *Perks*, L. R. 1 Q. B. 456, per *Blackburn*, J.
(*s*) *Ibid.*

keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property. (*t*) It would seem that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority from his employer to arrest the offender; or if the clerk had reason to believe the money had been actually stolen and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, that also might be within the authority of a person in charge of the till. But there is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. The person having charge, etc., has no implied authority to take such steps as may be necessary for the purpose of punishing the offender. The principle governing the subject is: there is an implied authority to do all those things that are necessary for the protection of property entrusted to a person, or for fulfilling the duty which a person has to perform. (*u*)

Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender, and take him to a peace officer to answer for a breach of the peace. (*v*)

The fact that a party is violently assaulting the wife and child of another is no legal justification for the latter, not

(*t*) *Allen* v. *L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65.
(*u*) *Ibid.* 68-9, per *Blackburn*, J.
(*v*) *Forrester* v. *Clarke*, 3 U. C. Q. B. 151.

being a peace officer, breaking into the house of the former in order to prevent the breach of the peace. (*w*)

The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance and, after an interval of an hour, returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes, the constable forced open the door, entered and arrested the prisoner, who wounded one of them in resisting his apprehension. It was held that as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. (*x*)

A person unlawfully in another's house, and creating a disturbance and refusing to leave the house, may be forcibly removed, but, if he had not committed an assault, the circumstances do not afford a justification for giving him into the custody of a policeman. (*y*)

In all cases above mentioned, if the officer has not a legal authority or executes it in an improper manner, the offence will be manslaughter only. But if there is evidence of express malice it will amount to murder. (*z*) So ignorance of the character in which the officer is acting will reduce the offence to manslaughter. But if a constable command the peace or show his staff of office, this, it seems, is a sufficient intimation of his authority (*a*)

Where the fact of killing is proved, the defendant may rebut the presumption of malice arising therefrom, by proving that the homicide was justifiable or excusable.

Justifiable homicide is of three kinds:—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person

(*w*) *Rockwell* v. *Murray*, 6 U. C. Q. B. 412; *Handcock* v. *Baker*, 2 B. & P. 262.
(*x*) *Reg.* v. *Marsden*, L. R. 1 C. C. R. 131; 37 L. J. (M. C.) 80.
(*y*) *Jordan* v. *Gibbon*, 3 F. & F. 607.
(*z*) Arch. Cr. Pldg. 645-6.
(*a*) *Ibid.* 645; and see *Rex* v. *Higgins*, 4 U. C. Q. B. O. S. 83.

acting in his aid in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime, as, for instance, if a man attempts to rob or murder another and be killed in the attempt, the slayer shall be acquitted and discharged. (*b*)

Excusable homicide is of two kinds:—1. Where a man doing a lawful act, without any intention of hurt, by accident kills another, as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunam* or by misadventure. 2. Where a man kills another, upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling, which is termed homicide *se defendendo*, or in self-defence. (*c*)

The 32 & 33 Vic., c. 20, s. 7, provides that no punishment or forfeiture shall be incurred by any person who kills another by misfortune, or in his own defence, or in any other manner, without felony.

Concealing Birth.—The 32 & 33 Vic., c. 20, sec. 62, repeals the 21 Jac. I.; and sec. 61 of the same statute enacts that if any woman is delivered of a child, every person who, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavors to conceal the birth thereof, is guilty of a misdemeanor.

A secret disposition, under this Act, must depend upon the circumstances of each particular case; and the most complete exposure of the body might be a concealment, as, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where it would not likely be found. The

(*b*) Arch. Cr. Pldg. 623.
(*c*) *Ibid.* 623.

jury must, in each case, say whether or no the facts show that there has been such a secret disposition. (*d*)

The conduct of the prisoner, such as the denial on her part that she has had a child, is important as showing the intent with which a concealment, otherwise questionable was made. (*e*)

If a woman endeavor to conceal the birth of her child by placing the dead body under the bolster of a bed, and laying her head partly over the body, intending to remove it to some other place when an opportunity offers, it is an offence within 9 Geo. IV., c. 31, s. 14. (*f*)

Abortion.—This offence is now regulated by the 32 & 33 Vic., c. 20, ss. 59 and 60. Upon an indictment for causing abortion, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that the drug was both given by the prisoner, and taken by the woman, with that intent, but the taking was not in the presence of the prisoner. It produced a miscarriage. The court held that a conviction upon the facts above was right, and that there was an "administering and causing to be taken," within the statute, though the prisoner was not present at the time. (*g*)

What is a "noxious thing" within the statute, depends on the circumstances of each particular case. In one case, evidence that quantities of oil of juniper, considerably less than half an ounce, are commonly taken medicinally without any bad results, but that a half ounce produces ill effects, and is to a pregnant woman dangerous, was held sufficient from which a jury might infer that the latter quantity was a "noxious thing" within the statute. (*h*)

(*d*) *Reg.* v. *Brown*, L. R. 1 C. C. R. 246-7; 39 L. J. (M.C.) 94, per *Bovill*, C. J.; *Reg.* v. *Piché*, 30 U. C. C. P. 409.
(*e*) *Reg.* v. *Piché*, 30 U. C. C. P. 409.
(*f*) *Reg.* v. *Perry*, 1 U. C. L. J. 135; Dears. 471; 24 L. J. (M. C.) 137.
(*g*) *Reg.* v. *Wilson*, 3 U. C. L. J. 19; Dears. & B. 127; 26 L. J. (M. C.) 18; see also *Reg.* v. *Farrow*, Dears. & B. 164.
(*h*) *Reg.* v. *Cramp*, L. R. 5 Q. B. D. 307.

And where it was in evidence that oil of savin in any dose would be most dangerous to give to a pregnant woman; that the prisoner, with intent to procure abortion, had supplied a woman in that condition with a bottle of Sir. James Clarke's female pills, containing about four grains of that drug, and that such a quantity would be very irritating: the court held that there was a supplying of a "noxious thing." (*i*)

Rape.—This offence has been defined to be the having unlawful and carnal knowledge of a woman by force, and against her will. (*j*)

Upon an indictment for rape, there must be some evidence that the act was without the consent of the woman, even where she is an idiot. Where there is no appearance of force having been used to the woman, and the only evidence of the connection is the prisoner's own admission, coupled with the statement that it was done with her consent, there is no evidence for the jury. (*k*)

It was formerly held that where the woman consents to the connection, through the fraud of the ravisher, the act does not amount to rape; (*l*) but the soundness of this doctrine has lately been questioned in England, and seems inconsistent with the modern doctrines to consent in criminal law in general. The following proposition, it is submitted, correctly sets out the law on the subject: Where a person does or acquiesces in an act through a misapprehension of the nature of that act, or of the circumstances attending it, and that misapprehension is either induced by the prisoner, or the prisoner, knowing the mistake under which the other is laboring, takes advantage of that mistake, there is no consent in law, but that quality of crime is to be imputed to the prisoner of which he would have been guilty had he done the act against the expressed will of the other.

(*i*) *Reg.* v. *Stitt*, 30 U. C. C. P. 30.
(*j*) Russ. Cr. 904.
(*k*) *Reg.* v. *Fletcher*, L. R. 1 C. C. R. 39; 35 L. J. (M. C.) 172.
(*l*) *Reg.* v. *Barrow*, L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20.

Thus, on an indictment for indecently assaulting two boys, the judge left it to the jury to say whether the boys merely submitted to the acts ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to the prisoner's acts; and on a case reserved, the court held the action right. (*m*)

And where the prisoner, a depositor in the Post Office Savings Bank, in which 11s. stood to his credit, gave notice in the ordinary form to withdraw that sum, and the clerk, at the office of payment, referring by mistake to another letter of advice for £8 16s. 10d., placed the latter amount upon the counter and entered the same as paid in the prisoner's deposit book, which sum the prisoner took up, *animo furandi;* it was held by a majority of the judges for conviction, that such a delivery by the clerk under mistake, though with an intention of passing the property, had not that effect, and that there was a sufficient taking to warrant a conviction for larceny. (*n*)

And in a case of rape, in which the authority of *Reg.* v. *Barrow* (*nn*) was doubted, the prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to an illness from which she was suffering. He advised her that a surgical operation should be performed, and under pretence of performing it, he had carnal knowledge of her. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner. He was held guilty of rape. (*o*)

This case, it is true, differs from *Reg.* v. *Barrow* in that there the prosecutrix knew the nature of the act and consented to it under the mistaken belief that the person having

(*m*) *Reg.* v. *Lock*, L. R. 2 C. C. R. 10.
(*n*) *Reg.* v. *Middleton*, L. R. 2 C. C. R. 38.
(*nn*) L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20.
(*o*) *Reg.* v. *Flattery*, L. R. 2 Q. B. D. 410.

connection with her was her husband, while here the mistake was as to the nature of the act itself. But the distinction is verbal rather than substantial; and, besides, the principle of *Reg.* v. *Barrow* conflicts with that of *Reg.* v. *Middleton*, which embodies the approved doctrine on the subject in cases of larceny.

Apart from all questions of consent fraudulently obtained, the meaning of the phraseology in an indictment for rape that the prisoner "violently, and against her will, feloniously did ravish" the prosecutrix, is, that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as is possible under the circumstances, and so as to make the ravisher see and know that she is really resisting to the uttermost. (*oo*)

Thus, where, on an indictment for rape, the evidence of the prosecutrix showed that the prisoner, having followed her into the house, and, without her knowledge, bolted the door, succeeded, after she had several times escaped from him, in dragging and throwing her upon the bed, where he had connection with her, she making several attempts to get up, but being too exhausted to do so, the prisoner avowing that he had come on purpose, and, as she was in his power, he would do as he pleased; that she resisted as long as she could, and then, before he had effected his purpose, screamed out, and called to her child, who was outside; being corroborated as to the screams by the child, and by another witness, who heard cries, manifestly those of the prosecutrix; it also appearing that the husband of the prosecutrix had received a letter from her, on the 20th of the same month in which the rape was said to have been committed, which, it was alleged, was on the 17th of that month, stating that the prisoner had been at his house and abused her. It was held that this evidence showed the woman was quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made

(*oo*) *Reg.* v. *Fick*, 16 U. C. C. P. 379.

the ravisher see and know that she really was resisting to the utmost, and sustained the language of the indictment, that the prisoner "violently, and against her will, feloniously did ravish" the prosecutrix. A conviction for rape was therefore upheld. (*p*)

Where the prisoner forcibly had carnal knowledge of a girl thirteen years of age, who, from defect of understanding, was incapable of giving consent or exercising any judgment in the matter, it was held that he was guilty of rape, and that it was sufficient, in such a case, to prove that the act was done without the girl's consent, though not against her will. (*q*)

But in the case of rape of an idiot, or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, *e. g.*, that she was incapable of expressing assent or dissent, or from exercising any judgment upon the matter, from imbecility of mind or defect of understanding, and if she gave her consent from animal instinct or passion, (*r*) or if from her state and condition he had reason to think she was consenting, it would not be a rape. (*s*)

A child, under ten years of age, cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, under the 32 & 33 Vic., c. 20, s. 51. (*t*) And a person may be convicted of attempting to have carnal knowledge of such child, even though she consents to the acts done. (*u*) But her consent will render the attempt no assault. (*v*)

In the case of girls from ten to twelve, on a charge of

(*p*) *Reg.* v. *Fick*, 16 U. C. C. P. 379.
(*q*) *Reg.* v. *Fletcher*, 5 U. C. L. J. 143; Bell, 63; 28 L. J. (M.C.) 85.
(*r*) *Reg.* v. *Connolly*, *supra*, 317.
(*s*) *Reg.* v. *Barratt*, L. R. 2 C. C. R. 81; *Reg.* v. *Fletcher*, L. R. 1 C.C.R. 39, explained.
(*t*) *Reg.* v. *Connolly*, *supra*, 320, per *Hagarty*, J.
(*u*) *Reg.* v. *Beale*, L. R. 1 C. C. R. 10; 35 L. J. (M. C.) 60.
(*v*) *Reg.* v. *Cockburn*, 3 Cox, 543; *Reg.* v. *Connolly*, *supra*, 320, per *Hagarty*, J.

assault, with intent to carnally know, or indecent assault, or common assault, consent is a defence; but the prisoner may be indicted for attempting to commit the statutable misdemeanor, not charging an assault, in which case it seems consent is no defence. The proper course is to indict for attempt to commit the statutable misdemeanor, for every attempt to commit a misdemeanor is a misdemeanor, and where the essence of the offence charged is an assault, the attempt, though a misdemeanor, is no assault. (*w*)

By the 32 & 33 Vic., c. 20, s. 65, it is unnecessary, with respect to these offences, to prove the actual emission of seed, in order to constitute a carnal knowledge; but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.

In a case of rape, a statement made by the prosecutrix to her husband and another person, that the defendant ravished her, is not admissible, so far as it criminates the prisoner. (*x*)

The 32 & 33 Vic., c. 20, s. 56, provides that whosoever 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, is guilty of a misdemeanor.

The prisoner met a girl in the street going to school and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he had met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met the prisoner. The latter made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, or that he was taking her out of her father's possession; but he had no reason to, and

(*w*) *Reg.* v. *Connolly*, 26 U. C. Q. B. 323, per *Hagarty*, J.; see also *Reg.* v. *Guthrie*, L. R. 1 C. C. R. 241; 39 L. J. (M. C.) 95; *Reg.* v. *Oliver*, Bell, 287; 30 L. J. (M. C.) 12.

(*x*) *Reg.* v. *Fick*, 16 U. C. C. P. 379.

did not, believe that she was a girl of the town. It was held that the prisoner was not guilty of having unlawfully taken the girl out of the possession of her father, under the Imperial 24 & 25 Vic., c. 100, s. 55, which is analogous to our own Act, for it did not appear that the prisoner knew or had reason to believe that the girl was under the lawful care or charge of her father or mother or any other person, (*y*) But this decision seems questionable, for the statute does not make knowledge an ingredient of the offence, and in a later case on a similar charge, where it was proved that the prisoner *bona fidê* believed, and had reasonable ground for believing, that the girl was over sixteen though in fact under that age, it was held that the statute was express, and that his belief would not affect his criminality. (*z*)

Assault and battery.—An assault is an attempt or offer with force and violence to do a corporal hurt to another, and a battery, which is the attempt executed, includes an assault. (*a*) An assault is described as a violent kind of injury offered to a man's person of a more large extent than battery, for it may be committed by offering a blow. (*b*)

Whether the act shall amount to an assault must in every case be collected from the intention. If a person interfere in a fight to separate the combatants, this does not amount to an assault. (*c*) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is no battery. If the injury committed were accidental and undesigned, it will not amount to a battery. (*d*)

Using insulting and abusive language to a person in his own office and on the public street, and using the fist in a

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(*y*) *Reg.* v. *Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M. C.) 61.
(*z*) *Reg.* v. *Prince*, L. R. 2 C. C. R. 154; and see *Reg.* v. *Downes*, L. R. 1 Q. B. D. 25.
(*a*) *Reg.* v. *Shaw*, 23 U. C. Q. B. 619, per *Draper*, C. J.
(*b*) *McCurdy* v. *Swift*, 17 U. C. C. P. 139, per *A. Wilson*, J.
(*c*) Russ. Cr. 1025.
(*d*) *Ibid.*

threatening and menacing manner to the face and head of a person, amounts to an assault. (*e*)

A conductor on a train is not liable for an assault, in attempting to put a person off the cars who refuses, after being several times requested, to pay his proper fare; the conductor, in endeavoring to put the person off, being successfully resisted, and the person paying his proper fare on the conductor summoning others to his aid. (*f*)

To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit is an assault. (*g*)

A municipal corporation is liable for assaults committed by its servants, such as policemen, when the assaults are proved, and attempted to be justified by the corporation. (*h*)

If a warrant of commitment is good on its face, and the magistrate issuing it had jurisdiction on the case, it is a justification to a constable executing it, and a person resisting him is guilty of an assault. (*i*)

Where A., without any hostile intention, pulled the arm of B., the superintendent of a fire brigade, the moment the latter was engaged in directing the hose of the engine against a fire, for the purpose of calling his attention to an observation with the respect to the effect of the water upon the flames, it was held that this was not such an assault as would justify B. in giving A. into the custody of a policeman. (*j*) There can be no assault where the party consents to the act done. (*k*)

On an indictment that the prisoner, in and upon one D., a girl above the age of ten years, and under the age of

(*e*) *Reg.* v. *Harmer*, 17 U. C. Q. B. 555; *Stephens* v. *Meyers*, 4 C. & P. 350.
(*f*) *Reg.* v. *Faneuf*, 5 L. C. J. 167.
(*g*) *Reg.* v. *Cronan*, 24 U. C. C. P. 106.
(*h*) *Corporation of Montreal* v. *Doolan*, 13 L. C. J. 71; 18 L. C. J. 124.
(*i*) *Reg.* v. *O'Leary*, 3 Pugsley, 264.
(*j*) *Coward* v. *Baddeley*, 5 U. C. L. J. 262; 4 H. & N. 478; 28 L. J. (Ex.) 260.
(*k*) *Reg.* v. *Guthrie*, L. R. 1 C. C. R. 243; 39 L. J. (M. C.) 95, per *Bovill*, C. J.; and see *Reg.* v. *Beale*, *ibid.* 12, per *Pollock*, C. B.; *Reg.* v. *Connolly*, 26 U. C. Q. B. 320, per *Hagarty*, J.

twelve years, unlawfully did make assault, and her, the said D., did then unlawfully and carnally know and abuse against the form of the statute, etc. The offence of carnally knowing the girl was disproved, but there was evidence of an assault of an indecent and very violent character, which was left to the jury, who found the prisoner guilty of a common assault, and the question was whether they could properly do so upon this indictment; it was held that the prisoner was properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanors, namely, an assault at common law, and the statutory offence of unlawfully and carnally knowing and abusing the girl; that there being a distinct charge of an assault in the indictment, the prisoner might be convicted of it though the indictment also contained a charge of a more serious offence, consequently the prisoner might be found guilty of either offence. (*l*)

A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, under 32 & 33 Vic., c. 32, though when the party is before the magistrate, the charge of aggravated assault may be made in writing, and followed by a conviction therefor. (*m*)

The prisoner was found guilty at the Quarter Sessions, on an indictment charging that she, on, etc., in and upon one B., in the peace of God and of our Lady the Queen then being, unlawfully did make an assault and him, the said B., did beat and ill-treat with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, etc. A count was added for common assault. The evidence showed an attempt to murder, but it was moved, in arrest of judgment, that the

(*l*) *Reg.* v. *Guthrie*, L. R. 1 C. C. R. 241.
(*m*) *Re McKinnon*, 2 U. C. L. J. N. S. 324.

sessions had no jurisdiction, for that it was a capital crime within the Con. Stats. Can., c. 91, s. 5. The court held that the indictment did not charge a capital offence under that section, nor an offence against any statute, but charged in each count an offence at common law, rejecting from the first count the words "contrary to the statute" as surplusage, and any other words which were insufficient to sustain a prosecution for felony under any statute, and that the conviction might be sustained as for an assault at common law. (*n*)

The 32 & 33 Vic., c. 29, s 51, provides that on the trial of any person for any felony whatever, where the crime charged includes an assault against the person, the jury may acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding. It is quite clear that this section only authorizes a verdict of guilty of assault, when it is included in, and forms parcel of, the felony charged in the indictment. The words "crime charged" mean the crime charged as felony in the indictment, for the enactment only takes effect upon an acquittal, and the assault, to fall within the Act, must be an integral part of the felony charged. (*o*) Therefore, where on an indictment for murder the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased, it was held that the prisoner under such finding could not be convicted of the assault. (*p*)

And where the prisoners were indicted for murder, and the medical testimony showed burning to be the direct and only cause of the death, but there was no evidence to connect any of the prisoners with the burning, it was held that the prisoners could not be convicted of an assault, for, although an assault was proved, there was no evidence to show that it conduced to the death. (*q*)

(*n*) *Reg.* v. *McEvoy*, 20 U. C. Q. B. 344.
(*o*) *Reg.* v. *Dingman*, 22 U. C. Q. B. 283; *Reg.* v. *Bird*, 2 Den. C. C. 94.
(*p*) *Reg.* v. *Cregan*, 1 Hannay, 36; and see *Reg.* v. *Ryan*, *ibid.* 119, per *Ritchie*, C. J.
(*q*) *Reg.* v. *Ganes*, 22 U. C. C. P. 185; following *Reg.* v. *Bird*, 2 Den. C. C. 94; *Reg.* v. *Dingman*, 22 U. C. Q. B. 283.

It was held, under the Con. Stats. Can., c. 99, s. 66, that there could be no conviction for an assault, unless the indictment charged an assault in terms, or a felony necessarily implying an assault; (*r*) and it has been doubted how far the section under consideration, by providing that there may be a conviction for assault, "although an assault be not charged in terms," alters the law in this respect.

It would seem that in the cases of rape, robbery, stabbing and the like, being all crimes which necessarily include an assault, a prisoner, if acquitted of the felony, can clearly be convicted of an assault, under this section, if the assault was included in and conduced to the felony; and as the charge of either of these offences necessarily includes a charge of assault, he could be so convicted even before the recent Act, without any charge of assault in terms. And one would naturally be led to think that on indictments for murder and manslaughter, though the bare charge of these offences does not show an assault, the prisoner might be convicted of an assault under the Act though not charged in terms, if the evidence showed an assault committed, in attempting to commit the felony charged, or as parcel thereof. But it has been held in several cases that on an indictment for murder in the statutory form, not charging an assault, the prisoner cannot be convicted of an assault; (*s*) so that if the principle of these decisions be adopted, the section has practically no operation.

A case cannot be brought within this Act, by averring an assault in the indictment which is not included in, and parcel of, the felony charged. There can be no conviction of an assault, unconnected with the felony charged. The Act only dispenses with an express allegation of an assault, where the felony is of such a nature, that the mere charge of it is also a charge of an assault. (*t*)

(*r*) *Reg.* v. *Dingman*, *supra*.

(*s*) *Reg.* v. *Smith*, 34 U. C. Q. B. 552; *Reg.* v. *Mulholland*, 4 Pugsley & B. 512.

(*t*) See *Reg.* v. *Dingman*, 22 U. C. Q. B. 283; *Reg.* v. *Bird*, 2 Den. C. C. 94; *Reg.* v. *Lackey*, 1 Pugsley & B. 194.

Shooting with intent to murder involves an assault. (*u*) An indictment charging the prisoner with having maliciously assaulted J. M. and cut him with a knife, with intent to do him grievous bodily harm, concluding *contra formam statuti*, was held bad, for the means used were not set out with such particularity, as necessarily to manifest the design, which constituted the felony, and there was no allegation following the words of the Act; and it was also held that the conviction could not stand for an assault, as the Act does not operate to supply defects in indictments. (*v*)

Upon an indictment containing counts for assaulting and maliciously inflicting grievous bodily harm, and a count for a common assault, after evidence of grievous injuries inflicted by the prisoner, the judge told the jury that there was evidence to go to them of grievous bodily harm, and that the question of whether the prisoner intended to inflict grievous bodily harm consequently did not arise. The jury found the prisoner guilty of an aggravated assault, without premeditation, under the influence of passion; and it was held that the assault was intentional in the understanding of the law; that upon the facts, the jury were justified in finding the defendant guilty of an assault with grievous bodily harm, and that the prisoner was properly convicted of that offence. (*w*)

An indictment charging a prisoner with shooting at A. B., with intent to do him grievous bodily harm, is well supported by evidence, showing that he fired a loaded pistol indiscriminately into a group, intending to do grievous bodily harm, and that he hit A. B. (*x*)

In construing the latter part of the 32 & 33 Vic., c. 20, s. 19, we should read the section as though the term "malicious" had been introduced. It is an essential element in a conviction, under this section, that the act which caused

(*u*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 296, per *Draper*, C. J.
(*v*) *Reg.* v. *Magee*, 2 Allen, 14.
(*w*) *Reg.* v. *Sparrow*, 8 U. C. L. J. 55; Bell, 298; 30 L. J. (M.C.) 43.
(*x*) *Reg.* v. *Fretwell*, 33 L. J. (M. C.) 128; L. & C. 443.
(*y*) *Reg.* v. *Ward*, L. R. 1 C. C. R. 356.

the unlawful wounding should have been done maliciously as well as unlawfully. (*y*)

Thus the prosecutor and the prisoner were out at night, in separate punts on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds, notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt, in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light, and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired, apparently, with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding, with intent to do grievous bodily harm, but was found guilty of the misdemeanor of unlawfully wounding, within the above section; and it was held that there was proof of malice which justified the conviction of the prisoner. (*z*)

The Con. Stats. Can., c. 91, s. 37, applied only to common assaults. (*a*)

No words of provocation whatever can amount to an assault. (*b*) To constitute such an assault as will justify moderate and reasonable violence in self-defence, there must be an attempt or offer with force and violence to do a corporal hurt to another, as by striking him with or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitchfork at him, standing within reach of it, or by holding up one's fist at

(*z*) *Reg.* v. *Ward* L. R. 1 C. C. R. 356.
(*a*) *Re McKinnon*, 2 U. C. L. J. N. S. 328, per *A. Wilson*, J.
(*b*) *The Toronto S. V. A. R.* 170.

him, or by drawing a sword, and waving it in a menacing manner. (*c*)

Where therefore some thirty persons, armed and riotously assembled in front of the plaintiff's house, and apparently in the act of breaking into it, threatened to break into it, and assault, tar, feather and ride the plaintiff on a rail, it was held that though the plaintiff believed they were going to break into his house for this purpose, yet he could not justify shooting at them with a pistol, without warning them to desist and depart, but such request to depart would not have been necessary, perhaps, if the aggressors had been actually advancing upon the plaintiff in the attitude of assaulting him, and still less if any of them had actually struck him. (*d*)

The law is properly careful to exact that people shall not on the mere apprehension of violence, which is not immediately threatened, resort to desperate means of defence and shed blood without necessity, though there may be considerable provocation and some show of violence, and, generally speaking, it must be left to the jury to ascertain as a question of fact whether the means of resistance adopted were justified by the nature of the attack. (*e*) If more force and violence be used than necessary to expel a party from a house, after he has been requested, and refused to leave, it cannot be justified. (*f*) Although a party may lawfully take hold of one who declines to leave his house and put him out, yet he has no right to beat him cruelly, not in order to make him go out, but to punish him for not having done so. (*g*)

But there is a manifest distinction between endeavoring to turn a person out of a house into which he has entered quietly, and resisting a forcible attempt to enter; in the

(*c*) *The Toronto S. V. A. R.* 178-9.
(*d*) *Spires* v. *Barrick*, 14 U. C. Q. B. 424, per *Robinson*, C. J.
(*e*) *Ibid.* 424, per *Robinson*, C. J.
(*f*) See *Glass* v. *O'Grady*, 17 U. C. C. P. 233.
(*g*) *Ibid.* 236, per *J. Wilson*, J.; *Davis* v. *Lennon*, 8 U. C. Q. B. 599.

former case a request to depart is necessary, in the latter not. (*h*)

Upon an indictment for assaulting a bailiff of a county court, in the execution of his duty, the production of a county court warrant for the apprehension of the prisoner is sufficient justification of the act of the bailiff, in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant. (*i*)

Moderate correction of a servant or scholar, by his master, is not an assault. But a master has not by law a right to use force in the correction of any servant, but an apprentice. The moderate correction of a servant, who is an infant, may be justified, but the beating of a servant of full age cannot, and will form a sufficient cause or excuse for departure, or for discharge from service by a master, on complaint. Wounding, kicking and tearing a person's clothes do not fall within the scope of moderate correction. (*j*) School-masters have a right of moderate chastisement against disobedient and refractory scholars; but it is a right which can only be exercised when necessary for the maintenance of school discipline and the interests of education, and to a degree proportioned to the nature of the offence committed. Any chastisement exceeding this limit, and springing from motives of caprice, anger or bad temper, constitutes an offence punishable like ordinary delicts. (*k*)

On an indictment charging an aggravated assault, or an offence of a higher nature than an assault, but nevertheless including it, the prisoner may be found guilty of a common assault, for it is not necessary that matter of aggravation stated in the indictment should be proved, and, if not proved, the prisoner may be found guilty of the offence without the circumstances of aggravation. (*l*) Thus a person, in-

(*h*) *Reg.* v. *O'Neill*, 3 Pugsley & B. 49.
(*i*) *Reg.* v. *Davis*, 8 U. C. L. J. 140; L. & C. 64; 30 L. J. (M. C.) 159.
(*j*) *Mitchell* v. *Defries*, 2 U. C. Q. B. 430, per *McLean*, J.
(*k*) *Brisson* v. *Lafontaine*, 8 L. C. J. 173.
(*l*) *Reg.* v. *Taylor*, L. R. 1 C. C. R. 194; 38 L. J. (M. C.) 106.

dicted for inflicting grievous bodily harm and actual bodily harm, may be convicted of a common assault; (*m*) and a charge of assault and beating would be sustained by proof of an aggravated assault, as the aggravation is merely matter of evidence. (*n*)

This offence is a misdemeanor (*o*) and is so punishable. The punishment usually inflicted is fine, imprisonment and sureties to keep the peace. (*p*) The Court of Quarter Sessions has a general power to fine and imprison in case of assault. (*q*)

A charge of assaulting a bailiff in the execution of his duty, being a misdemeanor, is triable at the sessions. (*r*)

An assault may, in certain cases, amount to a capital felony, when, it is apprehended, it could not be tried at the sessions. An assault may be accompanied by violence from which death ensues, and then the offence would be either murder or manslaughter. Or an assault may be accompanied with a violation of the person of a woman against her will, in which case it would be a rape, or though the purpose was not effected, the circumstances might be such as to leave no doubt of an assault with intent to commit a rape, therefore an assault may amount to a capital felony, or a felony, or a misdemeanor, according to the circumstances with which it is accompanied. (*s*)

Kidnapping.—This offence is regulated by the 32 & 33 Vic., c. 20, s. 69. The intent referred to in that section refers to the seizure and confinement in Canada, as well as to kidnapping, and an indictment therefore charging such seizure and confinement, without averring any intent, is defective. (*t*)

(*m*) *Reg.* v. *Oliver*, 8 U. C. L. J. 55; Bell, 287; 30 L. J. (M. C.) 12; *Reg.* v. *Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70.
(*n*) *Re McKinnon*, 2 U. C. L. J. N. S. 329, per *A. Wilson*, J.
(*o*) See *Reg.* v. *Taylor*, L. R. 1 C. C. R. 194.
(*p*) *Ovens* v. *Taylor*, 19 U. C. C. P. 52, per *Hagarty*, J.; *Reg.* v. *O'Leary*, 3 Pugsley, 264.
(*q*) *Ovens* v. *Taylor*, *supra*, 49.
(*r*) *Reg.* v. *Caisse*, 8 L. C. J. 281.
(*s*) *McCurdy* v. *Swift*, 17 U. C. C. P. 139, per *A. Wilson*, J.
(*t*) *Cornwall* v. *Reg.* U. C. Q. B. 106.

CHAPTER V.

OFFENCES AGAINST PROPERTY.

Burglary.—Burglary has been defined to be a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. (*a*)

Both a breaking and entering are necessary to complete the offence, and every entrance into the house, in the nature of a mere trespass, is not sufficient. Thus if a man enter a house by a door or window which he finds open, or through a hole which was made there before, and steal goods, or draw goods out of the house through such door, window, or hole, he will not be guilty of burglary. (*b*) There must either be an actual breaking of some part of the house, in effecting which more or less actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy. (*c*)

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by putting back the leaf of a window with an instrument, and even the drawing or lifting of a latch. (*d*)

Where the door is not otherwise fastened, the turning of the key where the door is locked on the inside, or the unloosing

(*a*) Russ. Cr. 1.
(*b*) *Ibid.* 2.
(*c*) *Ibid.*
(*d*) 2 Russ. Cr. 2-3; *Rex* v. *Owen*, 1 Lewin, 35, per *Bayley, J.*; *Rex* v. *Lawrence*, 4 C. & P. 231; *Rex* v. *Jordan*, 7 C. & P. 432.

any other fastening which the owner has provided, will amount to a breaking. (*e*)

If a man enters by a door or window which he finds open, or through a hole which was made there before, it is not burglary. (*f*)

Where an entry was effected by taking out the glass from a door it was holden to be burglary; (*g*) and where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was holden to be burglary, although there was an outer shutter which was not put to. (*h*) So, where he raised a sash window which was shut down close but not fastened, though it had a hasp which might have been fastened. (*i*) And where a window opening upon hinges and fastened with wedges, but so that, by pushing against it, it could be opened, was opened, it was holden to be burglary. (*j*) So, where a party thrust his arm through the broken pane of a window, and in doing so broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was holden to be a sufficient breaking. (*k*) Lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. (*l*) If a window be partly open, but not sufficiently to admit a person, the raising of it so as to admit a person is not a breaking of the house. (*m*)

It is burglary if a man obtain entrance to a house by means of the chimney, for, though open, it is as much closed as the nature of the structure will admit. (*n*) But an entry through a hole in the roof is not burglary, for a chimney is a necessary

(*e*) 2 Russ. Cr. 3.
(*f*) *Ibid.* 2; and see *Rex* v. *Lewis*, 2 C. & P. 628; *Reg.* v. *Spriggs*, 1 M. & Rob. 357.
(*g*) *Reg.* v. *Smith*, R. & R. 417.
(*h*) *Reg.* v. *Haines*, R. & R. 451.
(*i*) *Reg.* v. *Hyams*, 7 C. & P. 441.
(*j*) *Reg.* v. *Hall*, R. & R. 355.
(*k*) *Reg.* v. *Robinson*, 1 Mood. C. C. 377.
(*l*) *Reg.* v. *Russell*, 1 Mood. C. C. 377.
(*m*) *Reg.* v. *Smith*, 1 Mood. C. C. 178; Arch. Cr. Pldg. 497.
(*n*) 2 Russ. Cr. 4; *Rex* v. *Brice*, R. & R. 450.

opening and requires protection, whereas if a man choose to have a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. (*o*)

As to breaking by fraud, where an act is done in *fraudem legis* the law gives no benefit to the party, so that if thieves obtain entrance under pretence of business, as to arrest a suspected person or the like, if the other ingredients are also in the offence, it will amount to burglary. (*p*)

It is also burglary if the entrance is obtained by conspiracy, as if A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door and lets him in, it is burglary in both. (*q*)

But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. (*r*)

There may also be a breaking in law where, in consequence of violence commenced or threatened, the owner, either from apprehension of the violence, or with a view to repel it, opens the door through which the thief enters. (*s*) With respect to the entry, any, even the least entry, either with the whole or any part of the body, hand or foot, or with any instrument or weapon introduced for the purpose of committing a felony, will be sufficient. (*t*)

The 32 & 33 Vic., c. 21, s. 53, renders it a felony to enter any dwelling-house in the night, with intent to commit any felony therein, and thus dispenses with proof of a breaking under this clause. Sec. 50 provides that whosoever enters the dwelling-house of another, with intent to commit any felony therein, or being in such dwelling-house commits any felony therein, and in either case breaks out of the said dwelling-house in the night, is guilty of burglary.

(*o*) *Rex* v. *Spriggs*, 1 M. & Rob. 357.
(*p*) 2 Russ. Cr. 9.
(*q*) *Ibid.*, 10.
(*r*) *Reg.* v. *Johnson*, C. & Mar. 218.
(*s*) 2 Russ. Cr. 8.
(*t*) *Ibid.* 11 ; see *Reg.* v. *Davis*, R. & R. 499 ; *Reg.* v. *Bailey*, R. & R. 341.

Every house for the dwelling and habitation of man is taken to be a dwelling-house in which burglary may be committed; (*u*) and this dwelling-house formerly included the outhouses, such as warehouses, barns, stables, cow-houses, or dairy-houses, though not under the same roof or joining contiguous to the dwelling-house, provided they were parcel thereof. But now the 32 & 33 Vic., c. 21, s. 52, enacts that such houses shall not be considered part of the dwelling-house for the purpose of burglary, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other. (*v*)

Unless the owner has taken possession of the house by inhabiting it personally or by some one of his family, it will not have become his dwelling-house as applied to the offence of burglary. (*w*) But the occasional or temporary absence of the owner will not prevent it from being his dwelling-house. (*x*) However, in these cases there must be an intention, on the part of the owner, to return to his house, *animus revertendi*. (*y*)

As to the time of committing the offence, it is settled that in the daytime there can be no burglary. (*z*) If a house is entered in the daytime it is house-breaking and not burglary. By the 32 & 33 Vic., c. 21, s. 1, it is enacted that so far as regards the offence of burglary the night shall be considered to commence at nine o'clock in the evening of each day, and end at six o'clock in the morning of the next succeeding day.

The breaking and entering need not be both in the same night, provided the breaking be with the intent to enter,

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(*u*) 2 Russ. Cr. 15.
(*v*) See *Reg.* v. *Burrowes*, 1 Mood. C. C. 274; *Reg.* v. *Higgs*, 2 C. & K. 322; *Reg.* v. *Jenkins*, R. & R. 224.
(*w*) 2 Russ. Cr. 21.
(*x*) *Idid.* 23.
(*y*) *Ibid.* 4 Bla. Com. 225.
(*z*) 4 Bla. Com. 224.

and the entry with the intent to commit a felony. (*a*) But the breaking and entry must both be committed in the night-time. If the breaking be in the day and the entry in the night, or the breaking in the night and the entering in the day, it is no burglary. (*b*)

As to the intent, the offence must be with intent to commit some felony within the house, whether such felonious intent be executed or not ; (*c*) and when the breaking is a breaking out of the dwelling-house in the night there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house. (*d*)

If the entry were only for the purpose of committing a trespass, the offence will not be burglary. But if a felony be committed, the act will be *prima facie* pregnant evidence of an intent to commit it. (*e*) And it is a general rule that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. (*f*) But it makes no difference whether the offence intended were felony at common law, or only created so by statute, on the ground that, when a statute makes an offence felony, it incidently gives it all the properties of felony at common law. (*g*)

The offence of house-breaking is very nearly allied to that of burglary, the principal distinctions between them being that the latter is committed by night, the former by day ; and by the express language of the statute, the breaking and entering, in case of the former, must be accompanied with some larceny, and an intent to commit a felony is not sufficient.

(*a*) *Reg.* v. *Smith*, R. & R. 417 ; see *Reg.* v. *Jordan*, 7 C. & P. 432 ; Arch. Cr. Pldg. 490.
(*b*) *Reg.* v. *Smith*, *supra*.
(*c*) *Ante* p. 225.
(*d*) *Ante* p. 227.
(*e*) See *Reg.* v. *Locoet*, Kel. 30.
(*f*) 2 Russ. Cr. 41.
(*g*) *Ibid.* 43.

A man cannot be indicted for a burglary in his own house. Therefore, if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of larceny. (*h*)

The 32 & 33 Vic., c. 21, s. 54, makes it felony to break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, though such building is not part thereof, according to the law of burglary. It is also felony for any one, being in any such building, to commit any felony therein, and break out of the same. Sec. 56 makes it felony to break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein; and sec. 57 provides that whosoever is indicted for any burglary, where the breaking and entering are proved at the trial to have been made in the daytime, and no breaking out appears to have been made in the night-time, or where it is left doubtful whether such breaking and entering, or breaking out, took place in the day or night-time, shall be acquitted of the burglary, but may be convicted of the offence specified in the next preceding section. By sec. 58, it shall not be available, by way of defence, for a person charged with the offence specified in the next preceding section but one, to show that the breaking and entering were such as to amount in law to burglary, provided that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be open to the court, before whom the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal, on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering their verdict, the same shall be recorded, to-

(*h*) Arch. Cr. Pldg. 496.

gether with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary.

Robbery.—This offence consists in the felonious taking of money or goods, of any value, from the person of another, or in his presence, against his will, by violence, or putting him in fear of purpose to steal the same. (*i*)

Robbery is, in effect, larceny, aggravated by circumstances of force, violence, or putting in fear; and a party indicted for robbery may be convicted of larceny, as the latter crime is included in the former. (*j*) Force is a necessary ingredient in robbery, but not in larceny. (*k*)

Merely snatching property from a person unawares, and running away with it, will not be robbery, (*l*) because fear cannot, in fact, be presumed in such a case. The rule appears to be well established that no such sudden taking or snatching is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it. (*m*)

The fear must precede the taking, for if a man privately steal money from the person of another, and afterwards keep it, by putting him in fear, this is no robbery, for the fear is subsequent to the taking. (*n*)

The goods must be of some value to the party robbed; and therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was holden by the judges not to be robbery, because the note was of no value to the prosecutor, who had not even a property in or possession of the paper on which it was written. (*o*) Under such circumstances, however, the defendant might now be indicted for the felony described in the 32 & 33 Vic., c. 21, s. 47.

(*i*) *Re Burley*, 1 U. C. L. J. N. S. 50, per *J. Wilson*, J.
(*j*) *Reg.* v. *McGrath*, L. R. 1 C. C. R. 210-11, per *Blackburn*, J.
(*k*) *Ibid.*
(*l*) *Reg.* v. *Baker*, 1 Leach, 290; *Reg.* v. *Walls*, 2 C. & K. 214.
(*m*) Arch. Cr. Pldg. 413-14.
(*n*) *Ibid.* 416.
(*o*) *Ibid.*; *Reg.* v. *Smith*, 2 Den. 449; 21 L. J. (M. C.) 111.

The goods must be taken either from the person of the prosecutor, or in his presence, (*p*) and against his will. If the party robbed consent to the robbery, the offence will not be made out; but it is sufficient to prove that the goods were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. (*q*)

The goods must appear to have been taken *animo furandi*, as in other cases of larceny; and if a person, under a *bona fidê* impression that the property is his own, obtain it by menace, that is a trespass, but not robbery. (*r*)

An actual taking, either by force, or upon delivery, is necessary—that is, it must appear that the robber actually got possession of the goods. The goods must also be carried away, as in other cases of larceny; but if the property be once taken, the offence will not be purged by the robbers delivering it back to the owner. (*s*)

Upon an indictment for robbery, or for an assault with intent to rob, in different counts, it has been held that the prosecutor ought to elect upon which count he would proceed. (*t*) But now, on the trial of an indictment for robbery, the jury may convict of an assault with intent to rob, (*u*) so that the necessity of several counts in such case is obviated. (*v*)

The proviso in s. 17 of the 32 & 33 Vic., c. 21, was intended to meet a difficulty which arose in *Reg.* v. *Skeen.* (*w*)

Larceny.—Theft is wrongfully obtaining possession of any movable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal

(*p*) See *Reg.* v. *Francis*, 2 Str. 1015; *Reg.* v. *Hamilton*, 8 C. & P. 49.
(*q*) Arch. Cr. Pldg. 416-17.
(*r*) *Ibid.*; *Reg.* v. *Hall*, 3 C. & P. 409.
(*s*) Arch. Cr. Pld. 417.
(*t*) *Reg.* v. *Gough*, 1 M. & Rob. 71.
(*u*) 32 & 33 Vic., c. 21, s. 40.
(*v*) Arch. Cr. Pldg. 70.
(*w*) Bell, 97; 28 L. J. (M. C.) 91.

with it as the property of some person other than the owner. (*x*) Larceny has been also defined as the wrongful or fraudulent taking, and carrying away, by any person, of the mere personal goods of another, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. (*y*)

The goods taken must, in the absence of any express statutory enactment, be personal goods, for none other can be the subject of larceny at common law. (*z*) Bonds, bills, etc., being mere *choses* in action, are not the subject of larceny at common law, for they are of no intrinsic value. (*a*) But the 32 & 33 Vic., c. 21, s. 15, and following sections, now render the stealing, destroying, cancelling, obliterating, or concealing of any valuable security, or of any deed relating to land, or any record of any court of justice, or other legal documents, felony.

The police court of Toronto is a court of justice within the meaning of these sections. (*b*)

The indictment under these sections must particularize the kind of valuable security stolen. (*c*)

When a note, which had been by mistake made out in favor of the defendant, and on discovery of the error returned by him unstamped and unendorsed, and afterwards stolen by him, and by him stamped and endorsed, it was held not a valuable security. (*d*)

A party cannot commit larceny of a bond made by another person to himself, and, especially, he could not be guilty of larceny in stealing a bond from the obligor because a bond in the hands of the obligor could be of no value to him, as a bond, under any possible circumstances;

(*x*) Cr. Law Comrs. 3rd Rep.
(*y*) *Reg.* v. *McGrath*, L. R. 1 C. C. R. 209, per *Kelly*, C. B.; 39 L. J. (M. C.) 7.
(*z*) Arch. Cr. Pldg. 316.
(*a*) *Ibid.* 317.
(*b*) *Reg.* v. *Mason*, 22 U. C. C. P. 246.
(*c*) *Reg.* v. *Lowrie*, L. R. 1 C. C. R. 61; 36 L. J. (M. C.) 24.
(*d*) *Scott* v. *Reg.*, 2 S. R. C. 349.

and when the 2 Geo. II., c. 25, was in force, no other than a bond for the payment of money could be the subject of larceny. (*e*)

Certificates treated and dealt with on the London Stock Exchange, as scrip of a foreign railway, are "valuable security" within the 7 & 8 Geo. IV., c. 29, s. 5, and the subject of larceny. (*f*)

On an indictment for stealing a piece of paper, the defendant could not be convicted of stealing an agreement, though unstamped, for building certain cottages, the work under which agreement was actually in progress. (*g*)

Larceny cannot be committed of things which are not the subject of property. (*h*) But partridges hatched and reared by a common hen, while they remain with her, and from their inability to escape, are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confind in a coop, or otherwise, but allowed to wander with her brood about the premises of her owner. (*i*)

Dogs not being the subject of larceny at common law, are not chattels within 7 & 8 Geo. IV., c. 29, s. 53, (*j*)

There is no absolute property in animals *ferœ naturæ*, but only a special or qualified right of property—a right *rationi soli* to take and kill them; and when killed upon the soil, they become the absolute property of the owner of the soil.

When the thing is not, in its original state, the subject of larceny, it is necessary that the act of taking should not be one continuous act with the act of severance, or other act, by which the thing becomes the subject of larceny. (*k*)

(*e*) *Caverley* v. *Caverley*, 3 U. C. Q. B. O. S. 341, per *Robinson*, C. J.
(*f*) *Reg.* v. *Smith*, 2 U. C. L. J. 59; Dears. C. C. 561.
(*g*) *Reg.* v. *Watts*, Dears. 326; 23 L. J. (M. C.) 56; see now 32 & 33 Vic. c. 21, s. 15.
(*h*) Arch. Cr. Pldg. 318.
(*i*) *Reg.* v. *Shickle*, L. R. 1 C.C.R. 158; 38 L.J. (M.C.) 21; *Reg.* v. *Cory*, 10 Cox, 23, followed.
(*j*) *Reg.* v. *Robinson*, 5 U. C. L. J. 143; Bell, 34; 28 L. J. (M.C.) 58.
(*k*) *Reg.* v. *Townley*, L. R. 1 C. C. R. 317, per *Bovill*, C. J.

Thus where poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown, and placed the rabbits in a ditch upon the same land, some of the rabbits in bags and some strapped together; having no intention of abandoning the wrongful possession of the rabbits which they had acquired by taking them, but placing them in the ditch as a place of deposit till they could conveniently remove them, which they did about three hours afterwards; it was held that the taking of the rabbits and the removal of them was one continuous act, and that the removal was therefore not larceny. (*l*)

But if the goods vest in the owner, in the interval between the severance and the removal, it is larceny. (*m*) Potatoes severed from the soil, or dug and in pits, are clearly the subject of larceny. (*n*)

The distinction between grand and petty larceny has been abolished, and now all larcenies, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the distinction between grand and petty larceny was abolished. (*o*)

There must be an actual or constructive taking of the goods, on the ground that larceny includes a trespass. (*p*) There must also be a carrying away; but, as the felony lies in the very first act of removing the property, the least removing of the thing taken from the place where it was before, with intent to steal it, is a sufficient asportation. (*q*)

There must also be an *animus furandi*: *i. e.*, a felonious intent to take the property of another against his will. The essence of the offence is knowingly taking the goods of another against his will. (*r*) If the goods were taken with the consent

(*l*) *Reg.* v. *Townley*, L. R. 1 C. C. R. 315.
(*m*) *Ibid.* 318, per *Bramwell*, B.
(*n*) *Hunter* v. *Hunter*, 25 U. C. Q. B. 146, per *Hagarty*, J.
(*o*) 32 & 33 Vic., c. 21, s. 2.
(*p*) 2 Russ. Cr. 152.
(*q*) *Ibid.*; see also *Reg.* v. *Townley*, L. R. 1 C. C. R. 319, per *Blackburn*, J.
(*r*) *Reg.* v. *McGrath*, L. R. 1 C. C. R. 210-11, per *Blackburn*, J.; see *Reg.* v. *Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8.

of the owner then the property would pass, and according to a distinction to be afterwards pointed out, it would not be larceny. If not taken feloniously, the taking would amount only to a bare trespass.

Thus, where the prisoner's goods were seized under warrants of execution of a county court, and were in possession of a bailiff, and the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him, without any intent otherwise to make use of them, it was held that the prisoner was not guilty of larceny. (*s*) But in such case the prisoner might be guilty of taking the warrants for a fraudulent purpose, within the meaning of the 32 & 33 Vic., c. 21, s. 18, by which the stealing of any records is made felony. (*t*)

Returning the goods may be evidence to negative the *animus furandi* at the time of taking them, but it is no evidence that the prisoner intended to return them when taken. (*u*)

As to larceny of lost property, the general rule seems to be that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. (*v*) It is necessary that the prisoner, at the time of finding, should believe that the owner can be ascertained, and without this, an intention to appropriate, at the time of the finding, will not make the

(*s*) *Reg.* v. *Bailey*, L. R. 1 C. C. R. 347.
(*t*) *Ibid.*
(*u*) *Reg.* v. *Cummings*, 4 U. C. L. J. 189, per *Sprague*, V. C.; *Reg.* v. *Trebilcock*, 4 U. C. L. J. 168; Dears. & B. 453; 27 L. J. (M. C.) 103.
(*v*) *Reg.* v. *Thurborn*, 1 Den. 388; 2 C. & K. 831; 18 L. J. (M. C.) 140; affirmed in *Reg.* v. *Glyde*, L. R. 1 C. C. R. 139; 37 L. J. (M. C.) 107.

prisoner guilty of larceny, though he ascertained the name of the owner before converting to his own use (*w*)

In these cases the first consideration is the prisoner's ground for believing that the goods were abandoned. (*x*)

There is a distinction between property which is lost or abandoned, and that which is only mislaid. If property is abandoned, any one may acquire a right against the owner, (*y*) and, as above explained, a person may, in certain cases, acquire a lawful title to lost property, and cannot, therefore, be found guilty of larceny. But if property is only mislaid or left in some place of deposit or security, a person fraudulently appropriating it is guilty of larceny.

Thus where a purchaser at the prisoner's stall left his purse in it, and a stranger pointed out the purse to the prisoner, supposing it to be hers, and reproved her for carelessness, when she put it in her pocket, and afterwards concealed it, and on the return of the owner denied all knowledge of it. Upon an indictment for larceny, the jury found that the prisoner took up the purse, knowing that it was not her own, intending at the same time to appropriate it to her own use, but that when she took it she did not know who was the owner. She was held properly convicted, and that the purse so left was not lost property. (*z*)

Next, the prisoner must, at the time of finding, have the means of ascertaining who the owner is, or reasonably believe that he can be found.

Upon an indictment for stealing a note, it was found by the jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged, nor was there evidence of any other circumstances which would disclose to the prisoner, at the time when he found it, the means of discovering the owner. It was held

(*w*) *Reg.* v. *Glyde*, *supra*.
(*x*) *Ibid.* 144, per *Cockburn*, C. J.
(*y*) See *Reg.* v. *Glyde*, *supra*.
(*z*) *Reg.* v. *West*, 1 U. C. L. J. 17 ; Dears. 402 ; 24 L. J. (M. C.) 4.

that he could not be convicted of larceny, although the jury being asked whether, at or after the time of finding, he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe the owner could be traced. (*a*)

Lastly, there must be evidence of a felonious intention to appropriate the property *at the time of finding*; and evidence of a subsequent intention is insufficient. (*b*)

Thus, where the prisoner, a depositor in a Post Office savings bank, in which 11s. stood to his credit, gave notice to withdraw 10s., and the clerk at the office of payment, by mistake referring to a letter of advice for £8 16s. 10d., laid the latter sum upon the counter, which the prisoner, *animo furandi*, took up and appropriated to his own use, it was held that he was guilty of larceny. (*c*)

But where a post letter, directed to J. D., containing a Post Office order, was misdelivered to J. D., one of the prisoners, who took it to W. D., the other prisoner, who read it to him. Upon hearing its contents, J. D. said that the letter and order were not for him, when W. D. advised him, notwithstanding, to keep the letter, and get the money. Both prisoners accordingly applied at the Post Office, and obtained the money. It was held that a conviction of the prisoners for stealing the order must be set aside, (*d*) as there was no *animus furandi* at the time of taking.

It has been already stated that every larceny involves a trespass, and that the taking must be *animo furandi* and *invito domini*. If the possession of the goods is lawfully obtained, there can be no larceny, nor can there be any larceny if the property in the goods is divested. The property in goods can only pass by a contract, which requires the assent of two minds; but it is of the essence of the offence of larceny that the property be obtained against

(*a*) *Reg.* v. *Dixon*, 2 U. C. L. J. 19; Dears. 580; 25 L. J. (M. C.) 39.
(*b*) *Reg.* v. *Christopher*, 5 U. C. L. J. 143; Bell, 27; 28 L. J. M. C.) 35.
(*c*) *Reg.* v. *Middleton*, L. R. 2 C. C. R. 38; see also *Reg.* v. *Ewing*, 21 U. C. C. P. 523.
(*d*) *Reg.* v. *Davies*, 2 U. C. L. J. 137; Dears. 640; 25 L. J. (M. C.) 91.

the will of the owner. If, therefore, the owner intends to part with the property, by virtue of which intention the property would pass, there can be no larceny, however fraudulent the means by which the property is obtained.

Or the law may be stated thus: When the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, or, in some cases, does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them, contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of larceny. But where the owner voluntarily parts with the possession *and property* of the goods, and intends to vest them in the defendant, because he relies upon the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the prisoner cannot be convicted of larceny. (*e*)

Where a servant is intrusted with his master's property, with a general or absolute authority to act for his master in his business, and is induced, by fraud, to part with his master's property, the person who is guilty of the fraud, and so obtains the property, is guilty of obtaining it by false pretences, and not of larceny, because, to constitute larceny, there must be a taking against the will of the owner, or of the owner's servant, duly authorized to act generally for the owner. But where a servant has no such general or absolute authority from his master, but is merely entrusted with the possession of his goods for a special or limited purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud, and so obtains the property, is guilty of larceny, because the servant has no authority to part with the property in the goods, except to fulfil the special purpose for which they were entrusted to him. (*f*)

(*e*) *Reg.* v. *Bertles*, 13 U. C. C. P. 610, per *Richards*, C. J.
(*f*) *Reg.* v. *Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8.

The cashier of a bank is a servant having such general authority; and if he is deceived by a forged order, and parts with the money of the bank, he parts intending to do so with the property in the money; and the person knowingly presenting such forged order is guilty of obtaining the money by false pretences, and not of larceny. (*g*)

The 32 & 33 Vic., c. 21, s. 93, has amended the law on this point. The subtle distinction between these offences, which this Act intended to remedy, was, that if a person, by fraud, induced another to part with the *possession only* of his goods, it was larceny: while, if with the *property as well as* the possession, it was not. (*h*)

The following case will serve to make clearer the distinction:—

The prisoner, with another man, went into the shop of the prosecutrix, and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into the money drawer, and put down 1s. 6d. in silver and fivepence in copper, in change, which the prisoner took up. The other man said, "You need not have changed," and threw down a penny, which the prisoner took up, and the latter then put down a sixpence in silver and sixpence in copper on the counter, saying "Here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money drawer, and put it on the counter, when the prisoner said to her, "You may as well give me the two-shilling piece, and take it all." The prosecutrix took from the money drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin, and the prosecutrix the silver sixpence and the sixpence in copper, put down by the prisoner, and also the shilling put down by herself, and was putting them into the money drawer, when she said she had

(*g*) *Reg.* v. *Prince, supra.*
(*h*) *Reg.* v. *Kilham*, L. R. 1 C. C. R. 263, per *Bovill*, C. J.

only got one shilling's worth of the prisoner's money; but at that moment the prisoner's companion drew away her attention, and, before she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop. It was held that the transaction was not complete, and that the property in the florin had not passed to or revested in the prisoner, and, on that ground, he was rightly convicted of larceny. (*i*)

A. acted as auctioneer at a mock auction. He knocked down some cloth for 26s. to B., who had not bid for it, as A. knew. B. refused to take the cloth, or to pay for it, and A. refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A. and took the cloth. She paid the 26s. because she was afraid. A. was indicted for, and convicted of feloniously stealing the 26s. It was held that the conviction was right, because, if the force used to B. made the taking a robbery, all the elements of larceny were included in that crime; and if not sufficient to constitute a robbery, the taking of the money, nevertheless, amounted to larceny, as B. paid the money to A. against her will, and because she was afraid. (*j*)

A. & B., by false representations, induced C. to become the purchaser of a dress for 25s. They then took one guinea out of her hand, she being taken by surprise, and neither consenting nor resisting, and left with her a dress of considerably inferior value, but refused to give her one which they had promised to give, if she would buy that. Upon a case reserved, as to whether the facts warranted a verdict of guilty of larceny, it was held that they did; the court being bound to assume that it was part of the fraud to obtain the property by a false sale; and, if so, there was no contract, but a fraud, whereby the felony was committed. (*k*)

A quantity of wheat, not the property of the prosecutors,

(*i*) *Reg.* v. *McKale*, L. R. 1 C. C. R. 125; 37 L. J. (M. C.) 97.
(*j*) *Reg.* v. *McGrath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7.
(*k*) *Reg.* v. *Morgan*, 1 U. C. L. J. 37; Dears. 395.

having been consigned to their care, was deposited in one of their storehouses, under the care of a servant, E., who had authority to deliver only to the orders of the prosecutors, or C., their managing clerk. The prisoner, a servant of the prosecutors, at another storehouse, by representation to E. that he had been sent by C. for some of the wheat and was to take it to the Brighton Railway, which representation was entirely false, obtained the key from E., and was allowed to remove five quarters, which he subsequently disposed of for his own use, the prisoner assisting to put the five quarters into the cart, in which it was conveyed away, and going with it. The prisoner was held guilty of larceny; for the wheat was delivered to him for a special purpose, namely, to be taken to the Brighton Railway, and the property remained in the prosecutors throughout, as bailees. (*l*)

But where the servants of a glovemaker broke open a storeroom on their master's premises, and removed to another room, in the same premises, a quantity of finished gloves, with the intent of fraudulently obtaining payment for them, as for so many gloves finished by themselves, it was held that they were not guilty of larceny, because there was no intention to divest the property in the goods. (*m*)

Where a man having *animus furandi* obtains, in pursuance thereof, possession of the goods by some trick or artifice, the owner not intending to part with his entire right of property, but with the temporary possession only, this is considered such a taking as to constitute larceny. (*n*)

Thus it was the course of business at a colliery, where coal was sold by retail, to take the carts, when loaded, to a weighing machine in the colliery yard, where they were weighed, and the price of the coal was paid. The prisoner having gone to the colliery with a fraudulent intent, a servant of the prosecutor, upon the prisoner saying he wanted a load of the

(*l*) *Reg.* v. *Robins*, 1 U. C. L. J. 17; Dears. C. C. 418.
(*m*) *Reg.* v. *Poole*, 4 U. C. L. J. 73; 27 L. J. (M. C.) 53; Dears. & B. 345.
(*n*) Arch. Cr. Pldg. 333.

best soft coal, loaded prisoner's cart with soft coal, and went away, leaving him to take it to be weighed and pay for it. The prisoner then fraudulently covered over the soft coal with slack, an inferior coal, and by this trick, and by saying that the coal in the cart was slack, induced the weighing clerk, who did not know that the cart contained soft coal, to weigh it as slack, and charge the prisoner accordingly. It was held that the prisoner had obtained possession of the soft coal by a trick, and that he was properly convicted of larceny. (*o*)

A policeman, late at night, met the prosecutor, who had just parted from a prostitute, and told him that he must go with him (the policeman) to gaol, for he was under a penalty of £1 for talking to a prostitute in the street; but if he would give him 5s., he might go about his business. The prosecutor gave him 4s. 6d., but, while he was searching for the other 6d., the inspector came. It was held to be no answer to the charge, that all the money had not been obtained. The offence was a larceny, and was also a menace within the meaning of the Act. (*p*)

Where a porter was employed by the vendor of goods to deliver them to the vendee, but had no authority to receive the money for them, and the vendee, nevertheless, voluntarily, and without solicitation, paid the porter: it was held by a majority of the judges that a conviction for larceny was not sustainable, (*q*) as the possession of the money was lawfully obtained.

In the case of bailment or contract of hiring, it must have been made to appear that the *animus furandi* existed at the time of receiving the chattel, and was not induced by anything that happened afterwards. (*r*)

But by the 32 & 33 Vic., c. 21, s. 3, the law in this re-

(*o*) *Reg.* v. *Bramley*, 7 U. C. L. J. 331; L. & C. 21.
(*p*) *Reg.* v. *Robertson*, 11 L. T. Rep. N. S. 387; L. & C. 483; 34 L. J. (M. C.) 35; see also *Reg.* v. *Ewing*, 21 U. C. Q. B. 523, as to what constitutes larceny.
(*q*) *Reg.* v. *Wheeler*, 14 W. R. 848.
(*r*) *Pease* v. *McAloon*, 1 Kerr, 116, per *Parker*, J.

spect has been altered, and in cases of bailment a felonious intent, at the time of obtaining, is no longer necessary to constitute larceny.

Even before this statute, although the goods had, in the first instance, been obtained without a felonious intent, yet if the possession of them was obtained by a trespass, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. (*s*)

A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to redeliver the very same chattel or money. (*t*)

The prisoner, a carrier, was employed by the prosecutor to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in the list, to whom only he was authorized to deliver them. Having fraudulently sold some of the coals, and appropriated the proceeds, he was held to have been properly convicted of larceny as a bailee. (*u*)

And a prisoner who hired a pair of horses from a livery stable, to go to a particular place, and afterwards absconded with them, not intending at first to steal, but, having accomplished the object of hiring, made up his mind to convert them to his own use, was held properly convicted on an indictment for larceny, in the ordinary form. (*v*)

But the lessee of a pawn who sells it, is not guilty of larceny, under the above clause. (*w*)

A., the proprietor of a quantity of broom-corn, delivered it to B., under the agreement that when B. should have manufactured it into brooms, he should not sell them, but that A.'s clerk should sell them on A.'s account; that A. should deduct his advances from the proceeds of the sale of the

(*s*) See *Reg.* v. *Riley*, Dears. 149; 22 L. J. (M. C.) 48; Arch. Cr. Pldg. 340.
(*t*) *Reg.* v. *Hoare*, 1 F. & F. 647; *Reg.* v. *Garrett*, 2 F. & F. 14; *Reg* v. *Hassell*, L. & C. 58; 30 L. J. (M. C.) 175.
(*u*) *Reg.* v. *Davies*, 14 W. R. 679; 10 Cox, 239.
(*v*) *Reg.* v. *Tweedy*, 23 U. C. Q. B. 120.
(*w*) *Gould* v. *Cowan*, 17 L. C. R. 46.

brooms, and B. should have the balance. B. supplied the smaller material requisite in working up the broom-corn into brooms. B. did not keep his agreement with A., but manufactured the brooms and converted them to his own use. It was held that A.'s delivery of the broom-corn to B. was a bailment to him, and that B.'s fraudulently converting it to his own use was larceny, in the terms of Con. Stats. Can., c. 92, s. 55. (*x*)

Money is property of which a person can be bailee, so as to make him guilty of felony if he appropriates it to his own use. (*y*)

And when a clerk, in performance of his duty, places money received by him in a safe, the property of his employers, his exclusive possession of that money ceases, even though the office containing the safe be his, and a subsequent appropriation of any of that money will amount to larceny. (*z*)

It seems that a married woman may be a bailee within 32 & 33 Vic., c. 21, s. 3. (*a*)

If the goods of the husband be taken with the consent or privity of the wife, it is not larceny; (*b*) and this even though she has been guilty of adultery. (*c*) Still, the fact of her being an adulteress might go to show a revocation of her authority to dispose of her husband's goods; and if others acted in concert with her in taking, that might amount to larceny on the part of those others. (*d*)

And where the prisoner was indicted for stealing certain chattels from his master, while in his employment, it was proved that he went off with his master's wife, *animo adulterii*, and knowingly took his master's property with him. On objection for the prisoner that he was acting under the control

(*x*) *Reg.* v. *Lebœuf*, 9 L. C. J. 245.
(*y*) *Reg.* v. *Massey*, 13 U. C. C. P. 484.
(*z*) *Reg.* v. *Wright*, 4 U. C. L. J. 167; Deara. & B. 431; 27 L. J. (M. C.) 65; and see *Reg.* v. *Hennessy*, 35 U. C. Q. B. 603.
(*a*) *Reg.* v. *Robson*, L. & C. 93; 31 L. J. (M. C.) 22; Arch. Cr. Pldg. 341.
(*b*) *Reg.* v. *Harrison*, 1 Leach, 47; *Reg.* v. *Avery*, 5 U. C. L. J. 215; Bell, 150; 28 L. J. (M. C.) 185.
(*c*) *Reg* v. *Kenny*, L. R. 2 Q. B. D. 307.
(*d*) *Ibid.*, per *Kelly*, C. B.

of its mistress, who could not be charged with stealing from her husband, and that, therefore, the charge could not be sustained, the court sustained the conviction. (*e*)

A servant and a bailee, at common law, are in a different position, for a bailee has the possession of the goods entrusted to him, a servant only the custody. (*f*) A servant, therefore, not having the lawful possession of his master's goods, might be guilty of larceny independently of the statute.

And where a servant, whose duty it was to pay his master's workmen, and, for this purpose, to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was, in fact, necessary to pay the workmen; intending at the time to appropriate the balance to his own use, which he afterwards did; it was held that, whether the obtaining the money in the first instance was larceny, or obtaining the money by false pretences, the money, while it remained in the prisoner's custody, was the property and in the possession of the master, the prisoner being the servant of the latter, and therefore the appropriation of it by the prisoner was larceny. (*g*)

The 32 & 33 Vic., c. 21, s. 38, enacts that "Whosoever, being a member of any copartnership, owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles, or unlawfully converts the same or any part thereof to his own use, or that of any person other than the owner, shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such copartnership, or one of such beneficial owners."

This section has been held practically inoperative in the Province of Quebec, as a partner, having a right, both of

(*e*) *Re Mutters*, 13 W. R. 326; L. & C. 511; 34 L. J. (M. C.) 54.
(*f*) *Reg.* v. *Cooke*, L. R. 1 C. C. R. 300, per *Bovill*, C. J.
(*g*) *Ibid.* 295; but see *Reg.* v. *Thompson*, 32 L. J. (M. C.) 57; L. & C., 233.

possession and property, in the joint goods, the elements of larceny and its kindred offences are wanting. (*h*) This technical difficulty is precisely the evil which the section was intended to remedy, and according to Lord Coke's rule, is the consideration which should determine its construction.

Previously to the passing of this section, it was held in the same province, that a shareholder in an incorporated company could not commit larceny from the company, nor be guilty of obtaining its money by false pretences, on the ground that he was a joint owner of its funds and property. (*i*)

It would seem that a party cannot be convicted under the 32 & 33 Vic., c. 21, s. 26, for stealing fruit, "growing in a garden," unless the bough of the tree upon which the fruit was hanging was within the garden. It is not sufficient that the root of the tree is within the garden. (*j*)

The 32 & 33 Vic., c. 21, s. 25, applies only to trees attached to the freehold, not to trees made into cordwood. (*k*)

In estimating the amount of the injury, under section 21 of same statute, the injury done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction. (*l*)

Before the passing of the 32 & 33 Vic., c. 21, ss. 5 and 6, it was necessary that there should be a separate indictment for each act of larceny, or the prosecutor must have proved that the articles were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction, otherwise the court would have put the prosecutor to elect for which act of larceny he would proceed. (*m*) But by this statute, three different acts may now be proved on one indictment for larceny. The question, whether the several

(*h*) *Reg.* v. *Lowenbruck*, 18 L. C. J. 212.
(*i*) *Reg.* v. *St. Louis*, 10 L. C. R. 34.
(*j*) *McDonald* v. *Cameron*, 4 U. C. Q. B. 1; see 4 & 5 Vic., c. 25, s. 34.
(*k*) *Reg.* v. *Caswell*, 33 U. C. Q. B. 303.
(*l*) *Reg.* v. *Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45.
(*m*) *Reg.* v. *Smith*, Ry. & M. 295; Arch. Cr. Pldg. 315.

acts are several takings or only one, is the same as before that statute. (*n*)

Before the section is applicable, it must be established that there were takings at different times, within the six months, which are to be calculated from the first to the last of such takings. (*o*)

Where gas was stolen by means of a pipe, which was joined to the main and always remained full, the gas being turned off only at the burners, it was held to be a continuous taking. (*p*)

The 32 & 33 Vic., c. 21, s. 112, provides for the punishment of persons bringing into or having in their possession in Canada, knowingly, any property stolen, embezzled, converted or obtained by fraud or false pretences, in any other country, in such manner that the stealing, etc., in like manner in Canada *would, by the laws of Canada*, be a felony or misdemeanor.

The Court of Queen's Bench had, at common law, no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. The 21 Hy. VIII., c. 11, and 32 & 33 Vic., c. 21, s. 113, only confer this jurisdiction on the court before whom the felon has been convicted. (*q*)

Where the defence to a charge of larceny was that the goods were the prisoner's own, and the jury brought in a verdict of not guilty, it was held to be a virtual finding that the goods were not the property of the prosecutor, and, therefore, that the presiding judge could not order restitution. (*r*)

If, upon an indictment for stealing, as the servant of the prosecutor, money alleged to be his property, it appears from the evidence that the prisoner stole the money from him, but that he was not his servant, the allegation in the indictment

(*n*) *Reg.* v. *Firth*, L. R. 1 C. C. R. 175, per *Bovill*, C. J.
(*o*) *Ibid.*; *Reg.* v. *Bleasdale*, 2 C. & K. 765.
(*p*) *Reg.* v. *Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54.
(*q*) *Reg.* v. *Lord Mayor of London*, L. R. 4 Q. B. 371.
(*r*) *Reg.* v. *Eveleth*, 5 All. 201.

that he was his servant may be rejected as surplusage, and the prisoner may be convicted of simple larceny. (*s*)

An indictment charging the prisoner with stealing bank notes "of the moneys, goods, and chattels of one J. B." sufficiently lays the property in the notes as the words, "moneys, goods, and chattels" may be rejected as surplusage and the indictment would then read "bank notes of one J. B." (*t*) As stealing bank notes is expressly made larceny, their legal character, as chattels, or otherwise, is not in question, because stealing them *eo nomine* is made felony. (*u*)

The prisoner was sent by his fellow-workmen to their common employer to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper with the names of the workmen and the sum due to each written inside; it was held that he received the money as the agent of his fellow-workmen, and not as the servant of his employer, and as the money belonged to the workmen, it was wrongly described as the property of the employer. (*v*)

A boy of fourteen years of age, living with, and assisting his father in his business without wages, at one o'clock in the day succeeded his father in the charge of his father's stall, whence some goods of the latter were stolen by the prisoner: it was held that, in a count for larceny, the ownership of the goods could not be laid in the boy; for he was not a bailee, but a servant. (*w*)

One C. was owner of an ox, and verbally gave it to his son, in whose name it was laid as being the owner in the indictment. There was no removal at the time of the gift, nor delivery, nor change of possession, nor writing; but the ox was in the son's possession at the time of the theft. On a case submitted for the opinion of the court, it was held that, to make a valid gift of personal property *inter vivos*, it

(*s*) *Reg.* v. *Jennings*, 4 U. C. L. J. 166; Dears. & B. 447.
(*t*) *Reg.* v. *Saunders*, 10 U. C. Q. B. 544; *Reg.* v. *Radley*, 2 C. & K. 974.
(*u*) *Reg.* v. *Saunders*, *supra*, 544, per *Robinson*, C. J.
(*v*) *Reg.* v. *Barnes*, L. R. 1 C. C. R. 45; 35 L. J. (M. C.) 204.
(*w*) *Reg.* v. *Green*, 3 U. C. L. J. 19; Dears. & B. 113; 26 L. J. (M. C.) 17.

is not necessary that there should be an actual delivery and change of possession. It is sufficient to complete such a gift, that the conduct of the parties should show that the ownership of the chattel has been changed, or that there has been an acceptance by the donee, and that therefore the property was well laid in the indictment. (*x*)

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead; that the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended by stating the goods to be the property of the mother. The case proceeded, and no further evidence of the administrative character of the mother was given; the county court judge holding the evidence of R. M. sufficient, and not leaving any question, as to the property, to the jury. On a case reserved, it was held that there was ample evidence of possession in R. M., to support the indictment, without amendment. (*y*) The conviction on the amended indictment was not sustainable, as the judge had apparently treated the case, as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence, nor was any question of ownership by her, apart from her representative character, left to the jury. (*z*)

Formerly, where goods stolen were the property of partners or joint owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendants would have been acquitted. (*a*) But now the 32 & 33 Vic., c. 29, s. 17, provides that it shall be sufficient to name one of such persons, and to state the property to be-

(*x*) *Reg.* v. *Carter*, 13 U. C. C. P. 611.
(*y*) *Reg.* v. *Jackson*, 19 U. C. C. P. 280.
(*z*) *Ibid.*
(*a*) *Reg.* v. *Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

long to the person so named, and another or others as the case may be. The provisions of this statute must be strictly complied with. (*b*) Where an indictment under the old 23 Vic., c. 37, s. 1, charged defendant with procuring certain persons to cut trees, the property of A. B. & C., growing on certain land belonging to them, and the evidence showed that the land belonged to them and another or others as tenants in common; it was held that the conviction could not be supported. (*c*) An indictment for breaking into a church, and stealing vestments there, and describing the goods stolen as the property of "the parishioners of the said church," was held insufficient, and that they must be laid as the property of some person or persons individually. (*cc*) But having regard to the grounds of the decision in this case, and the language of the 32 & 33 Vic., c. 29, s. 19, it is apprehended that an indictment, in the above form, would now be sufficient.

S. and C., carmen of the Great Northern Railway Company, left the station in Middlesex, to proceed to Woolwich, in Kent, with one of the company's waggons, and, before starting, the usual oats, etc., for provender for the horses were given out to them and placed in the waggon in nosebags; at Woolwich, they took the nosebags from the waggon and delivered them to B., an ostler, for 6d. Upon an indictment at the Middlesex Sessions against S. and C. for stealing the oats, etc., and B. for receiving, they were found guilty. It was held that the case was within 7 Geo. IV., c. 64, s. 13; (*d*) and that though the offences were committed in Kent, the prisoners might be tried in Middlesex. (*dd*)

The prisoner stole a watch at Liverpool, and sent it by rail to a confederate in London, and it was held that the constructive possession, which is equivalent to the actual

(*b*) *Reg.* v. *Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.
(*c*) *Ibid.* 158.
(*cc*) *Reg.* v. *O'Brien*, 13 U. C. Q. B. 436.
(*d*) See 32 & 33 Vic., c. 29, s. 9.
(*dd*) *Reg.* v. *Sharp*, 1 U. C. L. J. 17; Dears. C. C. 415.

possession, still remained in the prisoner, and that, under the Imp. 24 & 25 Vic., c. 96, s. 114 (by which the prisoner may be indicted where he has the property in his possession, though stolen in another part of the United Kingdom), he was triable at the Middlesex Sessions. (*e*)

Where a count for larceny charges the stealing of a great number of things, a general verdict of guilty will be supported by evidence that any one of the things mentioned has been stolen, notwithstanding there is no evidence as to the rest. (*ee*)

If larceny be committed by a lodger, the goods may be described as the property of the owner or person letting to hire. (*f*)

Stealing from the person.—To constitute a stealing from the person, the thing stolen must be completely removed from the person. (*ff*)

To constitute an attempt to steal, some act must be done towards the complete offence. Feeling a coat-tail to ascertain if there is anything in the pocket, is not an attempt to do the act of picking the pocket, for it may be that nothing was found to be in it, and therefore the prisoner does not proceed to the commission of the act itself, and, if there is nothing in the pocket, even putting the hand into it has been held not to be an attempt to steal. (*g*)

The prosecutor carried his watch in his waistcoat pocket, the chain attached passing through a buttonhole of the waistcoat, and being there kept from slipping through by a watch key. The prisoner took the watch out of the pocket, and drew the chain out of the buttonhole, but, his hand being seized, it appeared that, although the chain and key were drawn out of the buttonhole, the point of the key had caught up another button, and was thereby sus-

(*e*) *Reg.* v. *Rogers*, L. R. 1 C. C. R. 136 ; 37 L. J. (M. C.) 83.
(*ee*) *Reg.* v. *Johnson*, 4 U. C. L. J. 49 ; 1 Dears. & B. C. C. 340.
(*f*) 32 & 33 Vic., c. 21, s. 75 ; see *Reg.* v. *Healey*, 1 Mood. C. C. 1.
(*ff*) 2 Russ. Cr. 359.
(*g*) *Reg.* v. *Taylor*, 8 C. L. J. N. S. 55, per *Sergeant Cox.*

pended. It was held that the evidence was sufficient to warrant a conviction for stealing from the person. (*gg*)

In order to bring a case within the 32 & 33 Vic., c. 21, s. 44, as to obtaining property by threats, the demand, if successful, must amount to stealing, and to constitute a menace, within that section, it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect upon the prosecutor. (*h*)

Where a policeman professing to act under legal authority threatens to imprison a person, on a charge not amounting to an offence in law, unless money be given him, and the person, believing him, gives the money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. (*i*)

Demanding, with menaces, money actually due is not a demanding with intent to steal (*j*)

Embezzlement.—This offence is defined to be the act of appropriating to himself that which is received by one person in trust for another. (*k*) But in this large sense it was not criminal at common law, nor has it been rendered so by statute. The legislature, however, has from time to time specified different classes of cases, all coming within the meaning of the term embezzlement in the above sense, which it has declared to be criminal. (*l*)

Embezzlement, in its usual and more limited acceptation, imports the reception of money belonging to the master or employer of him who receives it in the course of his duty,

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(*gg*) *Reg.* v. *Simpson*, 1 U. C. L. J. 16; Dears. 621; 24 L. J. (M. C.) 7; see also *Reg.* v. *Thompson*, 1 Mood. C. C. 78.
(*h*) *Reg.* v. *Walton*, L. & C. 288; 32 L. J. (M. C.) 79.
(*i*) *Reg.* v. *Robertson*, L. & C. 483; 34 L. J. (M. C.) 35.
(*j*) *Reg.* v. *Johnson*, 14 U. C. Q. B. 569.
(*k*) *Reg.* v. *Cummings*, 4 U. C. L. J. 183, per *Blake*, Ch.
(*l*) *Ibid.*

and the fraudulent appropriation of that money before it gets into the possession of the master. (*m*)

To constitute the crime of embezzlement, there must be an *employment* as clerk or servant.

Thus the prisoner, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, had had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference as to the price, the horse was not taken and the prisoner brought him back. Afterwards, on the same evening, the prisoner, without any authority from the prosecutor, took the horse to M. and sold it as his own property, or professing to have the right to dispose of it, and received the money, giving a receipt therefor. It was held that the employment had ceased, and that when the prisoner received the money he received it for his own use and not as clerk or servant of the prosecutor, and that therefore a conviction for embezzlement could not be sustained. (*n*)

But where a "charter master," who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery, it being the prisoner's duty to pay over the gross money received on such sales, he being subsequently allowed a poundage thereon: he was held guilty of embezzlement for having converted money received for coal to his own use, and neglected to account for it. (*o*)

A person who receives no remuneration for his services, is not a clerk or servant within the Act; (*p*) but that character may be established if the party is entitled to recover for his services on a *quantum meruit*. (*q*)

A mortgagor, though strictly a tenant at sufferance, cannot

(*m*) *Ferris* v. *Irwin*, 10 U. C. C. P. 117, per *Draper*, C. J.
(*n*) *Reg.* v. *Topple*, 3 Russell & C. 566.
(*o*) *Reg.* v. *Thomas*, 1 U. C. L. J. 37; 6 Cox, C. C. 403.
(*p*) *Reg.* v. *Tyree*, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58.
(*q*) *Reg.* v. *Foulkes*, L. R. 2 C. C. R. 150.

be convicted of embezzlement in relation to the mortgaged property. (*r*)

It seems from the cases that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, is a clerk or servant within the meaning of the statute ; (*s*) and this, though at liberty to take orders for others. (*t*) It is a question for the jury whether a person is a clerk or servant. (*tt*)

The employment to receive money may be sufficient, though receiving money is not the prisoner's usual employment, and though it may have been the only instance of his having been so employed. (*u*)

The chattels, moneys or valuable securities must be received *from third persons;* if from the employer himself, if any offence, it will amount to larceny. (*v*) This distinction is, however, of little practical importance, as section 74 of the statute under consideration provides that persons indicted for embezzlement may be convicted of larceny, and *vice versa.*

The money or securities must be received *in the name, or for, or on account of* the employer.

Thus, where the prisoner was apprenticed to a baker, and had authority from his master to deliver bills for bread to customers and receive the money, and in payment of one account took a bank cheque payable to his master's order, upon which he forged his master's name and received the money from the bank : it was held that the money received, never having been the property of his employer, but the property of the bank—the forgery not operating to discharge the bank—was not received for or on account of the master, and that therefore the person was not guilty of embezzlement. (*w*)

(*r*) *McGregor* v. *Scarlett*, 7 U. C. P. R. 20.
(*s*) Arch. Crim. Pldg. 448 ; *Reg.* v. *Mayle*, 11 Cox. 150 ; *Reg.* v. *Marshall*, 11 Cox, 490 ; but see *Reg.* v. *Bowers*, L. R. 1 C. C. R. 41 ; 35 L. J. (M. C., 206 ; *Reg.* v. *Negus*, L. R. 2 C. C. R. 34.
(*t*) *Reg.* v. *Tite*, 7 U. C. L. J. 331 ; 30 L. J. (M. C.) 142.
(*tt*) See *Reg.* v. *Negus*, L. R. 2 C. C. R. 34.
(*u*) *Reg.* v. *Tongue*, 8 U. C. L. J. 55 ; Bell, 289 ; 30 L. J. (M. C.) 49.
(*v*) *Reg.* v. *Cummings*, 4 U. C. L. J. 182 ; 16 U. C. Q. B. 15.
(*w*) *Reg.* v. *Hathaway*, 6 Allen, 382.

So where the prisoner, the captain of a barge in the exclusive service of its owner, to whom the prisoner was bound to account for all its earnings, and having no authority to take any other cargoes than those appointed for him, took on board a certain cargo, though ordered not to carry it but to bring the vessel back empty, and received the freight therefor, and appropriated it to his own use, not professing to receive it for his master, and on being charged with disobedience to orders, declared that the vessel had come back empty; it was held that the money was not received for or on account of his master within the meaning of the Act. (*x*)

But where a clerk, whose duty it was to endorse cheques and hand them over to the cashier of the company in whose employ he was, endorsed several cheques and obtained money for them from friends of his own, and paid the proceeds over to the cashier, saying he wished them to go against his salary, which was overdrawn: on conviction, it was held that such proceeds were received on account of the company, and that the prisoner was therefore rightly convicted. (*y*)

The former statute, Con. Stat. Can., c. 92, rendered it necessary that the prisoner should have received the money "by virtue of such employment," and that the money was so received must have appeared in evidence; (*z*) but those words are omitted in the present enactment on the subject, so it is apprehended that if a clerk or servant receive money for his master and embezzle it, he may now be convicted of embezzlement, although it was neither his duty to receive it, nor had he authority to do so. (*a*)

The statute applies whether the employer be an individual or a corporation; and it has been held that friendly societies, though some of their rules may be in restraint of

(*x*) *Reg.* v. *Cullum*, L. R. 2 C. C. R. 28.
(*y*) *Reg.* v. *Gale*, L. R. 2 Q. B. D. 114.
(*z*) See *Reg.* v. *Thorley*, 1 Mood. C. C. 343; *Reg.* v. *Hawtin*, 7 C. & P. 281; *Reg.* v. *Mellish*, R. & R. 80; *Reg.* v. *Snowley*, 4 C. & P. 390; *Ferris* v. *Irwin*, 10 U. C. C. P. 116.
(*a*) See Arch. Cr. Pldg. 453.

trade, are entitled to the protection of the criminal law over their funds. (*b*)

Where the property was laid on a trustee of a savings bank, it was held not enough to show merely that the trustee acted as such on one occasion, without producing evidence of his appointment. (*c*)

Where a fund belonging to the late Trinity House was vested by statute in the master, deputy-master and wardens of the Trinity House of Montreal, the property was held properly laid in Her Majesty. (*d*)

It is no defence to an indictment for embezzlement that the prisoner intended to return the money fraudulently appropriated; (*e*) nor that he had entered the sum appropriated in his master's ledger. (*f*) And omitting to credit a sum received, but charging it as paid away, for the fraudulent purpose of concealing an appropriation, is ample to support a conviction. (*g*) But the prisoner must be shown to have received some particular sum, (*h*) and a general deficiency of account will not alone ground a conviction. (*i*) There have been several decisions, both in England and in this country, under the 32 & 33 Vic., c. 21, s. 76, and following sections, relating to frauds by persons intrusted, the results of which are given below.

As to intrusting.—The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage, and hand over the rest to the mortgagor. He prepared the

(*b*) *Reg.* v. *Stainer*, L. R. J. 1 C. C. R. 230; 39 L. R. (M. C.) 54.
(*c*) *Reg.* v. *Essex*, 4 U. C. L. J. 73; Dears. & B. 371; 27 L. J. (M.C.) 20.
(*d*) *Reg.* v. *David*, 17 L. C. J. 310.
(*e*) *Reg.* v. *Cummings*, 4 U. C. L. J. 189, per *Spragge*, V. C.
(*f*) *Reg.* v. *Lister*, 3 U. C. L. J. 18; Dears. & B. 119; L. J. (M.C.) 26.
(*g*) *Reg.* v. *Cummings*, *supra*.
(*h*) *Reg.* v. *Chapman*, 1 C. & K. 119, per *Williams*, J.; *Reg.* v. *Jones*, 7 C. & P. 833, per *Bolland*, B.; *Reg.* v. *Wolstenholme*, 11 Cox, 313, per *Brett*, J.; but see *Reg.* v. *Lambert*, 2 Cox, 309, per *Erle*, J.; *Reg.* v. *Moah*, Dears. 626; 25 L. J. (M.C.) 66.
(*i*) *Reg.* v. *Jones*, 8 C. & P. 288, per *Alderson*, B.; *Reg.* v. *Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.

mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use. It was held that he was not "intrusted" for any of the purposes mentioned in sections 76 or 77. (*j*)

And an agent who properly receives money by check payable to his own order, and deposits the same in his own bank, and fails to pay over, is not indictable under section 76 for having securities for special purpose without authority to negotiate. (*k*)

The words "or other agent" do not extend the meaning of the previous clause, "banker, merchant, broker, attorney," but only signify persons, the nature of whose occupation was such that chattels, valuable securities, etc., belonging to third persons would, in the usual course of their business, be intrusted to them. (*l*)

Where the prisoner, a stock and share broker, wrote to the prosecutrix, stating that he had purchased certain bonds for her, and enclosed a contract note with the letter, and the prosecutrix, in reply, sent the following: "I have just received your note and contract note for three I shares (those mentioned in the prisoner's letter), and enclose a cheque for £336 in payment;" and the prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque. It was held that the letter of the prosecutrix was a direction in writing within section 76, and that the prisoner was properly convicted. (*m*)

The power of attorney mentioned in section 78 must be a written one, and a merely verbal authority will not bring the defendant's act within the scope of that section. (*n*)

On an indictment under the corresponding English section of the 32 & 33 Vic., c. 21, s. 73, it appeared that the prisoner was a member of a copartnership. It was his duty to receive

(*j*) *Reg.* v. *Cooper*, L. R. 2 C. C. R. 123.
(*k*) *Reg.* v. *Tatlock*, L. R. 2 Q. B. D. 157.
(*l*) *Reg.* v. *Hynes*, 13 U. C. Q. B. 194.
(*m*) *Reg.* v. *Christian*, L. R. 2 C. C. R. 94.
(*n*) *Reg.* v. *Chouinard*, 4 Q. L. R. 220.

money for the copartnership, and once a week to render an account, and pay over the gross amount received during the previous week, which was usually received in a number of small sums from day to day. He was indicted for embezzling three different sums, amounting, in the aggregate, to £3 13s., received into his possession on the 5th, 12th, and 17th days of December, 1870, respectively, being within six months from the first to the last of the said receipts. It appeared, in evidence, that the said aggregate sum was received by ten small payments for the first and second weeks respectively, and eleven small payments in the third week; and it was held that the prisoner might be properly charged with embezzling the weekly aggregates—that three acts of embezzlement of such weekly aggregates, within six months, might be charged and proved under one indictment, and that evidence of the small sums received during each week was admissible, to show how the weekly aggregates were made up. (*o*)

But if a man receives a number of small sums, and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. In the above case, the prisoner might have been indicted for embezzling any of the separate small sums received by him. (*p*)

The 32 & 33 Vic., c. 29, s. 25, does not justify an allegation in an indictment of the embezzlement of money when a cheque only has been embezzled, and there is no proof that the prisoner has even cashed it. (*q*) But if the cheque is turned into money, the prisoner may be indicted for embezzling the money; and, upon such indictment, the embezzlement of the cheque, and conversion of it into money may be shown, or the prisoner may be indicted for the embezzlement of the cheque. (*r*)

(*o*) *Reg.* v. *Balls*, L. R. 1 C. C. R. 328.
(*p*) *Ibid.* 332-3, per *Cockburn*, C. J.
(*q*) *Reg.* v. *Keena*, L. R. 1 C. C. R. 113; 37 L. J. (M. C.) 43.
(*r*) *Ibid.* 114, per *Cockburn*, C. J.

In *Reg.* v. *Bullock*, (*s*) it was held, under the facts shown in the case, that the money was not improperly charged to be the money of the county of Essex, though it was received for the township of Maidstone, within the county, and was to be accounted for to it by the county; for, from the moment of payment, the county was responsible for the money, and had a special property in it.

A person who is nominated and elected assistant overseer, under the 59 Geo. III., c. 12, s. 7, by the inhabitants of a parish in vestry, and who is afterwards appointed assistant overseer by the warrant of two justices, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish. (*t*)

It has been held that the form of indictment, given by the Con. Stats. Can., c. 99, s. 51, was only applicable to embezzlement under c. 92, s. 42. (*u*)

In an indictment for embezzlement, where the offence relates to any money, or any valuable security, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property shall be sustained by proof of the embezzlement of any amount, although the particular species of coin, or valuable security, of which such amount was composed, is not proved etc. (*v*)

False pretences.—The law as to false pretences has been construed, of late years, in a much more liberal spirit than formerly; (*w*) still cases of considerable technical difficulty sometimes arise, so that a discussion of the various elements of the offence is necessary.

First, there must be a false pretence of an existing fact, and a mere promise to do an act will not suffice.

(*s*) 19 U. C. Q. B. 513.
(*t*) *Reg.* v. *Carpenter*, L. R. 1 C. C. R. 29; 35 L. J. (M. C.) 169.
(*u*) *Reg.* v. *Cummings*, 4 U. C. L. J. 182 (in E. & A.)
(*v*) 32 & 33 Vic., c. 21, s. 73; see *Reg.* v. *Hall*, 3 Stark, 67; R. & R. 46.
(*w*) *Reg.* v. *Lee*, 23 U. C. Q. B. 340, per *Hagarty*, J.

Thus, procuring a promissory note, by a promise to give the prosecutor $600 on what he would have out of the proceeds of the note, when discounted, is not sufficient to sustain a conviction. (*x*)

And where D. was to pay for all goods supplied to the prisoner to the amount of a certain promissory note held by the prisoner against D., the amounts supplied to be endorsed on the note; and the prisoner obtained goods without producing the note, saying he would bring it down and have the amount endorsed in a day or two, but intending not to do so nor to pay for the goods. The prisoner having been found guilty, was held to have been improperly convicted. (*y*)

But inducing a person to buy certain packages by representing that they contained good tea, when three-fourths of their contents were, to the prisoner's knowledge, not tea at all, but a mixture of substances unfit to drink, is a false representation of an existing fact. (*z*)

So the selling of a railway pass, good only to carry a particular person, and which the purchaser could not use except by committing a fraud upon the railway company, and at the risk of being at any moment expelled from the train, is a false pretence within the statute. (*a*)

So a false representation by a married man that he is single, thereby inducing a single woman to part with her money to him, for the purpose of furnishing a house, is a false pretence; and one false fact by which money is obtained is sufficient to support an indictment, although it may be united with false promises which would not of themselves do so. (*b*)

The giving a cheque does not amount to a representation that there is money of the drawer's at the bank indicated,

(*x*) *Reg.* v. *Pickup*, 10 L. C. J. 310.
(*y*) *Reg* v. *Bertle*, 13 U. C. C. P. 607.
(*z*) *Reg.* v. *Foster*, L. R. 2 Q. B. D. 301.
(*a*) *Reg.* v. *Abrahams*, 24 L. C. J. 325.
(*b*) *Reg.* v. *Jennison*, 9 U. C. L. J. 83; 6 L. T. Reps. N. S. 256; 31 L. J. M. C.] 146; *Reg.* v. *Lee*, 23 U. C. Q. B. 340, per *Hagarty*, J.

but it is a representation of authority to draw, or that it is a valid order for payment of the amount. (*c*)

The false representation by a person that he is in a large way of business, whereby he induces another to give him goods, is a false pretence. (*d*) So also is the obtaining a loan upon the security of a piece of land, by falsely and fraudulently representing that a house is built upon it. (*e*) And threatening to sue on a note which the prosecutor had made in favor of the prisoner, and which the prisoner had negotiated but pretended he was still the holder of, and thereby induced the prosecutor to pay, is a false pretence. (*f*)

And under the more recent decisions, the execution of a contract, between the same parties, does not secure from punishment the obtaining of money under false pretences in conformity with that contract. (*g*)

Fraudulently misrepresenting the amount of a bank note, and thereby obtaining a larger sum than its value in change, is obtaining money by false pretences, although the person deceived has the means of detection at hand, and the note is a genuine bank note. (*h*)

And where a prisoner obtained money and goods, by pretending that a piece of paper was the bank note of an existing solvent firm, knowing that the bank had stopped payment forty years before, he was held guilty of false pretences. (*i*) But the fact that a bank note was the note of a private bank, which had paid a dividend of 2s. 4d. on the pound, and no longer existed, and that a neighboring bank would not

(*c*) *Reg.* v. *Hazleton*, L. R. 2 C. C. R. 134.
(*d*) *Reg.* v. *Cooper*, L. R. 2 Q. B. D. 510; *Reg.* v. *Crab*, 5 U. C. L. J.N. S. 21, per *Kelly*, C. B.; 11 Cox, 85.
(*e*) *Reg.* v. *Burgon*, 2 U. C. L. J. 138; Dears. & B. 11; 25 L. J. (M. C.) 105; *Reg.* v. *Hoppel*, 21 U. C. Q. B. 281.
(*f*) *Reg.* v. *Lee*, 23 U. C. Q. B. 340.
(*g*) See *Reg.* v. *Abbott*, 1 Den. 173; 2 C. & K. 630; *Reg.* v. *Boss*, Bell, 208; 29 L. J. (M. C.) 86; *Reg.* v. *Meakin*, 11 Cox, 270; Arch. Cr. Pldg. 473.
(*h*) *Reg.* v. *Jessop*, 4 U.C.L.J. 167; Dears. & B. 442; 27 L. J. (M.C.) 70.
(*i*) *Reg.* v. *Dowey*, 16 W. R. 344; 37 L. J. (M.C.) 52; and see *Reg.* v. *Brady*, 26 U. C. Q. B. 14.

change it, was held not sufficient from which to infer that the note was of no value whatever. (*j*)

Upon an indictment alleging that the prisoner obtained a coat, by falsely pretending that a bill of parcels of a coat of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of parcels of another coat of the value of 22s., which the prisoner had had made to measure, and that 10s. only were due, it was proved that the prisoner's wife had selected the 14s. 6d. coat for him, at the prosecutor's shop, subject to its fitting on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On the prisoner's calling to try on the coat, it was found to be too small, and he was then measured for one, which he ordered to be made, to cost 22s.; and on the day named for trying on that coat he called, and the coat was fitted on by the prosecutor, who had not been present on the former occasion; and the case stated that the prisoner, on the coat being given to him, handed 10s. and the bill of parcels for the 14s. 6d. coat, saying, "There is 10s. to pay," which bill the prosecutor handed to his daughter, to examine, and upon that the prisoner put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. The prosecutor stated that, believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on payment of the 10s., which otherwise he should not have done. It was held that there was evidence to go to the jury, and that the conviction was right. (*k*)

Where a prisoner, who had been discharged from A.'s service, went to the store of O. and S., and representing himself as still in the employ of A., who was a customer of O. and S., asked for goods in A.'s name, which were sent to A.'s house, where the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him, saying, "This is for me; I am going in to see A.," but instead of doing

(*j*) *Reg.* v. *Evans*, 6 U. C. L. J. 262; Bell, 187; 29 L. J. (M.C.) 20.
(*k*) *Reg.* v. *Steels*, 16 W. R. 341.

so, walked out of the house with the parcel. It was held that the prisoner was rightly convicted of having obtained the goods from O. and S. under false pretences. (*l*)

The false pretence may be of a past or an existing fact. (*m*)

It would seem that indefinite or exaggerated praise, upon a matter of indefinite opinion, cannot be made the ground of an indictment for false pretences. (*n*)

But where the prisoner induced the prosecutor to purchase a chain from him, by fraudulently representing to him that it was 15 carat gold, when, in fact, it was only of a quality a trifle better than 6 carat, knowing at the time that he was falsely representing the quality of the chain, it was held that the statement was not mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, and a false pretence. (*o*) It would seem, from this case, that a specific representation of quality, if known to be false, is within the statute. (*p*)

Not only is a false pretence of an existing fact necessary, but the prosecutor must have been induced to part with his property in consequence thereof; (*q*) and if the money is parted with from a desire to secure the conviction of the prisoner, there is no obtaining by false pretences. (*r*)

And where the defendant made false representations to the prosecutor, and thereby induced him to sell his horses to him, but the prosecutor afterwards, on learning the falsity of the representations, entered into a new agreement in writing

(*l*) *Reg.* v. *Robinson*, 9 L. C. R. 278.

(*m*) *Reg.* v. *Gemmell*, 26 U. C. Q. B. 314, per *Hagarty*, J.; *Reg.* v. *Giles*, 11 L. T. Rep. N. S. 643; 10 Cox, 44.

(*n*) *Reg.* v. *Goss*, Bell, 208; 29 L. J. (M.C.) 90, per *Erle*, C. J.; *Reg.* v. *Bryan*, Dears. & B. 265; 26 L. J. (M. C.) 84; see also *Reg.* v. *Watson*, Dears. & B. 348; 27 L. J. (M. C.) 18, per *Erle*, J.; *Reg.* v. *Levine*, 10 Cox, 374.

(*o*) *Reg.* v. *Ardley*, L. R. 1 C. C. R. 301.

(*p*) But see *Reg.* v. *Eagleton*, 1 U. C. L. J. 179; Dears. 515; 24 L. J. (M. C.) 158.

(*q*) *Reg.* v. *Gemmell*, 26 U. C. Q. B. 312.

(*r*) *Reg.* v. *Mills*, 29 L. T. Reps. 114; Dears. & B. 205; 26 L. J. (M. C.) 79; *Reg.* v. *Gemmell*, 26 U. C. Q. B. 315, per *Hagarty*, J.; see also *Reg.* v. *Dale*, 7 C. & P. 352; *Reg.* v. *Roebuck*, Dears. & B. 25; 25 L. J. (M. C.) 101.

with the prisoner; it was held that the subsequent dealings repelled the idea that the prosecutor had parted with his property in consequence of the false pretence. (*s*)

The false pretence must be the proximate cause of the loss.

Thus an indictment for obtaining from A. $1,200 by false pretences, was not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity, inasmuch as it was an engagement or promise to pay at a future date, and, though remotely, the payment arose from the false pretence; yet immediately and directly it was made, because the prosecutor desired to retire his note, and did so before it became due, and though the false pretences on which the note was obtained might be said to be continuing, they were not, according to the evidence, made or renewed when the note was paid. (*t*)

And where a person, by falsely representing himself to be another person, induced another to enter into a contract with him for board and lodging, and was supplied accordingly with various articles of food: it was held that the obtaining of the goods was too remotely connected with the false representation to support a conviction. (*u*)

But a conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. (*v*) The test is the continuance of the pretence down to the time of delivery, and the direct connection between the pretence and delivery. (*w*)

It is essential that there should be an intention to deprive the owner wholly of the property in the chattel, and an obtaining by false pretences the use of a chattel for a limited time only, without an intention to deprive the owner wholly

(*s*) *Reg.* v. *Connor*, 14 U. C. C. P. 529.
(*t*) *Reg.* v. *Brady*, 26 U. C. Q. B. 13.
(*u*) *Reg.* v. *Gardner*, 2 U. C. L. J. 139; Dears. & B. 40; 25 L. J. (M.C.) 100; see, however, comments on this case in *Reg.* v. *Martin*, L.R. 1 C.C.R. 56, *infra*.
(*v*) *Reg.* v. *Martin*, L. R. 1 C. C. R. 56; 36 L. J. (M. C.) 20.
(*w*) *Ibid.* 60, per *Bovill*, C. J.

of the chattel, is not an obtaining by false pretences within the statute. (*x*)

But it is none the less a false pretence that the prisoner intended to, and did in fact pay over the money to the person properly entitled, if, by the false pretence, he attained a personal end; as where an attorney, who had been struck off the rolls, obtains money out of court under such circumstances as amount to a false pretence practised on the court, so that he may retain his costs thereout. (*y*) And it seems the offence would have been the same whatever the prisoner's object. (*z*)

Although inducing a person to execute a mortgage on his property, (*a*) or to sign an acceptance to a bill of exchange, (*b*) it not appearing that the paper on which it was drawn belonged to the prosecutor, is not obtaining from him a valuable security within the meaning of section 93 of the Act, yet the offence is indictable under sec. 95.

It is not necessary that the pretence should be in words; the conduct and acts of the party will be sufficient without any verbal representation.

Thus, an indictment alleging that the prisoner was in the employ of V. as a heaver of coals, and was entitled to 5d. for every tub filled by him, and that, by unlawfully placing a token upon a tub of coals, he falsely pretended that he had filled it, whereby he obtained 5d., was held to disclose a false pretence. (*c*)

And a person who tenders another a promissory note of a third party in exchange for goods, though he says nothing, yet he should be taken to affirm that the note has not to his knowledge been paid, either wholly, or to such an extent as almost to destroy its value. (*d*)

(*x*) *Reg.* v. *Kilham*, L. R. 1 C. C. R. 261; 39 L. J. (M.C.) 109.
(*y*) *Reg.* v. *Parkinson*, 41 U. C. Q. B. 545.
(*z*) *Ibid.*
(*a*) *Reg.* v. *Brady*, 26 U. C. Q. B. 13.
(*b*) *Reg.* v. *Danger*, Dears. & B. 307; 26 L. J. (M. C.) 185.
(*c*) *Reg.* v. *Hunter*, 16 W.R. 343; 10 Cox, 642; *Reg.* v. *Carter*, *ibid.* 648.
(*d*) *Reg.* v. *Davis*, 18 U. C. Q. B. 180; *Reg.* v. *Brady*, 26 U. C. Q. B. 14.

The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it would be in his power to do so. (*e*)

Formerly, if on an indictment for obtaining, etc., by false pretences, it was proved that the property was obtained in such a manner as to amount to larceny, the defendant was entitled to an acquittal, the misdemeanor being merged in the felony (*f*)

The true meaning of this clause is, that, if the obtaining by false pretences is proved, as it is laid in the indictment, the defendant is not entitled to be acquitted of the misdemeanor, simply because the case amounts to larceny. (*g*)

The effect of the statute seems to be merely to prevent the operation of that rule by which a misdemeanor merged in a felony, when the facts disclosed the latter crime. It is apprehended that a party could not be convicted under this clause, unless there was sufficient proof of an obtaining by false pretences.

Upon an indictment containing several counts for obtaining money under false pretences, the evidence went to show that the defendant had, by fraudulent misrepresentations of the business he was doing in a trade, induced the prosecutor to enter into a partnership agreement, and advance £500 to the concern; but it did not appear that the trade was altogether a fiction, or that the prosecutor had repudiated the partnership. The question for the court being whether, upon such evidence, the jury were bound to convict the defendant, it was held that he was entitled to an acquittal, as it was consistent with the evidence that the prosecutor, as partner, was interested in the money obtained. (*h*)

(*e*) *Reg.* v. *Naylor*, L. R. 1 C. C. R. 4; 35 L. J. (M. C.) 61.
(*f*) 32 & 33 Vic., c. 21, s. 93.
(*g*) *Reg.* v. *Bulmer*, L. & C. 476; 33 L. J. (M. C.) 171; 9 Cox, 492; Arch. Cr. Pldg. 483.
(*h*) *Reg.* v. *Watson*, 4 U. C. L. J. 73; Dears. & B. 348; 27 L. J. (M. C.) 18.

Where a defendant, on an indictment for obtaining money by false pretences, has been found "guilty of larceny," the court had no power, under the Con. Stats. U. C., c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words, "of larceny." (*i*)

A letter, containing a false pretence, was received by the prosecutor through the post, in the borough of C.; but it was written and posted out of the borough. In consequence of that letter, he transmitted through the post, to the writer of the first, a Post Office order for £20, which was received out of the borough; and it was held that, in an indictment against the writer of the first letter, for false pretences, the venue was well laid in the borough of C. (*j*)

Where the venue, in an indictment for obtaining sheep by false pretences, was laid in county E., where the person was convicted, and it appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into county E., where he was apprehended; it was held that he had been indicted in a wrong county. (*k*)

Our form of indictment for obtaining money by false pretences does not require the pretences to be set out, but simply that the prisoner, "by false pretences, did obtain," etc. It is apprehended that it will be sufficient to follow the statutory form, and that the false pretence of an existing fact need not be set out. (*l*)

To sustain an indictment for obtaining, or attempting to obtain, money by false pretences, the indictment, if not in the statute form, must state with certainty the pretence of a supposed existing fact.

Thus, a statement that prisoner pretended to H. P. (the manager of T.'s business) that H. P. was to give him 10s., and that T. was going to allow him 10s. a week, was held insufficient. (*m*)

(*i*) *Reg.* v. *Ewing*, 21 U. C. Q. B. 523.
(*j*) *Reg.* v. *Leech*, 2 U. C. L. J. 138; Dears. 642; 25 L. J. (M. C.) 77.
(*k*) *Reg.* v. *Stanbury*, 8 U. C. L. J. 279; L. & C. 128; 31 L. J. (M. C.) 88.
(*l*) See *Reg.* v. *Oates*, 1 U. C. L. J. 135; Dears. 459; 24 L. J. (M. C.) 123; *Reg.* v. *Dessemer*, 21 U. C. Q. B. 231.
(*m*) *Reg.* v. *Henshaw*, L. & C. 444; 33 L. J. (M. C.) 132.

A municipality having provided some wheat for the poor, the defendant obtained an order for fifteen bushels, described as "three of golden drop, three of fife, nine of milling wheat." Some days afterwards he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order "three of golden drop, three of fife," and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that the defendant unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from A., one of the municipality of B., requiring the delivery of certain wheat, by and from one C., and, by presenting the said order to C., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, to wit, nine bushels of wheat from the said C., of the goods and chattels of the said municipality, with intent to defraud. It was held that the indictment was sufficient in substance, and not uncertain or double, but in effect charging that defendant obtained the order, and, by presenting it, obtained the wheat by false pretences. (*n*)

An indictment, charging that defendant, by false pretences, did obtain board of the goods and chattels of the prosecutor, was held bad, the term "board" being too general. (*o*)

An indictment for obtaining by false pretences goods and chattels, or a chattel of the prosecutor, not defining them or it, would be insufficient. There must be the same particularity as in larceny, that the party may know certainly what he is charged with stealing, or obtaining by false pretences. (*p*) The prosecutor is not bound to deliver to the defendant the particulars of the crime charged against him. (*q*)

An indictment, for obtaining money or goods by false pretences, must have stated whose the money was, or goods were. (*r*) But the allegation of ownership is rendered unne-

(*n*) *Reg.* v. *Campbell*, 18 U. C. Q. B. 413.
(*o*) *Reg.* v. *McQuarrie*, 22 U. C. Q. B. 600.
(*p*) *Ibid.* 601, per *Draper*, C. J.
(*q*) *Reg.* v. *Senecal*, 8 L. C. J. 286.
(*r*) *Reg.* v. *McDonald*, 17 U. C. C. P. 638, per *A. Wilson*, J.; *Reg.* v. *Martin*, 8 A. & E. 481.

cessary by the 32 & 33 Vic., c. 21, s. 93. By the same section, a general allegation that the party accused did the act, with intent to defraud, is sufficient, without alleging an intent to defraud any person.

An allegation in a count for obtaining a cheque, describing it "for the sum of £8 14s. 6d. of the moneys of William Willis," sufficiently describes the ownership of the cheque, for the words "of the moneys" may be rejected. (*s*)

Having treated specifically of the offences of larceny, embezzlement, and the obtaining of money by false pretences, we proceed to point out the distinctions between them. It is of the essence of the offence of larceny that the property be taken against the will of the owner. (*t*) If taken by the consent of the owner, for instance, if he intends to part with the property, no larceny will be committed.

In false pretences the property is obtained with the consent of the owner, the latter intending to part with his property. (*u*) The crime is constituted by the pretence that something has taken place, which, in fact, has not. (*v*) It, therefore, necessarily differs from larceny, in the fact the *property* in the chattel passes to the person obtaining it, and that the owner is induced to voluntarily part with his property, in consequence of some false pretence of an existing fact, made by the person obtaining the chattel. But the crime of obtaining money by false pretences is similar to larceny in this, that, in both offences, there must be an intention to deprive the owner wholly of his property in the chattel. (*w*)

Embezzlement consists in obtaining the lawful possession of goods, etc., without fraud or any false pretence, as upon a contract, or with the consent of the owner, in the ordinary course of duty or employment, or independently of such em-

(*s*) *Reg.* v. *Godfrey*, 4 U. C. L. J. 167 ; Dears. & B. C. C. 426.
(*t*) *Reg.* v. *Prince*, L. R. 1 C. C. R. 154, per *Bovill*, C. J.
(*u*) See *White* v. *Garden*, 10 C. B. 927, per *Talfourd*, J.
(*v*) *Reg.* v. *McGrath*, L. R. 1 C. C. R. 209, per *Kelly*, C. B.
(*w*) See *Reg.* v. *Kilham*, L. R. 1 C. C. R. 261.

ployment, and subsequently converting the goods, with a felonious intent to deprive the owner of his property therein. It differs from larceny in this, that the possession of the goods, etc., is lawfully obtained, in the first instance, without the ingredient of trespass, and the converson takes place while the privity of contract exists between the parties. The acquisition of lawful possession, in the first instance, is the constituent feature of this offence, and, according to the doctrines of the common law, no larceny could be committed by a bailee or other person, whose original title was lawful, until the privity of contract was determined. A carrier could not be convicted of larceny unless he "broke bulk," and the reason was that the act of "breaking bulk" was an act of trespass in the carrier, by which the privity of contract was determined. Now, however, the carrier is guilty of larceny, although he do not break bulk or otherwise determine the bailment. (*x*)

The distinction between larceny and embezzlement may be illustrated by the case of a clerk or servant, whose duty it is to receive money for, or on account of, his master. An appropriation before the money, etc., comes into the actual possession of the master, as if a clerk in a shop, on receiving money, puts it into his pocket before putting it into the till, would be embezzlement. (*y*) But if the money is put in the till, or otherwise becomes actually in the master's possession before appropriation, and is, in the act of appropriation, taken out of the possession of the master, this is larceny at common law.

But these distinctions are not of such practical importance as formerly, for now, in either of the above cases, whether the indictment be framed for larceny or embezzlement, the defendant may be convicted of the offence proved in evidence, (*z*) and a person indicted for obtaining money by

(*x*) See 32 & 33 Vic., c. 21, s. 3.
(*y*) *Reg.* v. *Bull*, 2 Leach, 841; *Reg.* v. *Bayley*, 2 Leach, 835; *Reg.* v. *Sullens*, 1 Mood. C. C. 129; *Reg.* v. *Walsh*, R. & R. 218; *Reg.* v. *Masters*, 1 Den. 332; 2 C. & K. 930; 18 L. J. (M. C.) 2.
(*z*) See 32 & 33 Vic., c. 21, s. 74.

false pretences may be convicted of that offence, although the facts proved also show a larceny. (*a*)

Receiving stolen goods.—This offence was punishable at common law only as a misdemeanor, even when the principal had been found guilty of felony in stealing the goods; (*b*) and the mere receipt of stolen goods did not, at common law, constitute the receiver an accessory, but was a misdemeanor, punishable by fine and imprisonment, (*c*) unless he likewise received and harbored the thief. (*d*)

There must be a stealing of goods, and the stealing must be a crime, either at common law or by statute, before a party is liable to be convicted of receiving. (*e*)

A conviction of the principal for embezzlement is sufficient to warrant a conviction of the receiver, by virtue of the express words of sec. 100 of the 32 & 33 Vic., c. 21. (*f*)

The goods must be *stolen* goods at the time of their receipt.

Thus where four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel, by the same company's line, addressed to the prisoner. During the transit the theft was discovered, and on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter, whose duty it was to deliver it, with instructions to keep it until further notice. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods, knowing them to be stolen. Upon an indictment, which laid the property in the goods in the railway company, it was held, (*g*) that the goods had got back into the possession of the owner, so as to be no

(*a*) 32 & 33 Vic., c. 21, s. 93.
(*b*) 2 Russ. Cr. 542.
(*c*) *Ibid.* 554.
(*d*) *Reg.* v. *Smith*, L. R. 1 C. C. R. 270, per *Bovill*, C. J.
(*e*) *Ibid.* 266; 39 L. J. (M. C.) 112.
(*f*) *Reg.* v. *Frampton*, Dears. & B. 585; 27 L. J. (M. C.) 229; Arch. Cr. Pldg. 436.
(*g*) By *Martin*, B., and *Keating* and *Lush*, JJ.; *dissentientibus*, *Erle*, C.J., and *Mellor*, J.

longer stolen goods, and that the conviction, on that ground, was wrong. (*h*)

Again, stolen goods were found in the pocket of the thief by the owner, who sent for a policeman. The policeman took the goods, and the three went together towards the shop of A., where the thief had previously sold stolen goods. When near it, the policeman gave back the goods to the thief, who was sent, by the owner, to sell them where he had sold the others. The thief then went alone into A.'s shop and, sold the goods to him, and returned with the proceeds to the owner. It was held that, under these circumstances, A. could not be convicted of receiving stolen goods, for when the goods came to the prisoner's hands, they were not stolen goods. (*i*)

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them, and sold them to the prisoner: it was held that the latter (the receiver) could not be convicted on such an indictment, for the indictment charged a receiving of a mixture, which had been stolen, knowing it, *i.e.* the mixture, to have been stolen, but the only evidence showed that pure oats and pure peas were stolen, and afterwards mixed and sold to the prisoner—so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a mixture which had been stolen, for the mixture had not been stolen. (*j*)

Previously to the 32 & 33 Vic., c. 21, s. 103, if two defendants were indicted jointly for receiving, a joint act of receiving must have been proved in order to convict both; (*k*) but that statute now extends to cases, where, upon an indictment for a joint receipt, it is proved that each of the prisoners separately received the whole of the stolen property at different times, the one receipt subsequent to the other; and it makes no difference whether the receipt was direct from

(*h*) *Reg.* v. *Schmidt*, L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94.
(*i*) *Reg* v. *Dolan*, 1 U. C. L. J. 55; Dears. 463; 24 L. J. (M. C.) 59.
(*j*) *Reg.* v. *Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.
(*k*) *Reg.* v. *Messingham*, 1 Mood. C. C. 257.

the thief, or from an intermediate person. There is no distinction between separate receipts of the whole, and of part of the property ; (*l*) and, under s. 102, there is no distinction between separate receipts at the same time and separate receipts at different times. (*m*)

The goods stolen must be received by the defendant, and though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the exclusive possession still remains in the thief, a conviction for receiving cannot be sustained. (*n*) It is also necessary that the defendant should, at the time of receiving the goods, know that they were stolen. (*o*)

Where a husband and wife are indicted for receiving, it is proper that the jury should be asked whether the wife received the goods either from or in the presence of her husband, and where the question was not put, and both husband and wife were convicted, the court quashed the conviction of the wife. (*p*)

Where, on a joint indictment against husband and wife for receiving goods with a guilty knowledge, the indictment found specially that the wife did so receive, and that the husband "adopted the wife's receipt," it was held that the latter words were not equivalent to a verdict of guilty against the husband. (*q*)

Upon an indictment for feloniously receiving a hat and a watch, it was proved that, in consequence of information received from L. (the thief), a constable went to a room in a lodging house, where the prisoner slept, and, in a box in that room, found the stolen hat. The prisoner produced it at once, and admitted that L. had brought it there, but denied any knowledge of the watch. On the following day he was taken into custody, and after he had left the house, he told

(*l*) *Reg.* v. *Reardon*, L. R. 1 C. C. R. 31 ; 35 L. J. (M. C.) 171.
(*m*) *Reg.* v. *Reardon*, L. R. 1 C. C. R. 32, per *Pollock*, C. B.
(*n*) *Reg.* v. *Wiley*, 2 Den. 37 ; 20 L. J. (M. C.) 4 ; Arch. Cr. Pldg. 436.
(*o*) *Ibid.* 437.
(*p*) *Reg.* v. *Wardroper*, 6 U.C.L.J. 262 ; 1 Bell, C.C. 249 ; see also *Reg.* v. *Archer*, 1 Mood. C. C. 143.
(*q*) *Reg.* v. *Dring*, 4 U. C. L. J. 26 ; Dears. & B. 329.

the constable that he knew where the watch was, but did not like to say anything about it before the people in the house. The watch was not found at the first place to which he took the constable, but he afterwards sent a boy for it, and the boy having brought it to him, he gave it to the constable. This was held sufficient evidence to go to the jury of a felonious receiving. (*r*)

On an indictment for feloniously receiving goods, knowing them to have been stolen; it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed, for otherwise it would be in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge. (*s*)

Forgery.—This offence is defined as the fraudulent making or alteration of a writing to the prejudice of another man's right, (*t*) or as a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit. (*u*)

Forgery takes a very wide range, and includes within it fraudulent acts and fabrications, of various descriptions and classes, effected in the numberless ways to which the evil ingenuity of crime can resort. (*v*) But it is said that the offence consists in the false making of an instrument purporting to be that which it is not, and not the making of an instrument purporting to be that which it really is, but which contains false statements; and that telling a lie does not become a forgery, because it is reduced to writing. (*w*)

The instrument must carry, on the face of it, the semblance of that for which it is counterfeited, and not be illegal in its very frame, though it is immaterial whether, if genuine, it would be of validity or not. (*x*)

(*r*) *Reg.* v. *Hobson*, 1 U. C. L. J. 36; Dears. C. C. 400.
(*s*) *Reg.* v. *Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.
(*t*) *Re Smith*, 4 U. C. P. R. 216, per *A. Wilson*, J.; and see *Reg.* v. *Smith*, 1 Dears. & B. 566.
(*u*) *Hall* v. *Carty*, 1 James, 385, per *Bliss*, J.
(*v*) *Ibid.*
(*w*) *Ex parte Lamirande*, 10 L. C. J. 290, per *Drummond*, J.
(*x*) *Reg.* v. *Brown*, 3 Allen, 15 per *Carter*, C. J.

On the above principles, the forging or uttering, in this country, a writing purporting to be a bank note, issued by a foreign banking company, amounts to the crime of forgery, though it is not proved that the company had power, by charter, to issue notes of that description; (*y*) it being shown that the note carried on its face the semblance of a bank note, issued by such company, and there being nothing in its frame to show it illegal. Even if the illegality were a defence, the *onus* of proving it would lie on the prisoner. (*z*) It is no objection that the note is payable in such foreign country. (*a*)

A person, having an order for delivery of wheat for the support of the poor persons in a municipality, is guilty of forgery, if he materially alters the order, so as to increase the quantity of wheat which is obtainable thereunder, with intent to defraud. (*b*)

So it is forgery to execute a deed in the name of, and as representing, another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be principal. (*c*)

But a man who gives a cheque as his own, merely signing a fictitious name, and not intending to pass it off as the cheque of a person other than himself, is not guilty of forgery. (*d*)

It is forgery, both at common law and within the meaning of the 32 & 33 Vic., c. 19, s. 23, to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is, in fact, made and executed by and between the persons by and between whom it purports to be made and executed. (*e*)

(*y*) *Reg.* v. *Brown*, 3 Allen, 13.
(*z*) *Ibid.* 15, per *Carter*, C. J.; *Reg.* v. *Partis*, 40 U. C. Q. B. 214.
(*a*) *Ibid.*
(*b*) *Reg.* v. *Campbell*, 18 U. C. Q. B. 416, per *Robinson*, C. J.
(*c*) *Reg.* v. *Gould*, 20 U. C. C. P. 159, per *Gwynne*, J.
(*d*) *Reg.* v. *Martin*, L. R. 5 Q. B. D. 34.
(*e*) *Reg.* v. *Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M. C.) 10.

It was the duty of the prisoner, a railway station master, to pay B. for collecting and delivering parcels; and the company provided a form in which the charges were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B. that the company would not pay for delivering, but only for collecting, continued to charge the company for collecting and delivering; and in order to furnish a voucher, after paying B.'s servant the sum entered in the form for collecting, and obtaining his receipt, in writing, for that amount, without either his or B.'s knowledge, put a receipt stamp under his servant's name, and put therein, in figures, a larger sum than he had paid, being the aggregate for collecting and delivery. This was held a forgery. (*f*)

Where, on an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable, two months after date, to the order of one J. S., and afterwards endorsed by said S.: the prisoner then altered the note, by making it payable three months after date, and discounted it at the bank of British North America, in London, Ontario. The jury having convicted him of forgery, on motion for a new trial, on the ground that the forgery or uttering, if any, was a forgery of or the uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud, it was held that the altering of the note while it was in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (*g*)

The instrument must be made with intent to defraud, which is the chief ingredient in the offence; (*h*) and the

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(*f*) *Reg.* v. *Griffiths*, 4 U. C. L. J. 240; Dears. & B. 548; 27 L. J. (M. C.) 205.

(*g*) *Reg.* v. *Craig*, 7 U. C. C. P. 239; *Reg.* v. *McNevin*, 2 *Revue Leg.* 711.

(*h*) 2 Russ. Cr. 774; *Reg.* v. *Craig*, *supra*, 244, per *Draper*, C. J.; *Reg.* v. *Dunlop*, 15 U. C. Q. B. 119, per *Robinson*, C. J.

writing of a signature in sport, without any intention to defraud, or pass it off as genuine, is not a forgery. (*i*)

A man may draw a promissory note for any sum he pleases, and in favor of any person, and payable to him, or to his order, or to bearer, and on demand, or at any time after date, at any place, and, so long as it remains simply as his own promissory note, in his own possession, and charging no other person but himself with liability, he may alter it, at his own free will, in all or any particulars. But that right of alteration ceases when another person becomes interested in the note, either by acquiring it as his own property, or by becoming a party to or responsible for its payment; and an alteration then made, prejudicial to any such person, and under circumstances which afford ground for inferring an intention to defraud, is a criminal act. It would seem that, even after another person becomes a party to the note—if, for instance, the note was made by the prisoner, and endorsed by another, but still retained in the hands of the prisoner, and not uttered as genuine, there would be nothing to establish the intention to defraud, and the prisoner could not be convicted of forgery. (*j*)

Sending a telegraphic message in the name of another, authorizing the receiver to advance money to the sender, is a forgery. (*k*)

The act of "forging, coining, etc., spurious silver coin," does not constitute the crime of forgery. (*l*)

Under the 32 and 33 Vic., c. 19, s. 51, the indictment need not allege an intent to defraud any person. (*m*) Nor is it necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the party accused did the act charged, with intent to defraud. (*n*)

(*i*) *Reg.* v. *Dunlop*, 15 U. C. Q. B. 119, per *Robinson*, C. J.
(*j*) *Reg.* v. *Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.
(*k*) *Reg.* v. *Stewart*, 25 U. C. C. P. 440.
(*l*) *Re Smith*, 4 U. C. P. R. 215.
(*m*) See *Reg.* v. *Hathaway*, 8 L. C. J. 285; *Reg.* v. *Carson*, 14 U. C. C. P. 309.
(*n*) 32 & 33 Vic., c. 19, s. 51.

It is also immaterial whether any person is actually defrauded by the forgery. (*o*) If, from circumstances, the jury can presume that it was the defendant's intention to defraud, it is sufficient to satisfy the allegation in the indictment, even though, from circumstances unknown to the defendant, he could not, in fact, defraud the prosecutor. (*p*)

The making of a false instrument is forgery, though it may be directed by statute that such instrument shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes. (*q*) Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation at law. (*r*)

But it seems that an indictment for forging a note or agreement, which is declared by law to be wholly void, cannot be maintained, if the instrument, on its face, affords evidence that it comes within the statute declaring it void. (*s*)

A false letter of recommendation, through the uttering of which to a chief constable the prisoner obtained a situation as constable, is the subject of forgery at common law. (*t*)

But a forgery must be of some document or writing; therefore, the painting of an artist's name in the corner of a picture, with the intention to pass it off as the original production of that artist, is not a forgery. (*u*) And where a bill, sent to a person without any drawer's name, for his acceptance, and the endorsement of a solvent third person, and returned with the acceptance and a fictitious endorsement, is

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(*o*) *Reg.* v. *Crooke*, 2 Str. 901; *Reg.* v. *Goate*, 1 Ld. Raym. 737.

(*p*) *Reg.* v. *Holden*, R. & R. 154; *Reg.* v. *Marcus*, 2 C. & K. 356; *Reg.* v. *Hoatson*, *ibid.* 777.

(*q*) *Rex* v. *Lyons*, Russ & Ry. 255.

(*r*) *Rex* v. *Hawkeswood*, 1 Leach, 257; *Rex* v. *Lee*, *ibid.* 258 n.; *Taylor* v. *Golding*, 28 U. C. Q. B. 201, per *Richards*, C. J.

(*s*) *Taylor* v. *Golding*, 28 U. C. Q. B. 202, per *Richards*, C. J.

(*t*) *Reg.* v. *Moah*, 4 U. C. L. J. 240; Dears. & B. 550; 27 L. J. (M. C.) 204.

(*u*) *Reg.* v. *Closs*, 4 U. C. L. J. 98; 1 Dears. & B. 460.

not a forgery of a negotiable security, though it might be a forgery at common law. (*v*)

An agreement in the following form :—

"GLANFORD, Jany. 29, 1864.

"I, John Hostine, do agree to William Carson, of Warstead Plymp, the full right and privilege of all the white oak and elm and hickory lying and standing on lot 26, south part, on the third concession of Plymp, for the sum of thirty dollars, now paid to Hostine by Carson, the receipt whereof is hereby by me acknowledged.

"JOHN HOSTINE."

may be considered as a contract or agreement for the sale of timber, and parol evidence, of the surrounding circumstances, at the time it was written, would be admissible to explain it; and, at all events, should it fail as an agreement, it is clearly a receipt for the payment of money within the Con. Stats. Can., c. 94, s. 9. (*w*)

The prisoner was secretary of a friendly society, called the Ancient Order of Foresters, having branches in various towns. A member of this society, having paid up all his dues, wished to obtain a "clearance," or certificate that he had made such payments, in order that he might be entitled to membership in a branch of the society in another town. The prisoner, having received the dues and fees for the clearance, neglected to pay them over to the proper officer, and forged the signature of the latter to a clearance; it was held that the clearance was not an acquittance or receipt for money within the corresponding English section of the 32 & 33 Vic., c. 19, s. 26. (*x*)

The prisoner was indicted under the Imperial 24 & 25 Vic., c. 98, s. 24, for feloniously making, by procuration, in the name of one A., a security for money, to wit, £417 13s., without lawful authority or excuse, with intent to defraud. The document forming the subject of the indictment was in the following form :—

(*v*) *Reg.* v. *Harper*, L. R. 7 Q. B. D. 78.
(*w*) *Reg.* v. *Carson*, 14 U. C. C. P. 309.
(*x*) *Reg.* v. *French*, L. R. 1 C. C. R. 217; 39 L. J. (M. C.) 58.

"THORNTON, October, 1867.

"Received of the South Lancashire Building Society the sum of four hundred and seventeen pounds 13s. on account of my share, No. 8071.

"p. p. SUSY AMBLER.
"£417 13s. WM. KAY."

It was held that this document, though in form a mere receipt, given by a depositor to the Building Society, might properly be described in an indictment as a "warrant," "authority," or "request," for the payment of money, if, by the custom of the society, such receipts were, in fact, treated as warrants, authorities and requests, for the payment of money. (*y*)

The 16th section of this statute, which is somewhat analogous to the 32 & 33 Vic., c. 19, ss. 19 and 20, extends to the engraving, in England, without authority, of notes purporting to be notes of a banking company, carrying on business in Scotland only, notwithstanding s. 65 enacts that nothing in the Act contained shall extend to Scotland. (*z*)

Upon an indictment under 1 Wm. IV., c. 66, s. 18, for engraving upon a plate part of a promissory note, purporting to be part of the note of a banking company, it was proved that the prisoner, having cut out the centre of a note of the British Linen Banking Company, on which the whole promissory note was written, had procured to be engraved upon a plate merely the Royal Arms of Scotland and the Britannia which formed part of the ornamental border, but placed upon the plate in the same manner as they are found in a complete note of the company. It was held that the plate so engraved satisfied the words of the section. That the ornamental border of such a note is part of the note within the section, as "note" is there used in the popular sense. That, in order

(*y*) *Reg.* v. *Kay*, L. R. 1 C. C. R. 257; 39 L. J. (M. C.) 118.
(*z*) *Reg.* v. *Brackenridge*, L. R. 1 C. C. R. 133; 37 L. J. (M. C.) 86.

to ascertain whether that which was engraved purported, within the section, to be part of a note, extrinsic evidence was admissible to the jury, and they might compare it with a genuine note of the company. (*a*)

An endorsement, "per procuration J. S.," signed in the defendant's own name, was held on the repealed statute, 11 Geo. IV., and 1 Wm. IV., c. 66, s. 3, not to be forgery, though the defendant falsely alleged that he had authority from J. S. to endorse. (*b*) It would however, be felony within the 31 & 32 Vic., c. 19, s. 27.

So, by s. 47 of this statute, the forgery of an instrument in this country, payable abroad, or the uttering of an instrument in this country, forged, and payable abroad, is made an offence within the meaning of the Act. (*c*)

When a prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I O U, in the following form:—

"NOVEMBER 21st, 1870.

"I O U thirty-five pounds (£35).

"ARTHUR CHAMBERS.

"GEORGE WICKHAM."

and purporting to be signed by the prisoner, and another whose signature was forged by the prisoner; it was held that this was an "undertaking for the payment of money" within 24 & 25 Vic., c. 98, s. 23, the corresponding English section of the 32 & 33 Vic., c. 19, s. 26. (*d*) And there being a consideration for the I O U, the fact that it did not appear was of no consequence; for the consideration of a guarantee need not be shown on its face. (*e*)

The following instrument was held to be a promissory note for the payment of money within s. 3, of the 10 & 11 Vic. c. 9:—

"The President, Directors and Co. of the Montreal Bank

(*a*) *Reg.* v. *Keith*, 1 U. C. L. J. 136; Dears. 486; 24 L. J. (M. C.) 110.
(*b*) *Reg.* v. *White*, 1 Den. 208; 2 C. & K. 404; Arch. Cr. Pldg. 579.
(*c*) See *Reg.* v. *Kirkwood*, 1 Mood. C. C. 311.
(*d*) *Reg* v. *Chambers*, L. R. 1 C. C. R. 341.
(*e*) *Ibid.*; see 26 Vic., c. 45.

promise to pay five dollars, on demand, to W. Martin, or bearer.

"A. SIMPSON, *Cashier*,
"WM. GANN, *Pres.*

"MONTREAL, June 1, 1853."

for a forged paper, purporting to be a bank note, is a promissory note within the meaning of the statute, and it is equally so if there is no such bank as that named, the bank intended being erroneously described in the instrument. (*f*)

A country bank note for the payment of one guinea, "in cash or Bank of England notes," was holden not to be "a promissory note for the payment of money" within the 2 Geo. II., c. 25, for it was necessary that such a note should be for the payment of money only. (*g*) Such a case is now provided for by the 32 & 33 Vic., c. 19, s. 15.

Under s. 26, the forgery of a request for the payment of money is made felony, though it was formerly no offence. (*h*)

A forged magistrate's order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal or directed to the constable, etc., was holden not to be within the former statute; for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. (*i*) Such orders would be authorities or requests within the above section.

An instrument in the following form:—

"$3.50. CARRICK, April 10, 1863.

"JOHN MCLEAN, tailor, please give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing you will oblige me.

"(Signed) ANGUS MCPHAIL."

is an order for the payment of money, and not a mere request. (*j*) But an instrument as follows:—

(*f*) *Reg.* v. *McDonald*, 12 U. C. Q. B. 543.
(*g*) *Reg.* v. *Wilcock*, 2 Russ. 498; Arch. Cr. Pldg. 579.
(*h*) See *Reg.* v. *Thorn*, 2 Mood. C. C. 210; C. & Mar. 206.
(*i*) *Reg.* v. *Rushworth*, R. & R. 317; Arch. Cr. Pldg. 583.
(*j*) *Reg.* v. *Steel*, 13 U. C. C. P. 619.

"RENFREW, June 13, 1860.

"MR. MCKAY,—Sir, would you be good enough as for to let me have the loan of $10 for one week or so, and send it, by the bearer immediately, and much oblige your most humble servant,

"(Signed), J. ALMIRAS, p.p."

was held not an order for the payment of money, within the Con. Stats. Can., c. 94, but a mere request. (*k*)

"MR. WARREN,—Please let the bearer, William Tuke, have the amount of ten pounds, and you will oblige me,

"B. B. MITCHELL,"

is an order for the payment of money, within this statute, and not a mere request; (*l*) but it would not be a warrant for the payment of money, within the meaning of the statute. (*m*) The true criterion as to the instrument being an order or not, is, whether the person to whom it is directed could recover the amount on payment. (*n*)

A writing not addressed to a particular person by name, or to anyone, may be an order for the payment of money, within the statute, if it be shown by evidence that it was intended for such person, or for whom it was intended. (*o*)

Thus where the order was for $15, in favor of "bearer or R. R." and purported to be signed by one "B," and the prisoner in person presented it to M., representing himself to be the payee and a creditor of "B;" it was held that it might fairly be inferred to be intended for M., and a conviction for forgery was sustained. (*p*)

An indictment will not lie for forging or altering the

(*k*) *Reg.* v. *Reopelle*, 20 U. C. Q. B. 260.
(*l*) *Reg.* v. *Tuke*, 17 U. C. Q. B. 296.
(*m*) *Ibid.* 298, per *Robinson*, C. J.
(*n*) *Ibid.* 299, per *Robinson*, C. J.; *Reg.* v. *Carter*, 1 Cox, C. C. 172; *ibid.* 241; *Reg.* v. *Dawson*, 3 Cox, C. C. 220.
(*o*) *Reg.* v. *Parker*, 15 U. C. C. P. 15; *Reg.* v. *Snelling*, 6 Cox, 230; 1 Dears. 219.
(*p*) *Reg.* v. *Parker*, 15 U. C. C. P. 15; *Reg.* v. *Snelling*, 6 Cox, 230; 1 Dears. 219.

Assessment Roll for a township, deposited with the clerk. (*q*) This would probably now be an offence within the 32 & 33 Vic., c. 19.

An indictment for forgery of a note was held defective, in not stating expressly that the note was forged, or that the defendant uttered it as true. (*r*)

Until the provincial statute, 9 Vic., c. 3, the old rule of the criminal law of England prevailed, that the party by whom a forged instrument purported to be signed, was not competent to prove the signature to be forged, and any one who might, by possibility, receive the remotest advantage from the verdict was equally excluded. But the objection was founded on the ground of interest, and, if the witness were divested of such interest, he became competent. (*s*)

The 10 & 11 Vic., c. 9, re-enacted the provisions of the 9 Vic., c. 3, and the 16 Vic., c. 19, Con. Stats. U. C., c. 32, removed the incapacity of crime or interest. This latter statute did not supersede the former, and both are founded on the same principle, namely, to prevent the exclusion of witnesses, on the ground of interest in the subject-matter of inquiry, the first being applicable to inquiries relative to forgery, the latter, general, and also removing the disqualification attached to a conviction for crime. (*t*)

The 32 & 33 Vic., c. 19, s. 54, and c. 29, s. 62, now embody all the provisions of the former enactments on these points.

Where the prisoner was indicted for forging an order for the delivery of goods, and on the trial the only witnesses examined were the person whose name was forged and the person to whom the order was addressed, and who delivered the goods thereon, and, there being no corroborative evidence, it was held, that, under the proviso in the 10 & 11 Vic., c.

(*q*) *Reg.* v. *Preston*, 21 U. C. Q. B. 86.
(*r*) *Reg.* v. *Dunlop*, 15 U. C. Q. B. 118.
(*s*) *Reg.* v. *Giles*, 6 U. C. C. P. 86, per *Draper*, C. J.
(*t*) *Ibid.* 86, per *Draper*, C. J.

9, s. 21, there was not sufficient evidence to support a conviction. (*u*)

Where, on an indictment for forgery of the prosecutor's name as endorser of a promissory note, the prosecutor swore that he was a marksman, and had on several occasions endorsed notes for the prisoner, sometimes allowing the prisoner to write his name, and sometimes making his mark, and the only evidence offered in corroboration was that of the prosecutor's son, to the effect that his father was a marksman; it was held (*v*) that such corroboration was sufficient to warrant a conviction. (*w*) But the court were not unanimous in their decision, and the authority of the case may well be doubted. Furthermore, it has been held in Quebec, that the corroboration of the evidence of an interested witness cannot be based on something stated by that witness. (*x*)

The offence of forgery is not triable at the Quarter Sessions. (*y*)

Great care was formerly requisite in describing the instrument in an indictment for forgery, but now it is sufficient to describe the same by any name or designation, by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof. (*z*)

It is not necessary, in an indictment for forgery, to allege an intent to defraud any particular person, but it is sufficient to allege that the party accused did the act with intent to defraud. (*a*)

Where goods were obtained by false pretences, through the medium of a forged order, the uttering of which was felony, the indictment must formerly have been for the felony,

(*u*) *Reg.* v. *Giles*, 6 U. C. C. P. 84. As to what is sufficient corroboration, see *Reg.* v. *McDonald*, 31 U. C. Q. B. 337.
(*v*) *Cameron*, J. dissenting.
(*w*) *Reg.* v. *Bannerman*, 43 U. C. Q. B. 547.
(*x*) *Reg.* v. *Perry*, 1 L. C. L. J. 60.
(*y*) *Reg.* v. *McDonald*, 31 U. C. Q. B. 337; *Reg.* v. *Dunlop*, 15 U. C. Q. B. 118.
(*z*) 32 & 33 Vic., c. 19, s. 49.
(*a*) See s. 51.

otherwise an acquittal would have been directed on the ground that the misdemeanor was merged. (*b*)

In an indictment for forging a receipt, it must be alleged that such receipt was either for money or goods, etc., as mentioned in the Con. Stats. Can., c. 94, s. 9. (*c*)

Where the instrument is set out in *hæc verba*, in an indictment for forgery, the description of its legal character is surplusage, and unnecessary. (*d*)

It is no defence to an indictment for forging a note, that the prisoner may have expected, and fully intended, to pay it when it became due. (*e*)

The offence of forgery, at common law, was only a misdemeanor, and it fell within the general class of cheats. (*f*)

Cheats and frauds.—These offences at common law consisted in the fraudulent obtaining the property of another, by any deceitful and illegal practice or token, short of felony, which affects, or may affect, the public, or such frauds as are levelled against the public justice of the realm. (*g*) But every fraud on private individuals is not a penal offence. (*h*)

In the case of forgery, it was sufficient that the party might be prejudiced by the false instrument, but nothing could be prosecuted as a cheat at common law without an actual prejudice, which was an obtaining on the statute 33 Hy. VIII. (*i*)

If a person, in the way of his trade or business, put, or suffer to be put, a false mark or token upon any article, so as to pass off as genuine that which is spurious, if such article be sold by such false token or mark, the person so selling may be indicted for a cheat at common law, but the indictment must allege that the article was passed off by means of such false token or mark.

(*b*) *Reg.* v. *Evans*, 5 C. & P. 553; but see now 32 & 33 Vic., c. 29, s. 50.
(*c*) *Reg.* v. *McCorkill*, 8 L. C. J. 283.
(*d*) *Reg.* v. *Carson*, 14 U. C. C. P. 309; *Reg.* v. *Williams*, 2 Den. C. C. 61.
(*e*) *Reg.* v. *Craig*, 7 U. C. C. P. 244.
(*f*) 2 Russ. Cr. 709 *et seq.*
(*g*) *Reg.* v. *Roy*, 11 L. C. J. 94, per *Drummond*, J.; and see 2 Russ. Cr. 613.
(*h*) *Reg.* v. *Roy*, 11 L. C. J. 89.
(*i*) 2 Russ. Cr. 613; *Ward's case*, 2 Str. 747.

Where an indictment alleged that the prisoner, being a picture dealer, knowingly kept in his shop a picture whereon the name of an artist was falsely and fraudulently painted, with intent to pass the picture off as the original work of the artist whose name was so painted, and that he sold the same to H. F., with intent to defraud, and did thereby defraud him, but without stating that the picture was passed off by means of the artist's name being so falsely painted, it was held that such painting of the artist's name was putting a false token on the picture, and that the selling by means thereof would be a cheat at common law, but that the want of such last averment was fatal. (*j*)

Where a person contracts to deliver loaves of bread, of a certain weight, at a certain price, the delivery of a less quantity (*i. e.*, less in weight) than that contracted for, is a mere private fraud, and not indictable, if no false weights or tokens have been used. (*k*)

False personation.—Falsely personating a voter at a municipal election is not an indictable offence. Our statute law contains no provision on the subject, nor is it an offence at common law. (*l*) It is different, however, with regard to parliamentary elections, for by 37 Vic., c. 9, s. 74, it is enacted that "a person shall, for all purposes of the laws relating to parliamentary elections, be deemed to be guilty of the offence of personation, who, at an election of a member of the House of Commons, applies for a ballot paper in the name of some other person, whether such other name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election, applies at the same election for a ballot paper in his own name."

To complete the offence of inducing a person to personate a voter, it would seem not necessary that the personation should be successful, and a conviction for the offence was

(*j*) *Reg.* v. *Closs*, 4 U. C. L. J. 98; Dears. & B. 460; 27 L. J. (M. C.) 54.
(*k*) *Reg.* v. *Eagleton*, 1 U. C. L. J. 179; Dears. 515; 24 L. J. (M. C.) 158.
(*l*) *Reg.* v. *Hogg*, 25 U. C. Q. B. 66; *Reg.* v. *Dent*, 1 Den. C. C. 159.

held good, though it did not set out the mode or facts of the inducement. (*m*)

It would seem that in an indictment for this offence there should be an averment negativing the identity of the defendant with the voter suggested to be personated. (*n*)

Malicious injuries.—Injuring or destroying private property is, in general, no crime, but a mere civil trespass, over which a magistrate has no jurisdiction, unless by statute. (*o*)

The 32 & 33 Vic., c. 22, contains provisions respecting malicious injury to property; but, to bring a case within this statute, the act must have been wilfully or maliciously done. (*p*) But the malice, to be proved, need not have been conceived against the owner of the property, in respect of which it shall be committed. (*q*) And where a man does an act to an animal which he knows may prove fatal, not from ill-will towards the owner or animal, but simply to gratify his depraved tastes, such act is malicious within the statute. (*r*) But where the prisoner threw a stone at a crowd intending to hit one or more of them, but not intending to injure the window, it was held that there was no malice, actual or constructive. (*s*) On principle, one would have thought that the malice would have been transferred to the window.

It would seem to be necessary to allege that the property injured is the property of another person. (*t*)

It is not necessary that the damage done should be of a permanent kind. Plugging up the feed pipe of a steam engine is an offence within s. 19 of this Act. (*u*)

It was held under the former statute, 4 & 5 Vic., c. 26, s. 5, the words of which were not so comprehensive as the

(*m*) *Reg.* v. *Hague*, 12 W. R. 310.
(*n*) *Reg.* v. *Hogg*, 25 U. C. Q. B. 68, per *Hagarty*, J.
(*o*) *Powell* v. *Williamson*, 1 U. C. Q. B. 155, per *Robinson*, C. J.
(*p*) *Powell* v. *Williamson*, *supra*; *Reg.* v. *Elston*, 5 All. 2.
(*q*) See. 66; *Reg.* v. *Bradshaw*, 38 U. C. Q. B. 564; *Reg.* v. *Elston*, 5 All. 2.
(*r*) *Reg.* v. *Welch*, L. R. 1 Q. B. D. 23.
(*s*) *Reg.* v. *Pembleton*, L. R. 2 C. C. R. 119.
(*t*) *Reg.* v. *Elston*, 5 All. 2.
(*u*) *Reg.* v. *Fisher*, L. R. 1 C. C. R. 7; 35 L. J. (M. C.) 57.

present statute, that an apparatus for manufacturing potash, consisting of ovens, kettles, tubs, etc., was not a machine or engine, the cutting, breaking, or damaging of which was felonious. (*v*)

If the defendant sets up and shows a *bona fidé* claim of title to land, the jurisdiction of the magistrate is ousted, (*w*) even though he believe the claim to be ill-founded. (*x*)

Under s. 45 of the 32 & 33 Vic., c. 22, upon an indictment for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound, and the word "wound" must be taken in the ordinary sense. (*y*)

Secs. 20 and 28 of the 4 & 5 Vic., c. 26, gave a summary remedy, not for trespassing on the close, but for malicious injuries to the tree. (*z*)

A summons for malicious injury to property, under the former statute, must have been upon complaint under oath, and a conviction stating that the offence complained of was committed "*depuis environ huit jours*," was held bad for uncertainty. (*a*)

The offence of wilfully injuring a fence, etc., under the (N.B.) 1 Rev. Stats., c. 153, s. 11, was a misdemeanor, not punishable by summary conviction. (*b*)

An indictment charging that the defendant in a secret and clandestine manner cut off the hair from the manes of two horses, the property of one W. B., discloses an offence within the Rev. Stats. of Nova Scotia, c. 169, s. 22; and where an act is committed wrongfully and intentionally, and with full knowledge of the ownership of the property, malice will be presumed. (*c*)

(*v*) *Reg.* v. *Dugherty*, 2 L. C. R. 255.
(*w*) *Reg.* v. *O'Brien*, 5 Que. L. R. 161; *ex parte Donovan*, 2 Pugsley, 389; *Reg.* v. *Taylor*, 8 U. C. Q. B. 257.
(*x*) *Reg.* v. *Davidson*, 45 U. C. Q. B. 91.
(*y*) *Reg.* v. *Bullock*, L. R. 1 C. C. R. 115; 37 L. J. (M. C.) 47.
(*z*) *Madden* v. *Farley*, 6 U. C. Q. B. 213, per *Robinson*, C. J.
(*a*) *Ex parte Hook*, 3 L. C. R. 496.
(*b*) *Ex parte Mulhern*, 4 Allen, 259.
(*c*) *Reg.* v. *Smith*, 1 Sup. C. R. (N. S.) 29.

Arson.—Arson at common law is an offence of the degree of felony, and has been described as the malicious and wilful burning of the house of another. (*d*) It is to be observed that the burning must be of the house of another, but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (*e*)

The owner of a house would, at common law, commit no offence by destroying it, whether by fire or by pulling it down to the ground, provided that in so doing he did not infringe the maxim, *sic utere tuo ut alienum non lædas*, and even by non-observance of that rule he would only commit a civil injury, and not a crime. (*f*)

Arson, at common law, being an injury to the actual possession, and not merely a wrong in destroying a valuable property, when the legislature extends the limits of the crime, we must construe its enactments strictly. (*g*)

By the 32 & 33 Vic., c. 22, s. 3, the setting fire to any house, whether the same is then in the possession of the offender or in the possession of any other person, is made felony; and now, under this statute, it is immaterial whether the house be that of another or of the defendant himself.

The words in this statute are "set fire to" merely, and therefore, it is not necessary to aver in the indictment that the house, etc., was burnt, nor is proof required that it was actually consumed. (*h*) But within this Act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent or attempt to do it is not sufficient. (*i*)

Where a small faggot, having been set on fire on the boarded floor of a room, the boards were thereby "scorched black but not burnt," and no part of the wood was con-

(*d*) 2 Russ. C. R. 1024.
(*e*) *Ibid.*
(*f*) *Reg.* v. *Bryans*, 12 U. C. C. P. 163-4, per *Draper*, C. J.
(*g*) *McNab* v. *McGrath*, 5 U. C. Q. B. O. S. 522, per *Robinson*, C. J.
(*h*) *Reg.* v. *Salmon*, R. & R. 26; *Reg.* v. *Stallion*, 1 Mood. C. C. 398; Arch. Cr. Pldg. 509.
(*i*) *Ibid.*

sumed, this was held not a sufficient burning. (*j*) Now, however, by s. 8 of the statute, setting fire to any matter or thing, being in, against, or under any building, under such circumstances, that if the building were thereby set fire to, the offence would amount to felony, is made felony.

Setting fire to a quantity of straw on a lorry is not an offence within the Act. (*k*) The burning must also be malicious and wilful, otherwise it is only a trespass. And an information simply saying that the prosecutor believed that the prisoner had set fire to the prosecutor's premises, was held to disclose no offence. (*l*) No negligence or mischance, therefore, will amount to such a burning. (*m*) But malice against the owner of the property is not necessary. (*n*)

The decisions with respect to burglary apply also to arson, as to what may be considered a house, shop, etc. (*o*)

A shop is defined to be a place where things are publicly sold. It also has another signification, as a room where some kind of manufactures are carried on, as a shoemaker's shop, etc.; but this sense is merely confined to common speech, and the legislature does not generally use the word in this sense; and in the 3 Wm. IV., c. 3, they clearly did not, because buildings used in carrying on any trade or manufacture were protected under a separate and distinct provision, although the term shop had been used before, and, in fact, by their adding the qualification used, in carrying on any trade or manufacture, the legislature evinced that they intended to have reference to the purpose for which the building was actually used, at the time of the offence. (*p*)

Where a building set fire to had not, for a year or more, been occupied as a shop, but contained some iron in the cellar, but was otherwise not inhabited for any purpose; it

(*j*) *Reg.* v. *Russell*, C. & Mar. 541.
(*k*) *Reg.* v. *Satchwell*, L. R. 2 C. C. R. 21.
(*l*) *Munro* v. *Abbot*, 39 U. C. Q. B. 78.
(*m*) 2 Russ. Cr. 1025.
(*n*) 32 & 33 Vic., c. 22, s. 66; *Reg.* v. *Bradshaw*, 38 U. C. Q. B. 564.
(*o*) *McNab* v. *McGrath*, 5 U. C. Q. B. O. S. 522.
(*p*) *Ibid.*, *supra*, 520.

was held not to be a shop within the meaning of the statute. (*q*)

It was clearly not the intention of the legislature to make the burning of any and every building arson, and the reason which may have led to including dwelling-houses, barns, or shops, can only be intended to apply to buildings occupied as dwelling houses, barns, or shops. Not that a dwelling-house, etc., can only be regarded as being legally such at the very moment when it is actually being used for its appropriate purpose. If left for a moment *animo revertendi*, it is still the dwelling-house of its possessor. A mere building, though fitted up, or intended for any of these purposes, does not acquire its character until it has been appropriated to its proper purpose, and, after it has been so appropriated, the use must be continued to the time of the offence, or, if discontinued, must be discontinued under such circumstances as indicate an intended immediate resumption. (*r*)

A small shanty, about twelve feet square, slightly constructed with boards placed upright, having a shed-roof of boards but no floor, nor any windows or openings for windows, having, however, a door not hung but fastened with nails, being used by a carpenter who was putting up a house near it, as a place of deposit for his tools and window-frames which he had made, but in which no work was carried on by him, and which had not been used as a workshop at any time, to any degree, was held not a building used in carrying on the trade of a carpenter, within the 4 & 5 Vic., c. 26, s. 3. (*s*)

A building, within the 32 & 33 Vic., c. 22, s. 7, need not necessarily be a completed or finished structure: it is sufficient that it should be a connected and entire structure.

Thus in one case, the building set fire to was one of seven built in a row, intended for dwelling-houses, and built, in part, of machine-made bricks, all the walls, external and

(*q*) *McNab* v. *McGrath*, 5 U. C. Q. B. O. S. 519.
(*r*) *Ibid.* 522.
(*s*) *Reg.* v. *Smith*, 14 U. C. Q. B. 546.

internal, of the house, being built and finished, the roof being on and finished, and a considerable part of the flooring laid. The internal walls and ceiling were prepared, and ready for plastering, and the house was in a forward state towards completion, but was not completed; it was held to be a building within the meaning of this section. (*t*)

But the remains of a wooden dwelling-house after a previous fire, which left only a few rafters of the roof and injured the sides and floors so as to render it untenantable, and which was being repaired, was held to be no "building" within the section. (*u*)

Where the question of building or no building is properly left to the jury, their finding is conclusive. (*v*)

Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, provided it be wilful, for every person is deemed to intend the natural consequences of his own act. (*w*)

On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. (*x*)

An indictment, under Con. Stat., c. 93, s. 4, need not have alleged the intent to injure or defraud, as the statute did not make the intent part of the crime, and differed from the English in this respect. (*y*) But it was necessary to prove an intent to injure or defraud, in order to show the act to be unlawful and malicious within the meaning of the statute, (*z*) when the court would infer the act to be unlawful and malicious. (*a*)

The 32 & 33 Vic., c. 22, s. 3, makes the intent part of the

(*t*) *Reg.* v. *Manning*, L. R. 1 C. C. R. 338.
(*u*) *Reg.* v. *Labadie*, 32 U. C. Q. B. 429.
(*v*) *Reg.* v. *Manning*, L. R. 1 C. C. R. 338.
(*w*) See *Reg.* v. *Farrington*, R. & R. 207.
(*x*) See Arch. Cr. Pldg. 511-12; *Reg.* v. *Gilson*, R. & R. 138.
(*y*) *Reg.* v. *Bryans*, *supra*; *Reg.* v. *Greenwood*, 23 U. C. Q. B. 250.
(*z*) *Reg.* v. *Bryans*, 12 U. C. C. P. 161.
(*a*) *Ibid.*

crime, and it is apprehended that the intent must now be alleged in the indictment, notwithstanding the above cases. (*b*)

In *Greenwood's case*, the prisoner being indicted for unlawfully and maliciously attempting to burn his own house, by setting fire to a bed in it, it appeared in evidence that the house in question was so closely adjoining to another house, both being of wood, and the space between the two being only a few inches, that it would be next to impossible that the one should be burnt without also burning the other; that the dead body of a woman was in the bed at the time; that her death had been caused by violence; that she had been recently delivered of a child, whose body was found in the kitchen, and that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shown that the prisoner had been indicted for the murder of this woman, and acquitted, and the record of his acquittal was put in. This evidence was objected to, as tending to prejudice the prisoner's case; but the court held it admissible, for, the house being the prisoner's, it was necessary to show that his attempt to set fire to it was unlawful and malicious, and that these facts would prove it, and might also satisfy the jury that, the murder being committed by another, the prisoner's act was intended to conceal it. (*c*)

The intention must be to injure some person who is not identified with the defendant. Therefore, a married woman cannot be indicted for setting fire to the house of her husband, with intent to injure him. (*d*)

Where the prisoners are indicted under the 32 & 33 Vic., c. 22, s. 3, for unlawfully, maliciously, and feloniously setting fire to a shop "of and belonging to" one of the prisoners, the averment of ownership is an immaterial averment, which may be rejected as surplusage, and need not be proved;

(*b*) See Arch. Cr. Pldg. 508; *Reg.* v. *Price*, 1 C. & K. 73; but see *Reg.* v. *Cronin*, Rob. & J. Dig. 904.
(*c*) 23 U. C. Q. B. 250.
(*d*) *Reg.* v. *March*, 1 Mood. C. C. 182; Arch. Cr. Pldg. 512.

and an intent to injure another person, whose name is not stated in the indictment, may be proved in support of the indictment; for, by s. 68 of the Act, it is not necessary to allege an intent to injure or defraud any particular person. (*e*)

The word "arson" is not used as a term of art, as "murder," or the like, in legal documents; but is used to express what indictments describe as wilfully, maliciously, and feloniously setting fire to a house. (*f*)

Where one W., after arranging against a wall, under the prisoner's directions, a blanket saturated with coal oil, so that if a flame were communicated to it, the building would have caught fire, lighted a match, and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket, when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving, without making any second attempt, and no fire was actually communicated to the oil or blanket; it was held that these were overt acts immediately and directly tending to the execution of the principal crime, and that the prisoner was properly convicted under the 32 & 33 Vic., c. 22, s. 12, of an attempt to commit arson. (*g*)

On an indictment under the corresponding English section of 32 & 33 Vic., c. 22, s. 8, it appeared that the prisoner, from ill-will and malice against a person lodging in a house, made a pile of her goods on the stone floor of the kitchen, and set fire to them, under such circumstances that the house would almost certainly have been burned, had not the police extinguished the fire before the house was actually ignited. The judge, at the trial, told the jury that, if the house had caught fire from the burning goods, the question whether the offence would have amounted to felony would have depended upon whether such a setting fire to the house would have been malicious, and with intent to injure, so as to bring the case

(*e*) *Reg.* v. *Newboult*, L. R. 1 C. C. R. 344.
(*f*) *Re Anderson*, 11 U. C. C. P. 69, per *Hagarty*, J.
(*g*) *Reg.* v. *Goodman*, 22 U. C. C. P. 338.

within the corresponding section of 32 & 33 Vic., c. 22, s. 3; and that, though the prisoner's object was only to destroy the goods, and injure the owner of them, and not to destroy the house, or injure the landlord, yet, if they thought he was aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that, if the building had caught fire, from the setting fire to the goods, the offence would have been felony, otherwise not. The jury found that the prisoner was guilty, but not so that, if the house had caught fire, the setting fire to the house would have been wilful and malicious; and it was held that, upon the finding of the jury, the prisoner was not guilty of felony; for their finding was only that the goods were set on fire with intent to injure the owner of the goods, and there was no section in the Act which makes the wilful and malicious setting fire to goods felony. (*i*)

It is a felony, under 14 & 15 Vic., c. 19, s. 8, coupled with 7 Wm. IV., and 1 Vic., c. 89, s. 3, for a man to set fire to goods in a house in his own occupation, with intent to defraud an insurance company, by burning the goods. One of these Acts makes it felony to set fire to a house, with intent to defraud. The other, felony to set fire to goods in a house, the setting fire to which house would be felony. If the intention to defraud is meant to extend to the defrauding of any person who may be defrauded by the effects in the house being destroyed, then, in this case, it would be felony to set fire to the house; but setting fire to goods in a house, the setting fire to which house would be felony, is felony. (*j*)

Upon an indictment under 7 Wm. IV., and 1 Vic., c. 89, s. 10, for setting fire to a stack of grain, it was proved that the prisoner set fire to a stack of flax, with the seed in it, and the jury found that flax seed is grain, and it was held that a conviction was right. (*k*)

(*i*) *Reg.* v. *Child*, L. R. 1 C. C. R. 307.
(*j*) *Reg.* v. *Lyons*, 5 U. C. L. J. 70; Bell, C. C. 38.
(*k*) *Reg.* v. *Spencer*, 3 U. C. L. J. 19; Dears. & B. 131; 26 L. J. (M.C.) 16.

Perjury and subornation of perjury.—Perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not. (*l*) Subornation of perjury, by the common law, is an offence, in procuring a man to take a false oath, amounting to perjury, who actually takes such oath. (*m*) These offences are now misdemeanors, by the 32 & 33 Vic., c. 23. s. 1.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding, before a competent jurisdiction. (*n*)

The swearing falsely by a voter, at an election of aldermen, is not an oath upon which, by the common law, perjury could be assigned, not being in any judicial proceeding, or anything tending to render effectual a judicial proceeding. (*o*) This would probably now be perjury, under the 32 & 33 Vic., c. 23, s. 2. (*p*)

But false swearing before a local marine board, lawfully constituted, upon a matter material to an inquiry, then being lawfully investigated by them, in pursuance of the 17 & 18 Vic., c. 104, is perjury and indictable, as such, for it is in a tribunal invested with judicial powers. (*q*)

Since the Judicature Act, it is sufficient evidence of the existence of proceedings for the officer of the court to produce the copy of the writ filed, and of the pleadings, if any. (*r*)

Although a summons in bastardy is irregularly issued, yet, if the defendant actually appears, he thereby waives any irregularity there might be in the process; consequently the proceeding of the justices, in taking his evidence, is a

(*l*) 3 Russ. Cr. 1.
(*m*) *Ibid.*
(*n*) *Reg.* v. *Aylett*, 1 T. R. 69; 3 Russ. Cr. 2.
(*o*) *Thomas* v. *Platt*, 1 U. C. Q. B. 217.
(*p*) *Hogle* v. *Hogle*, 16 U. C. Q. B. 520, per *Robinson*, C. J.
(*q*) *Reg.* v. *Tomlinson*, L. R. 1 C. C. R. 49; 36 L. J. (M. C.) 41; *Reg.* v. *Smith*, L. R. 1 C. C. R. 110.
(*r*) *Reg.* v. *Scott*, L. R. 2 Q. B. D. 415.

valid judicial proceeding sufficient to make the prisoner's false swearing, in the course of it, perjury. (*s*)

Where the affidavit is not taken in a judicial proceeding, and therefore does not constitute perjury in its strict sense, the party may nevertheless be indicted for a misdemeanor at common law if taken on a lawful occasion, in which it has been made an offence by law to swear falsely. (*t*) Thus a false statement in an affidavit made under the Bills of Sale Act, for the purpose of having a bill of sale filed, though not strictly constituting perjury, was, nevertheless, a false oath, sufficient to found a conviction for perjury on the ordinary indictment. (*u*)

The party administering the oath must have competent authority to administer it in the particular proceeding in which the witness is sworn. (*v*)

To give a magistrate jurisdiction, it is unnecessary to show any summons issued, or any step taken to bring the person complained of before him, for, so long as he was present, the manner of his getting there was immaterial; (*w*) and even the fact that he was arrested on a warrant illegally issued does not affect the magistrate's jurisdiction. (*x*)

But where the complaint before the magistrate was for selling liquor without license, contrary to the (Ont.) 32 Vic., c. 32, and the indictment did not show where the liquor was sold, and s. 25 of the Act required the proceedings to be carried on before magistrates "having jurisdiction in the municipality in which the offence is committed," so that it did not appear from the indictment that the magistrate had jurisdiction to hear the complaint or administer the oath, the indictment was held insufficient in law. (*y*)

(*s*) *Reg* v. *Fletcher*, L. R. 1 C. C. R. 320.
(*t*) *Reg.* v. *Chapman*, 1 Den. 432, 2 C. & K. 846; *Reg.* v. *Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14; *Hogle* v. *Hogle*, *supra*.
(*u*) *Reg.* v. *Hodgkiss*, L. R. 1 C. C. R. 212.
(*v*) *Reg.* v. *McIntosh*, 1 Hannay, 372; *McAdam* v. *Weaver*, 2 Kerr, 176.
(*w*) *Reg.* v. *Mason*, 29 U. C. Q. B. 431.
(*x*) *Reg.* v. *Hughes*, L. R. 4 Q. B. D. 614.
(*y*) *Reg* v. *Mason*, 29 U. C. Q. B. 434, per *Wilson*, J.

Defendant, by verbal agreement, engaged to work as a farm servant with one T., on the 9th of April, 1860, at $8 per month, the bargain being, that he should work for half a month, and as long after as he was found to suit, or until the fall ploughing was done. It was held that this could not be treated as a hiring for a year, or any period beyond it, and that it was such a hiring as came within the Con. Stats. U. C., c. 75, and under the 12th section of the Act, gave the magistrate jurisdiction to adjudicate on the matter, and afford redress, and that a false oath taken in such proceeding was therefore perjury. (*z*) A magistrate has jurisdiction to adjudicate upon such a complaint, although the summons be not taken out until the relation of master and servant has ceased; or, at any rate, he has jurisdiction to inquire into the existence of that relation. (*a*)

But where a woman, having obtained judgment against the defendant in a county court, married, and afterwards, in her maiden name, took out a judgment summons against him in another district, which, on hearing, the judge amended by inserting her husband's name, and the defendant was then sworn and examined, and was afterwards indicted and convicted at that hearing; it was held that he was improperly convicted, as he had been sworn in a cause in which there was no judgment, and in which the county court had no jurisdiction; (*b*) and on an information for unlawfully killing cattle, the charge was held to be only one of trespass, and that, therefore, the magistrate had no jurisdiction to administer an oath. (*c*)

The defendant was convicted on an indictment for perjury, assigned upon a clause in his affidavit, made before a magistrate under Con. Stat. U. C., c. 52, s. 73, in compliance with one of the conditions of a policy issued to him by a mutual fire insurance company, requiring the assured, in case of loss

(*z*) *Reg.* v. *Walker*, 21 U. C. Q. B. 34.
(*a*) *Reg* v. *Proud*, L. R. 1 C. C. R. 71.
(*b*) *Reg.* v. *Pearce* 9 U. C. L. J. 333; 3 B. & S. 531; 32 L. J. (M. C.) 75
(*c*) *Ganong* v. *Fawcett*, 2 Pugsley, 129.

by fire, to deliver unto the company a detailed statement, under oath, of his loss, and value of the property destroyed. It was held that the policy of insurance containing this condition should have been produced in order to show the authority of the justice of the peace, before whom the affidavit was made, to administer the oath, and also the condition above referred to, of which there had been no proof whatever, although the perjury assigned had been committed in complying with it. (*d*)

By the 32 & 33 Vic., c. 23, s. 4, the justice or commissioner is now required to take the affidavit or declaration.

On an indictment for perjury, on the hearing of a complaint for trespass in pursuit of game, it appeared that the complaint alleged that the defendant was in the close for the purpose of destroying game, but it did not allege that it was for the purpose of destroying game there. The complaint was held to be sufficient in form to give the justices jurisdiction, so as to make false evidence, on the hearing, perjury. (*e*)

The clerk of a Division Court, acting under the 13 & 14 Vic., c. 53, s. 102, issued an interpleader summons on his own authority, without the bailiff's request. The statute requires the summons to be issued upon the application of the officer charged with the execution of the process. Both parties attended before a barrister appointed by the judge of the court, who was ill. They thereby submitted to the jurisdiction, and an order was made under this section. The judge afterwards granted a new trial, which took place. The defendant was convicted of perjury, committed on the hearing, after the granting of the new trial; but it was held that both parties having appeared in the first instance, the proceedings then could not be considered void, for want of a previous application by the bailiff, and were, consequently, final and conclusive. But it not being competent to the judge to order a new trial, under s. 84 of this Act, the pro-

(*d*) *Reg.* v. *Gagan*, 17 U. C. C. P. 530.
(*e*) *Reg.* v. *Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

ceedings on the second trial were irregular and extra-judicial, and the false swearing taking place on it, the conviction was illegal, as there was no authority to administer the oath. (*f*)

Not only must offences of the nature charged be within the competence of the magistrate, but he must also have jurisdiction territorially. (*g*)

Where the jurat of an affidavit states the place, it is *prima facie* evidence of administering the oath there. (*h*) A person is indictable who gives false evidence before a grand jury, on a bill of indictment, and the false swearing may be proved by the evidence of other witnesses, examined before them on the same bill (*i*)

Previously to the 32 & 33 Vic., c. 23, s. 7, the doctrine was, that that part of the oath upon which the perjury is assigned must be material to the matter then under the consideration of the court. (*j*)

But that section enacts that all evidence and proof whatsoever, whether given or made orally, or by, or in any affidavit, affirmation, declaration, examination or deposition, shall be deemed and taken to be material, with respect to the liability of any person to be proceeded against, and punished for wilful and corrupt perjury, or for subornation of perjury.

The matter sworn must be either false in fact or, if true, the defendant must not have known it to be so. But a man may be indicted for perjury, in swearing that he believes a fact to be true, which he must know to be false. (*k*)

(*f*) *Reg.* v. *Doty*, 13 U. C. Q. B. 398.

(*g*) *Reg.* v. *Row*, 14 U. C. C. P. 307; *Reg.* v. *Atkinson*, 17 U.C.C.P. 295.

(*h*) *Reg.* v. *Atkinson*, *supra*, 301, per *J. Wilson*, J.

(*i*) *Reg.* v. *Hughes*, 1 C. & K. 519; Arch. Cr. Pldg. 815.

(*j*) *Reg.* v. *Griepe*, 1 Ld. Raym. 256; *Reg.* v. *Nichol*, 1 B. & Ald. 21; *Reg.* v. *Townsend*, 10 Cox, 356; 4 F. & F. 1089; Arch. Cr. Pldg. 816; 2 Salk. 514; *Reg.* v. *Lavey*, 3 C. & K. 26; *Reg.* v. *Overton*, 2 Mood. C. C. 263; C. & Mar. 655; see also *Reg.* v. *Gibbons*, L. & C. 109; 31 L. J. (M.C.) 98; Arch. Cr. Pldg. 817; *Reg.* v. *Tyson*, L. R. 1 C. C. R. 107; 37 L. J. (M.C.) 7; 16 W. R. 317; *Reg.* v. *Murray*, 1 F. & F. 80; *Reg.* v. *Alsop*, 5 C. L. J. N. S. 159; 11 Cox, 264; *Reg.* v. *Naylor*, 11 Cox, 13; W. R. 374; *Reg.* v. *Courtney*, 7 Cox, 111; 5 Ir. L. R. N. S. 434; *Reg.* v. *Dunston*, Ry. & M. 109; *Reg.* v. *Goodard*, 2 F. & F. 361.

(*k*) *Reg.* v. *Pedley*, 1 Leach, 327; *Reg.* v. *Schlesinger*, 10 Q. B. 670; 17 L. J. (M. C.) 29; Arch. Cr. Pldg. 818.

The false oath must be taken deliberately and intentionally; for, if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. (*l*)

It would seem that perjury may be assigned, when the oath is administered upon the Common Prayer book of the Church of England. (*m*)

Where, in an indictment for perjury, the defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given previous to the election, and the notice appearing to have been given on the nomination of the candidate objected to; it was held that the assignment of perjury was not proved, as an election, under the Municipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary, to constitute an election, that a poll should be demanded. (*n*)

The false oath must be clear and unambiguous. But where a joint affidavit, made by defendant and one D., stated, "each for himself maketh oath, and saith that, etc., and that he, this deponent, is not aware of any adverse claim to or occupation of said lot;" the defendant having been convicted of perjury upon this latter allegation, it was held that there was neither ambiguity nor doubt in what each defendant said; but that each, in substance, stated that he was not aware of any adverse claim to or occupation of said lot. (*o*)

It would seem that a magistrate taking an affidavit without authority is guilty of a misdemeanor, and that a criminal information will lie against him for so doing. (*p*)

To constitute perjury at common law, it is not necessary that an affidavit should be read or used; for the crime is

(*l*) Arch. Cr. Pldg. 818-19.
(*m*) *McAdam* v. *Weaver*, 2 Kerr, 176; *Rokeby* v. *Langston*, 2 Keb. 314.
(*n*) *Reg.* v. *Cowan*, 24 U. C. Q. B. 606.
(*o*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 295.
(*p*) *Jackson* v. *Kassel*, 26 U. C. Q. B. 346, per *Draper*, C. J.

complete on the affidavit being sworn to, though no use was afterwards made of it; but, under the 5 Eliz., c. 9, as nothing can be an offence within it unless some one is actually aggrieved, the affidavit must be read or used. (*q*)

To sustain a conviction for perjury, it is not necessary that the jurat of the affidavit, upon which the perjury is assigned, should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material, and although through the defective jurat the affidavit could not be received in court, yet perjury may be committed in an affidavit which the court would refuse to read. The jurat is no part of the affidavit. (*r*)

There can be no accomplices in perjury. (*s*)

It has been held that, on an indictment for perjury, the defendant must appear and submit to the jurisdiction of the court, before he can be allowed to plead, and that this rule applies to misdemeanors as well as felonies. (*t*)

An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the Court of Quarter Sessions for the county of B., on the 11th of June 1867, on a charge of larceny; which was held sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken, nor to allege that the indictment was in the name of the Queen, as the court must take judicial notice of the fact that Her Majesty alone could prosecute on a charge of larceny. (*u*) This decision was, to some extent, founded on the provisions of the Con. Stats. Can., c. 99, ss. 39 and 51; and as those of the 32 & 33 Vic., c. 23, s. 9, are the same in substance, the decision will still hold.

Although, in an indictment for obtaining money or goods by false pretences, the property in the money or goods must

(*q*) *Milner* v. *Gilbert*, 1 Allen, 57.
(*r*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 295.
(*s*) *Reg.* v. *Pelletier*, 1 *Revue Leg.* 565.
(*t*) *Reg.* v. *Maxwell*, 10 L. C. R. 45.
(*u*) *Reg.* v. *Macdonald*, 17 U. C. C. P. 635.

be alleged, yet in reciting such a prosecution, upon which to found a charge of perjury, it seems the same particularity would not be necessary, otherwise the false pretence should be set out too, and it was only after a long course to the contrary that it was at length determined the false pretences should be set out in the indictment, for the specific offence. (*v*)

Where an indictment for perjury stated that a cause was pending in the county court, in which A. and B. were plaintiffs and C. defendant; that, on the hearing of such cause, it "became a material question whether the said A. had, in the presence of the prisoner, signed at the foot of" a certain bill of account, purporting to be a bill of account between a certain firm called A. & Co. and the aforesaid C., a receipt for payment of the amount of the said bill, "and that the said prisoner did" falsely, corruptly, and maliciously swear that the said A. did, on a certain day, in the presence of the prisoner, sign the said receipt (meaning a receipt at the foot of the said first mentioned bill of account for the payment of the said bill), whereas, etc.: it was held sufficiently certain. (*w*)

And an indictment for perjury which stated the offence to have been committed on the trial of "a certain indictment for misdemeanor," at the Quarter Sessions for the county of Salop, but did not state what the misdemeanor was, so as to show that the court had jurisdiction to try it, nor expressly averred that the court had such jurisdiction, was held good. (*x*)

The 32 & 33 Vic., c. 23, s. 9, renders it unnecessary to set forth the authority to administer the oath. This Act was passed to do away with technical forms of indictments, and where an indictment contains every averment required by this section, it is by the express terms of the section sufficient, although it does not contain any express or equivalent

(*v*) *Reg.* v. *Macdonald*, 17 U. C. C. P. 638, per *A. Wilson*, J.; *Rex.* v. *Mason*, 2 T. R. 581.
(*w*) *Reg.* v. *Webster*, 5 U. C. L. J. 262; 1 F. & F. 515.
(*x*) *Reg.* v. *Dunning*, L. R. 1 C. C. R. 290.

averment that the court had competent authority to administer the oath. (*y*)

Where it appeared, on the face of an indictment for perjury, that the statement complained of was made before a justice of the peace, in preferring a charge of larceny committed within his jurisdiction, it was held unnecessary to allege expressly that he had authority to administer the oath. (*z*)

An indictment for perjury, which charged the defendant with having sworn falsely in certain proceedings before justices, wherein he was examined as a witness, the allegation of materiality averred that "the said D. R. (the defendant) being so sworn as aforesaid, it then and there became material to inquire and ascertain, etc., was held bad, as not sufficiently showing that the alleged perjury was committed at the said proceedings, and that the words "upon the trial" should have been used. (*a*)

In 32 & 33 Vic., c. 23, s. 9, "the substance of the offence charged" means that the charge must contain such a description of the crime that the defendant may know what crime he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes. (*b*)

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury, in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of

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(*y*) *Reg.* v. *Dunning*, L. R. 1 C. C. R. 294-5, per *Channel*, B.
(*z*) *Reg.* v. *Callaghan*, 20 U. C. Q. B. 364.
(*a*) *Reg.* v. *Ross*, 1 Oldright, 683; and see 32 & 33 Vic., c. 29, sch. A. Perjury, 291.
(*b*) *Reg.* v. *Macdonald*, 17 U. C. C. P. 636, per *A. Wilson*, J.; *Reg.* v. *Horne*, Cowp. 682.

perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (*c*)

An indictment for perjury, based upon an oath alleged to have been made before the "judge of the General Sessions of the Peace in and for the said district" [of Montreal], instead of, as the fact was, before the "judge of the Sessions of the Peace in and for the city of Montreal," that being the proper title of the judge, may be amended after the plea of not guilty. (*d*)

Where an attempt to incite a woman to take a false oath consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting but not proved to bear the Bradford post mark, and addressed to the woman at Toronto, where it was received by her: it was held that the case could be tried in York. (*e*)

The 32 & 33 Vic., c. 23, s. 10, contains provisions as to the form of the indictment, whether the offence has or has not been actually committed, and section 8 provides that any person accused of perjury may be tried and convicted in any district, county or place, where he is apprehended, or is in custody.

The ordinary conclusion of an indictment for perjury, "did thereby commit wilful and corrupt perjury," may be rejected as surplusage. (*f*)

It has been held under the 14 & 15 Vic., c. 100, s. 1, (*g*) that the judge had power to amend an indictment for perjury, describing the justices before whom the perjury was committed as justices for a county, where they are proved to be justices for a borough only. (*h*)

(*c*) *Reg.* v. *Broad*, 14 U. C. C. P. 168.
(*d*) *Reg.* v. *Pelletier*, 15 L. C. J. 146.
(*e*) *Reg.* v. *Clement*, 26 U. C. Q. B. 297.
(*f*) *Reg.* v. *Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14; *Ryalls* v. *Reg.*, 11 Q. B. 781.
(*g*) See 32 & 33 Vic., c. 29, s. 71.
(*h*) *Reg.* v. *Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

By 26 Vic., c. 29, s. 7, it is enacted that witnesses before commissioners for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions, on the ground that the answers thereto may criminate them, and that "no statement made by any person, in answer to any question put by such commissioners, shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal." It was held that, "except in cases of indictments for perjury," applies only to perjury committed before the commissioners; and, therefore, on an indictment for perjury, committed on the trial of an election petition, evidence of answers to commissioners appointed to inquire into the existence of corrupt practices at the election in question is not admissible. (*i*)

Some one or more of the assignments of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts, confirming his testimony. (*j*) And the assignment so proved must be upon a part of the matter sworn, which was material to the matter before the court, at the time the oath was taken. (*k*)

Where three witnesses proved that the prisoner had made parol statements, contradictory to the truth of the statement upon which perjury was assigned, and the evidence of several witnesses went to confirm the truth of such parol statements, but there was no direct evidence that they were true, a conviction for perjury was supported. (*l*)

The 32 & 33 Vic., c. 23, s. 8, applies to all cases of perjury, and not merely to "perjuries in insurance cases," which is the heading under which the sections from 4 to 12 are placed. Therefore a magistrate acting in the county of Halton, has jurisdiction to take an information against, and

(*i*) *Reg.* v. *Buttle*, L. R. 1 C. C. R. 248.

(*j*) *Reg.* v. *Boulter*, 2 Den. 396; 21 L. J. (M. C.) 57; 3 C. & K., 236; *Reg.* v. *Webster*, 1 F. & F. 515; *Reg.* v. *Braithwaite*, *ibid.* 638; *Reg.* v. *Shaw*, L. & C. 579; 34 (L. J. (M. C.) 169; Arch. Cr. Pldg 822.

(*k*) *Ibid.*; see also *Reg.* v. *Muscot*, 10 Mod. 194; *Reg.* v. *Lee*, 2 Russ. 650; *Reg.* v. *Gardner*, 8 C. & P. 737; *Reg.* v. *Roberts*, 2 C. & K. 607.

(*l*) *Reg.* v. *Hook*, 4 U. C. L. J. 241; Dears. & B. 606; 27 L. J. (M. C.) 221.

to apprehend and bind over, a person charged with perjury committed in the county of Wellington. (*m*)

Conspiracy.—A conspiracy is an agreement by two persons or more, to do, or cause to be done, an act prohibited by penal law, or to prevent the doing of an act ordained under legal sanction, by any means whatever, or to do, or cause to be done, an act, whether lawful or not, by means prohibited by penal law. (*n*)

It is otherwise defined as a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means. (*o*) And a further extension of the definition is as follows: An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prisoner a right of suit, founded on fraud or on violence, exercised on or toward him, is a criminal conspiracy. (*p*)

Conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. (*q*) The conspiracy or unlawful agreement is the gist of the offence. (*r*)

As it is thus complete, by a mere combination of persons, to commit an illegal act, or any act whatever, by illegal means, the parties will be liable, though the conspiracy has

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(*m*) *Reg.* v. *Currie*, 31 U. C. Q. B. 582.
(*n*) *Reg.* v. *Roy*, 11 L. C. J. 93, per *Drummond*, J.
(*o*) *Reg.* v. *Vincent*, 9 C. & P. 91, per *Alderson*, B.; *Reg.* v. *Roy*, *supra*, 92, per *Drummond*, J.
(*p*) *Reg.* v. *Aspinall*, L. R. 2 Q. B. D. 48; *Reg.* v. *Warburton*, L. R. 1 C. C. R. 274.
(*q*) *Mulcahy* v. *Reg.* L. R. 3 E. & I. App. 306, 317, 328.
(*r*) *Horseman* v. *Reg.* 16 U. C. Q. B. 543; *Reg.* v. *Seward*, 1 A. & E. 706; 3 L. J. (M. C.) 103; *Reg.* v. *Richardson*, 1 M. & Rob. 402; *Reg.* v. *Kenrick*, 5 Q. B. 49; 12 L. J. (M. C.) 135; 3 Russ. Cr. 116.

not been actually carried into execution. (*s*) The actual execution of the conspiracy need not be alleged in the indictment. (*t*)

For the same reason, it is not necessary that the object should be unlawful; and in many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, though the same act, if done separately by each individual, without any agreement amongst themselves, would not have been illegal. (*u*)

The rule is, that when two fraudulently combine, the agreement may be criminal, although, if the agreement were carried out, no crime would be committed, but a civil wrong only inflicted on the party. (*v*)

It is sufficient to constitute a conspiracy if two or more persons combine, by fraud and false pretences, to injure another. (*w*)

A fraudulent agreement, by a member of a partnership, with third persons, wrongfully to deprive his partner, by false entries and false documents, of all interest in some of the partnership property, in taking accounts for the division of the property, on the dissolution of the partnership, was held to be a conspiracy, although the offence was completed before the passing of the corresponding English section of the 32 & 33 Vic., c. 21, s. 38 (by which a partner can be criminally convicted for feloniously stealing the partnership property); for the object was to commit a civil wrong by fraud and false pretences (*x*)

It appears that an indictment lies not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by

(*s*) *Reg.* v. *Roy*, 11 L. C. J. 92, per *Drummond*, J.
(*t*) *Ibid.*
(*u*) *Rex* v. *Mawbey*, 6 T. R. 636, per *Grose*, J.; 3 Russ. Cr. 116.
(*v*) *Reg.* v. *Warburton*, L. R. 1 C. C. R. 276, per *Cockburn*, C. J.; 40 L. J. (M. C.) 22; *Reg.* v. *Aspinall*, L. R. 2 Q. B. D. 48.
(*w*) *Ibid.* 276, per *Cockburn*, C. J.
(*x*) *Reg.* v. *Warburton*, L. R. 1 C. C. R. 274.

the use of unlawful means, and this although such purpose be not effected. (*y*)

But in an indictment for conspiracy, an offence prohibited by penal law must be set forth either in the averment of the end or means. The indictment ought to show that the conspiracy was for an unlawful purpose, or to effect a lawful purpose by unlawful means. *Malum prohibitum*, and not *malum in se non prohibitum*, is the only foundation either as to the end or the means, upon which an indictment for conspiracy should rest. (*z*) But an omission in an indictment to state that the agreement was made with intent to defraud, is cured by verdict. (*a*)

All the definitions of conspiracy show that the offences of this nature belong to one or other of two classes. The first, where the illegal character of the object constitutes the crime; the second, where the illegal character of the means used to attain the end is the constituent feature of the offence. In the first class of cases, it is unnecessary to state in the indictment the means by which the unlawful end was attained, or sought to be reached; while in the second class, the means, or overt acts, must be specially set forth. (*b*)

In this case, the object was alleged to be to "cheat and defraud private individuals;" but as this was not necessarily a penal offence, and no penal offence was shown in the averment of the means used, the indictment was quashed. It was also held that the count should state of what thing or things the defendant intended to defraud the parties. (*c*)

An indictment, charging that defendants, H., C. and D., were township councillors of East Nissouri, and T., treasurer; that defendants, intending to defraud the council of £300 of the moneys of said council, falsely, fraudulently, and unlawfully, did combine, conspire, confederate and agree among

(*y*) *Reg.* v. *Tailors' Com.* 8 Mod. 11; *Reg.* v. *Best*, 6 Mod. 185; 3 Russ. Cr. 116.
(*z*) *Reg.* v. *Roy*, 11 L. C. J. 89-93, per *Drummond*, J.
(*a*) *Reg.* v. *Aspinall*, L. R. 2 Q. B. D. 48.
(*b*) *Reg.* v. *Roy*, 11 L. C. J. 93, per *Drummond*, J.
(*c*) *Ibid.*

themselves, unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer, as aforesaid, was held bad, on writ of error, on the following grounds: The money in the hands of the treasurer was, under 12 Vic., c. 81, s. 74, the property of the municipal corporation, and the intent to defraud should have been laid as an attempt to defraud the latter of its moneys; second, there was nothing to show what the parties conspired to accomplish; third, the unlawful conspiracy, which is the gist of the offence, was not first sufficiently alleged, and the overt act stated to have been done, in pursuance of it, was not wrong or unlawful; fourth, it was not alleged that any unlawful means were had in order to get the money into the possession of the treasurer. (*d*)

Conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them. (*e*)

Whenever a joint participation in an enterprise is shown, any act done in furtherance of the common design is evidence against all who were, at any time, concerned in it. (*f*) It is clearly unnecessary to prove that all the defendants, or any two of them, actually met together, and concerted the proceeding carried out. It is sufficient if the jury are satisfied, from their conduct, and from all the circumstances, that they were acting in concert. (*g*) But, in general, proof of concert and connection must be given before evidence is

(*d*) *Horseman* v. *Reg.*, 16 U. C. Q. B. 543.
(*e*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 317, per *Willes*, J.; *Reg.* v. *Brissac*, 4 Ea. 171, per *Grose*, J.
(*f*) *Reg.* v. *Slavin*, 17 U. C. C. P. 205; and see *Reg.* v. *Shellard*, 9 C. & P. 277; *Reg.* v. *Blake*, 6 Q. B. 126; 13 L. J. (M. C.) 131.
(*g*) *Reg.* v. *Fellowes*, 19 U.C.Q.B. 48; and see *Reg.* v. *Parsons*, 1 W. Bl. 322; *Reg.* v. *Murphy*, 8 C. & P. 297.

admissible of the acts or declarations of any person not in the presence of the prisoner. (*h*) The prosecutor may go into general evidence of the nature of the conspiracy before he gives evidence to connect the defendant with it. (*i*)

The prisoners were indicted for conspiring to commit larceny. The evidence was that the two prisoners, with another boy, were seen by a policeman to sit together on some door-step near a crowd, and when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in his pocket, but making no visible attempt to pick the pocket; and to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the door-step, and resumed their seats. They repeated this two or three times, but there was no proof of any preconcert other than this proceeding. It was held not to be sufficient evidence of a conspiracy; for to sustain a charge of conspiracy, there must be evidence of concert to do the illegal act, and the doing of an act not illegal is no evidence of a conspiracy to do an illegal one, there being no other evidence of the conspiracy than the act so done. (*j*)

In an indictment for conspiracy to obtain money by false pretences, it is not necessary to set out the pretences, as the gist of the offence is the conspiracy. (*k*) But where the conspiracy is to obtain money from certain persons, it is necessary to state who they are, for the conspiracy is to cheat them. (*l*) Where the conspiracy is to obtain goods, it is not necessary to specify the goods or describe them, as in an

(*h*) 3 Russ. Cr. 161; *The Queen's case*, 2 Brod. & B. 302; *Reg.* v. *Jacobs*, 1 Cox, C. C. 173; *Reg.* v. *Duffield*, 5 Cox, C. C. 404.
(*i*) *Reg.* v. *Hammond*, 2 Esp. 718.
(*j*) *Reg.* v. *Taylor*, 8 C. L. J. N. S. 54; 25 L. T. Reps. N. S. 75.
(*k*) *Reg.* v. *Macdonald*, 17 U.C.C.P. 638, per *A. Wilson*, J.; *Rex* v. *Gill*, B. & Ald. 204.
(*l*) *Ibid.*

indictment for stealing them; stating them as "divers goods" would be sufficient. (*m*)

Conspiracy is an offence at common law, independently of the 33 Edw. I., c. 2. (*n*) A conspiracy to kidnap is a misdemeanor. (*o*)

A conspiracy to charge a man falsly with treason, felony or misdemeanor, is indictable: but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion. (*p*)

A conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods, is indictable. (*q*) So a conspiracy to defraud the public by means of a mock auction or an auction with sham bidders, who pretend to be real bidders for the purpose of selling goods at prices grossly above their worth. (*r*) So a conspiracy by a female servant and a man, whom she got to personate her master, and marry her, in order to defraud her master's relatives of a part of his property, after his death. (*s*) So a conspiracy to injure a man in his trade or profession; (*t*) so a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price. (*u*) So a conspiracy to raise the prices of the public funds by false rumors, as being a fraud upon the public; (*v*) so a conspiracy by persons, to cause themselves to be reputed men of property, in order to defraud tradesmen; (*w*) so a conspiracy to defraud by means of false representations of

(*m*) *Reg.* v. *Roy*, 11 L. C. J. 92, per *Drummond*, J.
(*n*) *Ibid.*
(*o*) *Ex parte Blossom*, 10 L. C. J. 41, per *Badgley*, J.
(*p*) *Reg.* v. *Best*, 1 Salk. 174; 2 Ld. Raym. 1167.
(*q*) *Reg.* v. *Macarty*, 2 Ld. Raym. 1179.
(*r*) *Reg.* v. *Lewis*, 11 Cox, 404, per *Willes*, J.
(*s*) *Reg.* v. *Taylor*, 1 Leach, 47.
(*t*) *Reg.* v. *Eccles*, 1 Leach, 274.
(*u*) *Reg.* v. *Carlile*, 23 L. J. (M. C.) 109.
(*v*) *Rex* v. *De Berenger*, 3 M. & S. 67.
(*w*) *Reg.* v. *Roberts*, 1 Camp. 399.

the solvency of a bank or other mercantile establishment; (*x*) so a conspiracy by traders, to dispose of their goods in contemplation of bankruptcy with intent to defraud their creditors; (*y*) so a conspiracy to procure the defilement of a girl, (*z*) or a conspiracy to induce a woman, whether chaste or not, to become a common prostitute. (*a*)

But an indictment will not lie for a conspiracy to commit a mere civil trespass, (*b*) or for a conspiracy to deprive a man of an office under an illegal trading company. (*c*)

If, however, the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a contract. (*d*)

A conspiracy to commit a felony or misdemeanor is indictable. (*e*)

Even before the 32 & 33 Vic., c. 29, s. 50, although the evidence, in support of an indictment for conspiracy, showed its object to have been felonious, or even that a felony was actually committed in the course of it, the defendants were not entitled to an acquittal on the ground that the misdemeanor had merged in the felony; nor was, or is it, any ground for arresting the judgment, that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. (*f*)

From the very nature of conspiracy, it must be between two persons at least, and one cannot be convicted of it unless he has been indicted for conspiring with persons to the jury unknown. (*g*) A man and his wife cannot be indicted

(*x*) *Reg.* v. *Esdaile*, 1 F. & F. 213.
(*y*) *Reg.* v. *Hall*, 1 F. & F. 33.
(*z*) *Reg* v. *Mears*, 2 Den. 79; 20 L. J. (M. C.) 59.
(*a*) *Reg.* v. *Howell*, 4 F. & F. 160.
(*b*) *Reg.* v. *Turner*, 13 Ea. 228.
(*c*) *Reg.* v. *Stratton*, 1 Camp. 549 n.
(*d*) *Reg.* v. *Kenrick*, 5 Q. B. 49; Dav. & M. 208; 12 L. J. (M. C.) 135.
(*e*) *Reg.* v. *Pollman*, 2 Camp. 229 n; Arch. Cr. Pldg. 938-9.
(*f*) *Reg.* v. *Button*, 11 Q. B. 929; 18 L. J. (M. C.) 19; *Reg.* v. *Neale*, 1 Den. 36; 1 C. & K. 591.
(*g*) Arch. Cr. Pldg. 942.

for conspiring alone, because they constitute one person in law. (*h*)

But one person alone may be tried for a conspiracy, provided the indictment charged him with conspiring with others who have not appeared, (*i*) or who are since dead. (*j*)

Where the indictment charged that A., B. and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. (*k*) By the 31 Vic., c. 71, s. 5, conspiracy to intimidate a provincial legislative body is made felony.

(*h*) Arch. Cr. Pldg 942.
(*i*) *Reg.* v. *Kinnersley*, 1 Str. 193.
(*j*) *Reg.* v. *Nicholls*, 2 Str. 1227.
(*k*) *Reg.* v. *Thompson*, 16 Q. B. 832 ; 20 L. J. (M.C.) 183 ; Arch. Cr. Pldg. 942.

CHAPTER VII.

ANNOTATIONS OF MISCELLANEOUS STATUTES.

It is a sound rule to construe a statute according to the common law rather than against it, except when or so far as the statute is plainly intended to alter the common law. (*a*)

Statutes are usually construed strictly in criminal cases, and no construction will be adopted which the language of the statute does not plainly authorize. (*b*)

But they are taken strictly and literally only, in the point of defining and setting down the crime and the punishment, and not generally in words that are but circumstance and conveyance in putting the case. (*c*)

It has been laid down that the court will construe a penal statute according to its spirit and the principles of natural justice; and cases may possibly arise in which, although a person, according to the letter of the Act, may be liable to the penalty, yet the court will direct the jury to acquit him, he not having offended against its spirit and intention. (*d*)

By 31 Vic., c. 1, s. 6, thirty-ninthly, every Act shall be deemed remedial, and shall be construed as such. In construing a remedial statute, the substance of its provisions must be looked to, (*e*) and the court will construe it liberally. (*f*)

In construing the Consolidated Statutes of Canada, the court may refer to the original enactments, in order to

(*a*) *Reg.* v. *Morris*, L. R. 1 C. C. R. 95, per *Byles*, J.
(*b*) See *Reg.* v. *O'Brien*, 13 U. C. Q. B. 436; see also *Reg.* v. *Brown*, 4 U. C. Q. B. 149, per *Robinson*, C. J.; *Wilt* v. *Lai*, 7 U. C. Q. B. 537, per *Robinson*, C. J.
(*c*) Dwarris, 634.
(*d*) *Attorney General* v. *Mackintosh*, 2 U. C. Q. B. O. S. 497.
(*e*) *Reg.* v. *Proud*, L. R. 1 C. C. R. 74, per *Kelly*, C. B.
(*f*) *McFarlane*, v. *Lindsay*, Draper, 142; Dwarris, 614.

arrive at a right conclusion. (*g*) No man can be deprived of any right or privilege, under any statutory enactment, by mere inference, or by any reasons founded solely upon convenience or inconvenience. Statutes are to be construed in reference to the principles of common law, or of the law in existence at the time of their enactment. It is not to be presumed that the legislature intended to make any innovation upon the common or then existent law, farther than the case absolutely required; and judges must not put upon the provisions of a statute a construction not supported by the words. (*h*)

The court will not put an interpretation upon an Act to give it a retrospective effect, so as to deprive a man of his right. (*i*) In general, the court will not ascribe retrospective force to new laws affecting rights, unless, by express words or necessary implication, it appears that such was the intention of the legislature. (*j*)

But the court cannot refuse to give effect to an *ex post facto* statute, which is clearly so in its terms. (*k*) A prisoner is liable to be indicted, on the 29 & 30 Vic., cc. 2 & 3, for unlawfully invading Quebec on a day antecedent to the passing of the statute. (*l*)

In construing an Act of Parliament, as in construing a deed or a contract, we must read the words in their ordinary sense, and not depart from it, unless it is perfectly clear, from the context, that a different sense ought to be put on them. (*m*) A statute must be taken as it is, and when its object is to protect public interests, its clauses must be received in that light. (*n*) A statutory enactment should be so construed as

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(*g*) *Whelan* v. *Reg.* 28 U. C. Q. B. 108.
(*h*) *Reg.* v. *Vonhoff*, 10 L. C. J. 293, per *Drummond*, J.
(*i*) *Attorney General* v. *Halliday*, 26 U. C. Q. B. 414, per *Draper*, C. J.; *Evans* v. *Williams*, 11 Jur. N. S. 256.
(*j*) *Phillips* v. *Eyre*, L. R. 6 Q. B. 23, per *Willes*, J.
(*k*) *Reg.* v. *Madden*, 10 L. C. J. 342.
(*l*) *Ibid.*
(*m*) *Reg.* v. *Chandler*, 1 Hannay, 551, per *Ritchie*, C. J.
(*n*) *Reg.* v. *Patton*, 13 L. C. R. 316, per *Mondelet*, J.

to make the remedy co-extensive with the mischief it is intended to prevent. (*o*)

Where two statutes are in *pari materia*, and by the enactments of the latter statute expressly connected together, they are to be taken as one Act. (*p*) And even when a statute refers to another, which is repealed, the words of the latter Act must still be considered as if introduced into the former statute. (*q*)

In general, an affirmative statute does not alter the common law. (*r*)

Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. (*s*) In accordance with this principle, the words "or other persons whatsoever," in the Con. Stats. U. C., c. 104, s. 1, cannot be taken to include all persons doing anything whatever on a Sunday, but must be taken to apply to persons following some particular calling of the same description as those mentioned. (*t*) There can be no estoppel against an Act of Parliament. If the transaction contravening the Act be in reality illegal, no writing or form of contract, or color given, can prevent an inquiry into the actual facts. (*u*) It would seem that the principle of estoppel does not apply as against the public interest. (*v*)

It is a general rule that subsequent statutes, which add accumulative penalties and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words. Nor has a later Act of Parliament ever been con-

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(*o*) *Reg.* v. *Allen*, L. R. 1 C. C. R. 375, per *Cockburn*, C. J.
(*p*) *Reg.* v. *Beveridge*, 1 Kerr, 68, per *Chipman*, C. J.
(*q*) Dwarris, 571.
(*r*) Dwarris, 473-4; and see *Levinger* v. *Reg.* L. R. 3 P. C. App. 282.
(*s*) *Sandiman* v. *Breach*, 7 B. & C. 100.
(*t*) *Hespeler and Shaw*, 16 U. C. Q. B. 104, per *Robinson*, C. J.; see also *Reg.* v. *Hynes*, 13 U. C. Q. B. 194; *Reg.* v. *Sylvester*, 33 L. J. (M. C.) 79; *Reg.* v. *Tinning*, 11 U. C. Q. B. 636; *Reg.* v. *Armstrong*, 20 U. C. Q. B. 245.
(*u*) *Battersbey* v. *Odell*, 23 U. C. Q. B. 482.
(*v*) See *Reg.* v. *Ewing*, 21 U. C. Q. B. 523.

strued to repeal a prior Act, unless there be a contrariety or repugnance in them. (*w*)

In *Foster's case* (*x*) it was held that the law does not favor a repeal by implication, unless the repugnance be very plain. A subsequent Act, which can be reconciled with a former Act, shall not be a repeal of it, though there be negative words. The 1 & 2 Ph. & M., c. 10, which enacts that all trials for treason shall be according to the course of the common law, and not otherwise, does not take away 35 Hy. VIII., c. 2, for trial of treason beyond sea. (*y*)

The rule is, *leges posteriores priores contrarias abrogant.* If both statutes be in the affirmative. they may both stand; but if the one be a negative and the other an affirmative, or if they differ in matter, although affirmative, the last shall repeal the first. So, if there be a "contrariety in respect of the form prescribed," a repeal will also be effected. (*z*)

We will now consider some miscellaneous statutes relating to criminal law.

The 31 Vic., c. 14, seems now to be the governing enactment, protecting the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty. It extends the 3 Vic., c. 12, (*a*) and the 29 & 30 Vic., cc. 2, 3, & 4, respectively, to the whole of Canada. (*b*)

The Imperial statute 11 & 12 Vic., c. 12, did not override the 3 Vic., c. 12, (*c*) for the latter was re-enacted by the consolidation of the statutes, which took place in 1859, and is, therefore, later in point of time than the Imperial statute. (*d*)

(*w*) Dwarris, 532-3.
(*x*) 11 Rep. 63.
(*y*) *Reg.* v. *Sherman*, 17 U. C. C. P. 168, per *J. Wilson*, J.
(*z*) See *O'Flagherty* v. *McDowell*, 4 Jur. N. S. 33; *Reg.* v. *Sherman*, *supra*, 170, per *A. Wilson*, J.
(*a*) Con. Stats. U. C., c. 98.
(*b*) See also the 31 Vic., c. 16, and 33 Vic., c. 1.
(*c*) *Reg.* v. *School*, 26 U. C. Q. B. 212.
(*d*) *Reg.* v. *Slavin*, 17 U. C. C. P. 205.

A British subject who has become a naturalized citizen of a foreign state is a "citizen or subject ofany foreign state or country," within the statute. (*e*) Although, where a person is born within the Queen's dominions, the rule is, "once a British subject, always one," yet the Crown may waive the right of allegiance, and try him as an American citizen, if he claim to be such. (*f*)

If the prisoner appeared clearly to be a British subject, and there was no evidence that he was an American citizen, he would still be indictable under our statute law for substantially the same felony, with some variation of statement; (*g*) for his offence in such case would partake of the nature of treason, and where the Crown has the right to deal with a party as a traitor, it may proceed against him as guilty only of felony. (*h*) And the prisoner's own admissions, and declarations of the country to which he belongs, are evidence against him. (*i*)

At an early hour, on the first of June, 1866, about eight hundred men landed at Fort Erie, in arms, coming in canal boats towed by tugs, the inference being irresistible that they were from the United States. The prisoner was seen among them, armed with a revolver. The Canadian volunteers in uniform were attacked at Lime Ridge by these men, who were called Fenians, and some were killed and wounded. The prisoner was within half a mile of the battle-field, and attended the wants of the wounded on both sides, and heard the confession of five wounded Fenians. On the day before, the prisoner was talking with the Fenians in their camp, two or three being then officers, and seemed friendly with them. When the Fenians moved, on that day, from their camp, some of them left their valises behind, and the prisoner said, "Pick up the valises; the boys may want them: we do not know

(*e*) *Reg.* v. *McMahon*, 26 U. C. Q. B. 195.
(*f*) *Reg.* v. *Lynch*, 26 U. C. Q. B. 208.
(*g*) See 31 Vic., c. 14, s. 3; *Reg.* v. *Lynch*, 26 U. C. Q. B. 211.
(*h*) *Reg.* v. *McMahon*, 26 U. C. Q. B. 201.
(*i*) *Reg.* v. *Slavin*, 17 U. C. C. P. 205.

how long we may stay in Canada." The men picked up the valises, and the prisoner followed them. He spoke to the men, and told them to take care of themselves, and said to some bystanders: "Don't be afraid, we do not want to hurt civilians." Some one said they wanted to see red coats, and the prisoner said, "Yes; that was what they wanted." It was held that these facts were sufficient to go to the jury, to establish that the Fenians entered the province with intent to levy war against the Queen, and that the prisoner was connected with them, and consequently involved in their guilt; and this even if he had carried no arms. (*j*) Another prisoner belonging to the same body asserted that he came over with the invaders as reporter only, but it was held that this could form no defence, for there was a common unlawful purpose, and the presence of any one in any character, aiding and abetting or encouraging the prosecution of the unlawful design, must involve a share in the common guilt. The facts above stated were held evidence of an intent to levy war. (*k*)

The fact of the invaders coming from the United States would be *prima facie* evidence of their being citizens or subjects thereof.

This intent, as laid down in *Frost's case*, (*l*) may be collected from the acts of the accused, the *bellum percussum* of the body, with which he is identified, and does not require the passing of a resolution, or a verbal or written declaration, plainly expressive of a purpose to levy war. (*m*) When the prisoner was in arms at Fort Erie, in Ontario, at four o'clock in the morning of the attack made upon the volunteers, and that he had been there with the armed enemy the night before: it was held evidence that he was in arms in Upper Canada with intent to levy war, notwithstanding his statement that he had found the weapons, with which he was

(*j*) *Reg.* v. *McMahon*, 26 U.C.Q.B. 195; *Reg* v. *Slavin*, 17 U.C.C.P. 205.
(*k*) *Reg.* v. *Lynch*, 26 U. C. Q. B. 208; and see *Reg.* v. *School*, *ibid.* 214
(*l*) 9 C. & P. 150.
(*m*) *Reg.* v. *Slavin*, 17 U. C. C. P. 205.

armed, upon the road, and the fact that there was evidence of his having been unarmed the night before.

Evidence was properly admitted, against a prisoner, of the engagement above alluded to, although the same took place several hours after his arrest. (*n*)

Where there are two sets of counts, one charging the prisoner as a citizen of the United States, the other as a subject of Her Majesty, the Crown is not bound to elect on which it will proceed. (*o*)

Where the prisoner was indicted under C. S. U. C., c. 98, as amended by 29 & 30 Vic., c. 41, and charged as a citizen of the United States, but was acquitted on proving himself to be a British subject, and then indicted under the same section as a subject of Her Majesty, he cannot plead *autrefois acquit*. (*p*)

Under s. 11 of the 28 Vic., c. 1, for repressing outrages on the frontier, the court can only order restoration of property seized, when it appears that the seizure was not authorized by the Act. (*q*) On the facts of this case, they refused to interfere, holding that the collector, who seized, had probable cause for believing that the vessel was intended to be employed in the manner pointed out by the ninth section. (*r*)

The 32 & 33 Vic., c. 20, s. 26, provides that whosoever 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, is guilty of a misdemeanor.

As this statute uses the word "unlawfully," it would seem that it only applies to persons on whom the law casts the obligation of maintaining and protecting the child, and makes this a duty. A person who has the lawful custody and possession of the child, or the father who is legally bound to

(*n*) *Reg.* v. *Slavin*, 17 U. C. C. P. 205.
(*o*) *Reg.* v. *School*, 26 U. C. Q. B. 212.
(*p*) *Reg.* v. *McGrath*, 26 U. C. Q. B. 385.
(*q*) *Re Georgian*, 25 U. C. Q. B. 319.
(*r*) *Ibid.*

provide for it, may offend against the provisions of the statute. But where two persons, strangers to the child, were indicted under this clause, the court held they were entitled to an acquittal. (*s*)

It would seem, also, if the child dies the clause does not apply, but the prisoner would be guilty of murder or manslaughter, according to the circumstances. (*t*)

A woman who was living apart from her husband, and who had the actual custody of their child under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 P.M. till 1 A.M., when it was removed by a constable, the child then being cold and stiff but not dead. It was held that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of the corresponding English section of 32 & 33 Vic., c. 20, s. 26. (*u*)

A. and B. were indicted, for that they did abandon and expose a certain child, then being under the age of two years, whereby the life of the child was endangered. A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton-wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking-office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was

(*s*) *Reg.* v. *White*, L. R. 1 C. C. R. 311.
(*t*) See *ibid.* 314, per *Blackburn*, J.
(*u*) *Reg.* v. *White*, L. R. 1 C. C. R. 311.

addressed, "Mr. Carr's, Northoutgate, Gisbro,—with care: to be delivered immediately,"—at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45, and arriving at G. at 8.15, p.m. At 8.40 p.m. the hamper was delivered at its address. The child died three weeks afterwards from causes not attributable to the conduct of the prisoners. On proof of these facts at the trial, it was objected, for the prisoners, that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and exposure of the child, within the meaning of the statute. The objections were overruled, and the prisoners found guilty; and it was held by a majority of the fifteen judges that the conviction should be affirmed. (*v*)

In the indictment of a husband under sec. 25 of the same statute, for neglecting to provide his wife with necessary food and clothing, it is not necessary to allege that the defendant had the means and was able to provide such food and clothing; nor that the neglect on the part of defendant to provide such food and clothing endangered the life or affected the health of his wife. (*w*) But the wife's need and husband's ability must appear in evidence. (*x*) An allegation that the wife is ready and willing to live with her husband is surplusage. (*xx*)

The 32 & 33 Vic., c. 32, which contains provisions respecting the prompt and summary administration of criminal justice in certain cases, was extended to Manitoba by 37 Vic., c. 39; to Prince Edward Island by 40 Vic., c. 4; to Keewatin by 39 Vic., c. 21; and to British Columbia by 37 Vic., c. 42. It repeals and substantially re-enacts the provisions of the former statute, Con. Stats. Can., c. 105, so that

(*v*) *Reg.* v. *Falkingham*, L. R. R. 1 C. C. 222.
(*w*) *Reg.* v. *Smith*, 23 L. C. J. 247.
(*x*) *Reg.* v. *Nasmith*, 42 U. C. Q. B. 242.
(*xx*) *Ibid.*

the decisions under the old will equally apply to the new Act.

Imprisonment is only authorized under this statute as a substantive punishment; and a conviction, therefore, imposing a fine, and directing imprisonment for a term unless the fine be sooner paid, is bad. (*y*)

It is not necessary that the disorderly conduct should be visible from the outside of the house. (*z*)

A person letting a house to several young women for the purpose of prostitution, cannot be indicted under this statute. (*a*)

Under this Act it is no objection that the commitment stated the offence to have been committed on the 11th of August, and the conviction on the 10th. (*b*) And a conviction for keeping a house of ill-fame on the 11th October, and on other days and times, is sufficiently certain. (*c*)

Nor is it material that the commitment or conviction charge that the prisoner "was the keeper of," or "that she did keep," instead of designating the offence as "keeping any disorderly house," etc., as in the statute. (*d*)

The limits of the city of Toronto having been assigned by a public statute, the court takes judicial notice of them in determining the jurisdiction of the magistrate. (*e*)

A commitment is good though it does not show that the party was charged before the convicting magistrate. This might, however, and probably would, be a defect in the conviction.

A variance between the conviction and the information, the latter being that defendant was the keeper of a well-known disorderly house, and the former that the prisoner did keep a common disorderly bawdy house, is immaterial. (*f*)

(*y*) *Re Slater*, 9 U. C. L. J. 21.
(*z*) *Reg.* v. *Rice*, L. R. 1 C. C. R. 21.
(*a*) *Reg.* v. *Stannard*, 9 Cox C. C. 405; *Reg.* v. *Barrett*, *ibid.* 255.
(*b*) *Reg.* v. *Munro*, 24 U. C. Q. B. 44.
(*c*) *Reg.* v. *Williams*, 37 U. C. Q. B. 540.
(*d*) *Reg.* v. *Smith*, *supra*.
(*e*) *Reg.* v. *Munro*, *supra*.
(*f*) *Reg.* v. *Smith*, 24 U. C. Q. B. 44.

It is no objection that no notice had been put up, as required by s. 25 (*g*) of the same Act, to show that the court was that of a police magistrate, not of an ordinary justice of the peace; for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice.

The charge of "keeping a common disorderly bawdy house" is sufficiently certain. (*h*) And the place of committing the offence is sufficiently laid, though not stated in express terms, if the county be stated in the venue, and the parties described as of some locality in that county in which the magistrates have jurisdiction. (*i*)

In a case of this kind, affidavits are receivable upon the question, whether the magistrate had jurisdiction or no, and an affidavit stating the non-compliance with the requirements of s. 25 was received, though offered with a view to show that the magistrate had not jurisdiction; but it would seem affidavits are not receivable to sustain objections as to the conduct of the magistrate in dealing with the case before him. (*j*)

On an application for a writ of *habeas corpus* at common law, it seems affidavits may be received, but not if the writ is applied for under the statute of Charles, (*k*) for it confers no power to receive them.

Affidavits might, perhaps, be received that no such sentence passed, but not to impeach it; and also as to matter of fact, but not of law. (*l*)

When the court cannot get at the want of jurisdiction but by affidavit, it must, of necessity, be received, as if the charge were insufficient, and the magistrate mis-stated it in drawing up the proceedings, so that they appeared regular. (*m*) It would seem that a judge of the superior

(*g*) 32 & 33 Vic., c. 32, s. 26.
(*h*) *Reg.* v. *Munro*, 24 U. C. Q. B. 44.
(*i*) *Reg.* v. *Williams*, 37 U. C. Q. B. 540.
(*j*) *Reg.* v. *Munro*, 24 U. C. Q. B. 53, per *Draper*, C. J.
(*k*) 31 Car. II., c. 2
(*l*) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per *A. Wilson*, J.
(*m*) *Ibid.*

court could not, on *habeas corpus*, inquire into the conclusion at which the magistrate, acting under this statute, has arrived, provided he had jurisdiction over the offence charged, and had issued a proper warrant upon that charge; but it seems the judge might inquire into what that charge was, or whether there was a charge at all. (*n*)

Under s. 3 of this Act the magistrate may, before any formal examination of witnesses, ascertain the nature and extent of the charge, and, if the party consents to be tried summarily, may reduce it into writing. It would seem that the magistrate may then (that is, when a person is charged before him, prior to the formal examination of witnesses) reduce the charge into writing, and try the party upon the charge thus reduced; and, if this is the meaning of the statute, it would not signify whether the original information and warrant to apprehend did or did not state a charge, in the precise language of the Act. (*o*) But the magistrate must, either by the original information, or by the charge which he makes when the party is before him, have the charge in writing, and must read it to the prisoner, and ask him whether he is guilty or not. (*p*)

A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, under 32 & 33 Vic., c. 32, though, when the party is before the magistrate, the charge of aggravated assault may be made in writing, and followed by a conviction therefor. Under doubts as to the law and the power to receive affidavits on the disputed facts, the prisoner was admitted to bail, pending the application for his discharge, which was to be renewed in term. (*q*)

The meaning of the words "a competent magistrate" in the Act is defined by 37 Vic., cc. 39 & 40.

(*n*) *Re McKinnon*, 2 U. C. L. J. N. S. 328, per *A. Wilson*, J.
(*o*) *Ibid.* 329, per *A. Wilson*, J.
(*p*) *Ibid.*
(*q*) *Ibid.*

The Con. Stats. U. C., c. 76, secs. 9 and 10, and R. S. O., c. 135, (*r*) contain provisions respecting apprentices and minors.

Where the apprentice is a minor, it is necessary to a conviction under this statute that the articles should be executed by some one on his behalf. (*s*)

The satisfaction to be given (*t*) must be ascertained, and an absolute imprisonment for two months is not authorized by the statute.

The Acts of the various provinces which render breaches of contract criminal, have been repealed by the 40 Vic., c 35 (D); and a number of new offences created by that statute, viz., wilful and malicious breaches of contract endangering life, person or property, or of contracts with gas, water or railway companies; also wilful and malicious breaches of contracts by such companies. The word "malicious" is to be construed in the manner required in the Act respecting Malicious Injuries to Property. The object of the statute, as appears by its preamble, is to remove breaches of contract of service from the catalogue of crimes, and render such offences purely civil in their nature.

The defendant was indicted under the Banking Act of 1871, 34 Vic., c. 5, s. 62, for making a wilfully false and deceptive return; the falsity of the return consisting in the improper classification of assets and liabilities: First, large sums borrowed by the defendant's bank from other banks on deposit receipts, were classified as "other deposits payable after notice, or on a fixed day;" second, demand notes classed as "bills and notes discounted and current;" and third, overdrafts as "notes and bills discounted and current." It was held, as to the first and second of the above charges, that it was for the jury to determine the questions raised thereby as matters of fact, and not for the judge presiding at the trial; but as to the third, that as a matter of law an overdraft is not current. (*u*)

(*r*) 14 & 15 Vic., c. 11.
(*s*) *Reg.* v. *Robertson*, 11 U. C. Q. B. 621.
(*t*) R. S. O., c. 135, s. 19.
(*u*) *Reg.* v. *Sir Francis Hincks*, 24 L. C. J. 116.

The wilful intent under this statute, as in other cases, may be inferred from all the circumstances of the case. (*v*)

The R. S. O., c. 153, s. 82 *et seq.*, (*w*) provides for the establishment and regulation of tolls, on roads constructed by joint stock companies.

The offence created and contemplated by the statute is the exacting and taking a sum over and above the amount of toll which the collector is authorized to take. Section 128 of this statute, which makes it an offence to "take a greater toll than is authorized by law," does not apply to the case of taking toll from a person who is altogether exempt. If it did, a conviction for such offence should state the ground of exemption and the fact of exemption being claimed, so that the court could see that an offence was committed.

Where a person passed through the gate on the 10th of January, the collector giving him credit, as was usual between them, and on the 20th they had a settlement, and the toll for the 10th was then demanded, and paid; it was held that a conviction for such a demand, if illegal, could not be supported. (*x*)

Section 94, subs. 7, exempts any person, with horse or carriage, going to or returning from his usual place of religious worship, on the Lord's day.

If a minister attends church, according to the usage prescribed and observed by the rules of the particular persuasion to which he belongs, such church may be considered, as to him, the usual place of religious worship when he is attending it, on the day so prescribed. (*y*) But if a person claims exemption, he must state to the toll-keeper the grounds of his claim. (*z*)

A waggon of the seller carrying artificial manure to the farm of the purchaser, is within the exemption from toll, in

(*v*) *Reg.* v. *Sir Francis Hincks*, 24 L. C. J. 116.
(*w*) See R. S. O., c. 152, s. 82.
(*x*) *Reg.* v. *Campion*, 28 U. C. Q. B. 259.
(*y*) *Smith* v. *Barnett*, L. R. 6 Q. B. 36, per *Blackburn*, J.
(*z*) *Reg.* v. *Davis*, 22 U. C. Q. B. 333.

the 5 & 6 Wm. IV., c. 18, s. 1, as "a carriage employed in conveying manure for land." (*a*)

The following conviction before the magistrates, "for that the defendant did, at, etc., on or about the first day of December, and upon other days and times, before and since, take and receive toll from the informant, at the toll-gate No. 3, situate on the macadamized road between Hamilton and Brantford, in the said district, unlawfully and improperly, the said gate not being in a situation or locality authorized by law," being removed into this court by *certiorari*, was held bad in not showing that the defendant was summoned, or was heard, and in not setting out the evidence, or stating that any complaint was made, or evidence given by any one on oath; in not stating how much toll was taken, and in not showing in what respect the taking of toll was unlawful. (*b*)

Where tolls, fixed by the commissioners, had been exacted by a toll-gate keeper, at a gate not six miles apart from the one previously passed, the toll-gate keeper, under the 3 Vic., c. 53, s. 34, was held not liable to a summary conviction, for the statute was intended to prevent the taking of more or less toll than the commissioners had appointed. (*c*)

A conviction is bad which omits any statement of the information; or of the summons and appearance or default of the accused; or of his plea, denying or confessing. So in not giving the evidence, or in not showing that any toll was claimed, or what toll, or how imposed, or that any could be claimed or imposed by reason of the completion of the road, or any part of it. Also, it is fatal if it do not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and, after turning out of the road, had returned to or re-entered it, with such carriage or animal beyond the toll-gate, without paying toll, whereby payment was evaded. (*d*)

(*a*) *Foster and Tucker*, L. R. 5 Q. B. 224; see (Ont.) 32 Vic., c. 40; Con. Stats. Can., c. 86, s. 3.
(*b*) *Reg.* v. *Brown*, 4 U. C. Q. B. 147.
(*c*) *Reg.* v. *Brown*, 4 U. C. Q. B. 147.
(*d*) *Reg.* v. *Haystead*, 7 U. C. Q. B. 9.

A conviction, under s. 95 of this Act, stating that defendant wilfully passed a gate without paying, and refusing to pay toll, was held good, as sufficiently showing a demand of toll. It seems doubtful whether it would be sufficient to allege that he wilfully passed without paying, and without in any way showing a demand. (*e*) It was also held, in this case, that the non-exemption of the defendant, if essential to be alleged, was sufficiently stated in these words: "he, the said James Caister, not being exempted by law from paying toll on the said road;" and the Con. Stats. Can., c. 103, s. 44, throws the proof on the defendant.

Where the general form prescribed by the Con. Stats. Can., c. 103, s. 50, sched. 1, is used, it is clearly not requisite to show that the defendant was summoned or heard, or any evidence given.

It is not necessary to name any time for payment of the fine, and, in such case, it is payable forthwith. (*f*)

Where, assuming the facts to be true, the magistrate has jurisdiction, the conviction only can be looked to. (*g*)

Where the defendant, having been convicted, on the information of a toll-gate keeper, of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on his trial, for which no authority was cited. (*h*)

The 32 & 33 Vic., c. 22, s. 40, enacts that whosoever, by any unlawful act, or by any wilful omission or neglect, obstructs, or causes to be obstructed, any engine or carriage, using any railway, or aids or assists therein, is guilty of a misdemeanor.

The prisoner unlawfully altered some railway signals at a railway station, from "all clear" to "danger" and "caution." The alteration caused a train, which would have

(*e*) *Reg.* v. *Caister*, 30 U. C. Q. B. 247.
(*f*) *Ibid.*
(*g*) *Ibid.*
(*h*) *Stewart and Blackburn*, 25 U. C. Q. B. 16.

passed the station without slackening speed, to slacken speed, and come nearly to a stand. Another train, going in the same direction and on the same rails, was due at the station in half an hour; it was held that this was obstructing a train within the meaning of the above clause. (*i*)

The Act is not limited to mere physical obstructions. The prisoner, who was not a servant of the railway company, stood on a railway, between two lines of rails, at a point between two stations; as a train was approaching he held up his arms, in the mode used by inspectors of the line when desirous of stopping a train between two stations. The prisoner knew that his doing so would probably induce the driver to stop or slacken speed, and his intention was to produce that effect. This caused the driver to shut off steam and diminish speed, and led to a delay of four minutes; it was held that the prisoner had obstructed a train within the meaning of the statute. (*j*)

The 13 & 14 Vic., c. 74, contained provisions prohibiting the sale of Indian lands, but these provisions were omitted in the Con. Stats. Can., c. 9. The subject is now regulated by the 31 Vic., c. 42, and 32 & 33 Vic., c. 6. The latter Act repeals the Con. Stats. Can., c. 9, and is to be construed as one Act with the 31 Vic., c. 42. The 13 & 14 Vic., c. 74 made the purchasing of any Indian lands, unless under the authority and with the consent of Her Majesty, a misdemeanor, and various decisions took place as to what kind of contract was within the Act. (*k*)

The 31 Vic., c. 42, imposes certain penalties on persons trespassing on Indian lands; but, it is apprehended, the decisions under the old Act will not apply to the 31 Vic., c 42, as the clauses of the former have not been re-enacted.

A pawnbroker may, under Con. Stats. Can., c. 61, charge

(*i*) *Reg.* v. *Hadfield*, L. R. 1 C. C. R. 253; 39 L. J. (M. C.) 131.
(*j*) *Reg.* v. *Hardy*, L. R. 1 C. C. R. 278.
(*k*) See *Reg.* v. *Hagar*, 7 U. C. C. P. 380; *Reg.* v. *Baby*, 12 U. C. Q. B. 346; *Totten* v. *Watson*, 15 U. C. Q. B. 392; *Little* v. *Keating*, 6 U. C. Q. B. O. S. 265.

any rate of interest that may be agreed upon between the parties, that statute being an enabling Act, and intended to legalize loans to poor persons at higher rates of interest than that allowed by the usury laws in force at the time of the passing of the Act. (*l*)

A conviction under the Pawnbroker's Act, R. S. O., c. 148, for neglecting to have a sign over the door, as directed by the 8th section, is not sustained by evidence of one transaction alone, for the penalty attaches only on persons "exercising the trade of a pawnbroker," as mentioned in the first section, and a single act of receiving or taking a pawn or pledge is not an exercising the trade or carrying on the business of a pawnbroker. (*m*)

The Con. Stats. Can., c. 61, also contains provisions with regard to pawnbrokers.

The return of convictions by justices of the peace is now regulated by the 32 & 33 Vic., c. 31, s. 76, the 33 Vic., c. 27, s. 3, and R. S. O., c. 76. The Consolidated Statute of Upper Canada has been repealed. (*n*)

Under these statutes a justice of the peace is liable for a separate penalty for each conviction of which a return is not properly made to the sessions. (*o*)

Justices were not jointly liable in one penalty, but each in a separate penalty for the offence; (*p*) but under the 32 & 33 Vic., c. 31, it seems that only one penalty is recoverable, though the conviction be by two or more justices. (*q*)

The object of the legislature in passing the statutes, was to compel the justices to make a return of whatever fines they had imposed, in order that their diligence in collecting the fines might be quickened, and also in order that it might be known what money they should admit themselves to

(*l*) *Reg.* v. *Adams*, 8 U. C. P. R. 462.
(*m*) *Reg.* v. *Andrews*, 25 U. C. Q. B. 196.
(*n*) See 32 & 33 Vic., c. 36.
(*o*) *Donogh q. t.* v. *Longworth*, 8 U. C. C. P. 437; *Durragh q. t.* v. *Paterson*, 25 U. C. C. P. 529.
(*p*) *Metcalf q. t.* v. *Reeve*, 9 U. C. Q. B. 263.
(*q*) *Drake q. t.* v. *Preston*, 34 U. C. Q. B. 257.

have received, so that they might be made to account for it; (*r*) and, therefore, they are none the less bound to make their returns, although notice of abandonment of an appeal has been served. (*s*)

The illegality of a conviction is no excuse for not returning it, but if on that account the fine had not been levied, a return should be made explaining the circumstances. (*t*)

An order for the payment of money made by a justice, under the Con. Stats. U. C., c. 75, was not a conviction which it is necessary to return. (*u*) But a conviction under s. 165 of the Inland Revenue Act, 31 Vic., c. 8, imposing a penalty of $200, must be returned. (*v*)

A conviction made by an alderman, in a city, must be returned to the next ensuing General Sessions of the Peace for the county, and not to the Recorder's Court for such city. (*w*)

The clerk of the peace is the clerk of all magistrates, and it is no objection that a conviction is not in the magistrate's office, but in that of the clerk of the peace. (*x*)

It would seem that the right to legislate on returns of convictions and fines for criminal offences belongs to the Dominion and not the Provincial Legislature. (*y*)

The seller of flour in barrels not marked or branded, is not liable to the penalty affixed by the 4 & 5 Vic., c. 89, s. 23, which applies only to the manufacturer or packer, and magistrates have no summary jurisdiction, when the accumulated penalties are more than £10. And when the inspector in a

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(*r*) *O'Reilly q. t.* v. *Allan*, 11 U.C.Q.B. 415, per *Robinson*, C. J.; *Atwood* v. *Bosser*, 30 U. C. C. P. 628.

(*s*) *McLellan q. t.* v. *McIntyre*, 12 U. C. C. P. 546.

(*t*) *O'Reilly q. t.* v. *Allan*, *supra*.

(*u*) *Runney q. t.* v. *Jones*, 21 U. C. Q. B. 370.

(*v*) *May q. t.* v. *Middleton*, 3 Ont. App. 207.

(*w*) *Keenahan q. t.* v. *Egleson*, 22 U. C. Q. B. 626; see also *Ollard q. t.* v. *Owens* 29 U. C. Q. B. 515; *Grant q. t.* v. *McFadden*, 11 U. C. C. P. 122; *Kelly q. t.* v. *Cowan*, 18 U. C. Q. B. 104; *Murphy q. t.* v. *Harvey*, 9 U. C. C. P. 528.

(*x*) *Reg.* v. *Yeomans*, 6 U. C. P. R. 66.

(*y*) *Clemens q. t.* v. *Bemer*, 7 C. L. J. N. S. 126.

corporate town is the informer, he is not entitled to half the penalty. (*z*)

The statute only applies to flour made within the province. (*a*)

The R. S. O., c. 189, (*b*) was passed to prevent the profanation of the Lord's day.

A conviction under this Act "for that he, Jacob Hespeler, of the village of Preston, Esquire, did on Sunday, the 26th day of July last past, at the township of Waterloo, work at his ordinary calling inasmuch as he, and his men, did make and haul in hay, on the said day," is bad, as not stating any offence within the statute, for defendant was not alleged to be of, nor to have worked at, any particular calling, nor did it state any facts from which this might be inferred. (*c*) The convict ion should negative the exception in the statute, by stating that the work done was not one of necessity. (*d*)

A person is liable, under the Act, for plying with his steamboat, on Sunday, between the city of Toronto and the peninsula—persons carried between those places not being "travellers" within the meaning of the exception in the first section. (*e*)

Peppermint lozenges sold by a druggist must be considered *prima facie* a medicine, though not expressly asked for or sold as such, and such a sale is, therefore, within the exception of the Act. (*f*)

A note made on Sunday, in payment of goods sold on that day, is void between the original parties, but not as against an endorsee for value, and without notice. (*g*)

The giving or taking security, as an ordinary mortgage of personal property, on a Sunday is not void, as a "buying or selling," within the Act. (*h*)

(*z*) *Reg.* v. *Beekman*, 2 U. C. Q. B. 57.
(*a*) *Ibid.*
(*b*) See Con. Stats. U. C., c. 104.
(*c*) *Hespeler and Shaw*, 16 U. C. Q. B. 104.
(*d*) See post, "Pleading."
(*e*) *Reg.* v. *Tinning*, 11 U. C. Q. B. 636.
(*f*) *Reg.* v. *Howarth*, 33 U. C. Q. B. 537.
(*g*) *Houliston* v. *Parsons*, 9 U. C. Q. B. 681.
(*h*) *Wilt* v. *Lai*, 7 U. C. Q. B. 535.

But all sales or agreements for a sale of real or personal property made on Sunday are void. (*i*)

A snare to catch game is an engine within the meaning of sections 4 and 5, and putting down a snare, on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, is using an engine on Sunday and an offence within the Act, even though the party be not present using it. (*j*)

A farmer working on his own land on a Sunday is not liable to conviction, under 29 Car. II., c. 7, s. 1. The words "or other person whatsoever" are to be construed *ejusdem generis*, and a farmer is not *ejusdem generis*, with a tradesman, who is the only *employer* named, nor with a laborer, who is a person employed. (*k*)

The Imperial Act 21 Geo. III., c. 49, prohibiting amusements and entertainments on the Lord's day, is in force in Ontario. (*l*)

The Con. Stats. U. C., c. 19, s. 181, (*m*) is confined to the use of false instruments, and does not apply to the mere verbal assertion of authority. Therefore, where the prisoner had obtained payment of a sum, in discharge of a debt and costs, from a defendant (who had been previously duly served with a summons in the county court), by pretending that he was an officer of, and authorized by, the court to receive it, it was held, under analogous provisions in the Imperial statute 9 & 10 Vic., c. 95, s. 57, that the offence was not made out. (*n*)

But in another case, under the same clause of the statute, the prisoner was indicted for acting, and professing to act, under a false color and pretence of county court process, and it was proved that the prisoner, being a creditor of R.,

(*i*) *Lai* v. *Stall*, 6 U. C. Q. B. 506.
(*j*) *Allen and Thompson*, L. R. 5 Q. B. 336.
(*k*) *Reg.* v. *Silvester*, 33 L. J. (M. C.) 79.
(*l*) *Reg.* v. *Barnes*, 45 U. C. Q. B. 276.
(*m*) See R. S. O., c. 47, s. 216 *et seq.*
(*n*) *Reg.* v. *Myott*, 1 U. C. L. J. 35; 6 Cox, C. C. 406.

sent him a nonsensical letter, headed with the royal arms, and purporting to be signed by the clerk of a county court, threatening county court proceedings. He subsequently told R.'s wife that he had ordered the county court to send the letter, upon which she paid the debt; and, whilst making out the receipt, he made demand of her for the county court expenses; it was held that these facts constituted felony within the meaning of the section, and that the conviction must be supported. (*o*)

Where A. delivered to B. a document requiring him to produce accounts, etc., at a trial in a county court, intituled of the court, and giving the names of plaintiff and defendant, with a statement in the margin of the amount of the sum claimed, no such cause really existing; on an indictment against A., for feloniously causing to be delivered to B. a paper purporting to be a copy of a certain process of the county court of L., it was held that the document above mentioned was a notice to produce documents, etc., between party and party, and not a process of the court, nor did it purport to be so. (*p*)

B. being indebted to A., A. obtained a blank form for plaintiff's instructions to issue county court summons. This he filed up with particulars of the names and addresses of himself and B., as plaintiff and defendant, and of the nature and amount of the claim, and, without any authority, signed it in the name of the registrar, endorsing also a notice, signed also by A. in the name of the registrar, and without his authority, that unless the amount claimed were paid by B. on a certain day, an execution warrant would issue against him. This paper he delivered to B., with intent thereby to obtain payment of his debt. This was held (*q*) "an acting, or professing to act, under false color and pretence of process of the county court," within the meaning of 9 & 10 Vic., c. 95, s. 57. (*r*)

(*o*) *Reg.* v. *Evans*, 3 U.C.L.J. 119; Dears. & B. 236; 26 L.J. (M.C.) 92.
(*p*) *Reg.* v. *Castle*, 4 U.C.L.J. 73; Dears. & B. 363; 27 L. J. (M. C.) 70.
(*q*) Affirming *Reg.* v. *Evans*, *supra*.
(*r*) *Reg.* v. *Richmond*, 5 U. C. L. J. 237; Bell, 142.

To constitute an offence under the 3rd section of the 7 Geo. IV., c. 3, providing for the maintenance of good order in churches, the act complained of must have been committed "during divine service." (*s*)

An information, setting out that the defendant had conducted himself in a disorderly manner at a church door, by keeping his hat on his head during the procession of the holy sacrament, discloses no legal offence. (*t*)

Where a justice of the peace convicted the plaintiff, under the Con. Stats. Can., c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol, without first issuing a warrant of distress to levy fine and costs under that section; it was held that the Con. Stats. Can., c. 103, ss. 57 and 59, applied to this conviction, and that the justice, being satisfied the party had no goods, had authority and jurisdiction, under the latter statute, to commit to gaol, without first issuing a warrant to levy fine and costs. (*u*)

The 32 & 33 Vic., c. 28, as amended by 37 Vic., c. 43, provides that certain persons, therein described, shall be deemed vagrants, and shall, upon conviction before any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, be deemed guilty of a misdemeanor. Its operation was extended to Manitoba by the 34 Vic., c. 14, to British Columbia by the 37 Vic., c. 42, and to Prince Edward Island by the 40 Vic., c. 4.

A conviction for prostitution under sec. 1 of this Act should allege that the woman was asked, before she was taken, or at the time of her being taken, to give an account of herself, and that she did not give a satisfactory account, and that, therefore, the arrest was made. (*v*) And an allegation "she giving no satisfactory account," does not show that any prior demand or request has been made upon her for that purpose. (*w*)

(*s*) *Ex parte Dumouchel*, 3 L. C. R. 493.
(*t*) *Ex parte Filiau*, 4 L. C. R. 129.
(*u*) *Moffat* v. *Barnard*, 24 U. C. Q. B. 498.
(*v*) *Reg.* v. *Levecque*, 30 U. C. Q. B. 509.
(*w*) *Ibid.*

An obligation to maintain must be made out against any person charged with vagrancy being able to work and maintain himself and family. A man, for instance, is not bound to support a wife who has left him and is living in adultery; (*x*) nor can he be convicted if he offers to take back his wife, even though her refusal be well grounded on his ill-usage. (*y*) It is, however, no defence that he is industrious and constantly at work. (*z*)

A woman who, deserted by her husband, and having no means of maintaining her children, leaves them so that they become chargeable to the parish, cannot be convicted for running away and leaving them chargeable under the Vagrant Act 5 Geo. IV., c. 83, s. 4. (*a*)

It would seem a wife is not a competent witness against her husband in prosecutions under this Act. (*b*)

The 32 & 33 Vic., c. 20, s. 25, makes it a misdemeanor in any one, who, being legally liable, either as husband, parent, guardian or committee, master or mistress, nurse or otherwise, to provide for any person as wife, child, ward, lunatic or idiot, apprentice or servant, infant or otherwise, necessary food, clothing or lodging, to neglect or refuse wilfully and without lawful excuse to do so. (*c*)

In the case of a wife prosecuting under this section, it is necessary to prove that the defendant is her husband, the wife's need, and the husband's ability. If she is better able to support herself than he is to maintain her, or if she is living with another man as his wife, or if without lawful excuse she absents herself from her husband's roof and refuses to return, in these and similar cases the husband must be acquitted. (*d*)

The Con. Stats. Can., c. 67, s. 16, which declares it a misdemeanor, in any operator or employee of a telegraph com-

(*x*) *Reg.* v. *Flinton*, 1 B. & Ad. 227.
(*y*) *Flannagan* v. *Bishop Wearmouth*, 8 E. & B. 451.
(*z*) *Carpenter* v. *Stanley*, 33 J. P. 38.
(*a*) *Peters* v. *Cowie*, L. R. 2 Q. B. D. 131.
(*b*) *Reeve* v. *Wood*, 5 B. & S. 364.
(*c*) See page 201, *ante*, as to this statute.
(*d*) *Reg.* v. *Nasmith*, 42 U. C. Q. B. 242.

pany, to divulge the contents of a private despatch, only protects the rights of each individual sender or receiver of a message, against disclosures of facts which come to the knowledge of the operators in the course of their employment. When the rights of others come in question, as when a suit is pending between the sender or receiver of a message and a third party, with whom he is alleged to have contracted, the operator or secretary of the company is bound to disclose the contents of the telegram, in odedience to a *subpœna duces tecum.* (*e*)

The 32 & 33 Vic., c. 21, s. 43, makes it a felony to send "any letter demanding of any person with menaces, without any reasonable or probable cause, any property, etc." The latter words, "without any, etc." apply to the money or property demanded, and not to the threatened accusation. (*f*) Therefore, if money be actually due, it is no offence to demand it with menaces. (*g*) The offence will be complete though the accusation was not intended to be made to a magistrate, (*h*) or though it was not to be made against the person threatened, but against some one in whom he has an interest, as his son. (*i*)

An offer to give information if money is sent, is no offence; (*j*) but a letter stating that an injury is intended, and the writer will not interfere to prevent it unless money is sent, amounts to an offence. (*k*) So threatening bodily violence, or to charge with adultery, is an offence under this section. (*l*)

The menace must be such as to influence a reasonable mind; (*m*) and a conviction may take place although the

(*e*) *Leslie* v. *Hervey*, 15 L. C. J. 9.
(*f*) *Reg.* v. *Mason*, 24 U. C. C. P. 58.
(*g*) *Reg.* v. *Johnson*, 14 U. C. Q. B. 569.
(*h*) *Reg.* v. *Robinson*, 2 Mood. 14.
(*i*) *Reg.* v. *Redman*, L. R. 1 C. C. R. 12.
(*j*) *Reg.* v. *Pickford*, 4 C. & P. 227.
(*k*) *Reg.* v. *Smith*, 1 Den. C. C. 510.
(*l*) *Reg.* v. *Chalmers*, 10 Cox, C. C. 450.
(*m*) *Reg.* v. *Walton*, L. & C. 288; 9 Cox, C. C. 268.

money has been paid, (*n*) or though the person threatened had no money at the time. (*o*)

Evidence of the truth of the accusation is not admissible by way of defence. (*p*)

A policeman extorting money by threatening to imprison a person on a charge not amounting to an offence in law, may be prosecuted under this statute, and may also, it seems, be indicted for larceny. (*q*)

The cases will apply in principle to ss. 44, 45, 46, 47 and 48 of the same statute, as also to 32 & 33 Vic., c. 20, s. 15.

By the 11 & 12 Wm. III., c. 12, and 42 Geo. III., c. 85, if any governor of a colony, or other person holding or having held public employment out of Great Britain, has been guilty of any crime or misdemeanor in the exercise of his office, every such crime may be prosecuted or inquired of, and heard and determined in the Court of King's Bench in England, either upon information by the Attorney General, or upon indictment found, and such crime may be laid to have been committed in Middlesex. An offence under the above statute is an offence committed on land beyond the seas, for which an indictment may legally be preferred in any place in England, within the 11 & 12 Wm. III., and this section and the other enactments of the statute, as to preliminary examinations, etc., before a magistrate, in whose jurisdiction the accused might be, apply to charges under the above statutes, and the Court of Queen's Bench is included in the term, "next Court of Oyer and Terminer." (*r*)

Upon an indictment under the Con. Stats. U. C., c. 26, s. 20, (*s*) for making an assignment to defraud creditors, it was held that a money bond is personally seizable on an execution under the statutes 13 & 14 Vic., c. 53, and 20 Vic., c. 57, and further, that a transfer, made by a party to a creditor, who

(*n*) *Reg.* v. *Robertson*, L. & C. 483.
(*o*) *Reg.* v. *Edwards*, 6 C. & B. 515.
(*p*) *Reg.* v. *Cracknall*, 10 Cox, C. C. 408.
(*q*) *Reg.* v. *Robertson*, 10 Cox. C. C. 9.
(*r*) *Reg.* v. *Eyre*, L. R. 3 Q. B. 487; see 32 & 33 Vic., c. 30, s. 3.
(*s*) See R. S. O., c. 118.

accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment. (*t*)

To subject a person to the penalty of the 22 Geo. II., c. 45, for suing out process, the attorney allowing his name to be used must be first convicted. (*u*)

An offence committed before, though tried after, the Revised Statutes of New Brunswick came in force, is not indictable under those statutes, though the words creating the offence are not altered thereby, the Act creating it being embodied in the Revised Statutes in its original words. The indictment must be considered as founded on the Act creating the offence. (*v*)

The punishment provided by the ordinance 4 Vic., c. 30, s. 1, is cumulative, and sentence of imprisonment and fine is to be awarded upon the conviction had against the defendant in manner and form as enacted by the ordinance. (*w*)

An overseer of the poor of a parish is liable, under the Acts of Assembly 26 Geo. III., cc. 28 & 43, and 33 Geo. III., c. 3, s. 6, to an indictment for not accounting to the first General Sessions of the Peace in the year, for moneys received by him for the support of the poor, during the preceding year. (*x*)

In an indictment of a cashier under section 62 of the Banking Act of 1871, for having unlawfully and wilfully made a false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, or to specify on what particulars the return was false, or that such false statement was made with intent to deceive or mislead. (*y*)

The enumeration in the indictment of several alleged

(*t*) *Reg.* v. *Potter*, 10 U. C. C. P. 39.
(*u*) *Rex* v. *Bidwell*, Taylor, 487.
(*v*) *Reg.* v. *Pope*, 3 Allen, 161 ; *Reg.* v. *McLaughlin*, *ibid.* 159.
(*w*) *Reg.* v. *Palliser*, 4 L. C. J. 276.
(*x*) *Reg.* v. *Matthew*, 2 Kerr, 543.
(*y*) *Reg.* v. *Cotte*, 22 L. C. J. 141.

false statements constitutes but one count, and a general verdict is sufficient if the statement be shown to be false in any one of the particulars alleged. (*z*)

Revised Statute of Ontario, c. 142, imposes penalties on persons who practise medicine without having been registered in that province. Where the defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fan-light containing the name of the registered practitioners, with the addition "M. D., M. C. P. & S., Ont.," and the name of the defendant with only "M. D.," it was held that the use of the latter letters, in contradistinction to the full titles of the defendant's partners appearing on the same fan-light, was not the use of a title "calculated to lead people to infer" registration under the above statute. (*a*)

Militia officers attached to B. battery, though holding commissions in no regular or active militia corps, are competent to sit in courts martial of the said battery under the Militia Act. (*b*)

Members of the volunteer militia are *ipso facto* discharged by the expiration of the term of their engagement; and a court martial is without jurisdiction to try a man for acts done subsequently to such expiration; and a conviction under such circumstances will be quashed on *certiorari*. (*c*)

By 32 Vic., c. 17, of the Province of Quebec, a refractory child under fourteen may be sent to an industrial school; and the rule that where a minor is brought up by *habeas corpus*, the court will leave him to elect as to the custody in which he will be if he be of an age to exercise a choice, has no application to such a child.

The 38 Vic., c. 41, and 40 Vic., c. 33, provide for the suppression of gaming houses; and 40 Vic., c. 32, imposes penalties for gambling in public places; while 40 Vic., c. 31,

(*z*) *Reg.* v. *Cotte*, 22 L. C. J. 141.
(*a*) *Reg.* v. *Teffi*, 45 U. C. Q. B. 144.
(*b*) *Ex parte Thompson*, 5 Q. L. R. 200; see 31 Vic., c. 40.
(*c*) *Ibid.*

was passed for the repression of betting and pool-selling. The 44 Vic., c. 30, treats of prize-fighting; 41 Vic., c. 11, provides for the punishment of persons adulterating food. The 36 Vic., c. 8, regulates the carriage of dangerous goods in ships; and 38 Vic., c. 42, makes provision for enforcing the care of animals in transit. Under s. 96 of 37 Vic., c. 45, the inspection of raw hides is compulsory, in every inspection district where an inspector or deputy-inspector has been appointed; and any person selling, or offering for sale, within or exporting from such district, any raw hides without the same being first inspected and stamped or marked by the inspector or deputy, as provided by the Act, is liable to the penalty thereby imposed, and the hides so sold, offered for sale or exported, become forfeited. (*d*) And the person selling or exporting cannot avoid such forfeiture or penalty by himself marking the hides, according to the provisions of section 87. (*e*)

(*d*) *Clarke q. t.* v. *Calkin*, 4 Pugsley & B. 98.
(*e*) *Ibid.*

CHAPTER VIII.

EVIDENCE.

The rules of evidence are, in general, the same in civil and criminal proceedings. (*a*)

There are, however, some exceptions. Thus, the doctrine of estoppel has a much larger operation in the former. So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due to that statement. Again, confessions, or other self-disserving statements of prisoners, will be rejected, if made under the influence of undue promises of favor or threats of punishment. So, although both these branches of the law have each their peculiar presumptions, still the technical rules, regulating the burden of proof, cannot be followed out in all their niceties when they press against accused persons. (*b*)

There is also a strong and marked difference in the effect of evidence in civil and criminal proceedings: in the former a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (*c*)

The persuasion of guilt ought to amount to such a moral certainty, as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. (*d*)

(*a*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.
(*b*) Best on Evid., 4th ed., 122.
(*c*) *Clark* v. *Stevenson*, 24 U.C.Q.B. 209, per *Draper*, C. J.; *Hollingham* v. *Head*, 4 C.B.N.S. 388; *Reg.* v. *Jones*, 28 U.C.Q.B. 421, per *Richards*, C.J.
(*d*) *Reg.* v. *Jones*, 28 U.C.Q.B. 421, per *Richards*, C. J.; *Reg.* v. *Atkinson*, 17 U.C.C.P. 305, per *J. Wilson*, J.; and see *Reg.* v. *Chubbs*, 14 U.C.C.P. 43n.

The *onus* of proving everything essential, to the establishment of the charge against the accused, lies on the prosecutor. This rule is derived from the maxim of law, that every person must be presumed innocent until proved guilty. It is, however, in general, sufficient to prove a *prima facie* case; then, if circumstances calling for explanation are not explained, the case becomes stronger, for, as has been remarked, imperfect proofs, from which the accused might clear himself and does not, become perfect. (*e*) The presumption of innocence only obtains before verdict; after verdict of guilty, all presumptions will be against it. (*f*) The rule that the burden of proof lies on the party who, substantially, asserts the affirmative, is applicable in criminal cases. (*g*)

But in some cases, where negative proof is peculiarly within the knowledge of a party, he is bound to adduce it. The rule of law is plain, that where any one is proceeded against for doing an act which he is not permitted to do unless he has some special license or qualification in his favor, it is sufficient to charge this want of license or qualification against the party, and it is for the latter to prove it affirmatively; (*h*) for it is not incumbent on the prosecutor to give any negative evidence. (*i*) Still, it may be doubted whether the prosecutor must not first give some general evidence, to cast the *onus* on the other side. (*j*)

Where the defence calls evidence to prove facts in order to show that a Crown witness's testimony is untrue, evidence may be given by the Crown in rebuttal. (*k*)

In criminal cases, whether the evidence be circumstantial,

(*e*) *Reg.* v. *Jones*, 28 U.C.Q.B. 425, per *Richards*, C. J.; *Reg.* v. *Atkinson*, 17 U. C. C. P. 303, per *J. Wilson*, J.

(*f*) *Reg.* v. *Hamilton*, 16 U. C. C. P. 361, per *Richards*, J.

(*g*) *Re Barrett*, 28 U. C. Q. B. 561, per *A. Wilson*, J.; *Rex* v. *Hazy*, 2 C. & P. 458.

(*h*) *Re Barrett*, *supra*, 561, per *A. Wilson*, J.; *Rex* v. *Turner*, 5 M. & S. 206.

(*i*) *Ex parte Parks*, 3 Allen, 237.

(*j*) See *Elkin* v. *Janson*, 13 M. & W. 662, per *Alderson*, B.; see, however, *Apoth. Co.* v. *Bentley*, R. & M. 159.

(*k*) *Reg.* v. *Tower*, 4 Pugsley & B. 168.

or direct and positive, the jury must decide, not simply that all the facts are consistent with the prisoner's guilt, but that they are inconsistent with any other rational conclusion than that the prisoner is the guilty person. (*l*)

The jury must make all necessary inferences from the facts proved, and it lies within their peculiar province to decide on the credibility of witnesses. (*m*)

In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but, where such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, that conclusion becomes almost irresistible. (*n*)

In regard to deciding on the credibility of a witness, the jury should consider the nature of the story he tells, and his manner of telling it: the probability of its being true; his demeanor and his readiness to answer some questions, as well as his unwillingness to answer others; and his whole conduct indicating favor to one side or the other. On the other hand, the jury should consider, whether the witness exhibits a frank straightforward manner of answering questions, without regard to consequences to either party; a desire to state all the facts, and no hesitation to answer the various questions put to him. (*o*)

Where a witness, examined on the trial, directly confessed

(*l*) *Reg.* v. *Greenwood*, 23 U. C. Q. B. 258, per *Draper*, C. J.; Taylor on Evid. 84; and see *Reg.* v. *Jones*, 28 U. C. Q. B. 416.

(*m*) *Reg.* v. *Jones*, 28 U. C. Q. B. 416; *Reg.* v. *Greenwood*, 23 U. C. Q. B. 255; *Reg.* v. *Chubbs*, 14 U. C. C. P. 32; *Reg.* v. *Seddons*, 16 U. C. C. P. 389; *Reg.* v. *McIlroy*, 15 U. C. C. P. 116.

(*n*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 305, per *J. Wilson*, J.

(*o*) *Reg.* v. *Jones*, 28 U. C. Q. B. 419, per *Richards*, C. J.

the crime, it was held that the judge was not bound to tell the jury that they must believe this witness, in the absence of testimony to show her unworthy of credit, but that he was right in leaving the credibility of her story to them ; and if from her manner he derived the impression that she was under the influence of some one in court, it was not improper to call their attention to it in his charge (*p*)

A prisoner, being indicted for the murder of one H., the principal witness for the Crown stated that the crime was committed on the 1st of December, 1859, on a bridge over the River Don, and that the prisoner and one S. threw H. over the parapet of the bridge into the river. S. had been previously tried and acquitted. The counsel for the prisoner proposed to prove by one D. that S. was at his (D.'s) place fifty miles off on that evening, but the learned judge rejected the evidence, saying that S. might be called, and if the Crown attempted to contradict his evidence, he would allow the prisoner to call witnesses to corroborate it. But it was held in error that the presence of S. was a fact material and not collateral to the inquiry, and that D., therefore, should have been admitted, when tendered, on the broad principle that he was called to speak on a matter directly connected with the very fact under investigation, and his evidence would affect the credibility of the evidence for the prosecution. (*q*)

But on a trial for murder by stabbing with a sharp instrument, it was proved that the prisoner struck the deceased, but that neither a knife nor other instrument was seen in his hand. Evidence for the prisoner, that the day preceding the homicide he, the prisoner, had a knife which could not have inflicted the wound of which the deceased died, and that on that day the prisoner had parted with it to a person who held it till after the crime was committed, was held to have been properly rejected, (*r*)

(*p*) *Reg.* v. *Jones*, 28 U. C. Q. B. 416.
(*q*) *Reg.* v. *Brown*, 21 U. C. Q. B. 330.
(*r*) *Reg.* v. *Herod*, 29 U. C. Q. B. 428.

Where a number of persons against whom warrants had been issued were met together at a certain house, and on the officers of the law attempting to arrest them, one of the latter was killed by a shot fired by some of the party, though it was not known by which, and all were indicted for murder; on the trial of one of them, it was held competent for the prisoners who were not on their trial, and were called as witnesses, to state the purpose for which they went to the house, in order to disprove the inference that they were there for an unlawful purpose, though declarations of the prisoners would not have been admissible unless accompanying and explanatory of an act, and thereby becoming a part of the *res gestæ*. (*s*)

Where two prisoners are jointly indicted, one of them may, in certain cases, be acquitted, and called as a witness for the other. The general rule on this point is: Where the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against two jointly, and no evidence whatever is given against the person thus unjustly made a defendant, the judge, in his discretion, may direct the jury to acquit either during the progress or at the termination of the inquiry, so as to give an opportunity to the other defendant to avail himself of his testimony. (*t*)

The ground of this rule is to prevent the prosecutor from excluding the evidence of a material witness, by joining him in the indictment. But, as in a criminal case, the indictment against all the prisoners is usually found by a grand jury, and should only be found upon, at least, a *prima facie* case of guilt against all, it is somewhat distinguishable from a civil action, and seems to call for the exercise of a more guarded discretion on the part of the judge, lest an accomplice in guilt escape through an unfortunate and premature acquittal. The circumstance, that the indictment is found by the grand

(*s*) *Reg.* v. *Chasson*, 3 Pugsley, 546.
(*t*) *Reg.* v. *Kennedy*, 2 Thomson, 218, per *Wilkins*, J.; *Reg.* v. *Hambly*, 16 U. C. Q. B. 617; *Rex* v. *Owen*, 9 C. & P. 83; *Rex* v. *O'Donnell*, 7 Cox, 337; Arch. Cr. Pldg. 274.

jury, affords less ground for the suspicion that the party is made a defendant for the purpose of excluding his testimony. (*u*) In a criminal case, though no evidence appears against one defendant, there is no necessary inference that he was made a defendant for this purpose. (*v*) Where there is no evidence whatever against one defendant, he should be acquitted at the close of the prosecutor's case; (*w*) but it seems this is discretionary with the judge. (*x*) If there is some evidence, though very slight, against the prisoner, his case must be submitted to the jury. (*y*)

If, after the close of the prisoner's case, there is no legal evidence of his guilt, it seems the judge would be bound to direct an acquittal. (*z*) The correct and reasonable rule would appear to be that it is discretionary with the judge to direct an acquittal, if applied for before the close of the prisoner's case; but that it is obligatory upon him to do so, when the case for the defence is closed, particularly if it appears the prisoner was made a defendant for the purpose of excluding his testimony.

Where, at the close of the case for the Crown, very slight evidence appears against one of two prisoners jointly indicted, the other cannot of right claim that the case of the former be submitted separately to the jury; but this is discretionary with the judge. The question whether the judge has properly exercised his discretion, or not, cannot be reserved as a point for the consideration of the court. (*a*) And it is always permissible to the judge to recall any witnesses, and make further inquiries, to meet objections, of course allowing counsel for the defence to cross-examine on such new evidence. (*b*)

Whenever a co-defendant is ordered to be acquitted, in

(*u*) *Reg.* v. *Kennedy*, 2 Thomson, 211, per *Bliss*, J.
(*v*) *Ibid.* 219, per *Wilkins*, J.
(*w*) *Reg.* v. *Hambly*, 16 U. C. Q. B. 617.
(*x*) *Ibid.*; *Reg.* v. *Kennedy*, 2 Thomson, 203.
(*y*) *Ibid.*; *Reg.* v. *Hambly*, *supra*, 625.
(*z*) *Reg.* v. *Kennedy*, *supra*.
(*a*) *Reg.* v. *Hambly*, 16 U. C. Q. B. 617.
(*b*) *Reg.* v. *Jennings*, 20 L. C. J. 291.

anticipation of the general verdict, his credit is left to the jury, how strong soever the bias on his mind may be. (*c*)

Should the judge refuse to direct an acquittal, for the purpose of evidence of the co-defendant, against whom there appeared neither legal proof nor moral implication, a verdict against the other prisoner would be set aside. (*d*)

Where two prisoners are jointly indicted for felony, and plead not guilty, but one only is given in charge to the jury, the other is an admissible witness against the one on trial, although the plea of not guilty remains on the record undisposed of; the witness not having been acquitted or convicted, and no *nolle prosequi* having been entered. (*e*) But notwithstanding 32 & 33 Vic., c. 29, ss. 62 and 63, if both have been given in charge to the jury, neither can be called as a witness. (*f*)

It is conceived that this decision will hold in Ontario at least, as the Evidence Act here, Con. Stats. U. C. c. 32, s. 18, only protects a party in criminal proceedings from giving evidence for or against himself. It is also unaffected by the R. S. O., c. 62.

Parties separately indicted for perjury alleged to have been committed at one and the same hearing, can be witnesses for or against each other. (*g*)

Where four prisoners were indicted together for robbery, and one severed, in his challenges, from the other three, who were tried first; it was held that the former, although not actually upon his trial, after pleading not guilty, and before trial or judgment, was a competent witness on their behalf. (*h*) He would also be competent for the Crown. (*i*)

It would seem that, in any case, one prisoner, whether he pleads guilty or not guilty, may, if he severs in his chal-

(*c*) *Reg.* v. *Kennedy*, 2 Thomson, 219-20, per *Wilkins*, J.
(*d*) *Ibid.* 220, per *Wilkins*, J.
(*e*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 390 (Ex. Chr.); 35 L. J. (M. C.) 161.
(*f*) *Reg.* v. *Payne*, L. R. 1 C. C. R. 349.
(*g*) *Reg.* v. *Pelletier*, 15 L. C. J. 146; 1 *Revue Leg.* 565.
(*h*) *Reg.* v. *Jerrett*, 22 U. C. Q. B. 499.
(*i*) *Ibid.* 500, per *Hagarty*, J.

lenges from the other prisoners, and the Crown elects to proceed against the others first, so that he is not on trial with them, be called for the prosecution; and this on the ordinary principles of the common law. (*j*)

In such cases, however, it might be advisable, in order to ensure the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty, as to him, or to have his plea of not guilty withdrawn and a plea of guilty taken and sentence passed, so that the witness may give his evidence with a mind free from all the corrupt influences which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. (*k*) This course cannot, however, be held absolutely necessary, since the decision of this case in the Exchequer Chamber.

As to the competency of witnesses, a child of any age, if capable of distinguishing between good and evil, may be admitted to give evidence.

A child of six years of age was examined, on being interrogated by the judge, and making answers that there was a God, that people would be punished in hell who did not speak the truth, and that it was a sin to tell a falsehood under oath, although he stated he did not know what an oath was. (*l*)

On a trial for murder, an Indian witness was offered, and on his examination by the judge, it appeared that he had a full sense of the obligation to speak the truth, but he was not a Christian, and had no knowledge of any ceremony, in use among his tribe, binding a person to speak the truth or imprecating punishment upon himself if he asserted what was false. It appeared also that he and his tribe believed

(*j*) *Reg.* v. *Jerrett*, 22 U. C. Q. B. 500 *et seq.*, per *Hagarty*, J.; see *Reg.* v. *King*, 1 Cox, C. C. 232; *Reg.* v. *George*, C. & Mar. 111; *Reg.* v. *Williams*, 1 Cox, C. C. 289; *Reg.* v. *Stewart*, *ibid.* 174; *Reg.* v. *Gerber*, 1 Temp. & Mew, 647; *Reg.* v. *Clouter*, 8 Cox, C. C. 237.
(*k*) *Winsor* v. *Reg.* L. R. 1 Q. B. 312, per *Cockburn*, C. J.
(*l*) *Reg.* v. *Berube*, 3 L. C. R. 212.

in a future state, and in a Supreme Being who created all things, and in a future state of reward and punishment according to their conduct in this life. He was then sworn in the ordinary way on the New Testament, and it was held that his evidence was admissible. (*m*) If the witness had belonged to any nation or tribe that had in use among them any particular ceremony which was understood to bind them to speak the truth, however strange and fantastic the ceremony might be, it would have been indispensable that the witness should have been sworn according to such ceremony; because all should be done, that can be done, to touch the conscience of the witness according to his notions, however superstitious they may be. (*n*)

The defendant, on his trial upon an indictment, cannot give evidence for himself, nor can his wife be admitted as a witness for him. (*o*)

The wife of any one of several prisoners, jointly indicted, stands in the same position with respect to the admissibility of her evidence as her husband. (*p*)

Thus where A. and B. were tried together, on a joint indictment for assault on a peace officer, and the wife of A. was offered, as a witness, to disprove the charge against B.; it was held that her evidence was properly rejected, but had the husband not been on his trial, she would have been a competent witness. (*q*)

But where the prisoner was indicted, among other things, for a conspiracy between himself and E., the wife of T., but E. was not indicted; it was held that the evidence of T. was properly received. (*r*)

A conviction on the evidence of an accomplice would be good in law, if the judge directed the attention of the jury to

(*m*) *Reg.* v. *Pah-mah-gay*, 20 U. C. Q. B. 195.
(*n*) *Ibid.* 198, per *Robinson*, C. J.
(*o*) *Reg.* v. *Humphreys*, 9 U. C. Q. B. 337; and see *Reg.* v. *Madden*, 14 U. C. Q. B. 588.
(*p*) *Reg.* v. *Thompson*, L. R. 1 C. C. R. 377.
(*q*) *Reg.* v. *Thompson*, 2 Hannay, 71.
(*r*) *Reg.* v. *Halliday*, 7 U. C. L. J. 51; Bell, 257; 29 L. J. (M. C.) 148.

the rule of practice, by which the testimony of the accomplice requires corroboration as to the identity of the accused, (*s*) and it seems even if the judge did not act on this rule, (*t*) and the testimony of the accomplice were uncorroborated. (*u*) In a prosecution for selling liquor on a Sunday, the persons who purchased the liquor, though accomplices of the accused, were held competent witnesses to prove the selling. (*v*)

Judges, in their discretion, will advise a jury not to convict a prisoner upon the testimony of an accomplice alone without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the judge. (*w*) The direction of the judge should be so strongly against the testimony, if uncorroborated, as almost to amount to a direction to acquit. (*x*)

In *Reg.* v. *Seddons*, (*y*) the jury were told that the testimony of the accomplice was not sufficiently corroborated to warrant a conviction, whereupon they came into court stating that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but, after a short interval, they returned a verdict of guilty. Before recording their finding, the presiding judge recommended them not to convict on the evidence, saying, however, they could do so if they thought proper. They nevertheless adhered to their verdict, and the court held that there was neither error, nor misconduct in fact, nor in law.

The nature and extent of the corroboration that should be required will depend a great deal upon the character of the crime. And on the trial of a charge of scuttling, a direction to the jury that it was not necessary that the accomplice should

(*s*) *Re Caldwell*, 6 C. L. J. N. S. 228; 5 U. C. P. R. 221; per *A. Wilson*, J.; *Reg.* v. *Seddons*, 16 U. C. C. P. 389; *Reg.* v. *Tower*, 4 Pugsley & B. 168.
(*t*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 53, per *Blackburn*, J.
(*u*) *Reg.* v. *Fellowes*, 19 U. C. Q. B. 51; *et seq.* per *Robinson*, C. J.; *Reg.* v. *Beckwith*, 8 U. C. C. P. 274.
(*v*) *Ex parte Birmingham*, 2 Pugsley & B. 564.
(*w*) *Reg.* v. *Beckwith*, *supra*, 279, per *Draper*, C. J.
(*x*) *Reg.* v. *Seddons*, *supra*, 394, per *A. Wilson*, J.
(*y*) *Supra*.

be corroborated as to the very act of boring the holes in the vessel, if the other evidence and circumstances of the case satisfied them that he was telling the truth in his account of its destruction. (*z*)

In *Beckwith's case*, the corroborative evidence did not affect the identity of the accused; it did not show that he was the guilty party; and it might be said only to concur with the testimony of the accomplice, as to the manner in which the crime was committed. The learned judge (*Draper*, C. J.,) adverted to the fact that there had been a departure from that which the authorities show is a well settled practice, as to the manner in which the testimony of an accomplice is left to the jury; and he regretted that there should be an omission to submit his evidence to the jury coupled with a caution, which the practice and authority of the most eminent judges in England recommend. But he considered that the alleged misdirection was in a matter of practice, and that, on the authority of *Reg.* v. *Stubbs*, (*a*) it could not be treated as a point of law, nor was it a question of fact, and a rule *nisi* obtained for a new trial, under Con. Stats. U. C., c. 113, was therefore discharged. It must be recollected, in considering these reasons of the learned judge, that the application was made under the above statute, and the court was then of opinion the only grounds it opened up was "upon any point of law or question of fact." (*b*)

The rule that the evidence of an accomplice requires corroboration is not a rule of law, but of general and usual practice, the application of which is for the discretion of the judge by whom the case is tried, and in its application much depends upon the nature of the offence, and the extent of the complicity of the witness in it; (*c*) and it has been doubted

(*z*) *Reg.* v. *Tower*, 4 Pugsley & B. 168.
(*a*) Dears, 555; 1 Jur. N. S. 1115; 25 L. J. (M. C.) 16.
(*b*) See the judgment in this case.
(*c*) *Reg.* v. *Seddons*, 16 U. C. C. P. 394, per *A. Wilson*, J.; *Reg.* v. *Boyes*, 1 B. & S. 320, per *Wightman*, J.

whether an accessory, after the fact is so far involved with the principal offender as to come within the rule. (*d*)

The evidence of an incompetent witness may be withdrawn from the jury, upon his incompetency appearing during his examination in chief, although he has been examined previously on the *voir dire*, and pronounced to be competent. (*e*) So illegal evidence allowed to go to the jury, under a reserve of objection, may be subsequently ruled out by the judge in his charge, and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence. (*f*)

One witness is in general sufficient to establish the charge on an indictment. Neither statute nor any principle of the common law requires the testimony of a second witness except in cases of treason and perjury. (*g*)

A barrister or attorney is not compellable to disclose confidential communications made to him by his client; but this protection does not extend to physicians or clergymen. (*h*)

At common law, a witness is entitled to refuse to answer questions that may tend to criminate him; not only because the answer itself might be evidence against him on a criminal charge, but because it might form a link in the chain of testimony which might implicate him in such charge. (*i*) A witness is not compellable to answer any question tending to subject him to a penalty or a forfeiture of any nature. (*j*) Questions tending to destroy his defence must be regarded as tending to subject the witness to a penalty. (*k*) If the witness declines answering, no inference of the truth of the fact can be drawn from that circumstance. (*l*) And it seems he

(*d*) *Reg.* v. *Smith*, 38 U. C. Q. B. 218.
(*e*) *Reg.* v. *Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186.
(*f*) *Reg.* v. *Fraser*, 14 L. C. J. 245.
(*g*) *Reg.* v. *Fellowes*, 19 U. C. Q. B. 51, per *Robinson*, C. J.
(*h*) *Browne* v. *Carter*, 9 L. C. J. 163.
(*i*) *Reg.* v. *Hulme*, L. R. 5 Q. B. 384, per *Blackburn*, J.
(*j*) *Burton q. t.* v. *Young*, 17 L. C. R. 379; and see Arch. Cr. Pldg. 279; Taylor on Evid. 1222-1236 (4th ed.); 3 Russ. Cr. 540.
(*k*) *Burton q. t.* v. *Young*, 17 L. C. R. 392, per *Meredith*, J.
(*l*) *Ibid.*

is not bound, in order to claim the privilege, to state his belief that his answering would tend to criminate him. (*m*)

It, however, appears now to be settled that for the purpose of impeaching the credit of a witness, he may always be asked on cross-examination questions with regard to alleged crimes or other improper conduct on his part. (*n*)

And questions relating to collateral facts may be put to a witness for this purpose, as showing his interest, motives and prejudices, such as whether he had not declared that no Roman Catholic should sit on the jury; whether he had not been constantly advising with the Attorney General as to which of the jurors should be ordered to stand aside; and whether it was not his desire, as a member of the Government, to procure a conviction. (*o*)

It has been held that if a witness intends to insist on his right to refuse answering any question tending to subject him to a penalty, he must do so at once; if he answers part, he must answer all. (*p*) As where a witness, called to prove that the consideration of a note was usurious, declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said that he gave what he thought it was worth, the court held that he was bound in re-examination to state what he gave, on the ground that having answered part, he was bound to answer the whole. (*q*) But it is elsewhere laid down that the witness may claim the protection of the court at any stage of the inquiry; although he may have already answered, without objection, some questions tending to criminate him. (*r*)

Upon the trial of the defendant for bribery, a witness was called upon to give in evidence the receipt of a bribe by him from the defendant. Upon his objecting to answer, on the

(*m*) *Ellis* v. *Power*, 4 Pugsley & B. 40.
(*n*) See also 32 & 33 Vic., c. 29, s. 65.
(*o*) *Reg.* v. *Chasson*, 3 Pugsley, 546.
(*p*) *Peters* v. *Irish*, 4 Allen, 326.
(*q*) *Ibid.*
(*r*) *Reg.* v. *Garbett*, 2 C. & K. 474; Arch. Cr. Pldg. 279.

ground that his answer would criminate himself, a pardon, under the Great Seal, was offered, and accepted by him; but he still refused to answer, on the same ground. It was held that, as the pardon protected the witness against every proceeding, except an impeachment by the House of Commons, and as there was no probability whatever, under the circumstances of the case, that the witness would ever be subjected to such a proceeding, for the matter which he was called upon to give in evidence, he was not privileged from answering; and that the judge was bound to compel the witness to answer. (*s*)

A witness may now be cross-examined as to previous statements made by him, in writing, or reduced into writing, relative to the subject-matter of the case, without such writing being shown to him. But sec. 64 of the 32 & 33 Vic., c. 29, has no application to papers which it does not appear the witness had either written, signed or seen until shown to him in the witness box. (*t*) It is competent, however, it seems, for counsel, on cross-examination of the witness, to put into his hands a paper, such as a policy of insurance, not in evidence, and ask him if he did not see certain words in it; also to read from a paper purporting to be a protest made by the prisoner, and to ask the witness if he did not write the protest. But he could not read from such a paper and found a question on it. (*u*)

A question should not be put to a witness, in cross-examination, for the mere purpose of contradicting him, unless such question is relevant to the matter in issue; but if an irrelevant question be put, the answer is conclusive; (*v*) for, otherwise, the court would be involved in the trial of innumerable issues, totally unconnected with the matter under

(*s*) *Reg.* v. *Boyes*, 8 U. C. L. J. 139; 2 F. & F. 157; 1 B. & S. 311; 30 L. J. (Q.B.) 301.
(*t*) *Reg.* v. *Tower*, 4 Pugsley & B. 168.
(*u*) *Ibid.*
(*v*) *Gilbert* v. *Gooderham*, 6 U. C. C. P. 39; *Reg.* v. *Brown*, 21 U.C.Q.B. 334, per *Robinson*, C. J.

investigation, (*w*) and which the parties would not be prepared to meet. (*x*)

On an indictment for rape, or attempt at rape, or for an indecent assault, amounting in substance to an attempt at rape, if the prosecutrix is asked, in cross-examination, whether she has had connection with another person, not the prisoner, evidence cannot be called to contradict her. (*y*)

Now, however, by the 32 & 33 Vic., c. 29, s. 65, if a witness, on being questioned as to whether he has been convicted of any felony or misdemeanor, either denies the fact, or refuses to answer, the opposite party may prove such conviction.

By section 69, if a witness, upon cross-examination as to a former statement made by him, relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did, in fact, make it.

In order to impeach the character of a witness for veracity, persons may be called to prove that his general reputation is such that they would not believe him on his oath. (*z*) In cross-examining the witness for this purpose, counsel is not obliged to explain the object of his questions, because that might often defeat his object. (*a*)

By the 32 & 33 Vic., c. 29, s. 68, in case a witness, in the opinion of the court, proves adverse, the party producing him may contradict him by other evidence, or, by leave of the court, may prove that the witness made, at other times, a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness,

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(*w*) *Reg.* v. *Brown*, 21 U. C. Q. B. 334, per *Robinson*, C. J.
(*x*) *Reg.* v. *Holmes*, L. R. 1 C. C. R. 334.
(*y*) *Ibid.*; *Rex.* v. *Hodgson*, R. & R. 211; *Reg.* v. *Cockroft*, 11 Cox, 410.
(*z*) *Reg.* v. *Brown*, L. R. 1 C. C. R. 70; 36 L. J. (M. C.) 59.
(*a*) *Reg.* v. *Brown*, 21 U. C. Q. B. 334, per *Robinson*, C. J.

and he must be asked whether or not he did make such statement. (*b*)

A witness should be interrogated as to facts only, and not as to matter of law. (*c*)

A skilled witness cannot, in strictness, be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question, which, in effect, will decide the same thing. (*d*)

Where, on a trial for murder, the Crown having made out a *prima facie* case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, by two blows with a stick, about two feet long, and one and a half inches thick. In answer to this, a medical man, previously examined on the part of the Crown, was recalled, and asked whether the blows so inflicted by the prisoner's daughter would produce the fractures that were found on the head of the deceased. This question having been allowed, the answer was: "A stick such as she describes, one inch or an inch and a half in thickness, and two feet long, could not, in my opinion, produce such extensive fractures by two blows; there must have been a greater number of blows to produce such fractures. There were bruises on both arms, head and legs, and two blows could not have done all that. Deceased must have had a succession of blows from a larger instrument than the girl describes." It was objected that this was skilled evidence and matter of opinion, when skilled evidence and matter of opinion were not admissible; but the court held that the rule excluding a skilled witness from giving evidence on the point which the jury are to determine was not infringed, and that the medical testimony was material to enable the jury to determine the true cause of death; (*e*) and also that this was not an informal or illegal

(*b*) *Reg.* v. *Jerrett*, 22 U. C. Q. B. 499.
(*c*) *Reg.* v. *Massey*, 13 U. C. C. P. 484.
(*d*) *Reg.* v. *Jones*, 28 U. C. Q. B. 422, per *Richards*, C. J.
(*e*) *Ibid. supra*, 416.

way of impeaching the veracity of the prisoner's daughter, nor was the evidence collateral to the fact of killing, but was important, as testing the credibility of the witness. (*f*)

By the 32 & 33 Vic., c. 29, s. 67, it is provided that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and it has been held under this section that the signature of a person was properly proved by comparing it with an endorsement on a promissory note, purporting to be his but not proved to be so, otherwise than by the fact that the prisoner had endorsed the note below such signature. (*g*) But it may be doubted whether such a lax mode of proving handwriting was contemplated by the legislature.

It is a general and well-established principle that the confession of a prisoner, in order to be admissible, must be free and voluntary. Any inducement to confess held out to the prisoner by a person in authority, or any undue compulsion upon him, will be sufficient to exclude the confession. The rule is carried so far that, if an oath is administered to the prisoner, while being examined under the 32 & 33 Vic., c. 30, s. 31, the oath will be a sufficient constraint or compulsion to render his statement inadmissible. (*h*) The reasons for this are, the statements made on his examination are regarded as confessions which must be voluntary, and a statement under oath is not so regarded; secondly, a prisoner shall not be compelled to criminate himself, and to this it may be added, that it is harsh and inquisitorial, and for that reason should be rejected. (*i*)

This rule, however, only applies to the time during which the prisoner is under examination, as a prisoner on a charge against himself. His deposition, on oath, as a witness

(*f*) *Reg.* v. *Jones*, 28 U. C. Q. B. 416.
(*g*) *Reg.* v. *Tower*, 4 Pugsley & B. 168, *Weldon*, J., *dissentiente*.
(*h*) *Reg.* v. *Field*, 16 U. C. C. P. 98.
(*i*) *Reg.* v. *Field*, *supra*, 101, per *Richards*, C. J.

against another person, when voluntarily made, with the privilege of refusing to answer criminatory questions, is admissible against himself, if subsequently charged with a crime, and this even though he have not been cautioned to that effect. (*j*)

The prisoner was convicted of arson. His admission or confession was received in evidence, on the testimony of the constable, who said that, after the prisoner had been in a second time before the coroner, he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was also evidence that, on the third day of his incarceration, he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and after an absence of a few minutes, returned and made a full confession. It was held that, on these facts appearing, the statement made to the constable was *prima facie* receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner, after due warning by him.

To make this good evidence to go to the jury, it would seem, however, that the more reasonable rule is, that, notwithstanding the caution of the magistrate, it is necessary, in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him; and if, in such case, the prisoner, after he has been cautioned, and his mind impressed with the idea that his prior statement cannot be used against him, still thinks fit to confess, the latter declaration is admissible.

In the same case, it afterwards appeared that the prosecutor had offered direct inducements to the prisoner to con-

(*j*) *Reg.* v. *Field*, 16 U. C. C. P. 101, per *Richards*, C. J.; *Reg.* v. *Coote*, 18 L. C. J. 103.

fess—promising to get up a petition in his favor, etc.—and the court held that, if the judge was satisfied that the promise of favor thus held out had induced the confession, and continued to act in the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them. If, in the course of the examination of the witnesses for the prosecution, the judge had suspected the confession had been obtained by undue influence, that suspicion ought to have been removed before the evidence was received. (*k*)

A confession made by the prisoner to the prosecutor in the presence of the police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you," was held inadmissible. (*l*)

So where the prisoner, implicated with several others in a Fenian conspiracy, went before a magistrate, at the request of a constable to whom he had previously made admissions tending to criminate himself, and laid an information against his fellows, saying, "I came to save myself;" and no caution was given on this occasion, nor was any charge preferred against him until afterwards on his refusing to prosecute, when he was arrested, tried, and convicted, his own information being put in evidence against him; the court held such admissions improperly received. (*m*)

This case does not affect the position that the voluntary deposition of a witness, on oath, is admissible against him when subsequently charged with a crime. (*n*)

Section 32 of 32 & 33 Vic., c. 30, is only directory, so that a voluntary statement, made by a prisoner in the presence of a magistrate, as provided for by that Act, is admissible in evidence, although the statement was not taken down in

(*k*) *Reg.* v. *Finkle*, 15 U. C. C. P. 453.
(*l*) *Reg.* v. *Fennell*, L. R. 7 Q. B. D. 147.
(*m*) *Reg.* v. *Gillis*, 14 W. R. 845; and see *Hall's case*, 2 Leach, C. C. 559; 3 Russ. Cr. 373.
(*n*) *Reg.* v. *Goucie*, 1 Pugsley & B. 611.

writing, and no caution was given by the magistrate to the effect prescribed by s. 31, provided it appear that the prisoner was not induced to make the statement by any promise or threat. (*o*)

Confessions to a constable, by an accused in his custody, were not admitted where the accused might be under the influence of hopes held out; but admissions made the same day, to a physician, in the absence of the constable, were admitted. (*p*)

Statements made by a prisoner to parties who arrested him, he having been previously told on what charge they arrested him, are evidence. (*q*)

Words importing only advice on moral grounds, as by a master to his pupil, do not render a statement inadmissible against the prisoner. (*r*)

And where the prisoners, two children, one aged eight and the other a little older, were tried for attempting to obstruct a railway train, and it was proved that the mothers of the prisoners and a policeman being present, after they had been apprehended on suspicion, the mother of one of the prisoners said, "You had better, as good boys, tell the truth," whereupon both the prisoners confessed; it was held that this confession was admissible in evidence against the prisoners.(*s*)

A confession is admissible in evidence made to one in authority, although the prisoner was, immediately before such confession, in the custody of another person not produced, and although it is not shown that such person did not hold out a threat or inducement; for it is unnecessary, in general, to do more than negative any promise or inducement held

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(*o*) *Reg.* v. *Strip*, 2 U. C. L. J. 137; Dears. 648; 25 L. J. (M. C.) 109; *Reg.* v. *Goucie*, *supra*; *Reg.* v. *Sansome*, 1 Den. 545; 19 L. J. (M. C.) 138; Arch. Cr. Pldg. 228.

(*p*) *Reg.* v. *Berube*, 3 L. C. R. 212.

(*q*) *Reg.* v. *Tufford*, 8 U. C. C. P. 81.

(*r*) *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96; and see *Reg.* v. *Baldry*, 2 Den. C. C. 430.

(*s*) *Reg.* v. *Reeve*, L. R. 1 C. C. R. 362; and see *Reg.* v. *Parker*, 8 U. C. L. J. 139; L. & C. 42; 30 L. J. (M. C.) 144.

out by the person to whom the confession was made. If, however, there be any probable ground to suspect collusion in obtaining the confession, such suspicion, it is said, ought in the first instance to be removed. (*t*)

It may be generally laid down that, though an inducement has been held out by an officer or prosecutor or the like, and, though a confession has been made in consequence of such inducement, still if the prisoner be subsequently warned, by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or if he be simply cautioned by the magistrate not to say anything against himself, any admission of guilt, afterwards made, will be received as a voluntary confession. More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to the inferior officer; because a caution from the latter person might be insufficient to efface the expectation of mercy, which had been previously raised in the prisoner's mind. (*u*)

It is for the judge to decide whether the prisoner has been induced to confess by undue influence or not. (*v*)

The jury are not bound to believe the whole statements of a prisoner, in making a confession. The exculpatory as well as the implicative portions thereof should be left to the jury, and they must exercise their own judgment as to whether they believe the whole, or only a part. (*w*)

The correct course to be taken by the judge, when evidence has been received which it is afterwards shown not to be properly receivable, is to treat it as if it had been inadmissible in the first instance, and the most effectual way of doing this is to tell the jury not to consider the inadmissible evidence, and to dispose of the case on the other evidence.

(*t*) *Reg.* v. *Finkle*, 15 U.C.C.P. 455, per *Richards*, C.J.; Phillips on Evid. 430; and see *Reg.* v. *Clewes*, 4 C. & P. 221.
(*u*) *Reg.* v. *Finkle*, 15 U. C. C. P. 457, per *Richards*, C. J.
(*v*) *Ibid.* 453; *Reg.* v. *Garner*, 1 Den. C. C. 329.
(*w*) *Reg.* v. *Jones*, 28 U. C. Q. B. 416.

A similar principle is acted on when the names of other prisoners are mentioned in confession, and the proper course seems to be to read the names in full, the judge directing the jury not to pay any attention to them. (*x*)

But the inclination of the courts is not to extend the rule for excluding confessions; (*y*) and where a prisoner is willing to make a statement, it is the magistrate's duty to receive it.

Examinations taken before a commissioner in bankruptcy are admissible in evidence against the prisoner on a criminal charge. (*z*)

The 66th section of the statute declares that the several forms given in the schedule, or forms to the like effect, shall be good, valid and sufficient in law. The form N., of the statement of the accused before the magistrate, contains the cautions specified in s. 31, and not that in s. 32. Therefore, a statement returned, purporting to be signed by the magistrate, and bearing, on the face of it, the caution provided for by s. 31, is admissible by virtue of s. 34, without further proof. (*a*)

The object of taking depositions, under the 32 & 33 Vic., c. 30, is not to afford information to the prisoner, but to preserve the evidence, should any of the witnesses be unable to attend the trial, or die. This being the ground on which they are taken, until recently the prisoner had no right to see them. (*b*) Now he is entitled to inspect the depositions, that he may know why he is committed. (*c*) It is not incumbent on the prosecution to abstain from giving any additional evidence, discovered subsequently to the taking

(*x*) *Reg.* v. *Finkle*, 15 U. C. C. P. 459, per *Richards*, C. J.; *Rex* v. *Jones*, 4 C. & P. 217; *Rex* v. *Mandesley*, 2 Lew. C. C. 73.
(*y*) *Reg.* v. *Finkle*, 15 U. C. C. P. 459.
(*z*) *Reg.* v. *Robinson*, L. R. 1 C. C. R. 80.
(*a*) *Ibid.*; see *Reg.* v. *Bond*, 1 Den. 517; 19 L. J. (M. C.) 138; Arch. Cr. Pldg. 228.
(*b*) *Reg.* v. *Hamilton*, 16 U. C. C. P. 364, per *Richards*, C. J.
(*c*) *Ibid.*; 32 & 33 Vic., c. 29, s. 46.

of depositions; but it is only fair that the prisoner's counsel should be apprised of the character of such evidence. (*d*)

It would seem that depositions taken before a coroner can only be proved by the coroner himself, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry, that the forms of law have been duly complied with. (*e*)

But depositions made and signed by a party at an inquest may be received in evidence to contradict him, whether the inquest was illegally taken or not, as being statements of a witness made on a previous occasion. (*f*)

It was not, however, necessary to prove depositions by the magistrate or his clerk, when taken before justices of the peace; though it was intimated that in important cases it would be better if they were present at the trial. (*g*) And now, an examination taken under the 32 & 33 Vic., c. 30, may be given in evidence without further proof, unless it be proved that the justice purporting to have signed the same did not in fact sign it. (*h*) The signature of the prisoner is not absolutely necessary. The effect of the statute, so far as regards the evidence of a confession, seems to be that a written examination, taken as the statute directs, is evidence *per se*, and the only admissible evidence of the deponents having made a declaration of the things therein contained. (*i*)

The statute authorizes the reading of the depositions before the grand jury, for the purpose of finding a bill, as well as before the petty jury at the trial. (*j*) In order, however, that the deposition may be admissible before the grand jury, the presiding judge must, by evidence taken in the presence of the accused, satisfy himself of the ex-

(*d*) *Reg.* v. *Hamilton*, 16 U. C. C. P. 365, per *Richards*, C. J.
(*e*) *Reg.* v. *Hamilton*, *supra*, 340; Taylor on Evid. 473; *Reg.* v. *Wilshaw*, C. & Mar. 145.
(*f*) *Reg.* v. *Chasson*, 3 Pugsley, 546.
(*g*) *Reg.* v. *Hamilton*, *supra*, 353, per *Richards*, C. J.
(*h*) Sec. 34.
(*i*) Arch. Cr. Pldg. 233.
(*j*) *Reg.* v. *Clements*, 2 Den. 251; 20 L. J. (M. C.) 193.

istence of the facts required by the statute to make such deposition admissible in evidence. (*k*)

Under the 32 & 33 Vic., c. 30, s. 29, it is not necessary that each deposition should be signed by the justice taking it. Therefore, where a number of depositions, taken at the same hearing on several sheets of paper, were fastened together, and signed by the justices taking them once only at the end of all the depositions, in the form given in the schedule (M), it was held that one of the depositions was admissible in evidence, under s. 30 of this Act, after the death of the witness making it, although no part of it was on the sheet signed by the justice. (*l*)

A deposition, properly taken, under 32 & 33 Vic., c. 30 s. 30, before a magistrate, on a charge of feloniously wounding, is admissible in evidence against the prisoner on his trial for murder, the deponent having subsequently died of the wound.

Formerly depositions were receivable only where the indictment was substantially for the same offence as that with which the defendant was charged before the justice; (*m*) but now by the 32 & 33 Vic., c. 29, s. 58, depositions taken in the preliminary or other investigation of any charge against any person, may be read as evidence in the prosecution of such person for any other offence whatsoever.

Pregnancy may create such an illness as will render depositions receivable in evidence. (*mm*) But the illness must be such as to render the witness unable to travel. And where a woman 74 years of age, whose depositions were sought to be read, lived near the court house, but her medical adviser swore that, although able to travel the distance, it

(*k*) *Reg.* v. *Beaver*, 10 Cox, 274, per *Byles*, J.; Arch. Cr. Pldg. 250.
(*l*) *Reg.* v. *Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60; *Reg.* v. *Richards*, 4 F. & F. 860, overruled.
(*m*) See *Reg.* v. *Beeston*, 1 U. C. L. J. 17; Dears. 405; *Reg.* v. *Ledbetter*, 3 C. & K. 108.
(*mm*) *Reg.* v. *Stevenson*, 9 U. C. L. J., 139; L. & C. 165; 31 L. J. (M. C.) 147; *Rex* v. *Wellings*, L. R. 3 Q. B. D. 426; see, however, *Reg.* v. *Welton*, 9 Cox, 296.

would be dangerous for her to see so many faces, or to be examined at all, the court held that her depositions were not admissible. (*n*)

It seems the statement of a deceased witness is admissible in evidence, though it is headed "the complaint of," etc., instead of "the examination" of the deceased, and does not state, on its face, to have been taken in the presence of the accused, it being proved that it was taken in his presence. (*o*)

The 43 Vic., c. 35, makes provision for the taking of depositions of any person dangerously ill, who is able to give material evidence in a criminal proceeding, for the purpose of having the same read at the trial, in the event of such person being then dead or unable to attend.

Where several felonies are connected together and form part of one entire transaction, evidence of one is admissible to show the character of the others. (*p*)

But where a prisoner indicted for murder, committed while resisting constables about to arrest him, had with others been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and therefore had a motive to resist the officers. (*q*)

And where, on an indictment for riot and unlawful assembly on the 15th January, evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of showing (as was alleged) that the prosecutor, in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office; and the prisoners thereupon claimed the right to show that they had met on the 14th to attend a school meeting and to give evidence of what took place thereat; it was held

(*n*) *Reg.* v. *Farrell*, L R. 2 C. C. R. 116.
(*o*) *Reg.* v. *Millar*, Sup. Ct. N B. H.T. 1861; 5 Allen, 87.
(*p*) *Clark* v. *Stevenson*, 24 U. C. Q. B. 209; *Reg.* v. *Egerton*, Russ. & Ry. C. C. 375; *Rex* v. *Ellis*, 6 B. & C. 145; *Reg.* v. *Chasson*, 3 Pugsley, 546.
(*q*) *Reg.* v. *Chasson*, *supra*.

that as the conduct of the prisoners on the 14th could not qualify or explain their conduct on the following day, the evidence was properly rejected. (*r*)

So, where upon an indictment for obtaining money by false pretences, it appeared that the defendant was employed to take orders for goods, but had no authority to receive the price, and that, eleven days after he was so employed, he obtained the money from a customer, by representing that he was authorized by his employer to receive it for goods delivered, in pursuance of an order which the defendant had taken; evidence of an obtaining by a similar representation from another person, within a few days of the time when the moneys on which the indictment was found were obtained, was held inadmissible. (*s*)

But witnesses may be called, on the part of the Crown, to speak to facts having no immediate connection with the case under trial, for the purpose of showing the motives of the prisoners, (*t*) as, for instance, to prove that when the stolen goods mentioned in the indictment were found in the possession of the prisoner, there were found also in his possession various other articles that can be shown to have been recently stolen from other people. So, in the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having, about the same time, passed other counterfeit money or bills, or had many such in his possession, even though of a different denomination; (*u*) which circumstances tend strongly to show that he was not acting innocently, and had not taken the money casually, but that he was employed in fraudulently putting it off. (*v*)

So a false and fraudulent statement to a pawnbroker, that

(*r*) *Reg.* v. *Mailloux*, 3 Pugsley, 493.
(*s*) *Reg.* v. *Holt*, 8 U. C. L. J. 55; Bell, 280; 30 L. J. (M. C.) 11.
(*t*) *Reg.* v. *Mailloux*, 3 Pugsley, 493.
(*u*) *Reg.* v. *Foster*, 1 U. C. L. J. 156.
(*v*) *Reg.* v. *Brown*, 21 U. C. Q. B. 335, per *Robinson*, C. J.

a chain offered as a pledge is of silver, is indictable under the 7 & 8 Geo. IV., c. 29, and, upon the trial of such an indictment, evidence is admissible of similar misrepresentations made to others about the same time, and of the possession of a considerable number of chains of the same kind. (*w*)

And where the offence has been proved, slight proof will let in documentary evidence for confirmatory purposes. Thus on an indictment for false pretences, by inserting with intent to defraud an advertisement in a newspaper containing false statements, and receiving money thereby, where it was proved that several letters had been found on the person of the prisoner, bearing the address mentioned in the advertisement, and containing postage stamps to the amount indicated therein, other letters similarly addressed, and containing stamps to the same amount, but which had been stopped by the postal authorities, were received as evidence without proof that they had been written by the parties by whom they purported to have been sent. (*x*)

A declaration by a subscribing witness (who was dead) to a deed, that he left the country because he had forged a name thereto, is not admissible, on the ground that it is hearsay evidence. (*y*). And evidence of an extra-judicial confession of the sister of a prisoner, tending to prove fraud between them, is objectionable on the same ground. (*z*)

But the description given by a person of his sufferings, whilst laboring under disease and pain, has been held not to be hearsay evidence. (*a*)

When the prisoner was indicted for setting fire to his own house, it was held that his verbal admissions that the house was insured were sufficient to prove that fact, though the policy was not produced, nor its non-production accounted for. (*b*)

(*w*) *Reg.* v. *Rosbuck*, 2 U. C. L. J. 138; Dears. & B. 24; 25 L. J. (M.C.) 101; and see *Reg.* v. *Francis*, L. R. 2 C. C. R. 128.
(*x*) *Reg.* v. *Cooper*, L. R. 1 Q. B. D. 19.
(*y*) *Rose* v. *Cuyler*, 27 U. C. Q. B. 270.
(*z*) *Reg.* v. *Guay*, 18 L. C. J. 306.
(*a*) *Reg.* v. *Berube*, 3 L. C. R. 212; *sed quære*.
(*b*) *Reg.* v. *Bryans*, 12 U. C. C. P. 161.

Secondary evidence of a document in the prisoner's possession is not admissible unless notice to produce has been served on him. (*c*) The form of an indictment for perjury does not convey sufficient notice to the prisoner to produce the document to dispense with a notice to produce. (*d*)

A dying declaration is only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (*e*) Therefore, upon an indictment for using instruments with intent to procure abortion, the dying declaration of the woman was held inadmissible. (*f*)

The question whether a dying declaration is admissible is for the consideration of the judge who tries the case, but the weight of it is for the jury. (*g*)

To render the proof of a declaration admissible as a dying declaration, there must be proof that the person who made it was at the time under the impression of almost immediate dissolution, and entertained no hope of recovery.

Vague and general expressions, such as "I will die of it!" "I will not recover!" "It is all over with me!" are insufficient to allow the proof of the declaration of a deceased person. (*h*) And where a person about to die, on hearing her statement read over to her, altered it, so that, instead of reading "no hope of recovery," it read "no hope *at present*," etc., it was held that her declaration was inadmissible. (*i*) There must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die; and the burden of proving the facts that render the declaration admissible is upon the prosecution. (*j*) But where the deceased by her statements shows emphatically that she has

(*c*) *Reg.* v. *Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. (M. C.) 3.
(*d*) *Ibid.*; see *Kular* v. *Cornwall*, 8 U. C. Q. B. 168.
(*e*) *Reg.* v. *Mead*, 2 B. & C. 605, per *Abbott*, C. J.
(*f*) *Reg.* v. *Hind*, 7 U. C. L. J. 51; Bell, 253; 29 L. J. (M. C.) 147.
(*g*) *Reg.* v. *Charlotte Smith*, 13 W. R. 816.
(*h*) *Reg.* v. *Peltier*, 4 L. C. R. 3.
(*i*) *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 187; L. J. (M. C.) 82.
(*j*) *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 192, per *Kelly*, C. B.

abandoned all hope of living, the mere use of the words "If I die" will not alone render her statement inadmissible. (*k*) And if the statement is otherwise receivable, it makes no difference as to its admissibility that the answers were given to leading questions. (*l*)

It is said that dying declarations ought to be admitted with scrupulous and almost superstitious care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and material misrepresentations, both by the declarant and the witness. (*m*) The statements may be incomplete, and, though true as far as they go, may not constitute the whole truth. They may be fabricated, and their truth or falsehood cannot be ascertained; and experience shows that implicit reliance cannot, in all cases, be placed on the declarations of a dying man, for his body may have survived the powers of his mind or his recollection, if his senses are not impaired by pain, or otherwise may not be perfect, or for the sake of ease and to be rid of the importunity of those around him, he may say, or seem to say, whatever they suggest. (*n*)

In a prosecution for selling liquor without license, the person who bought the liquor is a competent witness, (*o* but it is not necessary that he should be produced. It is sufficient to call a person who saw the sale, and saw what was paid. Nor is it necessary to call the person to whom the liquor was sold to prove that it was "fermented" liquor. A person who tasted the liquor may prove this. (*p*)

A conviction, made by a justice of the peace, when duly returned, according to the statute, to the Court of Quarter Sessions, and filed by the clerk of the peace, becomes a re-

(*k*) *Reg.* v. *Sparham*; Rob. & Jos. Dig. 929.
(*l*) *Reg.* v. *Smith*, 23 U. C. C. P. 312.
(*m*) *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 193, per *Byles*, J.
(*n*) *Re Anderson*, 20 U. C. Q. B. 181, per *McLean*, J.
(*o*) *Ex parte Birmingham*, 2 Pugsley & B. 564.
(*p*) *Thompson and Durnford*, 12 L. C. J. 285.

cord of that court, and may be proved as any other similar record without producing the original. (*q*)

A conviction by a justice for an assault and battery is a record, and a record of our own country, and so not provable when directly denied by an examined copy, as in the case of a foreign judgment, but by the production of the record itself. The course in such a case is to produce the original record of conviction, which may be made up by the justice at any time, and may be procured upon a writ of *certiorari* from this court, either to the justice or to the Quarter Sessions, if the record has been returned thither. Or, perhaps, it may be produced (when it can be so obtained) without the formality of a writ of *certiorari*.

In case of the death of the justice who made the conviction, the writ may go to his executor. (*r*)

There is a well-settled distinction between proving the record of a different court, from that in which the evidence is offered, and a record of the same court. A court will look at its own minutes, while sitting under the same commission, when another court would require more formal proof. (*s*)

The minutes of a Court of General Quarter Sessions are in themselves evidence, in the same court, of the facts therein stated, without any other proof that the matter there recorded took place. Therefore, a recognizance, in a case of bastardy, taken under the Act 2 Vic., c. 42, before the court itself, in open court, is proved by the production of the minutes of the sessions containing the entry. (*t*)

When a record of acquittal or conviction is produced at *nisi prius*, the court cannot inquire into the circumstances under which it is brought forward.

In a case of felony, as well as misdemeanor, a copy of the record of acquittal may be, and indeed must be, received

(*q*) *Graham* v. *McArthur*, 25 U. C. Q. B. 484 n.
(*r*) *Thomson* v. *Leslie*, 9 U. C. Q. B. 360.
(*s*) *Neill* v. *McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.
(*t*) *Ex parte Daley*, 1 Allen, 424.

in evidence when offered, without its being necessary to show that an order of a judge has been obtained, sanctioning the delivery of a copy, though it seems the officer having the custody of the records should not deliver it without an order. (*u*)

Where a conviction has been returned to the sessions, and filed by the clerk of the peace, but quashed on appeal afterwards made to the sessions, the quashing may be proved by an order under the seal of that court, signed by its clerk, directing that the conviction should be quashed, the conviction itself being in evidence, and the connection between it and the order being shown. (*v*) After the return of the conviction, it becomes a record, and may be proved as other records.

It is not necessary to make up a formal record of the judgment on the appeal, for the 32 & 33 Vic., c. 31, enables the Court of Quarter Sessions to dispose of the conviction, "by such order as to the court shall seem meet." (*w*)

It would seem that the minute book of the sessions, having an apparently proper caption, and signed by the clerk of the peace, would not be sufficient proof *per se* of the judgment of the court quashing the conviction without proof of the order following it; but, if the further proof were added that, in practice, no other record is kept or made up, the minute book would be evidence. So the minute book would be evidence as to indictments, verdicts, and judgments in criminal matters, at the sessions. (*x*)

A conviction, before a police magistrate, can only be proved by the production of the record of the conviction, or an examined copy of it. Where a police magistrate, after hearing a case of common assault, ordered the accused to enter into a recognizance and pay the recognizance fee, but did not order him to be imprisoned, or to pay any fine, it was held

(*u*) *Lusty* v. *Magrath*, 6 U. C. Q. B. O. S. 340.
(*v*) *Neill* v. *McMillan*, 25 U. C. Q. B. 485.
(*w*) *Ibid.*
(*x*) *Neill* v. *McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.

that this was not a conviction within the corresponding English section of the 32 & 33 Vic., c. 20, s. 45; and that even if it were, a statement of the above facts by the magistrate's clerk, without producing a record of the proceedings, was not sufficient proof of its existence. (*y*)

An information, and other proceedings before a justice of the peace, returned to the Supreme Court with a *certiorari*, and filed with the clerk of the Crown, become a record, and may be proved by an examined copy taken before the originals were filed. (*z*)

To prove the finding of an indictment at the sessions, it is not sufficient to produce an exemplification of the record of acquittal, without any general heading or caption to it, (*a*) and it would seem the proper way of proving it is to have the record regularly drawn up, and produce an examined copy. (*b*)

The production of the original indictment is insufficient to prove an indictment for felony, and a record showing a proper caption must be made up. (*c*)

A judgment of the Court of Quarter Sessions, affirming a conviction of the defendant, before a magistrate, on a charge of assaulting H. M., "by using insulting and abusive language to him, in his own office and on the public street, and by using his fist in a threatening and menacing manner to the face and head of the said H. M.," is sufficient proof of a breach of the peace. (*d*)

The court will judicially notice a public statute. (*e*) By the Interpretation Act, 31 Vic., c. 1, s. 7, thirty-eighthly, every Act shall be deemed to be a public Act, and shall be judicially noticed by all judges, justices of the peace and others,

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(*y*) *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553.
(*z*) *Sewell* v. *Olive*, 4 Allen, 394.
(*a*) *Aston* v. *Wright*, 13 U. C. C. P. 14.
(*b*) *Ibid.* 19, per *Draper*, C. J.
(*c*) *Henry* v. *Little*, 11 U. C. Q. B. 296; *Rex* v. *Smith*, 8 B. & C. 341; see also on this 32 & 33 Vic., c. 29, s. 77.
(*d*) *Reg.* v. *Harmer*, 17 U. C. Q. B. 555.
(*e*) See *Reg.* v. *Shaw*, 23 U. C. Q. B. 616.

without being specially pleaded, and all copies of Acts, public or private, printed by the Queen's printer, shall be evidence of such Acts and of their contents, and every copy purporting to be printed by the Queen's printer shall be deemed to be so printed, unless the contrary be shown.

Where an Act of Parliament makes a gazette evidence if it purport to be printed "by the Queen's printer" or "by the Queen's authority," a gazette purporting to be printed by A. B., without giving his style as Queen's printer, and purporting to be printed "by authority," is not receivable. But evidence *aliunde* might be admissible to show that A. B. was the Queen's printer, and that the authority was the Queen's authority. (*f*)

On a charge of murder, threats made by the prisoner to a third person more than six months before the commission of the crime, that the prisoner would take the law into his own hands, are clearly admissible, though there are friendly relations between the parties afterwards, and if undue prominence is given to these threats in the charge of the jury, the prisoner's counsel should call the attention of the court to it, and request that the jury should be told that if there were subsequent acts of kindness and expressions of friendliness, they would raise a presumption of kindness to rebut that of malice. (*g*) The reception of evidence in reply is, as a general rule, in the discretion of the judge, subject to be reviewed by the court. Evidence in explanation of some matter brought out by the prisoner's witnesses, is properly received in reply; (*h*) and witnesses may be recalled for this purpose. (*i*)

According to the strict practice, a party cannot, after closing his case, put in any evidence, unless by permission of the judge. (*j*) And in an action for libel, it was held that the plaintiff could not, after closing his case, have a paper which

(*f*) *Reg* v. *Wallace*, 2 U. C. L. J. N. S. 138; 10 Cox, 500.
(*g*) *Reg.* v. *Jones*, 28 U. C. Q. B. 416.
(*h*) *Ibid.*
(*i*) *Reg.* v. *Sparham*, Rob. & Jos. Dig. 929.
(*j*) *Cross* v. *Richardson*, 13 U. C. C. P. 433.

he had proved before, read and filed, except in the discretion of the judge trying the case. (*k*)

Before the 32 & 33 Vic., c. 29, s. 80, did away with the granting of new trials in criminal cases, it was held that the rule is the same in the latter as in civil cases; at any rate, where the prisoner is defended by counsel, that any objection to the charge of the presiding judge, either for non-direction or for misdirection, must be taken at the trial, when it can be directly cured; and if not then taken, it cannot be afterwards raised on motion for new trial or otherwise, especially when the evidence fully sustains the verdict; that non-direction is not an available objection when the verdict is not against evidence, and where the law is clear, it is no misdirection to leave the facts simply to the jury, for they are judges of the evidence; that misdirection could only be on a point of law, and not on a matter of fact. (*l*)

The improper reception of evidence upon a criminal trial is not necessarily a ground for quashing the conviction, if the other evidence adduced be amply sufficient to sustain it. (*m*)

It would seem that, as the law now stands in Canada, when material evidence has been incorrectly admitted or rejected, or the verdict, though regularly obtained, is manifestly contrary to the evidence, the proper remedy for the prisoner is an application to the Crown for a pardon. (*n*)

A bill of exceptions will not lie in a criminal case. (*o*) It follows that, on a charge of that nature, a question as to the reception of evidence, or the rulings of the judge thereon, or his directions to the jury, cannot be raised on the

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(*k*) *Cross* v. *Richardson*, 13 U. C. C. P. 433.

(*l*) *Reg.* v. *Fick*, 16 U. C. C. P. 379; see also *Cousins* v. *Merrill*, 16 U. C. C. P. 120.

(*m*) *Reg.* v. *Foster*, 1 U. C. L. J. 156.

(*n*) *Reg.* v. *Kennedy*, 2 Thomson, 216, per *Bliss*, J.; *ibid.* 225, per *Wilkins*, J.

(*o*) *Whelan* v. *Reg.* 28 U. C. Q. B. 132, per *Draper*, C. J.; (in E. & A.); *Reg.* v. *Pattee*, 5 U. C. P. R. 292; 7 C. L. J. N. S. 124, per *Dalton*, J.; *Duval dit Barbinas* v. *Reg.*, 14 L. C. R. 74, per *Meredith*, J.; *ibid.* 79, per *Duval*, C. J. (in error).

record, so as to constitute a ground of error; (*p*) for the effect of a bill of exceptions is to raise the point excepted to specifically on the record, so as to be subject to revision in error. (*q*)

An indictment in a criminal prosecution of the defendant is not admissible as evidence in a civil suit against him. (*r*) And on the trial of an indictment for receiving goods which one M. had feloniously stolen, evidence is not admissible to show that M. had previously been tried for the larceny and acquitted. (*s*)

The fabrication of evidence by a prisoner, or inducing a witness to swear in his favor, is most damaging to the prisoner's case. (*t*)

The reading to witnesses of the judge's notes of their evidence, taken on a former trial, should be discouraged. Where, on a second trial, at the same sitting, before another jury, some of the witnesses having been re-sworn, the evidence given by them at the first trial was read over to them from the judge's notes, liberty being given, both to the prosecution and to the prisoner, to examine and cross-examine the witnesses, it was held that this proceeding was irregular, and could not be cured by the consent of the prisoner. (*u*)

But witnesses may refer to memoranda for the purpose of refreshing their memories. And a witness was allowed to look at a time book, from which he made up the amounts due to the employees of the establishment in which he was pay clerk, for the purpose of proving sums paid to them, though the entries were made by another person. (*v*)

On a trial for common assault, or when a higher crime is charged but only common assault proved, the prisoner is a

(*p*) *Winsor* v. *Reg.* L. R. 1 Q. B. 312, per *Cockburn*, C. J.
(*q*) *Duval dit Barbinas* v *Reg.* 14 L. C. R. 52.
(*r*) *Winning* v. *Fraser*, 12 L. C. J. 291.
(*s*) *Reg.* v. *Ferguson*, 4 Pugsley & B. 259.
(*t*) *Reg.* v. *Jones*, 28 U. C. Q, B. 416.
(*u*) *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520.
(*v*) *Reg.* v. *Langton*, L. R. 2 Q. B. D. 297.

competent witness on his own behalf. (*w*) But on an indictment for an assault occasioning actual bodily harm, the prisoner's evidence is inadmissible. Where the prisoner's evidence is admissible, so also is that of the husband or wife of the prisoner. (*x*)

A prosecution to recover a fine for solemnizing a marriage between minors without the consent of their parents was held a criminal proceeding, so as to render the defendant incompetent to give evidence under the (N. B.) 19 Vic., c. 45. (*y*) But proceedings for the recovery of a penalty, being in the nature of a civil writ, the evidence of the defendant in such cases is admissible under that statute. (*z*)

Instruments liable to stamp duty are, by 41 Vic., c. 10, s. 5, rendered admissible in evidence in any criminal proceeding, though not stamped as by law required.

The 44 Vic., c. 28, provides for the mode of admitting documentary evidence of an official nature.

(*w*) 43 Vic., c. 37.
(*x*) *Reg.* v. *McDonald*, 30 U. C. C. P. 21.
(*y*) *Ex parte Jarvis*, Stev. Dig. 1269; *Reg.* v. *Gollart*, 5 Allen, 115.
(*z*) *Ex parte Frank*, 1 Pugsley & B. 277.