LARCENY.

GENERAL REMARKS.

Larceny is the wrongful taking and carrying away of the personal goods of any one from his possession, with a felonious intent to convert them to the use of the offender, without the consent of the owner; 2 East P. C. 553; the word "felonious" showing that there is no colour of right to excuse the act, and the "intent" being to deprive the owner permanently of his property.—Reg. vs. Thurborn, 1 Den. 388; Reg. vs. Guernsey, 1 F. & F. 394; Reg. vs. Holloway, 1 Den. 370; 3 Burn's Justice, 198; 2 Russell, 146, note by Greaves; Reg. vs. Middleton, 12 Cox, 417.

It is not, however, an essential ingredient of the offence that the taking should be for a cause of gain, *lucri causâ*; a fraudulent taking, with intent wholly to deprive the owner of his property, or with intent to destroy it is sufficient. But see *post*, on this question of intent in larceny.

Larceny is either *simple*, that is, unaccompanied by any other aggravating circumstance, or *compound*, that is, when it is accompanied by the aggravating circumstances of taking from the house or person, or both.

Larceny was formally divided into grand larceny and petit larceny; but this distinction is now abolished; see *post*, sect. 2 of the Larceny Act.

By sect. 110 of the said Act, a more severe punishment may be inflicted when the value of the article

stolen is over two hundred dollars, but then, this value must be alleged in the indictment and duly proved on the trial, otherwise the larceny is punishable under section 4 of the said Act.

The requisites of the offence are:

1. *The taking.*
2. *The carrying away.*
3. *The goods taken.*
4. *The owner of the goods.*
5. *The owner's dissent from the taking.*
6. *The felonious intent in taking.*

1.—THE TAKING.

To constitute the crime of larceny, there must be a taking or severance of the thing from the actual or constructive possession of the owner; for all felony includes trespass, and every indictment must have the words *feloniously took* as well as *carried away;* from whence it follows that, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away.—1 Hawkins, p. 142.—As in the case of a wife carrying away and converting to her own use the goods of her husband, for husband and wife are one person in law, and, consequently, there can be no taking so as to constitute larceny; 1 Hale, 514, and the same if the husband be jointly interested with others in the property so taken.—R. vs. Willis, 1 Mood. 375.

The taking, however, may be by the hand of another, 2 East P. C. 555; as if the thief procure a child within the age of discretion to steal goods for him, it will be the same as if he had taken them himself, and the taking in such case should be charged to him.—1 Hale, 507.

The possession of the owner may be actual or constructive; that is, he may have the goods in his manual possession, or they may be in the actual possession of another, and at the same time be constructively in the owner's possession; and they may be his property by virtue of some contract, and yet not have been reduced by him into actual possession; in which case, his possession is constructive, as by placing them under his servant's care to be by him managed for him.

But besides the actual and constructive possession in the owner, who at the same time has the property in him, there is a possession distinct from the actual property, although arising out of an interest in the goods, acquired by contract, as in the case of one who has possession of goods in pledge, or of goods lent, or let. Such an one has a property, as well as possession, concurrent with the absolute property of the real owner, and either defeasible or reducible into an absolute property, according to the terms agreed upon between him and the actual owner.

Either of the above kinds of possession will be sufficient to sustain an indictment of larceny from the absolute owner.—3 Burn's Just. 201.

This part of the law on larceny is laid down *as follows* in the draft of a Criminal Code for Canada, introduced in the Legislative Assembly, in 1850, by Mr. Justice Badgley, then Attorney-General: "To constitute larceny, a thing must be owned by, or be the general or special property of some one, or belong to him, either by a proprietory or possessory right thereto. A proprietory right is that of one having a general or special property in a thing. A possessory right is that of one having and being entitled to the possession of a thing. One having the authorized custody of or being entrusted

with a thing, so as to be answerable therefor, or for the value thereof, has a possessory right thereto. The actual possession of a thing by any one is the constructive possession of all who have proprietory or possessory rights therein, general or special, absolute or qualified. A proprietory or a possessory right to a thing by one constitutes him the owner thereof as to larceny thereof by another."

As very nice questions frequently arise, as to what will amount to a sufficient taking, where the owner of the chattels has delivered them to the party accused, or to a third person, the subject will be inquired into in the following order.

1. *The taking where the owner has delivered the chattels, under a bare charge.*

2. *The taking where the possession of the goods has been obtained animo furandi.*

3. *The taking where the possession of the goods has been obtained bona fide without any fraudulent intention in the first instance.*

4. *The taking where the offender has more than a special property in the goods.*—3 Burn's Justice, 201.

1. *The taking where the offender has a bare charge.*

The books notice cases in which, although the manual custody be out of the owner, and delivered by him to another, yet the possession, absolute as well as constructive, is deemed to remain in him, and the possession of the other to be no more than a bare charge.

Upon this difference between a possession and a charge, Lord Coke says: "There is a diversity between a possession and a charge: for, when I deliver goods to a man, he hath the possession of the goods, and may have an action of trespass if they be taken or stolen out of his possession. But my butler, or cook, that in my house

hath charge of my vessels or plate, hath no possession of them, nor shall have an action of trespass as the bailee shall; and therefore, if they steal the plate, etc., etc., it is larceny: and so it is of a shepherd, for these things be in onere et non in possessione promi, coci, pastoris, etc., etc."

So he says: "If a taverner set a piece of plate before a man to drink in it, and he carry it away, it is larceny; for it is no bailment, but a special use to a special purpose."

The servant who keeps a key to my chamber may be guilty of felony in fraudulently taking away the goods therein, for he hath only a bare charge given him. And where a person employed to drive cattle sells them, it is larceny, for he has the custody merely, and not the right to the possession,—R. vs. McNamee, 1 Mood. 368; although the intention to convert them were not conceived until after they were delivered to him.—R. vs. Harvey, 9 C. & P. 353; Reg. vs. Jackson, 2 Mood. 32.—So a carter going away with his master's cart was holden to have been guilty of felony.—R. vs. Robinson, 2 East. P. C. 565.—If A. ask B., who is not his servant, to put a letter into the post, telling him that it contains money, and B. break the seal and abstract the money before he puts the letter in the post, he is guilty of larceny.—R. vs. Jones, 7 C. & P. 151.—So if a master deliver property into the hands of a servant for a special purpose, as to leave it at the house of a friend, or to get change, or to deposit it with a banker, the servant will be guilty of felony in applying it to his own use; for it still remains in the constructive possession of its owner.—1 Leach, 302; 2 Leach, 870.

So where a lady asked the prisoner to get a railway ticket for her, and handed him a sovereign to pay for it,

which he took, intending to steal, and instead of getting the ticket, ran away; it was held to be larceny.—Reg vs. Thompson, L. & C. 225.

If a banker's clerk is sent to the money room to bring cash for a particular purpose, and he takes the opportunity of secreting some for his own use, 1 Leach, 344; or if a tradesman intrust goods to his servant to deliver to a customer, and he appropriate them to himself, the parties are respectively guilty of larceny.—R. vs. Bass, 2 East P. C. 566; 1 Leach, 251; 1 Cowp. 294.

And if several people play together at cards, and deposit money for that purpose, not parting with their property therein, and one sweep it all away and take it to himself, he will be guilty of larceny, if the jury find that he acted with a felonious design—1 Leach, 270; R. vs. William, 6 C. & P. 390; R. vs. Robson, R. & R. 413.

And if a bag of wheat be delivered to a warehouseman merely for safe custody, and he take all the wheat out of the bag, and dispose of it, it is larceny.—R. vs. Brazier, R. & R. 337.

An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them. —Reg. vs. White, 9 C. & P. 344.

Where goods have not been *actually* reduced into the owner's possession, yet, if he has intrusted another to deliver them to his servant, and they are delivered accordingly, and the servant embezzle them, he may be guilty of larceny.—R. vs. Spears, 2 East P. C. 568; R. vs. Abrahat, 2 East P. C. 569; R. vs. Reid, Dears. 257.

On the trial of an indictment for larceny as a servant it appeared that the prisoner lived in the house of the

prosecutor, and acted as the nurse to her sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages: while the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept, and brought back a forged receipt to the coal bill: *held*, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money. Reg. vs. Frances, 1 Car. & K. 423.

These several cases were all founded upon the master having an actual or legal possession, prior to the delivery to the servant. But there are others in which the master has neither *property* nor *possession* in the goods, previously to the receipt of them by his servant from a third person, for the purpose of delivering them to him. And it has been held, that a servant so receiving goods, and then embezzling them, is not guilty of larceny at common law.—2 East P. C. 568.

Therefore, if a shopman receive money from a customer of his master, and, instead of putting it into the till, secrete it, R. vs. Bull, 2 Leach, 841; or if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it, R. vs. Bazely, 2 Leach, 835; or receive a bond for the purpose of being deposited in the bank, and, instead of depositing it, convert it to his own use, R. vs. Waite, 1 Leach, 28: in these cases it has been holden that the clerk or shopman is not guilty of larceny at common law.

But now, this offence is punishable under section 70 of the Larceny Act, 32–33 Vict., ch. 21, see *post*.

2. *The taking where the possession of the goods has been obtained animo furandi.*—Where the offender unlawfully ac-

quired the possession of goods, as by fraud or force, with an intent to steal them, the owner still retaining his property in them, such offender will be guilty of larceny in embezzling them. Therefore, hiring a horse on pretence of taking a journey, and immediately selling it, is larceny: because the jury found the defendant acted *animo furandi* in making the contract, and the parting with the *possession* merely had not changed the nature of the property. —R. vs. Pear, 1 Leach, 212. And so, where a person hires a post-chaise for an indefinite period, and converts it to his own use, he may be convicted of larceny, if his original intent was felonious.—R. vs. Semple, 1 Leach, 420.

So, where the prisoner intending to steal the mail bags from the post office, procured them to be let down to him by a string, from the window of the post office, under pretence that he was the mail guard, he was held guilty of larceny.—R. vs. Pearce, 2 East, P. C. 603.

Where the prisoner was hired for the special purpose of driving sheep from one fair to another, and, instead, of doing so, drove them, the following morning after he received them, a different road, and sold them, the jury having found that, at the time he received the sheep, he intended to convert them to his own use, and not drive them to the specified fair, the judges were unanimously of opinion that he was rightly convicted of larceny.—R. vs. Stock, 1 Mood. 87.

Where the prisoner covered some coals in a cart with slack, and was allowed to take the coals away, the owner believing the load to be slack, and not intending to part with his property in the coals, it was held a larceny of the coals.—R. vs. Bramley, Leigh & Cave, 21.

Prevailing upon a tradesman to bring goods, proposed to be brought to a given place, under pretence that the

price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then, getting them from that person without paying the price, is a felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman and not pay for them.—R. vs. Campbell, 1 Mood. 179.

In another case, a person by false pretences induced a tradesman to send by his servant to a particular house, goods of the value of two shillings and ten pence, with change for a crown piece. On the way, he met the servant, and induced him to part with the goods and the change for a crown piece which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again: it was held, that the offence amounted to larceny.—Reg. vs. Small, 8 C. & P. 46.

The prosecutor met a man and walked with him. During the walk, the man picked up a purse, which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner who opened it, and there appeared to be about forty pounds in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public house and had some drink. Prisoner then showed some money and said, if the man would let him have ten pounds, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be ten pounds in money and the prisoner and prosecutor then went out together. They returned and prisoner appeared to give the ten pounds back and five pounds more. Prisoner then said

he would do the same for the prosecutor and by that means obtained three pounds in gold, and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house, and made off with the three pounds and the watch and chain. At the trial, the prosecutor said he handed the three pounds and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him five pounds. *Held*, that the prisoner was properly convicted of larceny.—Reg. vs. Hazell, 11 Cox, 597.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning: *held*, that the conviction was right.—Reg. vs. Slowly & al., 12 Cox, 269.

So, taking goods the prisoner has bargained to buy is felonious, if, by the usage, the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession and dispose of them for his own benefit, without paying for them.—R. vs. Gilbert, 1 Mood. 185.

So, getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then, getting them from the cart, without paying the price, will be larceny, if the prisoner never had the intention to pay, but had,

ab initio, the intention to defraud.—R. vs. Pratt, 1 Mood. 250.

So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendants, by fraud, induced the servant to part with the possession of the horse, under colour of an exchange for another, intending all the while to steal it: this was holden to be larceny.—Reg. vs. Sheppard, 9 C. & P. 121.

So, where the prisoner, pretending to be the servant of a person who had bought a chest of tea deposited at the East India Company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it; it was held that this was larceny.—R. vs. Hench, R. & R. 163.

Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter which the prisoner took up. The confederate said, "You need not have changed" and threw down a penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter when prisoner said, "You may as well give me the florin back and take it all." Prosecutor took the florin from the till, and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin, and prosecutor took up the silver sixpence and the sixpence in copper, and the shilling put down by herself, and was put-

ting them in the drawer, when she saw that she had only got one shilling of the prisoner's money and her own shilling: but, at that moment, her attention was diverted by the confederate, and both confederate and prisoner quitted the shop. *Held*, upon a case reserved, that this was a case of larceny, for the transaction of exchange was not complete: prosecutor had not parted with the property in the florin.—Reg. vs. McKale, 11 Cox, 32.

On the other hand, if the owner give his property voluntarily, whatever false pretence be used to obtain it, no felony can be committed.—1 Hale, 506; Rex. vs. Adams, R. & R. 225.

Thus, where, in a case of ring-dropping, the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money, intending to part with it for ever, and not with the possession of it only, it was held by Coleridge, J., that this was not a larceny.—Reg. vs. Wilson, 8 C. & P. 111.

It was the duty of the prisoner to ascertain the amount of certain dock dues payable by the prosecutors, and having received the money from their cash-keeper, to pay the dues to those who were entitled to them. He falsely represented a larger sum to be due than was due, and, paying over the real amount, converted the difference to his own use. This was held not to be a larceny.—R. vs. Thompson, Leigh & Cave, 233.

So, where the prisoner was sent by his fellow workmen to get their wages, and received the money from the employer done up in separate pieces of paper, and converted the money to his own use, it was held upon an indictment laying the property in the employer that the prisoner could not be convicted, he being the agent of

the workmen.—R. vs. Barnes, 12 Jur. N. S. 549. And see Reg. vs. Jacobs, 12 Cox, 151, *post*.

A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine: where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to the crime of larceny. By the Court of Criminal Appeal, in Reg. vs. Prince, 11 Cox, 193. In this case, Bovill, C. J., said: "The distinction between larceny and false pretences is very material. The one is a felony and the other a misdemeanor; and, although, by reason of modern legislation, it has become not of so much importance as formerly, it is still desirable to keep up the distinction. To constitute a larceny, there must be a taking of the property against the will of the owner, which is the essence of the crime of larceny. The authorities cited by the counsel for the prisoner show that where the property has been obtained voluntarily from the owner, or a servant acting within the scope of his authority, the offence does not amount to larceny. The cases cited for the prosecution were cases where the servant who parted with the property had a limited authority only. In the present case, the cashier of the bank was acting within his authority in parting with the possession and property in the money. Under these circumstances the conviction must be quashed."

And, if credit be given for the property, for ever so short a time, no felony can be committed in converting it.—2 East P. C. 677.

Thus, obtaining the delivery of a horse *sold*, on promise to return immediately and pay for it, and riding off, and not returning is no felony.—R. vs. Harvey, 1 Leach, 467.

So, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him a piece of silk, to be paid for on delivery, and upon the silk being sent accordingly, gave the servant who brought it bills which were mere fabrications, and of no value; it was holden not to be larceny on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit.—Parke's case, 2 Leach, 614.

The prisoner, having entered into a contract with the prosecutors for the purchase of some tallow, obtained the delivery orders from the prosecutors, by paying over to them a cheque for the price of the tallow, and, when the cheque was presented, there were no assets. *Held* not to be a larceny of the delivery orders by a trick, but a lawful possession of them by reason of the credit given to the prisoner in respect of the cheque. —Reg. vs. North, 8 Cox, 433.

So, fraudulently winning money at gaming, where the injured party really intended to pay, is no larceny, though a conspiracy to defraud appear in evidence.—R. vs. Nicholson, 2 Leach, 610.

To constitute larceny, there must be an original felonious design. Lord Coke draws a distinction between such as gain possession *animo furandi*, and such as do not. He says: "The intent to steal must be when it comes to his hands or possession: for if he hath the possession of it once lawfully, though he hath the *animus furandi* afterwards, and carrieth it away, it is no larceny." Therefore, where a house was burning, and a neighbour took some of the goods to save them, but afterwards converted them to his own use, it was held no felony.—1 Leach, 411.

But if the original intent be wrongful, though not a felonious trespass, a subsequent felonious appropriation is larceny. So, where a man drove away a flock of lambs from a field, and in doing so inadvertently drove away along with them a lamb, the property of another person, and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it: *held*, that as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use, the trespass became a felony.—Reg. vs. Riley, Dears. 149; 6 Cox, 88.

It is peculiarly the province of the jury to determine with what intent any act is done; and, therefore, though, in general, he who has a possession of anything on delivery by the owner cannot commit larceny thereof; yet, that must be understood, first, where the possession is absolutely changed by the delivery, and next, where such possession is not obtained by fraud, and with a felonious intent. For, if, under all the circumstances of the case, it be found that a party has taken goods from the owner, although by his delivery, with an intent to steal them, such taking amounts to felony.—2 East P. C. 685.

Overtures were made by a person to the servant of a publican to induce him to join in robbing his master's till. The servant communicated the matter to the master, and, some weeks after, the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money, it was, by his direction, placed upon the counter by the servant, in order that it might be taken up by the party who had come for the

purpose. It was so taken up by him: *held*, larceny in such party.—Reg. vs. Williams, 1 C. & K. 195.

3.—*The taking, where the possession of the goods has been obtained bonâ fide without any fraudulent intention in the first instance.*—If the party obtained possession of the goods lawfully, as upon a trust for, or on account of, the owner, by which he acquires a special property therein, he cannot *at common law* be afterwards guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as, by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the privity of the bailment and the special property thereby conferred upon him.—1 Hale, 504; 2 East P. C. 554.

But now, by sect. 3 of 32–33 Vict., ch. 21, it is provided that: "Whosoever being a bailee of any chattel, money or valuable security, fraudulently takes or converts the same to his own use or to the use of any person other than the owner thereof, although he do not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

See R. vs. Wells, 1 F. & F. 109, where it was held that a carrier who receiving money to procure goods, obtained and duly delivered the goods, but fraudulently retained the money, may be convicted of larceny as a bailee.

A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to re-deliver the *very same* chattel or money.—R. vs. Hoare, 1 F. & F. 647; R vs. Garrett, 2 F. & F. 14; R. vs. Hassall, L. & C. 58.

The prisoner was intrusted by the prosecutor with money to buy a load of coals, which were to be brought

to the prosecutor's by the prisoner in his own cart, the prisoner being paid for his services including the use of his horse and cart. He bought a load of coals in his own name, and on the way to the prosecutor's abstracted a portion of the coal and converted it to his own use, delivering the rest of the coal to the prosecutor as and for the whole load. *Held*, that he was rightly convicted of larceny as a bailee.—R. vs. Bunkall, L. & C. 371; 9 Cox 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's, cart, a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and, having fraudulently sold some of the coals and appropriated the proceeds, is properly convicted of larceny as a bailee.—Reg. vs. Davies, 10 Cox, 239.

It seems that a married woman may be a bailee within the meaning of sect. 3 of the Larceny Act, R. vs. Robson, L. & C. 93, notwithstanding a previous ruling to the contrary by Martin, B., in R. vs. Denmour, 8 Cox, 440.

See, *post*, remarks under section 3 of the Larceny Act.

4.—*The taking where the offender has more than a special property in the goods.* If the goods of a husband be taken with the consent or privity of the wife, it is not larceny.—R. vs. Harrison, 1 Leach, 47; R. vs. Avery, Bell, 150.

However, it is said that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony; Dalt. c. 104. And where a stranger took the goods of the husband *jointly* with the wife, this was holden to be larceny in him, he being her adulterer.—R. vs. Tolfree, 1 Mood. 243, overruling R. vs. Clarke, 1 Mood. 376, note *a*

Also, in Reg. vs. Featherstone, Dears. 369; the prisoner was charged with stealing twenty-two

sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bedroom thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room, "It's all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house, where they slept together. When taken into custody, the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband. Upon a case reserved, it was held that the conviction was right. Lord Campbell, C. J., in delivering the judgment said: "We are of opinion that this conviction is right. The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases."—See Reg. vs. Berry, Bell, 95, where the same principle was maintained.

And so it is, even though no adultery has been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger.—R. vs. Tollett, C. & Mar. 112; R. vs. Thompson, 1 Den. 549.

And if a servant, by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property.—R. vs. Mutters, L. & C. 511.

It seems, however, that if a wife elopes with an adulterer, it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel.—R. vs. Fitch, Dears. & B. 187, overruling on this point the direction of Coleridge, J., in R. vs. Tollett, cited *supra*.

The prisoner who had lodged at the prosecutor's house left it, and the next day, the prosecutor's wife also left, taking a bundle with her, which, however, was not large enough to contain the things which, the evening she left, it was found had been taken from the house. Two days after, all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property, knowing it to have been stolen.—R. vs. Deer, L. & C. 240.

But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession.—R. vs. Rosenberg, 1 C. & K. 233; Archbold, 342.

The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart and harness in the presence of the wife, who did not object to the sale and received the proceeds which she retained after paying the prisoner a sovereign he had expended in obtaining lodging while they were living in a state of adultery. *Held*, that the presence of the woman did not alter the offence; that the fact that he negotiated the sale and received part of the proceeds, was sufficient; from the circumstances, the prisoner must have known that the

pony, cart and harness were not the property of the woman; and that if the jury were of opinion he had that knowledge, they were bound to convict him. By Lush, J., in Reg. vs. Harrison, 12 Cox, 19.

Under certain circumstances, indeed, a man may commit felony of his own goods; as if A bail goods to B and afterwards, *animo furandi*, steal the goods from B with design to charge him for the value of them, this is felony.—1 Hale, 513; 2 East P. C. 558.

So where A having delivered money to his servant to carry to a certain place, disguised himself and robbed the servant on the road, with intent to charge the hundred, this was held robbery in A.—2 East P. C. 558.

If a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny.—R. vs. Wilkinson, R. & R. 470. But it is said in Roscoe, Cr. evid. 597: "It may be doubted whether the law has not been somewhat distorted in this case in order to punish a flagrant fraud."

Bishop, 2 Cr. L. 790, says: "If one, therefore, has transferred to another a special property in goods, retaining in himself the general ownership, or, if the law has made such transfer, he commits larceny by taking them with felonious intent."

So if a man steal his goods *in custodiâ legis*. But "if the goods stolen were the general property of the defendant, who took them from the possession of one to whose care they had been committed, as, for instance from an officer seizing them on an execution against the defendant, it must be shown that the latter knew of

the execution and seizure; otherwise the required intent does not appear. The presumption, in the absence of such knowledge, would be, that he took the goods supposing he had the right so to do."—2 Bishop, Cr. proc. 749.

If a part owner of property steal it from the person in whose custody it is, and who is *responsible for its safety*, he is guilty of larceny.— R. vs. Bramley, R. & R. 478. See, *post*, sect. 38 of the Larceny Act, and remarks under it.

A wife may steal the goods of her husband which have been bailed or delivered to another person, or are in the possession of a person who has a temporary special property in them.—1 Hale, 513.

The wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her own voluntary act. Yet, if she do in his absence, and, by his mere command, she is then punishable as if she were sole.—R. vs. Morris, R. & R. 270; R. vs. Robson, L. & C. 93.

Husband and wife were jointly indicted for stealing. The husband was in the employ of the prosecutors, and was seen near the spot when the property stolen arrived at the prosecutor's. The next day, the wife was seen near the spot where her husband was engaged on his work. She was at a place where there was no road, with a bundle concealed, and was followed home. On the following day, she pledged the stolen property at two different places. At one of the places, where she was not known, she pledged it in a false name. *Held*, that, upon this evidence, the wife might be convicted of stealing the property.—Reg. vs. Cohen, 11 Cox, 99.

The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her hus-

band, only raises a disputable presumption of law in her favour, which is, in all cases, capable of being rebutted by the evidence : this disputable presumption of law exists in misdemeanors as well as in felonies, and the question for the jury is the same in both cases; the doctrine in question applies to the crime of robbery with violence. *Semble :* Where a man and woman are indicted together for a joint crime, and it appears from the evidence for the prosecution that they had lived together for some months as husband and wife, having with them an infant, who passed as their child, it is not necessary for the woman to give evidence of her marriage in order to entitle her to the benefit of the doctrine of coercion, although the indictment does not describe her as a married woman.—Reg. vs. Torpey, 12 Cox, 45.

2. THE CARRYING AWAY.

To constitute larceny, there must be a *carrying away*, asportation, as well as a taking. The least removing of the thing taken *from the place where it was before* is sufficient for this purpose, though it be not quite carried off. And, upon this ground, the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So, also, was he, who, having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. And such was the case of him who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further.—2 East, P. C. 555; 3 Burn's Just. 214. Or if a servant, *animo furandi*, take his master's hay from his

stable, and put it into his master's waggon.—Reg. vs. Gruncell, 9 C. & P. 365.

H. was indicted for stealing a quantity of currants, which were packed in the forepart of a waggon. The prisoner had laid hold of this parcel of currants, and had got near the tail of the waggon with them, when he was apprehended; the parcel was afterwards found near the middle of the waggon. On this case being referred to the twelve judges, they were unanimously of opinion that, as the prisoner had *removed* the property from the spot where it was originally placed, with intent to steal, it was a *taking and carrying away*.—Coslett's case, 2 East P. C. 556.

Prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out; it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied: *Held*, that this was a complete *asportation*.—R. vs. Walsh, 1 Mood. 14.

The offence of simple larceny is complete, if the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, though, the prosecutor then suddenly putting up his hand, the defendant let the book drop, and it fell back into the prosecutor's pocket.—R. vs. Thompson, 1 Mood. 78.

On the other hand, a mere change of *position* of the goods will not suffice to make out a carrying away. So, where W. was indicted for stealing a wrapper and some pieces of linen cloth, and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a waggon, and that

the prisoner set up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything; all the judges agreed that this was no larceny, although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon, must, for the instant at least, have the entire and absolute possession of them.—R. vs. Cherry, 2 East, P. C. 556.

So, where one had his keys tied to the strings of his purse in his pocket, which W. attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys; this was ruled to be no asportation.—Wilkinson's case, 1 Leach, 321.

So in another case, where A. had his purse tied to his girdle, and B. attempted to rob him: in the struggle, the girdle broke, and the purse fell to the ground. B. not having previously taken hold of it, or picked it up afterwards, it was ruled to be no taking.—1 Hale, 533.

Upon an indictment for robbery the prisoner was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him; on which the prosecutor laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay, the judges were of opinion that the offence was not complete.—Farrell's case, 2 East P.C. 557.

Where the prisoner by means of a pipe and stopcock, turned off the gas belonging to a company before it came into the meter, and so consumed the gas, it was held

that there was a sufficient severance of the gas in the entrance pipe to constitute an *asportavit*—Reg. vs. White, 1 Dears. & B. 203.

The same principle was upheld in Reg.vs.Firth, 11 Cox 234; see, *post*, under section 6 of the Larceny Act.

In the cases cited before the two last preceding, a verdict of guilty of an attempt to commit the offence charged could now be given, under section 49 of the Procedure Act of 1869.

If the thief once take possession of the thing, the offence is complete, though he afterwards return it.—3 Burn's Just. 215.

Where it is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals, who concur in the felony before the final carrying away of the goods from the virtual custody of the owner, 2 East P. C. 557; and if several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and another of them entice him away, that the man who has his goods may carry them off, all are guilty of felony, the receipt by one is a felonious taking by all. —R. vs. Standley, R. & R. 305.

And where property which the prosecutors had bought, was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart, and dispose of the property for his benefit jointly with that of the other persons, it was held, that the carter's servant, as well as the other persons, was guilty of larceny at common law. —R. vs. Harding, R. & R. 125.

3. THE GOODS TAKEN.

The property taken must, to constitute larceny at

common law, be *personal* property, and of some intrinsic value, though it need not be of the value of some coin known to the law.—Reg. vs. Morris, 9 C. & P. 349; 3 Burn's Just. 216; R. vs. Walker, 1 Mood. 155.

Things real, or which savour of the realty, choses in action, as deeds, bonds, notes, etc., etc., cannot be the subject of larceny, at common law.

But now, for these, see the Larceny Act, *post;* as to larceny of stamps, see 35 Vict., ch. 33, *post.*

No larceny, at common law, can be committed of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ* and unreclaimed. But if they are reclaimed or confined, or are practically under the care and dominion of the prosecutor and may serve for food, it is otherwise.

So young pheasants, hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house and although the pheasants are designed ultimately to be turned out and to become wild, are the subject of larceny.—R. vs. Cory, 10 Cox, 23.

Partridges were reared from eggs by a common hen: they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor: *held*, that they were the subject of larceny at common law.—Reg. vs. Shickle, 11 Cox, 189.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state: *held*, that the indictment was not proved.—Reg. vs. Roe, 11 Cox, 554.

Rabbits were netted, killed, and put in a place of deposit, viz: a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits and lay in wait for the poachers: *held*, that this did not amount to larceny.—Reg. vs. Townley, 12 Cox 59.

The flesh of such animals as are *feræ naturæ* may be the subject of larceny. In Reg. vs. Gallears, 1 Den. 501, the prisoner was indicted for stealing a ham. The prisoner objected that it did not appear by the indictment that the article stolen was the subject of larceny; that it might have been the ham of an animal *feræ naturæ*, a wild boar, for instance, which had been stolen. Upon a case reserved the objection was overruled. "I don't understand the objection," said Patteson, J. "Supposing it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcasses of animals when dead, such as a boar's head. Do you find in works on natural history that there is any living animal called a ham?"

See the Larceny Act, *post*, as to larceny of pigeons, oysters, animals of different species, etc., etc.

4 THE OWNER.

The goods taken, to constitute larceny, must be the property of another person, and not of the party taking them. But it has been seen, *ante*, that the owner, in certain cases, may commit larceny of his own goods;

See, *post*, under head "Indictment."

5. AGAINST OWNER'S CONSENT.

The taking must be against the will of the owner. The primary inquiry to be made is, whether the taking were *invito domino*, that is to say, without the will or approbation of the owner; for this is of the very essence of larceny and its kindred offence, robbery.—3 Burn's Just. 218.

But where a servant, being solicited to become an accomplice in robbing his master's house, informed his master of it, and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come: it was holden, that this conduct of the master was no defence to an indictment against the robbers.—See Bishop, 1 Cr. L. 262, and 2 Cr. L. 811.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. eleven pence, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her one shilling, and refused to give her the nineteen shillings change: *held*, that the prisoner could not be convicted upon this indictment of stealing nineteen shillings.—Reg. vs. Bird, 12 Cox, 257.

B. making a purchase from the prisoner, gave him half a sovereign in mistake for a six pence. Prisoner looked at it and said nothing but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half sovereign. Prisoner said "all right, my boy; I'll give it to you," but he did not return it, and was taken into custody: *held*, not to be a larceny.— Reg. vs. Jacobs, 12 Cox, 151.

6. THE FELONIOUS INTENT.

The taking and carrying away must, to constitute larceny be with a *felonious intent* entertained, at the time of the taking.

Felony is always accompanied with an evil intention, and, therefore, shall not be imputed to a mere mistake or misanimadversion: as where, persons break open a door in order to execute a warrant which will not justify such a proceeding: for in such case there is no *felonious* intention.—1 Hawk. 142.

For it is the mind that make the taking of another's goods to be felony, or a bare trespass only; but, because the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent or the contrary, the same must be left to the due and attentive consideration of the Judge and jury: wherein, the best rule is, in doubtful matters, rather to incline to acquittal than conviction. Only, in general, it may be observed, that the ordinary discovery of a felonious intent is, the party doing it secretly, or, being charged with the goods, denying it.—1 Hale, 509.

And if goods be taken on claim of right or property in them, it will be no felony; at the same time, it will be matter of evidence whether they were, *bonâ fide*, so taken, or whether they were not taken from, the person actually possessing them, with a thievish and felonious intent, and therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them, would be a felo-

ny.—1 Hale, 507. Lemott's case and Farre's case, Kelyng's C.C., 64,65, *reprint by Stevens and Haynes.*

In a recent case, the prisoner had set wires, in which game was caught. The prosecutor, a game-keeper, took them away for the use of the lord of the manor, while the prisoner was absent. The prisoner demanded his wires and game, with menaces, and under the influence of fear, the prosecutor gave them up. The jury found that the prisoner acted under a *bona fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained possession of what he considered his own. It was held no robbery, there being no *animus furandi.*—R. vs. Hall, 3 C. & P. 409.

And where a letter, directed to J. O. at St. Martin's Lane, Birmingham, inclosing a bill of exchange drawn in favor of J. O. was delivered to the defendant, whose name was J. O. and who resided near St. Martin's Lane, Birmingham; but, in truth, the letter was intended for a person of the name of J. O. who resided in New Hall Street; and the prisoner, who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because at the time when the letter was delivered to him, the defendant had not the *animus furandi.*—R. & Mucklow, 1 Mood. 160; Bishop, 2 Cr. L. 801.

And to constitute larceny, the intent must be to deprive the owner not temporarily, but permanently, of his property.—R. vs. Phillips, 2 East P. C. 662; Archbold, 326; 3 Burn's Just. 220. But see *post*, sect. 110 of the Larceny Act, and remarks thereon.—See Reg. vs. Hemmings, 4 F. & F. 50.

Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey.

Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not, that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved, as to whether the facts proved a larceny, that the question of felonious intention had been distinctly left to the jury, the Court quashed the conviction.—Reg. vs. Deering, 11 Cox, 298.

In all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake; whether he took them *bona fide* under a claim of right or otherwise, and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether and to appropriate and convert them to his own use, are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case.—1 Leach, 422; 3 Burn's Just. 224.

Upon an indictment for larceny, it appeared that the prisoner had been instructed by the wife of the prosecutor to repair an umbrella. After the repairs were finished, and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it. Blackburn, J., left it to the jury to say whether the taking by the prisoner was an honest assertion of his right, or only a colourable pretence to obtain possession of the umbrella: verdict, not guilty.—Reg. vs. Wade, 11 Cox, 549.

A depositor in a post office savings bank obtained a

warrant for the withdrawal of ten shillings, and presented it with his depositor's book to a clerk at the post office, who instead of referring to the proper letter of advice for ten shillings, referred by mistake to another letter of advice for eight pounds, sixteen shillings and ten pence, and placed that sum upon the counter. The clerk entered eight pounds, sixteen shillings and ten pence in the depositor's book as paid and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster General when he took it up, and found him guilty of larceny. *Held*, by a majority of the judges, that he was properly convicted of larceny. Per Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman and Archibald, J. J., that the clerk and therefore, the Postmaster General, having intended that the property in the money should belong to the prisoner through mistake, the prisoner knowing of the mistake, and having the *animus furandi* at the time, was guilty of larceny. Per Bovill, C. J., Kelly, C. B., and Keating, J., that the clerk having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore, the conviction was right. Per Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner had the *animus furandi*, and took it up, and was therefore guilty of larceny. Per Martin, B., Bramwell, B., Brett, J. and Cleasby, B., that the money was not taken *invito domino*, and therefore that there was no larceny. Per Bramwell, B., and Brett, J., that the authority of the clerk authorized the parting with the possession and property in the entire sum laid down on the counter.—Reg. vs. Middleton, 12 Cox, 260, 417.

Larceny by finding.—If a man lose goods, and another find them, and, not knowing the owner, convert them to his own use, this has been said to be no larceny, even although he deny the finding of them, or secrete them. But this doctrine must be taken with great limitation, and can only apply where the finder *bona fide* supposes the goods to have been lost or abandoned by the owner, and not to a case in which he colours a felonious taking under that pretence. Archbold, 330; R. vs. Kerr, 8 C. & P. 176; R. vs. Reed, C. & Mar. 306; R. vs. Peters, 1 C. & K., 245; R. vs. Mole, 1 C. & K. 417.

The true rule of law resulting from the authorities on the subject has been recently pronounced 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."—R. vs. Thurborn, 1 Den. 388; R. vs. Dixon, Dears. 580; R. vs Christopher, Bell, 27.

In a still more recent case, R. vs. Moore, Leigh & Cave, 1, on an indictment for stealing a bank-note, the jury found that the prosecutor had dropped the note in the defendant's shop: that the defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was: that he afterwards acquired knowledge who the owner was, and after that, converted the note to his own use;

that he intended, when he found the note to take it to his own use and deprive the owner of it, whoever, he was: and that he believed, when he found it, that the owner could be found. It was held that upon these findings, the defendant was rightly convicted of larceny. It is to be observed that in the last mentioned case although the prisoner at the time he found the bank-note did not know, nor had reasonable means of knowing who the owner was, yet that he *did believe* at the time of the finding that the owner could be found.—Archbold, 330.

The recent case of R. vs. Glyde, 11 Cox, 103, shows that the belief by the prisoner at the time of the finding of the chattel that he could find the owner is a necessary ingredient in the offence, and that it is not sufficient that he intended to appropriate the chattel at the time of finding it, and that he acquired the knowledge of who the owner was before he converted it to his own use. In that case, the prisoner found a sovereign on the highway, believing it had been accidentally lost; but nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should become known to him who the owner was. The owner was speedily made known to him, and the prisoner refused to give up the sovereign. There was, however, no evidence that he believed, at the time of finding the sovereign, that he could ascertain who the owner was, and the prisoner was, therefore, held not guilty of larceny.

In R. vs. Deaves, 11 Cox, 227, the facts were, that the prisoner's child, having found six sovereigns in the street, brought them to the prisoner, who counted them and told some bystanders that the child had found *a* sovereign. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. On the same evening,

about two hours after the finding, the prisoner was told that a woman had lost money, upon which the prisoner told her informant to mind her own business, and gave her half a sovereign. It was held by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from Reg. vs. Glyde, *supra;* that there was nothing to show that at the time the child brought her the money, the prisoner knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found, and that therefore, the conviction of the prisoner for larceny must be quashed.

Prisoner received from his wife a ten pound Bank of England note, which she had found, and passed it away. The note was endorsed "E. May" only, and the prisoner when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if instead of waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted, but, upon a case reserved, it was held that the conviction was wrong, and that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found. Reg. vs. Knight, 12 Cox, 102.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards, he was informed by S. that they had been put on his, S.'s marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his

marshes for a day or two, and then sent them a long distance away, as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found: 1. That at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. 2. That, at the time of finding them, he did not intend to steal them, but that the intention to steal came on him subsequently. 3. That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use: *held*, that a conviction of larceny by finding, or as bailee, could not be sustained under the above circumstances.—Reg. vs. Matthews, 12 Cox, 489.

It is clearly larceny if the defendant, at the time he appropriates the property, knows the owner; and therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it which he kept and converted to his own use, it was holden to be larceny.—2 Leach, 952.

So if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony, if he know the owner, or if he took him or set him down at any particular place, where he might have inquired for him.—R. vs. Wynne, 2 East P. C. 664; R. vs. Lamb, *loc cit*; R. vs. Lear, 1 Leach, 415; Archbold, 331.

So, in every case, where the property is not, properly speaking, lost, but only mislaid, under circumstances which would enable the owner to know where to look for and find it, as where a purchaser at a stall of the defendant in a market left his purse on the stall, the person who fraudulently appropriates property so mislaid is guilty of larceny.—R. vs. West, Dears. 402.

And in every case, in which there is any *mark* upon the property by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny.—R. vs. Pope, 6 C. & P. 346; R. vs. Mole, 1 C. & K. 417; R. vs. Preston, 2 Den. 353; Archbold, 331.

Doing an act openly doth not make it the less a felony, in certain cases.—3 Burn's Just. 223.—So, where a person came into a seamstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly, in her sight, this was adjudged to be a felony.—Chiser's case, T. Raym. 276.

Returning the goods will not purge the offence, if the prisoner took them originally with the intent of depriving the owner of them, and of appropriating them to his own use. In Reg. vs. Trebilcock, Dears. & B. 453, the jury found the prisoner guilty, but recommended him to mercy, "believing that he intended immediately to return the property": *Held*, that the conviction was right: the recommendation of the jury is no part of the verdict.

The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own benefit or use.—2 Starkie, on Evid. 606.

The intent need not be *lucri causâ*. 3 Burn's Just. 224; R. vs. Morfit, R. & R. 307; Reg. vs. Gruncell, 9 C. & P. 365; Reg. vs. Handley, 1 C. & Mar. 547; Reg. vs. Privett, 1 Den. 193; Reg. vs. Jones, 1 Den. 188; R. vs. Cabbage, R. & R. 292.

"The English Courts, however, seem at last, to have overthrown the old notion of *lucri causâ*." "Will it be contended, asked Pollock, C. B., that picking a man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?"—Reg. vs. Jones, 1 Den. 188; 2 Bishop, Cr. L. 846.

Possession of stolen property recently after its loss, if unexplained is presumptive evidence that the party in possession stole it.—Such presumption will, however, vary, according to the nature of the property stolen, and whether it be or not likely to pass readily from hand to hand.—R. vs. Partridge, 7 C. & P. 551; 3 Burn's Just. 225; Archbold, 235.

Prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning. The spot where the prisoner was found was twelve hundred yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any: *held*, that there was evidence to support a conviction for larceny.—Reg. vs. Mockford, 11 Cox, 16.

On the first floor of a warehouse, a large quantity of pepper was kept in bulk. The prisoner was met, coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same kind as that in the room above. On being stopped, he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. It was objected that, as there was no direct proof that any pepper had been stolen, the judge was bound to direct an acquittal, but the Court of Criminal Appeal held that there was evidence to warrant a conviction.—Reg. vs. Burton, 6 Cox, 293.

Indictment.—The form of indictment for simple larceny, as given in Archbold, 313, is as follows:

The jurors for Our Lady the Queen upon their oath present, that J. S. on.....three pairs of shoes, and one waistcoat, of the goods and chattels of J.N. feloniously did steal, take and carry away, against the peace of Our Lady the Queen, her crown and dignity.

If the defendant has been guilty of other distinct acts of stealing, not exceeding three, committed by him against the same person within the space of six calendar months, one or two other counts, as the case may be, in the following form, may be added, under sect. 5, of the Larceny Act of 1869.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within the space of six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on——six silver teaspoons, of the goods and chattels of the said J. N. feloniously did steal, take and carry away; against the form of the statute in such case made and provided.

As to the punishment for simple larceny, see sects. 4 and 110 of the Larceny Act of 1869, *post*; also 32–33 Vict. ch. 34; but this last Act applies to the Province of Quebec only.

It is not necessary to allege the value of the property stolen, except where the value is of the essence of the offence, or has any bearing on the punishment, as by the last part of sect. 110 of the Larceny Act of 1869, where an additional punishment is decreed, in cases where the value of the property stolen exceeds two hundred dollars.

By sect. 74 of the Larceny Act of 1869, if upon the trial of any person indicted for larceny, it be proved that the defendant took the property in such manner as to amount in law to embezzlement, he shall not by reason

thereof be entitled to be acquitted, but the jury may return as their verdict that the defendant is not guilty of larceny but is guilty of embezzlement. See this section and remarks under it, *post*.

And by section 99 of the said Larceny Act of 1869, see *post*, if upon the trial of any person for larceny, it appears that the offence proved amounts to an obtaining by false pretences, the jury may return as their verdict that the defendant is not guilty of larceny, but is guilty of obtaining by false pretences.

Also by section 110 of the said Larceny Act of 1869, if upon the trial of any person for larceny, the jury are of opinion that such person is not guilty of larceny, but are of opinion that he is guilty of an offence against the said section, they may find him so guilty. See this section and remarks under it, *post*.

But if the jury find a verdict of larceny, where the facts prove an embezzlement, or an obtaining by false pretences, or an offence against Section 110 of the Larceny Act, the conviction is illegal. R. vs. Gorbutt, Dears. & B. 166; the offence found by the jury must be the offence proved.

By section 49 of the Procedure Act of 1869, if, on the trial of any person charged with any felony or misdemeanor it appears to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, the jury may return as their verdict that the defendant is not guilty of the offence charged, but is guilty of an attempt to commit the same.

As to the venue, in indictments for larceny, &c., see sections 105, 106, 112 and 121 of the Larceny Act of 1869, *post*; and sections 8, 9, and 10 of the Procedure Act of 1869.

The time stated in the indictment need not be proved as laid; if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it will be sufficient. —See section 23 of the Procedure Act of 1869.

The goods stolen must be proved to be the absolute or special property of the person named in the indictment. But any variance between the indictment and the evidence, in this respect, as well as in the description of the property stolen, may now be amended.

An indictment charged the prisoner with stealing nineteen shillings and six pence in money of the prosecutor. At the trial, it was objected that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the Court amended the indictment by striking out the words "nineteen shillings and six pence" and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign. Upon a case reserved, the judges held that the Court had power so to amend under 14-15 Vict. ch. 100, s. 1, (sect. 71, of the Procedure Act of 1869.)—Reg. vs. Gumble, 12 Cox, 248; R. vs. Marks, 10 Cox, 167.

See section 19 of the Procedure Act of 1869, as to cases where property need not be laid in any person.

See sections 17 and 18 of the said Procedure Act of 1869, as to stating the ownership, in cases of partnerships, joint-tenancies, or joint stock companies; also sections 20, 21 and 22 of the said Act as to the statement of the ownership in certain other cases, and sections 24 and 25 as to the description of instruments and money in indictments.

Where goods are stolen out of the possession of the bailee, they may be described in the indictment as the

property of the bailor or of the bailee; but where a bailor steals his own goods from the bailee, they must be described as the goods of the bailee.—Archbold 321, 322.

Prisoner was charged with stealing a mare, the property of E. The evidence was that prosecutor, in presence of the prisoner, agreed to buy of W. a mare for five pounds, and that W. assented to take a cheque for the five pounds. The prosecutor afterwards sent prisoner to W. with the cheque, and direction to take the mare to Bramshot farm. On the next day, prisoner sold a mare to S., which he said he had bought for five pounds. When charged before the magistrate with stealing E.'s mare, he said he sold the mare to S., with the intention of giving the money to E., but that he got drunk: *held*, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E.—Reg. vs. King, 12 Cox, 134.

Prosecutor bought a horse, and was entitled to the return of ten shillings, chap money out of the purchase money. Prosecutor afterwards, on the same day, met the seller, the prisoner, and others together in company and asked the seller for the ten shillings, but said he had no change, and offered a sovereign to the prosecutor, who could not change it. The prosecutor asked whether any one present could give change: the prisoner said he could, but would not give it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign of his own with one hand to the prisoner, and held out the other hand for change. The prisoner took the sovereign and put one half-sovereign only into the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor and ran off with it: *held*, that the indictment rightly charged the prisoner with stealing a sovereign.—Reg. vs. Twist, 12 Cox, 509.

W. let a horse on hire for a week to C., who fetched the horse every morning from W.'s stable, and returned it after the day's work was done. The prisoner went to C. one day, just as the day's work was done, and fraudulently obtained it from him, by saying falsely "I have come for W.'s horse; he has got a job on, and wants it as quickly as possible." The same evening, the prisoner was found three miles off with the horse by a constable, to whom he stated that it was his father's horse, and that he was sent to sell it: *held*, that the prisoner was rightly convicted of larceny on an indictment alleging the property of the horse to be in W.—Reg. vs. Kendall, 12 Cox, 598.

By section 101 of the Larceny Act of 1869, *post*, it is lawful to add a count or several counts for feloniously receiving the stolen property to any indictment for larceny, and vice versâ. And it is deemed more prudent always to do so. And where a prisoner is charged with stealing and receiving, the jury may convict of receiving, though the evidence might have warranted a verdict of guilty as principal in the second degree.—Reg. vs. Hilton, Bell, 20; Reg. vs. Langmead, L. & C. 427; and Greaves' remarks upon it, 3 Russell, 668.

A summary trial, in certain cases of larceny, may be had, by consent, under 32-33 Vict., ch. 32, *an Act respecting the prompt and summary administration of Criminal Justice in certain cases*, and, 32-33 Vict., ch. 33, *an Act respecting the trial* and *punishment of juvenile offenders*. These Acts, by 37 Vict., ch. 42, are, with certain changes and restrictions, extended to British Columbia. By 34 Vict., ch. 13, they did not at first apply to Manitoba, but now, they are, by 37 Vict. ch. 39, extended to it.

The Act 32-33 Vict., ch. 35, also provides for the

more speedy trial, in certain cases, including larceny, of persons charged with felonies and misdemeanors, but applies only to the Provinces of Ontario and Quebec. By 37 Vict., ch. 41, this Act was *declared* to be in force in the District of Algoma.

As to the larceny, embezzlement, &c., &c., of post letters, mail bags, and other offences against the postal service, see 31 Vict., ch. 10, *an Act for the regulation of the postal service*, extended to Manitoba and British Columbia, by 34 Vict., ch. 13, and to Prince Edward Island, by 36 Vict., ch. 40.

AN ACT RESPECTING LARCENY AND OTHER SIMILAR OFFENCES.

32–33 Vict., Chap. 21.

Whereas it is expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, relating to larceny and other similar offences, and to extend the same as so consolidated, to all Canada: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.

Sect. 1.—In the interpretation of this Act:

1stly. The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold, note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to.

2ndly. The term "document of title to lands" shall include any deed, map, paper or parchment written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title

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to any real estate, or to interest in or out of any real estate, *or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate, or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title.*

3rdly. The term "trustee" shall mean a trustee on some express trust created by some deed, will or instrument in writing, or a trustee of personal estate created by parol, and shall include the heir or personal representative of any such trustee, and any other person upon or to whom the duty of such trust may have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies bankruptcy or insolvency, *and any person who is by the law of the Province of Quebec, an "administrateur;" and the word "trust" shall include whatever is by that law an "administration."*

4thly. The term "valuable security" shall include any order, exchequer acquittance or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of Canada, or of any Province therein, or of the United Kingdom or of Great Britain or Ireland, or of any British Colony or Possession, or of any foreign state, or in any fund of any body corporate, company or society whether within Canada or the United Kingdom, or any British Colony or Possession, or in any foreign state or country, or to any deposit in any *savings bank or other bank*, and shall also include any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money or for payment of money, whether of Canada, or of any Province therein, or of the United Kingdom, or of any British Colony or Possession, or of any foreign state, and

any document of title to lands or goods as hereinbefore defined, *and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge, or other instrument evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery, or transfer or sale of which, or for the entitling or evidencing title to which such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security.*

5thly. The term "property" shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as may have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

6thly. The term "cattle" shall include any horse, mule, ass, swine, or goat, as well as any neat cattle or animal of the Bovine species, and whatever be the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it may be known, and shall apply to one animal, as well as to many.

7thly. The term "banker" shall include any director of any incorporated bank or banking company.

8thly. The term "writing" shall include any mode in which and any material on which words or figures at

length or abridged are written, printed or otherwise expressed, or any map or place is inscribed.

9thly. The term "testamentary instrument" shall include any will, codicil, or any other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, where the same relates to real or personal estate, or both.

10thly. The term "municipality" shall include the corporation of any city, town, village, township, parish, or other territorial or local division of any Province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose.

Whenever the having anything in the possession of any person, is in this Act expressed to be an offence, then if any person has any such thing in his personal custody or possession, or knowingly or wilfully has any such thing in any dwelling-house or other building, lodging, apartment, field, or other place open or enclosed, whether belonging to, or occupied by himself or not, and whether such matter or thing be so had for his own use or benefit, or for that of another, such person shall be deemed to have such matter or thing in his custody or possession within the meaning of this Act, and where there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, has any such thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of all of them. For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day, *and the day shall include the remainder of the twenty-four hours.*—Sect. 1, 24–25 Vict., ch. 96, Imp.

The words in *italics*, and 6thly, 7thly, 8thly, 9thly, and 10thly are not in the English Act.

Sections 17 to 26, of the Procedure Act of 1869, contain various enactments as to description of property, money, written instruments, owners thereof, &c., &c., in indictments.

DISTINCTION BETWEEN GRAND AND PETIT LARCENY ABOLISHED.

Sect. 2.—Every larceny, 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 petit larceny was abolished.—Sect. 2, 24–25 Vict., ch. 96, Imp.

Grand larceny was when the value of the thing stolen was above twelve pence; petit larceny, when the thing stolen was of the value of twelve pence or under. This distinction was abolished in England, on the 21st day of June, 1827.

LARCENY BY BAILEES.

Sect. 3.—Whosoever being a bailee of any chattel, money or valuable security, fraudulently takes or converts the same to his own use, or to the use of any person other than the owner thereof, although he do not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.—Sect. 3, 24–25 Vict., ch. 96, Imp.

Greaves, on this clause, remarks: "Although there is no doubt that a person might have been convicted of any offence within this clause on a common indictment for larceny,—Reg. vs. Haigh, 7 Cox 403,—as it expressly

enacts that the offender 'shall be guilty of larceny,' yet to prevent all doubt, it is provided (by the Consolidated Act) that the offender may be convicted on an indictment for larceny. It was held that the bailment intended by the 20–21 Vict., ch. 54, s. 4, was a deposit of something which was itself to be returned; and therefore a person with whom money had been deposited, who was under an obligation to return the amount, but not the identical coin deposited, was held not to be a bailee of the money within that section.—Reg. vs. Hassall, Leigh & Cave 58. The object of this clause was simply to make those cases larceny, where the general property in the thing delivered was never intended to be parted with at all, but only the *possession;* where in fact the owner delivered the property to another under such circumstances as to deprive himself of the *possession* for some time, whether certain or uncertain, and whether longer or shorter, at the expiration or determination of which time the owner was to have restored to him the very same thing that had been so delivered. In order, therefore, to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved, 1st. That there was such a delivery of the property as to divest the owner of the *possession*, and vest it in the prisoner for some time. 2nd. That at the expiration or determination of that time, the identical same property was to be restored to the owner. Proof of these facts will be all that is necessary under this clause. The decision in Reg. vs. Hassall was clearly right, and will apply to the present clause."

The prisoner was a married woman living with her husband. They took in lodgers, but she exclusively had to deal with them. The prosecutor, who lodged with them, delivered to the prisoner, the woman, a box containing money to be taken care of. The prisoner stole the money, her husband being entirely innocent in the transaction. *Held*, that she was either guilty of simple larceny, or that she was a bailee, and guilty of larceny as a bailee, and by Pollock, C.B., and Martin, B., that a married woman may possibly be convicted of larceny as a bailee.—Reg. vs. Robson, Leigh & Cave, 93. The authority of Reg. vs. Denmour, 8 Cox 440, in which it was held that a married woman could not be a bailee, must be regarded as shaken.—Reporter's note, Leigh & Cave, 97.

The proviso, says Greaves, was introduced to prevent the clause applying to the cases of persons employed in the silk, woollen, and other manufactures, who dispose of goods entrusted to them, and are liable to be summarily convicted under sundry statutes.

Who is a bailee? What constitutes a bailment?..... "Bailment," (French, *bailler*) a compendious expression to signify a contract resulting from delivery. Sir William Jones has defined bailment to be "a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions as soon as the purpose for which they are bailed shall be answered." He has again in the closing summary of his essay, defined it in language somewhat different, as "a delivery of goods in trust, on a contract express or implied, that the trust shall be duly exercised and the goods re-delivered, as soon as the time or use for which they were bailed shall have elapsed or be performed." Each of these definitions seems redundant and inaccurate, if it be the proper office of a definition to include these things only which belong to the genus or class. Both of these definitions suppose that the goods are to be restored or re-delivered. But in a bailment for sale, as in the case

of a consignment to a factor, no re-delivery is contemplated between the parties. In some cases, no use is contemplated by the bailee, in others it is of the essence of the contract; in some cases time is material to terminate the contract; in others, time is necessary to give a new accessorial right. Mr. Justice Blackstone has defined a bailment to be "a delivery of goods in trust upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee." And in another place as a "delivery of goods to another person for a particular use." It may perhaps be doubted, whether, although generally true, a faithful execution, if by faithful be meant a conscientious diligence or faithfulness, adequate to a due execution, or a particular use, if by use be meant an actual right of user by the bailee, constitutes an essential or proper ingredient in all cases of bailment. Mr. Chancellor Kent, in his commentaries, has blended, in some measure, the definitions of Jones and Blackstone. Without professing to enter into a minute criticism, it may be said that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied to conform to the object or purpose of the trust. In the celebrated case of Coggs vs. Bernard, Lord Raym. 909, 1 Smith's leading cases, 177, Lord Holt divided bailments thus:

1. *Depositum*, or a naked bailment of goods, to be kept for the use of the bailor.

2. *Commodatum*, where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.

3. *Locato rei*, where goods are lent to the bailee to be used by him for hire.

4. *Vadium*, pawn or pledge.

5. *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

6. *Mandatum*, a delivery of goods to somebody, who is to carry them, or do something about them *gratis*. —Wharton, law lexicon.

A carrier who receives money to procure goods, obtains and duly delivers the goods, but fraudulently retains the money, is within this section.—R. vs. Wells, 1 F. & F. 109.

So one who takes a watch from the pocket of a tipsy man with his consent is a bailee of the watch.—R. vs. Reeves, 5 Jur. N. S. 716.

The bailment intended is a deposit of something to be specifically returned, and therefore one who receives money with no obligation to return the identical coins received is not a bailee within the section.—Reg. vs. Hassall, 1 Leigh & Cave, 58; Reg. vs. Garratt, 2 F. & F. 14; Reg. vs Hoare, 1 F. & F. 647.

The prosecutor gave the prisoner money to buy half a ton of coals for him. He bought the coals and took a receipt in his own name, and used his own horse and cart to fetch them, but on the way home he appropriated a portion of the coals to his own use, and afterwards pretended to the prosecutor that he had delivered to him the full quantity: *Held*, that even if it was necessary to show a specific appropriation of the coals to the prosecutor, there was sufficient evidence of such appropriation, and that the prisoner was rightly convicted of larceny as a bailee.—Reg. vs. Bunkall, Leigh & C. 371; 9 Cox, 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's cart, a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and having fraudulently sold some of the coals and appropriated the proceeds, is properly convicted of larceny as a bailee.—Reg. vs. Davies, 10 Cox, 239.

A., who was a trustee of a friendly society, was

appointed by a resolution of the Society to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank he applied it to his own purposes. He was indicted for stealing, as bailee of the money of the treasurer, and also for a common law larceny. The 18–19 Vict., ch. 63, sect. 18, vests the property of friendly societies in the trustees, and directs that in all indictments the property shall be laid in their names: *Held*, that A. could not be convicted either as a bailee or of a common law larceny.—Reg. vs. Loose, Bell, 259; 8 Cox, 302.

On an indictment for larceny as a bailee, it appeared that the prisoner borrowed a coat from the prosecutor, with whom he lodged, for a day, and returned it. Three days afterwards he took it without the prosecutor's permission, and was seen wearing it by him, and he again gave him permission to wear it for the day. Some few days afterwards, he left the town, and was found wearing the coat on board a ship bound for Australia. Martin, B., stopped the case, stating that in his opinion there was no evidence of a conversion. There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this Statute: the determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As for instance, in the case of a bailment of an article of silver for use, melting it would be evidence of conversion. So when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security, he is guilty of a conversion within the Statute. The prosecution ought to find some definite time at which the offence was committed. The taking the

coat on board ship was subsequent to the prisoner's going on board himself.—Reg. vs. Jackson, 9 Cox, 505.

Greaves, on this case, says: If this case is correctly reported it deserves reconsideration. The words are, "take *or* convert the same to his own use." The clause therefore does not require a conversion, but was studiously framed to avoid the necessity of proving one. The evidence was sufficient to go to the jury that the prisoner took the coat on board for his own use with intent permanently to deprive the owner of it; and such a case seems clearly within the Statute. Besides the case ought to have been left to the jury to say whether he did not return the coat to the prosecutor's house after the end of the last bailment for a day. If so the case was simply one of larceny.—3 Russell, 666.

M. was the owner of a wrecked ship. A. contracted with M. to save and recover the wrecked property. A. made a sub-contract with R. C. to act as diver and carry on the works of salvage; all goods saved to be forwarded to A., and the remuneration to be a percentage on the goods saved, but R. C. always to retain £150, as a guarantee. In his absence, R. C. put the defendant, his son, in charge of the wreck. The defendant corresponded with A. as to the sale of the salvage, and he was addressed by A. as a responsible party under the contract. A. deposed, however, that he had always considered R. C. as the party liable on the contract. The defendant sold and appropriated part of the salvage. The jury found that he did so *animo furandi*, but no question was asked them as to whether he was a bailee of A. *Held*, dissentientibus Fitzgerald and George, J.J., that there was sufficient evidence to show that the defendant was a bailee so as to make him liable for larceny under the 3rd section of the Larceny Act, also, that the property was rightly laid

in M.—Reg. vs. Clegg, Irish Cr. Appeal Court, 11 Cox, 212.

A. delivered two brooches to the prisoner to sell for him at £200 for one and £115 for the other, and the prisoner was to have them for a week for that purpose; but two or three days grace might be allowed. After ten days had elapsed, the prisoner sold them with other jewellery for £250, but arranged with the vendee that he might redeem the brooches for £110 before September: *held*, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee within sect. 3 of the Larceny Act.—Reg. vs. Henderson, 11 Cox, 593.

A traveller was entrusted with pieces of silk, about 95 yards each, to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, qualities and prices of the silk sold. All goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission. Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use: *held*, on a case reserved, by the Court of Criminal Appeal unanimously, that the prisoner was rightly convicted of larceny as a bailee.—Reg. vs. Richmond, 12 Cox, 495.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards

he was informed by S. that they had been put on his, S.'s marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away on his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found—1, that at the time the prisoner found the heifers, he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner.—2. That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently.—3. That the prisoner when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use: *held*, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances. —Reg. vs. Matthews, 12 Cox, 489.

The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey, the prosecutor made up to the prisoner £24, out of which he was to pay for the coals, keep 23 shillings for himself, and, if the price of the coal, with the 23 shillings, did not amount to £24, to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor; and the prosecutor did not know but that he did so; but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th of March, the prisoner had a balance of £3 in hand, and the prosecutor gave him £21 to make up £24 for next journey. The prisoner did not then buy any coal,

but fraudulently appropriated the money: *held*, that the conviction of the prisoner for larceny of the £21 as a bailee was right.—Reg. vs. Aden, 12 Cox, 512.

Boot and shoe manufacturers gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men might either take them to their own homes to work up, or work them up upon the prosecutor's premises; but in the latter case they paid for the seats provided for them. When the work was done they received a receipt for the delivery of the leather and materials and payment of the work. If the leather and materials were not re-delivered, they were required to be paid for. The prisoner Daynes was in the prosecutor's employ, and received materials for twelve pairs of boots: he did some work upon them, but instead of returning them sold them to the prisoner Warner. These materials were entered in the prosecutor's books to Daynes' debit, but omitted by mistake to be entered in Daynes' book: *held*, that Daynes could not be convicted of larceny as a bailee, under the 3rd section of the Larceny Act, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, ch. 8.—Reg. vs. Daynes, 12 Cox, 514.

An indictment for larceny by a bailee may be in the general form of indictment for larceny at common law; and it is not necessary to allege that the defendant is a bailee.—3 Burn's Justice, 305.

PUNISHMENT FOR SIMPLE LARCENY.

Sect. 4.—Whosoever is convicted of simple larceny or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable to be imprisoned in the Penitentiary for any

term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 4, Imp.

As to larceny after a previous conviction, see sections 7, 8, 9; and sect. 122, as to requiring the offender to enter into his own recognizances, and to find sureties, both or either, in cases of felony punishable under this Act. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

As to additional punishment, when the property stolen is over two hundred dollars in value, see *post*, sect. 110.

THREE LARCENIES, WITHIN SIX MONTHS IN ONE INDICTMENT.

Sect. 5.—It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them.—24–25 Vict., ch. 96, sect. 5, Imp.

Before the passing of the Act, it was no objection in point of law that an indictment contained separate counts charging distinct felonies of the same degree, and committed by the same offender.—2 Hale, 173; 1 Chit. 253; Reg. vs. Heywood, L. & C. 451. It was, in truth, a matter for the discretion of the Court; and if the Court thought the prisoners would be embarrassed by the counts, the Court would either quash the indictment, or compel the Counsel for the prosecution to elect.—R. vs. Young, 2 East's P. C. 515. It seems that, where three acts of larceny are charged in separate counts there

may also be three counts for receiving.—Reg. vs. Heywood, L. & C. 451. See, *post*, remarks under next section.

Greaves, on this clause, says:

"It frequently happened before this Statute passed that a servant or clerk stole sundry articles of small value from his master at different times, and in such a case it was necessary to prefer separate indictments for each distinct act of stealing, and on the trial it not seldom happened that the jury, having their attention confined to the theft of a single article of small value, improperly acquitted the prisoner on one or more indictments. The present section remedies these inconveniences, and places several larcenies from the same person in the same position as several embezzlements of the property of the same person, so that the prosecutor may now include three larcenies of his property committed within the space of six calendar months in the same indictment."—Lord Campbell's Acts, by Greaves, 19.

IF ONE TAKING IS CHARGED, AND SEVERAL ARE PROVED.

Sect. 6.—If, upon the trial of any indictment for larceny it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor or counsel for the prosecution shall not by reason thereof be required to elect upon which taking he will proceed, unless it appears that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings, and in either of such last mentioned cases the prosecutor or counsel for the prosetion shall be required to elect to proceed for such number of takings not exceeding three, as appear to have taken place within the period of six months from the

first to the last of such takings.—24–25 Vict., ch. 96, sect. 6, Imp.

The word "months" in this and the preceding clause means a calendar month.—31 Vict., ch. 1, sect. 7, Interpretation Act.

The effect of the above and the preceding section, is to restrain the power of the Court with respect to the doctrine of election. The Court cannot now put the prosecutor to his election where the indictment charges three acts of larceny within six months, or where the evidence shows that the property was not stolen at more than three different times, and that not more than six months had elapsed between the first and last of such times. But, on the other hand, the Court is not bound by the above section to put the prosecutor to his election in other cases, but is left to its discretion, according to the old practice at common law.—R. vs. Jones, 2 Campb. 131; Reg. vs. Heywood, L. & C. 451.

By means of a secret junction pipe with the main of a gas company, a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years: *held*, on an indictment for stealing 1000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time, and that section 6 of the Larceny Act, as to the prosecutor's electing on three separate takings within six months, did not apply.—Reg. vs. Firth, 11 Cox 234.

An indictment charged an assistant to a photographer with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the

17th of January, 1870, and that one particular article could not have been taken before March, 1868; but the prosecution abandoned the case as to this article: *held*, that this was not a case in which the prosecutor should be put to elect upon which articles to proceed, under section 6 of the Larceny Act.—Reg. vs. Henwood, 11 Cox, 526.

On this clause, Greaves remarks:

"Formerly it very often happened on the trial of an indictment alleging the stealing of a number of articles at the same time, that it turned out that they had been taken at different times, in which case the prosecutor was usually compelled to elect some single taking; such election being required to be made on the spur of the moment, some times led to improper acquittals. The present section is intended to afford a remedy for such cases, and to place such cases in the same position as the cases provided for by the previous section. When, therefore, it appears on the trial of an indictment for stealing a number of goods at the same time, that the goods were taken at different times, the prosecutor is not to be put to elect to proceed on any particular taking, unless it appear that there were more than three takings, or that more than six calendar months intervened between the first and last of such takings, in which case he is to elect such takings, not exceeding three, within the period of six calendar months from the first to the last of such takings. A suggestion has been made, that in some extraordinary cases this may unduly limit the evidence on the part of the prosecution, as it is said that evidence of only three takings will be admissible. This is a fallacy; the clause confines the prosecutor to *proceeding to obtain a conviction* for three takings, but it does not at all interfere with the admissibility of any evidence that may in

the opinion of the Court tend to explain the nature and character of any of the takings. If, therefore, a case should occur where a doubt arose whether the evidence as to one or more takings shewed that it was felonious, there can be no doubt that evidence of other takings would be admissible for the purpose of removing such doubt precisely in the same way as heretofore, but not otherwise. (*See Reg. vs. Bleasdale*, 2 C. & K. 765). In fact the clause empowers the prosecutor to proceed for three takings instead of one without in any respect otherwise altering the evidence that may be admissible."

LARCENY AFTER PREVIOUS CONVICTIONS.

Sect. 7.—Whosoever commits the offence of simple larceny after a previous conviction for felony, whether such conviction has taken place upon an indictment or under the provisions of the *Act respecting the prompt and summary administration of Criminal justice in certain cases* (32–33 Vict. ch. 32) or of any other Act for like purposes shall be liable to be imprisoned in the Penitentiary for any term not exceeding ten years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict. ch. 96, sect. 7, Imp.

Sect. 8.—Whosoever commits the offence of simple larceny or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. —24–25 Vict., ch. 96, sect. 8, Imp.

Sect. 9.—Whosoever commits the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction under the provisions contained in this Act, or in any former Act or law relating to the same subjects, or in the *Act respecting the prompt and summary administration of Criminal justice in certain cases* (32–33 Vict. ch. 32) or other Act for like purposes, or in the *Act respecting the trial and punishment of juvenile offenders* (32–33 Vict. ch. 33) or in the *Act respecting malicious injuries to property*, (32–33 Vict. ch. 22), whether each of the convictions has been in respect of an offence of the same description or not, and whether such convictions or either of them has been before or after the passing ot this Act, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour and with or without solitary confinement.—24-25 Vict. ch. 96, sect. 9, Imp.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

As to requiring the offender to enter into recognizances and give sureties for keeping the peace, in cases of felony, see sect. 122, *post*, of this Act (Larceny Act.)

The form of indictment for a subsequent offence, under these sections, is, in England, governed by sect. 116 of the Larceny Act, but, in Canada, this last clause is omitted from the Larceny Act, and inserted in the Procedure Act of 1869, sect. 26. It is exactly in the same terms, as sect. 116, of the English Larceny Act, and applies, for us, to subsequent offences, under all our Statutes.

LARCENY OF CATTLE AND OTHER ANIMALS.

Sect. 10—Whosoever steals any cattle is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict. ch. 96, sect. 16, Imp.

See *ante*, sect. 1, for the interpretation of the word *cattle*.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S. on.....at.....one horse of the goods and chattels of J. N. feloniously did steal, take and lead away; against the form.....If the indictment be for stealing a bull or sheep, &c., say "drive away" instead of "lead away." The indictment must give the animal one of the descriptions mentioned in the Statute; otherwise the defendant can be punished as for simple larceny merely.—R. vs. Beaney, R. & Ry. 416; Archbold, 349.

If a person go to an inn, and direct the ostler to bring out his horse, and point out the prosecutor's horse as his, and the ostler leads out the horse for the prisoner to mount, but, before the prisoner gets on the horse's back, the owner of the horse comes up and seizes him, the offence of horse-stealing is complete.—R. vs. Pitman, 2 C. & P. 243.

The prisoners enter another's stable at night, and take out his horses, and ride them 32 miles, and leave them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the horses merely with intent to ride and afterwards leave them, and not to return or make any further use

of them, *held* trespass and not larceny.—R. vs. Philipps and Strong, 2 East P.C. 662.

If a horse be purchased and delivered to the buyer, it is no felony though he immediately ride away with it, without paying the purchase money.—Rex. vs. Harvey, 1 Leach. 467.

If a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.—Rex. vs. Crump, 1 C. & P. 658.

Obtaining a horse under the pretence of hiring it for a day, and immediately selling it is a felony, if the jury find the hiring was *animo furandi*.—Rex. vs. Pear, 1 Leach, 212; Rex. vs. Charlewood, 1 Leach. 409. It is larceny (at common law) for a person hired for the special purpose of driving sheep to a fair, to convert them to his own use, the jury having found that he intended so to do, at the time of receiving them from the owner.—Rex. vs. Stock, 1 Moody 87.—Where the defendant removed sheep from the fold, into the open field, killed them, and took away the skins merely, the judges held that removing the sheep from the fold was a sufficient driving away to constitute larceny.—R. vs. Rawlins, 2 East P.C. 617. But it has been questioned, whether the merely removing a live sheep for the purpose of killing it, with intent to steal part of the carcase, was an asportation of the live sheep, as to constitute larceny of it.—R. vs. Williams, 1 Mood, 107. See 2 Russell, 361, and R. vs. Yend, 6 C. & P. 176

Any variance between the indictment and the proof, in the description of the animal stolen, may now be amended.—Sect. 71, Procedure Act, 1869. Reg. vs. Gumble, 12 Cox, 248.

KILLING ANIMALS WITH INTENT TO STEAL THE CARCASE.

Sect. 11.—Whosoever wilfully kills any animal, with

intent to steal the carcase, skin, or any part of the animal so killed, is guilty of felony, and shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony—24-25 Vict. ch. 96, sect. 11, Imp.

Indictment.....one sheep of the goods and chattels of J. N. feloniously and wilfully did kill, with intent feloniously to steal, take and carry away part of the carcase, that is to say, the inward fat of the said sheep, against the form.....Archbold, 350.

Cutting off part of a sheep, in this instance the leg, while it is alive, with intent to steal it, will support an indictment for killing with intent to steal, if the cutting off must occasion the sheep's death—R. vs. Clay, Rus. & Ry. 387.

So on the trial of an indictment for killing a ewe with intent to steal the carcase, it appeared that the prisoner wounded the ewe by cutting her throat, and was then interrupted by the prosecutor, and the ewe died of the wounds two days after. It was found by the jury who convicted the prisoner that he intended to steal the carcase of the ewe. The fifteen judges held the conviction right.—Reg. vs. Sutton, 8 C. & P. 291. It is immaterial whether the intent was to steal the whole or part only of the carcase.—R. vs. Williams, 1 Mood. 187.

STEALING DOGS, BIRDS, ETC., ETC., OR OTHER ANIMALS ORDINARILY KEPT IN CONFINEMENT, AND NOT SUBJECT OF LARCENY AT COMMON LAW.

Sect. 12.—Whosoever steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, *or for any lawful purpose of profit or advantage*, not being the subject of

larceny at common law, or wilfully kills any such dog, bird, beast or animal, with intent to steal the same or any part thereof, shall on conviction thereof before a Justice of the Peace, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept at hard labour for any term not exceeding one month, or else, shall forfeit and pay, over and above the value of the dog, bird, beast, or other animal, such sum of money, not exceeding twenty dollars as to the justice may seem meet, and whosoever having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any offence in this section before mentioned, and is convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding three months, as the convicting Justice may think fit.—24–25 Vict. ch. 96, sect. 18 and 21, Imp.

The words in *italics* are not in the English Act, and the subsequent offence of stealing a dog, after a previous conviction, is there made a misdemeanor.

By sect. 123, it is enacted that every offence punishable by this Act on summary conviction may be prosecuted in the manner directed by 32–33 Vict., ch. 31.

KILLING OR TAKING PIGEONS.

Sect. 13.—Whosoever unlawfully and wilfully kills, wounds or takes any house-dove or pigeon under such circumstances as do not amount to larceny at common law, shall, on conviction before a Justice of the Peace, forfeit and pay, over and above the value of the bird, any sum not exceeding ten dollars.—24–25 Vict. ch. 96, sect. 23, Imp.

This clause does not extend to killing pigeons under a claim of right.—Taylor vs. Newman, 9 Cox, 314.

By sect. 123, proceedings on summary convictions under this Act are governed by 32–33 Vict. ch. 31.

STEALING OR DREDGING FOR OYSTERS, ETC.

Sect. 14.—Whosoever steals any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, is guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny; and whosoever unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such for the purpose of taking oysters or oyster brood, although none shall be actually taken, or unlawfully and wilfully, with any net, instrument or engine, drags upon the ground of any such fishery, is guilty of a misdemeanor, and shall be liable to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying or fishery in which any of the said offences has been committed, without stating the same to be in any particular county, district or other local division; provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only. 24–25 Vict. ch. 96, sect. 26, Imp.

Indictment for stealing oysters or oyster brood.—..... from a certain oyster-bed called....the property of J. N.

and sufficiently marked out and known as the property of the said J. N., one thousand oysters feloniously did steal, take and carry away against the form.....

See sect. 122, *post*, for recognizances and sureties for the peace, both or either, in felonies under this Act.

Indictment for using a dredge in the oyster fishery of another.—.....within the limits of a certain oyster-bed called.....the property of J. N. and sufficiently marked out and known as the property of the said J. N., unlawfully and wilfully did use a certain dredge for the purpose of then and there taking oysters, against the form....—Archbold, 393.

See sect. 122, *post*, as to fine and sureties for the peace, in misdemeanors under this Act.

In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence as, for instance, that the prosecutor and his father for 45 years had exercised the exclusive right of oyster fishing in the locus in quo, and that in 1846, an action had been brought to try the right, and the verdict given in favor of the prosecutor.—Reg. vs. Downing, 11 Cox, 580.

LARCENY OF VALUABLE SECURITIES.

Sect. 15.—Whosoever steals or for any fraudulent purpose destroys, cancels, obliterates, or conceals the whole or any part of any valuable security, other than a document of title to lands, is guilty of felony, of the same nature and in the same degree, and punishable in the same manner as if he stole any chattel of like value with the share, interest or deposit, to which the security so stolen relates, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing

represented, mentioned or referred to, in or by the security.—24-25 Vict. ch. 96, sect. 27, Imp.

As to the interpretation of the words "valuable security" see *ante*, sect. 1.

Indictment.—.....a certain valuable security, other than a document of title to lands, to wit, one bill of exchange for the payment of ten pounds, the property of J. N., the said sum of ten pounds secured and payable by and upon the said bill of exchange being then due and unsatisfied to the said J. N., feloniously did steal, take and carry away, against the form..... Archbold, 371.

See *post*, sect. 122, as to requiring sureties in felonies under this Act.

To constitute the offence it must be proved that the defendant stole the bill as stated. Where the defendant, a stockbroker, received from the prosecutor a cheque upon his banker, to purchase exchequer bills for him, and cashed the cheque, and absconded with the money, upon an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny, although the jury found, that, before he received the cheque, the defendant had formed the intention of converting the money to his own use, not of the cheque, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him, and because being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels, nor of the proceeds of the cheque, because the prosecutor never had possession of them, except by the hands of the defendant. —R. vs. Walsh, Russ. & Ry. 215.—But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and he appropriated it to his own use, it was holden by the judges to be a

larceny of the cheque.—R. vs. Metcalfe, 1 Mood. 433; R. vs. Heath, 2 Mood, 33. See 2 Russell, 203, for a synopsis of Walsh's case.

With respect to what instrument or security is within the Act, the following decisions have taken place :—

At a conference of the Judges in Easter term, 1781, Nares, J., mentioned that a person was convicted before him for privately stealing from the person of another a pocket-book containing a note of the Bristol Bank signed by some one on behalf of himself and partners, promising to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed. All the judges were of opinion that this was a capital felony within the statute 2 Geo. 2, ch. 25, which made the stealing promissory notes felony, with the same consequence as goods of the like purported value, that this was a promissory note, and that its not being indorsed was immaterial.—Anon. 2 East P. C. 598.

So an indictment for stealing a bill of exchange in London was sustained by proof that, when found in the prisoner's posession there, it had an indorsement, made afterwards and not laid in the indictment, for the addition of a third name made no difference, it being the same bill that was originally stolen.—Austin and King's case, 2 East P. C. 602.

When one was compelled by duress to make a promissory note on stamped paper before prepared by the prisoner, who was present during the time, and withdrew the note as soon as it was made, this was holden not to be a felony within the Statute. For according to some of the judges, that is confined to available securities in the hands of the party robbed, which this was not, being of no value while in the hands of the maker himself, yet even if it were, according to others, this was never in his

possession, his signature having been procured by duress to a paper which during the whole continuing transaction was in possession of the prisoner.—Phipoe's case, 2 Leach, 673.

This last case would now be punishable under sect. 47, *post.*

And where, in consequence of an advertisement, A. applied to B. to raise money for him, who promised to procure £5000, and produced ten blank 6 shillings stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps as bills for £500 each, and put them in circulation, it was holden by Littledale, Rolland and Bossanquet that the stamps so filled up were not bills of exchange, orders for the payment of money or securities for money within the meaning of the Statute.—R. vs. Minter Hart, 6 C. & P. 106.

This offence would now be punishable under sect. 95, *post.* Reg. vs. Danger, Dears. & B. 307, would also now fall under the said section.

A cheque on a banker written on unstamped paper payable to D. F. G., and not made payable to bearer, is not a valuable security, for it would be a breach in the law for the bankers to pay it.—R. vs. Yates, 1 Mood. 170.

The case of R. vs. Clarke, R. & R. 182, where the prisoner was indicted for stealing re-issuable notes after payment and before re-issuing, does not decide whether such notes were considered as valuable within the Statute, for the judges held the conviction right on the counts for the value of the stamps and paper, not referring to the objections as to the value of the note. But in R. vs. Ransom, 2 Leach, 1090, which was against a clerk in the post-office for secreting a letter containing country bank-

notes paid in Lordon and not re-issued, it was contended that they were not available within the Act, but the majority of the judges, among whom was Lord Ellenborough, thought otherwise, and as upon the face of them they remained uncancelled, they would, in the hands of a holder for a valuable consideration, be available against the makers. And in the cases of R. vs. Vyse, 1 Mood. 218, it was decided that re-issuable notes, if they cannot properly be called valuable securities whilst in the hands of the maker, may be called goods and chattels.

Wherever, therefore, the instrument would, in the hands of an innocent holder, be *available* against the maker, such an instrument would, it is apprehended, be considered of value. It may be worth while to consider, further, whether the possession of the subject matter of the instrument is not sufficient to bring the offender within the Act. The object of the Statute is to put the securities mentioned therein upon the same footing as the money they represent. The property consists in the power of disposing: if therefore the power of disposal is taken away, the possession and property are gone. The disposal of such property is effected by means of those instruments; every such Act of disposal, therefore, it is apprehended, must be considered as an exercise of property, and the making of such a note, under any circumstances, an act of possession. If, therefore, such a promissory note so obtained, would be *accounted of value*, and to have been in the possession of the prosecutor, the offence would now, beyond doubt, come within the section.—3 Burn's Justice, 237.

In Reg. vs. West, Dears. & B. 109, the case of R. vs. Ransom was relied on in the argument, and it appeared that A. stole notes of a provincial bank which were not then in circulation for value, but which were paid in at

one branch of the bank, and were in course of transmission to another branch, in order to be re-issued: but it was held that, upon these facts, A. was rightly convicted.

The following instruments also have been held valuable securities: a post office money-order, Reg. vs. Gilchrist, 2 Mood. 233; a cheque on a banker, Reg vs. Heath, 2 Mood. 33; a pawnbroker's certificate, Reg. vs. Morrison, Bell, 158; and a scrip-certificate of a foreign Railway Company, Reg. vs. Smith, Dears. 56.

It is to be observed that *valuable security* includes also *document of title to goods* and *document of title to lands*, see *ante*, sect. 1, but that *documents of title to lands* are especially exempted in this section. It is, therefore, material, in drawing an indictment under this section, to show the sort of valuable security in order to bring it within the section: and a variance between such description and the evidence will be fatal, unless amended.—Reg. vs. Lowrie, L. R., 1 C. C. R. 61.

Bank notes are properly described as "money," although, at the time of the larceny, they were not in circulation, but were in the hands of the bankers themselves.—Reg. vs. West, 7 Cox, 183.

Halves of notes should be described as goods and chattels.—R. vs. Meagle, 4 C. & P. 535.

If the instrument is void as a security, as, for instance, by being unstamped, it should be described as a piece of paper.—R. vs. Pooley, R. & R. 12; Reg. vs. Perry, 1 Den. 69.

But where an executory contract was unstamped, it was held not to be the subject of larceny, being merely evidence of a chose in action: and that the prisoner could not be convicted on a count charging him with stealing a piece of paper.—Reg. vs. Watts, 6 Cox, 304.

STEALING DOCUMENTS OF TITLE TO REAL ESTATE.

Sect. 16.—Whosoever steals, or for any fraudulent purpose destroys, cancels, obliterates or conceals the whole or any part of any document of title to lands, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence, relating to any document of title to lands, it shall be sufficient to allege such document to be or contain evidence of the title, or of part of the title, or of some matter affecting the title, of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof.—24–25 Vict. ch. 96, sect. 28, Imp.

As to the interpretation of the words "documents of title to lands," see sect. 1, *ante*.

As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see *post*, s. 122.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

Indictment.—.....a certain deed, the property of J. N., being evidence of the title of the said J. N. to a certain real estate called.....in which said real estate the said J. N. then had, and still hath an interest, feloniously did steal, take and carry away, against the form..... Archbold, 357. Add a second count, describing the nature of the instrument more particularly. It seems that in an indictment under this

section, and the two following, for destroying, &c., &c., for a fraudulent purpose, the purpose should be stated.—Reg. vs. Morris, 9 C. & P. 89.

A mortgage deed cannot be described as goods and chattels.—R. vs. Powell, 2 Den. 403.

See the *proviso* to the following section.

STEALING, ETC., ETC., WILLS OR CODICILS.

Sect. 17.—Whosoever, either during the life of the testator or after his death, steals or for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any will, codicil or other testamentary instrument, whether the same relates to real or personal estate, or to both, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and it shall not, in any indictment for such offence, be necessary to allege that such will, codicil, or other instrument, is the property of any person *or of any value;* provided that nothing in this or in the last preceding section mentioned, nor any proceeding, conviction or judgment to be had or taken thereupon, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him, and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned by any evidence whatever, in respect of any act done by him, if he has at any time, previously to his being charged with such

offence, first disclosed such act, on oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit or proceeding, *bonâ fide* instituted by any party aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.—24–25 Vict., ch. 96, sect. 29, Imp.

The words in *italics* are not in the English Act.

As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see *post*, sect. 122.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—.....a certain will and testamentary instrument of one J. N. feloniously did steal, take and carry away, against the form.....Archbold, 356. Add counts varying description of the will, &c., &c.

The cases of Reg. vs. Skeen, Bell, 97, and Reg. vs. Strahan, 7, Cox 85, would not now be held as law.—Greaves, Cons. Stat. 126.

The words, *or of any value*, inserted into our Statute, were unnecessary.—Sect. 23, Procedure Act, 1869: Greaves loc. cit.

STEALING, ETC., ETC., RECORDS, ETC., ETC.

Sect. 18.—Whosoever steals, or, for any fraudulent purpose, takes from its place of deposit, for the time being, or from any person having the custody thereof, or unlawfully and maliciously cancels, obliterates, injures or destroys the whole or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever, of or belonging to any Court of Record

or other Court of Justice, or relating to any matter, civil or criminal, begun, depending or terminated in any such Court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or of any original document whatsoever of or belonging to any court of equity or relating to any cause or matter begun, depending or terminated in any such Court, or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any government or public office, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement, and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person.—24–25 Vict., ch. 96, sect. 30, Imp.

The words "*or other Court of Justice*" are not in the English Act.

As to recognizance and sureties, see *post*, sect. 122,

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment for stealing a record.—.....a certain judgment-roll of the Court of Our Lady the Queen, before the Queen herself, feloniously did steal, take and carry away, against.....

Indictment for taking a record from its place of deposit.—....a certain judgment-roll of the Court of our said lady the Queen, before the Queen herself, from its place of deposit for the time being, to wit, from the treasury of the said Court feloniously and for a fraudulent purpose

did take, against..... If for obliterating, &c., &c., &c., say, feloniously, unlawfully and maliciously did obliterate, &c., &c., &c.,.... Archbold 354, 355.

Stealing rolls of parchment will be larceny at common law, though they be the records of a Court of Justice, unless they concern the realty, R. vs. Walker, 1 Mood. 155; but it is not so if they concern the realty.—R. vs. Westbeer, 1 Leach, 13.

A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny at common law.—R. vs. Westbeer, loc. cit.

Upon an indictment for taking a record from its place of deposit, with a fraudulent purpose, the mere taking is evidence from which fraud may fairly be presumed, unless it be satisfactorily explained.—Archbold, 355.

The prisoner was indicted under this section of the Larceny Act. The first count charged the prisoner with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the County Court of Berkshire, in an action wherein one Arthur was plaintiff and the prisoner defendant. The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of a certain process of a court of record, to wit, a warrant of execution out of the County Court.....that defendant intending to prevent the due course of law, and to deprive Arthur of the rights, benefits and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he, Brooker, having then the lawful custody of it. Brooker was the bailiff who had seized the defendant's goods, under the said writ of execution. The prisoner, a day or two afterwards, forcibly took the warrant out of the bailiff's hand, and kept it. He then ordered him away, as having no more authority,

and, on his refusal to go, forcibly turned him out. The prisoner was found guilty, and the conviction affirmed upon a case reserved. Cockburn, C. J., said: "I think that the first count of the indictment which charges larceny will not hold. There was no taking *lucri causa*, but for the purpose of preventing the bailiff from having lawful possession. Neither was the taking *animo furandi*. I may illustrate it by the case of a man, who, wishing to strike another person sees him coming along with a stick in his hand, takes the stick out of his hand, and strikes him with it. That would be an assault, but not a felonious taking of the stick. There is, however, a second count in the indictment which charges in effect that the prisoner took the warrant for a fraudulent purpose. The facts show that the taking was for a fraudulent purpose. He took the warrant forcibly from the bailiff, in order that he might turn him out of possession. That was a fraud against the execution creditor, and was also contrary to the law. I am therefore of opinion that it amounts to a fraudulent purpose within the enactment, and that the conviction must be affirmed." The rest of the Court concurred.—Reg. vs. Bailey, 12 Cox, 129.

STEALING RAILWAY TICKETS, ETC., ETC.

Sect. 19.—Whosoever steals any railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamer or other vessel, is guilty of felony, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, with or without hard labour, for any term less than two years.

This clause is not in the English Statute. As to recognizances and sureties for the peace, see *post*, sect. 122.

STEALING OR BREAKING, ETC., ETC., LEAD, METAL, GLASS, ETC., ETC., FIXED TO HOUSE OR LAND.

Sect. 20.—Whosoever steals, or rips, cuts, severs, or breaks with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively, fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, is guilty of felony, and shall be liable to be punished as in the case of simple larceny: and in case of any such thing fixed in any such square, street or place as aforesaid, it shall not be necessary to allege the same to be the property of any person.—24–25 Vict., ch. 96, sect. 31, Imp.

At common law, larceny could not be committed of things attached to the freehold.

As to punishment for simple larceny, see *ante*, sect. 4, and *post*, sects. 110 and 122.

This enactment extends the offence much further than the prior acts did, as it includes all utensils and fixtures of whatever materials made, either fixed to buildings or in land, or in a square or street. A church, and indeed all buildings are within the Act, and an indictment for stealing lead fixed to a certain building, without further description will suffice.—R. vs. Parker, 1 East P. C. 592; R. vs. Norris, R. & R., 69.—An unfinished building boarded on all sides, with a door and a lock, and a roof of loose gorse, was held a building within the Statute.—R. vs. Worrald, 7 C. & P. 516.—So also where the lead stolen formed the gutters of two sheds built of brick,

timber and tiles upon a wharf fixed to the soil, it was held that this was a building within the Act.—Reg. vs. Rice, Bell, 87.—But a plank used as a seat and fixed on a wall with pillars, but with no roof was held not to be a building.—R. vs. Reece, 2 Russell, 254. Where a man, having given a false representation of himself, got into possession of a house, under a treaty for a lease of it, and then stripped it of the lead, the jury being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty, and he afterwards had judgment.—R. vs. Munday, 2 Leach, 850.

A prisoner, however, cannot, upon an indictment for this statutable felony, be convicted of simple larceny.—Reg. vs. Gooch, 8 C. & P. 293.

The prisoners were found guilty of having stolen a copper sun-dial fixed upon a wooden post in a churchyard. Conviction held right.—Reg. vs. Jones, Dears. & B. 655.

The ownership of the building from which the fixture is stolen must be correctly laid in the indictment.—2 Russell, 255.

Indictment for stealing metal fixed in land being private property.—.... two hundred pounds weight of iron, the property of J. N., then being fixed in a certain land which was then private property, to wit, in a garden of the said J. N. situate..... feloniously did steal, take and carry away, against.... Archbold, 369.

STEALING OR CUTTING TREES.

Sect. 21.—Whosoever steals or cuts, breaks, roots up, or otherwise destroys or damages with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood respectively growing in any park, pleasure ground, garden, orchard or avenue, or in any ground

adjoining or belonging to any dwelling-house, in case the value of the article or articles stolen, or the amount of the injury done, exceeds the sum of five dollars, is guilty of felony, and shall be liable to be punished as in the case of simple larceny; and whosoever steals or cuts, breaks, roots up, or otherwise destroys or damages with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, in case the value of the article or articles stolen, or the amount of the injury done, exceeds the sum of twenty-five dollars, is guilty of felony, and shall be liable to be punished as in the case of simple larceny. —24–25 Vict., ch. 96, sect. 32, Imp.

See sect. 4, *ante*, as to punishment for simple larceny, and sects. 110 and 122, *post*.

The words "grounds adjoining" mean ground in active contact with the dwelling-house. Whether the ground be a park or garden, etc., is a question for the jury. It seems it is not material that it should be in every part of it a park or garden.—R. vs. Hodges, M. & M. 341.—The amount of injury mentioned in this and the following section must be the actual injury to the tree or shrub itself, and not the consequential injury resulting from the act of the defendant.—Reg. vs. Whiteman, Dears. 353.—The respective values of several trees, or of the damage thereto, may be added to make up the £5, in case the trees were cut down, or the damage done as part of one continuous transaction.—Reg vs. Shepherd, 11 Cox, 119.

Indictment for stealing trees, etc., in parks, etc., of the value above five dollars.—.....one oak tree of the value of eight dollars, the property of J. N., then growing in a certain park of the said J. N. situate.... in the said park, feloniously did steal, take and carry away, against ..... Archbold, 361.

Indictment under second part of the section.—....one ash-tree of the value of thirty dollars, the property of J. N., then growing in a certain close of the said J. N. situate.... in the said close, feloniously did steal, take and carry away, against the form.....

It is not necessary to prove that the close was not a park or garden, etc.—Archbold, 362.

See proviso to sect. 23, *post*.

STEALING TREES WORTH 25 CENTS. FIRST OFFENCE. SECOND OFFENCE. THIRD OFFENCE.

Sect. 22.—Whosoever steals, or cuts, breaks, roots up or otherwise destroys or damages with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles or the injury done being to the amount of twenty-five cents at the least, shall, on conviction thereof before a Justice of the Peace, ferfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money not exceeding twenty-five dollars as to the justice may seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding three months, as the convicting Justice may think fit; and whosoever, having been twice convicted of any such offence, whether

both or either of such convictions shall have taken place before or after the passing of this Act, afterwards commits any of the offences in this section before mentioned, is guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny.—24–25 Vict., ch. 96, sect. 33, Imp.

By sect. 123, *post* offences punishable by summary conviction are to be prosecuted under 32–33 Vict., ch. 31.

As to punishment for simple larceny, see *ante*, sect. 4, and *post*, sect. 122.

See proviso to sect. 23, *post*.

As to indictment for any subsequent offence, see sect. 26, of the Procedure Act of 1869, which is based on sect. 116 of the English Larceny Act.

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that J. S. on.....one oak sapling of the value of forty cents, the property of J. N., then growing in certain land situate.....unlawfully did steal, take and carry away, against the form of the Statute in such case made and provided; and the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence herein before mentioned, to wit on ....at....the said J. S. was duly convicted before J. P., one of Her said Majesty's Justices of the Peace for the said district of.....for that he, the said J. S., on.....(*as in the first conviction*) against the form of the Statute in such case made and provided; and the said J. S. was thereupon then and there adjudged, for his said offence, to forfeit and pay the sum of twenty dollars, over and above the value of the said tree so stolen as aforesaid, and the further sum of forty cents, being the value of the said tree, and also to pay the further sum of.....for costs; and in default of immediate payment of the said sums to be imprisoned in the common gaol of the said district of

....., for the space of ..... unless the said sums should be sooner paid. (32–33 Vict., ch. 31). And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore mentioned, to wit, on .....at .... the said J. S. was duly convicted before O. P., one of Her said Majesty's Justices of the Peace for the said district of .....for that he.... (*setting out the second conviction in the same manner as the first and proceed thus*). And so, the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. on the day and year first aforesaid, the said oak sapling of the value of forty cents, the property of the said J. N., then growing in the said land situate..... feloniously did steal, take and carry away, against the form of the Statute in such case made and provided.—Archbold, 363; Greaves, on sect. 116 of the Larceny Act, and 37 of the Coin Act; Archbold 959; Reg. vs. Martin, 11 Cox 343, and remarks under sect. 12, of the Coin Act, 32-33 Vict., ch. 18, *ante*, page. 18.

PURCHASING OR RECEIVING STOLEN TREES.

Sect. 23.—If any person receives or purchases any tree or sapling, trees or saplings, or any timber made therefrom, exceeding in value the sum of ten dollars, knowing the same to have been stolen, or unlawfully cut or carried away, such receiver or purchaser shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the principal offender has or has not been convicted, or be or be not amenable to justice, and be liable to the same punishment as the principal offender; provided that nothing in this or in either of the two next preceding sections contained, nor any proceeding, conviction or judgment to be had or taken thereupon,

shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any of the said offences would have had, if this Act had not been passed; nevertheless the conviction of the offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be convicted of either of the offences aforesaid, by any evidence disclosed by him on oath, in consequence of the compulsory process of a Court of law or equity in any action, suit or proceeding, instituted by any party aggrieved.

This clause is not in the English Act. The punishment would be the same as under sect. 21, *ante*, though the offence there is a felony, and here a misdemeanor: but by sect. 122, *post*, a fine may be imposed in lieu of any other punishment.

STEALING FENCES, GATES, ETC., ETC.

Sect. 24.—Whosoever steals or cuts, breaks or throws down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on conviction thereof before a Justice of the Peace, forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty dollars, as to the Justice may seem meet, and whosoever having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding three months as the convicting Justice may think fit.—24-25 Vict., ch. 96, sect. 34, Imp.

See *post*, sect. 123, as to summary convictions under this Act.

POSSESSION OF STOLEN WOOD, ETC., ETC.

Section 25.—If the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, being of the value of twenty-five cents at the least, is found in the possession of any person, or on the premises of any person, with his knowledge, and such person being taken or summoned before a Justice of the Peace, does not satisfy the Justice that he came lawfully by the same, he shall, on conviction by the Justice, forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding ten dollars.—24-25 Vict., ch. 96, sect. 35, Imp.

In Reg. vs. Sunley, Bell, 145, the words "found in possession" under another Statute, were explained; also, in Reg. vs. Sleep, L. & C. 44.

See *post*, sect. 123, as to summary convictions under this Act.

STEALING, ETC., PLANTS, ETC., ETC., IN GARDENS.

Sect. 26.—Whosoever steals, destroys or damages with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory, shall, on conviction thereof before a Justice of the Peace, at the discretion of the Justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the value of the article or articles so stolen or the amount of the injury done, such sum of money, not exceeding twenty dollars,

as to the Justice may seem meet. And whosoever having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the offences in this section before mentioned, is guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny.—24-25 Vict., ch. 96, sect. 36, Imp.

As to summary convictions under this Act, see *post*, s. 123. As to punishment for larceny, see *ante*, s. 4 and *post*, s. 122.

The words *plant* and *vegetable production* do not apply to young fruit trees.—R. vs. Hodges, M. & M. 341. Stealing trees would fall under sections 21 and 22.

Indictment.—The jurors for Our Lady the Queen, upon their oath present, that J. S. on ..... twenty pounds' weight of grapes, the property of J. N., then growing in a certain garden of the said J. N. situate .... unlawfully did steal, take and carry away, against the form of the Statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say that, heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on ..... at ..... the said J. S. was duly convicted before J. P., one of Her Majesty's Justices of the peace for the said district of ..... for that he, the said J. S., on .... (*as in the previous conviction*) against the form of the Statute in such case made and provided, and the said J. S. was thereupon then and there adjudged for the said offence to forfeit and pay the sum of twenty dollars, over and above the amount of the article so stolen as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay the sum of ten shillings for costs, and in default of immediate payment of the said sums, to be imprisoned in .... for the space of ..... unless the said sum should

be sooner paid, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and in the year first aforesaid, the said twenty pounds' weight of grapes, the property of the said J. N., then growing in the said garden of the said J. N. situate .... feloniously did steal, take and carry away, against the form of the Statute in such case made and provided.—Archbold, 367.

As to indictments for a subsequent offence, see *ante* under sect. 22.

STEALING VEGETABLE PRODUCTIONS NOT IN GARDENS.

Sect. 27.—Whosoever steals or destroys or damages with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed, not being a garden, orchard, pleasure ground or nursery ground, shall, on conviction thereof before a Justice of the Peace, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding five dollars, as to the Justice seems meet, and in default of payment thereof together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made, and whosoever, having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term not exceeding three months, as the

convicting Justice thinks fit.—24–25 Vict., ch. 96, sect. 37, Imp.

As to summary convictions, under this Act, see *post*, sect. 123.

Clover has been held to be a cultivated plant, Reg. vs. Brunsby, 3 C. & K. 315; but it was doubted whether grass were so.—Morris vs. Wise, 2 F. & F. 51.

STEALING FROM MINES, MINERS REMOVING ORE, ETC., ETC.

Sect. 28.—Whosoever steals or severs with intent to steal, the ore of any metal, or any quartz, lapis calaminaris, manganese, or mundick, or any piece of gold, silver or any other metal, or any wad, black cawlke or black lead, or any coal or cannel coal, *or any marble, stone or other mineral*, from any mine, bed or vein thereof respectively, is guilty of felony, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years, with or without hard labour, and with or without solitary confinement; provided that no person shall be held guilty of any offence for having, for the purposes of explanation or scientific investigation, taken any specimen, or specimens, of any ore or mineral from any piece of ground unenclosed and not occupied or worked as a mine, quarry or digging.—24–25 Vict., ch. 96, sect. 38, Imp.

The words in *italics* and the proviso are not in the English Act.

Sect. 29.—Whosoever being employed in or about any mine, quarry or digging, takes, removes or conceals any ore of any metal, or any quartz, lapis calaminaris, manganese, mundick, *or any piece of gold, silver or any other metal*, or any mineral found or being in such mine, quarry or digging with intent to defraud any proprietor

of or any adventurer in the same, or any workman or miner employed therein, is guilty of felony, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 39, Imp.

The words in *italics* are not in the English Act.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

As to recognizances and sureties for keeping the peace in felonies under this Act, see *post*, sect. 122.

R. vs. Webb, 1 Mood. 421; Reg. vs. Holloway, 1 Den. 370; Reg. vs. Poole, Dears. & B. 345, would now fall under sect. 29. It must be alleged and proved that the ore was stolen from the mine.—Reg. vs. Trevenner, 2 M. & Rob. 476.

Indictment under sect. 28.—..... twenty pounds weight of copper ore, the property of J. N., from a certain mine of copper ore of the said J. N., situate.... feloniously did steal, take and carry away, against the form ..... Archbold, 360.

Indictment under sect. 29.—..... at ..... being then and there employed in a certain copper mine there situate, called .... the property of .... feloniously did take (*or remove or conceal*) fifty pounds weight of copper ore found in the said mine with intent thereby then to defraud the said ..... 3 Burn's Just. 313.

See *post*, sect. 35, as to possession of gold or silver being *primâ facie* evidence of larceny of it, in certain cases.

PENALTY FOR CONCEALING ROYALTY, SELLING OR PURCHASING GOLD, ETC., ETC.,

Sect. 30.—Whosoever being the holder of any lease or

license issued under the provisions of any Act relating to gold or silver mining, or by any private parties owning land supposed to contain any gold or silver, by any fraudulent device or contrivance, defrauds or attempts to defraud Her Majesty or any private party of any gold, silver or money payable or reserved by such lease, or with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sect. 31.—Whosoever, not being the owner or agent of mining claims then being worked, and not being thereunto authorized, in writing, by the commissioner or deputy commissioner of mines, in any district, or by the officer for the division in any gold mining division, or by any inspector or other proper officer in that behalf, named in any Act relating to mines in force in any Province of Canada, sells or purchases, except to or from such owner or authorized person, any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district, or mining district, or gold mining division, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sect. 32.—Whosoever purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver of the value of one dollar or upwards, except from such owner or authorized person as in the last preceding section mentioned, and does not

at the same time execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same in the office of the nearest commissioner or deputy commissioner of mines of the district, or officer for the division in the gold mining division, or of some inspector or other proper officer in that behalf named in any Act in force in the Province in which such purchase is made, within twenty days next after the date of such purchase, is guilty of a misdemeanor, and shall be liable to any penalty not exceeding in amount double the value of the gold or silver purchased, and to be imprisoned in any gaol or place of confinement, other than the Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement.

These three sections are not in the English Act.

See *post*, sect. 122, for fine and sureties in misdemeanors under this Act.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Sect. 36, *post*, applies to indictments under sections 31 and 32.

SEARCH WARRANT FOR GOLD, ETC., ETC. APPEAL, ETC., ETC.

Sect 33.—On complaint in writing made to any Justice of the Peace of the county, district or place, by any person interested in any mining claim, that mined gold or gold bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such Justice, as in the case of stolen goods, including any number of places or

persons named in such complaint, and if, upon search, any such gold or gold-bearing quartz, or silver or silver ore be found to be unlawfully deposited or held, the Justice shall make such order for the restoration thereof, to the lawful owner, as he considers right.

Sect. 34.—The decision of such Justice shall be subject to appeal as in ordinary cases, on summary conviction; but before such appeal shall be allowed, the appellant shall enter into a recognizance in the manner by law provided in cases of appeal from summary conviction, to the value of the gold or other property in question that he will prosecute his appeal at the next sittings of any Court having jurisdiction in that behalf, and will pay the costs of the appeal in case of a decision against him, and in case of the defendant appealing that he will pay such fine as the Court may impose, with costs.

These two sections are not in the English Act.

In a search warrant, the particular thing or things intended to be searched for should be described as accurately as the nature of the case will allow.—Greaves, Cons. Acts 399.

POSSESSION OF GOLD, ETC., ETC., IN CERTAIN CASES, EVIDENCE OF LARCENY,—FORM OF INDICTMENT.

Sect. 35.—When any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, is found in the possession of any operative, workman or labourer, actively engaged in or on any mine, contrary to the provisions of any law in that behalf, such possession shall be *primâ facie* evidence that the same has been stolen by him.

Sect. 36.—In any indictment brought under any of the five next preceding sections, it shall be sufficient to lay the property in the Queen, or in any person

or persons, or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial, and if no owner be proved the indictment may be amended by laying the property in the Queen.

These clauses are not in the English Act.

Sect. 36 can only apply to indictments under sections 31 and 32; there are no indictments under the three next preceding sections.

FRAUD ON PARTNERS.

Sect. 37.—Whosoever, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any claim or in any share or interest in any claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim, is guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny. (*Not in the English Act.*

See *ante*, sect. 4, as to punishment for simple larceny, and *post*, sects. 110 and 122.

LARCENY BY PARTNERS.

Sect. 38.—Whosoever, being a member of any co-partnership 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 co-partnership, or one of such beneficial owners.—31–32 Vict., ch. 116, sect. 1, Imp.

The English clause reads thus: "If any person, being

member of any co-partnership, or being one of two or nore beneficial owners of any money, goods or effects, ills, notes, securities, or other property, shall steal or mbezzle any such money, goods or effects, bills, notes, ecurities or other property, of or belonging to any such o-partnership, or to such joint beneficial owners, every ich person shall be liable to be dealt with, tried, convict- l and punished for the same as if such person had not een or was not a member of such co-partnership, or ne of such beneficial owners."

A partner stole goods belonging to the firm, and ren- ered himself liable to be dealt with as a felon under the 1–32 Vict., ch. 116, sect. 1, (*the present clause*), and sold ie same to the prisoner who knew of their having been olen: *held*, that the prisoner could not be convicted on i indictment for feloniously receiving, under the 24-25 ict., ch. 96, sect. 91, (*sect.* 100 *of our Larceny Act*), but ight have been convicted as an accessory after the fact ider the 24–25 Vict., ch. 94, sect. 3, (31 *Vict., ch.* 72 *of r Statutes*) on an indictment properly framed.—Reg. . Smith, 11 Cox, 511.

An indictment framed upon the 31–32 Vict., ch. 116, ct. 1, alleged that B. was a member of a co-partnership nsisting of B. and L., and that B., then being a member the same, eleven bags of cotton waste, the property of e said co-partnership, feloniously did steal, take and rry away: *held*, that the indictment was not bad for roducing the word "feloniously."—Reg. vs. Butter- orth, 12 Cox, 132. In this case, Cottingham, for the isoner, said: "The indictment is bad because it does t follow the words of the Statute. That enactment eates a new offence, one which did not exist at com- on law; it does not say that the offence shall be a ony, and the indictment is bad for using the word

"feloniously." There are offences of stealing, which are not felonies, such as dog stealing." Lush, J., said: "If the offence created by this section is not a felony, what is it?" And the Court, without calling upon the counsel for the prosecution, affirmed the conviction, holding the objection not arguable.

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that on ..... at ..... Thomas Butterworth, of ..... was a member of a certain co-partnership, to wit, a certain co-partnership carrying on the business of and trading as waste dealer, and which said co-partnership was constituted and consisted of the said Thomas Butterworth and of John Joseph Lee, trading as aforesaid; and thereupon, the said Thomas Butterworth, at ..... aforesaid, during the continuance of the said co-partnership, and then being a member of the same as aforesaid, to wit, on the day and year aforesaid, eleven bags of cotton waste of the property of the said co-partnership feloniously did steal, take and carry away, against the form of the Statute in such case made and provided, and against the peace of Our said Lady the Queen, her crown and dignity.—Reg. vs. Butterworth, *supra*.

See Reg. vs. Ball, 12 Cox, 96, for an indictment against a partner for embezzlement of partnership property; also Reg. vs. Blackburn, 11 Cox, 157; in these two cases the defendants were indicted under this section.

The importance of the decision, given by Mr. Justice Ramsay, in April last, upon the interpretation of this clause (38 of the Larceny Act) is a sufficient excuse for inserting it here, though Canadian cases are not generally referred to in these notes:—

Court of Queen's Bench, Crown side. Montreal, 13th April, 1874. Regina vs. John Lowenbruck. Ramsay, J:

"The prisoner is indicted for stealing money, the property of the partnership of which he is a partner, under sect. 38 of the Larceny Act of 1869. If it was the intention of the Legislature to overthrow the whole order of ideas as to the subject of larceny and embezzlement, they should have proceeded with a little more care than they have done in this section. This would have a double good effect. First the reducing the thing proposed to precise words would have the effect of making the proposition clear to the mind of the proposer; and secondly, it would warn the public what it is necessary to avoid. The Act really says that if the joint owner steals or embezzles any money or other property of which he is joint owner "he shall be liable to be dealt with, tried, convicted and punished, as if he had not been or were not a member of such co-partnership, or one of such beneficial owners." But, he cannot steal or embezzle it; therefore, the indictment for stealing or embezzling must fail. This is sufficient for me to say to determine the present case; but there is another category. If any such joint owner unlawfully converts the same, he shall be liable to be dealt with, tried, convicted and punished, as if he had not been or were not a member of such co-partnership, or one of such beneficial owners. At worst, he is only in the position of one unlawfully converting. How far is that indictable? Section 99, it is said, will meet the difficulty; but, on looking closely at that section, it will be seen that its object is to meet the case of larceny being laid in the indictment, and the obtention by false pretences, only, being proved. The indictment could not have been laid, or the case for the Crown been more satisfactorily proved, but the prosecution must fail, because the section of the Statute could not be applied. To have had the effect

sought to be given to it, the Statute should have stated that the unlawful conversion of the partnership property should be deemed to be larceny. But if the Act had been drawn in that form, it can hardly be supposed it would have passed. Such a law would destroy any tangible distinction between guilt and innocence, for partners are every hour of the day found unlawfully converting the partnership property, if their Acts were strictly examined. The simple unlawful conversion of the property of another is not indictable, and it should not be made indictable."

On the first category, provided for by this section, the English and Canadian Statutes are in the same terms, and since 1868, that the Statute is in operation in England, it has been, there, thought sufficiently to say that a partner who *steals* partnership property is guilty of larceny. Of course the taking must be *felonious*, and accompanied by the necessary circumstances, and have the ingredients required to constitute it a larceny. See the English cases, cited *ante*. And a partner, at common law, may be guilty of larceny of the partnership's property: so may a man be guilty of larceny of his own goods, Regina vs. Webster, L. & C. 77; Regina vs. Burgess, L. & C. 299; Regina vs. Moody, L. & C. 173: of course, that is when the property is stolen from another person in whose custody it is, and who is responsible for it. See also, Bovill's (C. J.) opinion in Reg. vs. Diprose, 11 Cox, 185.

As to the second category provided for by this section the words of the Statute do not seem to mean that all unlawful conversions by a partner of partnership property will be indictable, but only that, when the converting would be a misdemeanor in any other case, the fact that the property is partnership property, will not alter

the nature of the offence: extending in fact to misdemeanors, the English Act, which applies only to felonies within this kind of offences. A. and B. are in partnership, under the name of A. & Co.: there are there, three persons in law, 1, A; 2, B., and 3, the firm of A. & Co. If A. takes ten dollars from the firm of A. & Co., under such circumstances that the taking would be a larceny if A. were not a member of the firm, the fact that he is such a member of the firm, and consequently joint owner of these ten dollars, will not alter the criminal nature of the taking, and A. will be guilty of larceny. Is not that what the Statute means? Is not that what it says?

ROBBERY AND STEALING FROM THE PERSON.

Sect. 39.—Whosoever robs any person, or steals any chattel, money or valuable security from the person of another, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 40, Imp.

Sect. 40.—If upon the trial of any person upon an indictment for robbery it appears to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob, (*next clause*)

and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.—24-25 Vict., ch. 96, sect. 41, Imp.

Sect. 41.—Whosoever assaults any person with intent to rob is guilty of felony, and shall (save and except in cases where a greater punishment is provided by this Act) be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 42, Imp.

As to requiring the offender to enter into recognizances and give sureties for the peace, see *post*, sect. 122.—As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment for stealing from the person under sect. 39—..... one watch, one pocket-book and one pocket handkerchief of the goods and chattels of J. N., of ..... from the person of the said J. N. feloniously did steal, take, and carry away, against the form ..... Archbold, 419.

The words "from the person of the said J. N." constitute the characteristic of this offence, as distinguished from simple larceny: the absence of force, violence or fear distinguishes it from robbery.

The indictment need not negative the force or fear necessary to constitute robbery; and though it should appear upon the evidence that there was such force or fear, the punishment for stealing from the person may be inflicted.—R. vs. Robinson, R. & R. 321; R. vs. Pearce, R. & R. 174.

To constitute a stealing from the person, the thing

taken must be completely removed from the person. Where it appeared that the prosecutor's pocket book was in the inside front pocket of his coat, and the prosecutor felt a hand between his coat and waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and on doing so brushed the prisoner's hand; the book was just lifted out of the pocket, an inch above the top of the pocket, but returned immediately into the pocket: it was held by a majority of the judges that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor, but the judges all agreed that the simple larceny was complete. On ten judges, four were of opinion that the stealing from the person was complete.—R. vs. Thompson, 1 Mood. 78. Of course the prisoner could now, under these circumstances, be found guilty of the attempt to commit the offence, under sect. 49, of the Procedure Act of 1869.

Where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized, the watch remained there suspended, this was held a sufficient severance. The watch was no doubt temporarily, though but for a moment, in the possession of the prisoner.—Reg. vs. Simpson, Dears. 621. In this case, Jervis, C. J., said he thought the minority of the judges in Thompson's case, *supra*, were right.

Where a man went to bed with a prostitute, leaving

his watch in his hat, on the table, and the woman stole it whilst he was asleep, it was held not to be stealing from the person, but stealing in the dwelling-house.—R. vs. Hamilton, 8 C. & P. 49.

Upon the trial of any indictment for stealing from the person, if no asportation be proved, the jury may convict the prisoner of an attempt to commit that offence, under sect. 49, of the Procedure Act of 1869.

In Reg. vs. Collins, Leigh & Cave 471, it was held that there can only be an attempt to commit an act, where there is such a beginning as if uninterrupted would end in the completion of the act, and that if a person puts his hand into a pocket with intent to steal, he cannot be found guilty of an attempt to steal, if there was nothing in the pocket. But, Bishop, Cr. Law, Vol. 1, 741, censures this decision. By sects. 59 and 60, of 32–33 Vict., ch. 20, attempting to procure abortion is a crime, *whether the woman be with child or not.* And rightly so, it is the criminal intent, the *mens rea*, which deserves punishment. But why not so for the other case? What is the difference between putting the hand into the pocket and not finding there anything to be removed, and penetrating to the womb, and there finding no embryo or fœtus, in the first case to steal whatever may be in the pocket, in the second case to destroy whatever there may be in the womb.—Bishop, *loc. cit.*

Indictment for robbery under sect. 39.—.... in and upon one J. N. feloniously did make an assault, and him, the said J. N., in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, from the person and against the will of the said J. N. then feloniously and violently did steal, take and carry away, against the form..... Archbold, 419.

The indictment may charge the defendant with having assaulted several persons, and stolen different sums from such, if the whole was one transaction.—Archbold, *loc. cit.*

The crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property *from the person or whilst it is under the protection of the person by means either of violence* "or" *putting in* fear.—4th Rep. Cr. L. Commrs. LXVII.

Robbery is larceny committed by violence from the person of one put in fear.—Bishop, 2 Cr. Law. 1156.

This definition differs in the form of expression, though not in substance, from what has been given by preceding authors.

To constitute this offence, there must be, 1, a larceny embracing the same elements as a simple larceny. 2. Violence, but it need only be slight, for anything which calls out resistance is sufficient, or what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations of fear must be of a physical nature, (a threatened charge of a crime falling now under sect. 45.) And 3, the taking must be from what is technically called the "person", the meaning of which expression is, not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence.—Bishop, Stat. crimes, 517.

1. *Larceny.*—Robbery is a compound larceny, that is it is larceny aggravated by particular circumstances. Thus, the indictment for robbery must contain the description of the property stolen as in an indictment for larceny: the ownership must be in the same way set out, and so of the rest. Then if the aggravating matter is not proved at the trial, the defendant may be convicted of the

simple larceny. If a statute makes a larceny to steal a thing of which there could be no larceny at the common law, then it becomes, by construction of law, a robbery, to take this thing forcibly and feloniously from the person of one put in fear.. Bishop, 2 Cr. Law, 1158, 1159, 1160. An actual taking either by force or upon delivery must be proved, that is, it must appear that the robber actually got *possession* of the goods. Therefore if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up, this would not be robbery, because the purse was never in the possession of the robber.—1 Hale, P. C. 553.

But it is immaterial whether the taking were by force or upon delivery, and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretence.—Archbold, 417.

A carrying away must also be proved as in other cases of larceny. And therefore where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete.—R. vs. Farrell, 1 Leach, 362; 2 East P. C. 557.

But a momentary possession though lost again in the same instant, is sufficient. James Lapier was convicted of robbing a lady and taking from her person a diamond earring. The fact was that as the lady was coming out of the opera house she felt the prisoner snatch at her earring and tear it from her ear, which bled, and she was much hurt, but the earring fell into her hair, where it

was found after she returned home. The judges were all of opinion that the earring being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient to constitute robbery, although he could not retain it, but probably lost it again the same instant. —2 East P. C. 557.

If the thief once takes possession of the thing, the offence is complete, though he afterwards return it: as if a robber finding little in a purse which he had taken from the owner, restored it to him again, or let it fall in struggling, and never take it up again, having once had possession of it.—2 East, loc. cit.; 1 Hale, 533; R. vs. Peat, 1 Leach, 228; Archbold 417.

The taking must have been feloniously done, that is to say *animo furandi*, as in larceny, and against the will of the party robbed, that is, that they 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.—Archbold, 417.

Where on an indictment for robbery, it appeared that the prosecutor owed the prisoner money, and had promised to pay him five pounds, and the prisoner violently assaulted the prosecutor, and so forced him then and there to pay him his debt, Erle, C. J., said that it was no robbery, there being no felonious intent.—Reg. vs. Hemmings, 4 F. & F. 50.

2. *Violence.*—The prosecutor must either prove that he was actually in bodily fear from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; and in this latter case, if the circumstances thus proved be such as

are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore if a man knock another down, and steal from him his property whilst he is insensible on the ground, that is robbery. Or suppose a man makes a manful resistance, but is overpowered and his property taken from him by the mere dint of superior strength, this is a robbery.—Foster, 128; R. vs. Davies, 2 East P. C. 709.

On Mrs. Jeffries coming out of a ball, at St. James' Palace, where she had been as one of the maids of honor, the prisoner snatched a diamond pin from her headdress with such force as to remove it with part of the hair from the place in which it was fixed, and ran away with it: held, to be a robbery.—R .vs. Moore, 1 Leach, 335. See *supra*, Lapier's case, 1 Leach, 320.

Where the defendant laid hold of the seals and chain of the prosecutor's watch and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch; this was holden to be robbery.—R. vs. Mason, Rus. & Ry. 419.—But merely snatching property from a person unawares, and running away with it, will not be robbery,—R. vs. Steward, 2 East P. C. 702; R. vs. Horner, Id. 703; R. vs. Baker, 1 Leach, 290; R. vs. Robins, do, do; R. vs. Macauly, 1 Leach, 287; Archbold, 414,—because fear cannot in fact be presumed in such a case.—When the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery,

ıor did the force used afterwards in the scuffle; for the orce necessary to constitute robbery must be either mmediately before or at the time of the larceny, and not fter it.—R. vs. Gnosil, 1 C. & P. 304.—The rule, there-ore, appears to be well established, that no sudden aking or snatching of property unawares from a person s sufficient to constitute robbery, unless some injury be one to the person, or there be a previous struggle for the ossession of the property, or some force used to obtain .—Archbold, loc cit.; 2 Russell, 104.

If a man take another's child, and threaten to destroy im, unless the other give him money, this is robbery. -R. vs. Reane, 2 East P. C. 735; R. vs. Donnolly, Id. 18. So where the defendant, at the head of a mob, ame to the prosecutor's house and demanded money, reatening to destroy the house unless the money were iven, the prosecutor therefore gave him five shillings, ut he insisted on more, and the prosecutor, being terri-ed, gave him five shillings more: the defendant and the ob then took bread, cheese and cider from the prosecu-or's house, without his permission, and departed, this was olden to be a robbery as well of the money as of the read, cheese and cider.—R. vs. Simons, 2 East P. C. 31; R. vs. Brown, Id.—So where during some riots at irmingham, the defendant threatened the prosecutor at unless he would give a certain sum of money, he ould return with the mob and destroy his house, and e prosecutor, under the impression of this threat, gave m the money, this was holden by the judges to be rob-ery.—R. vs. Astly, 2 East P. C. 729.—So where, during e riots of 1780, a mob, headed by the defendant, came to e prosecutor's house, and demanded half a crown, which e prosecutor, from terror of the mob, gave, this was olden to be robbery, although no threats were uttered.

—R. vs. Taplin, 2 East P.C. 712.—Upon an indictment for robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoner who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and Parke, J., after consulting Vaughan and Anderson, J. J., admitted evidence of the *acts of the* mob at other places before and after on the same day, to show that the advice of the prisoner was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor.—R. vs. Winkworth, 4 C. & P. 444; Archbold, 414.—Where the prosecutrix was threatened by some person at a mock auction to be sent to prison, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling, she must go with him, and she gave him a shilling accordingly, not from any apprehension of personal danger but from a fear of being taken to prison, the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery: it was nothing more than a simple duress, or a conspiracy to defraud.—R. vs. Knewland, 2 Leach, 721; 2 Russell, 118. This case is now provided for by sect. 44, *post*.—In Reg. vs. MacGrath, 11 Cox, 347, a woman went into a mock auction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25 shillings. A man standing between the woman and the door said to the prisoner that she had bid 26 shillings for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it, before she would be allowed to go out, and she was pre-

vented from going out. She then paid 26 shillings to the prisoner, because she was afraid, and left with the cloth: the prisoner was indicted for larceny, and having been found guilty, the conviction was affirmed: but Martin, B., was of opinion that the facts proved also a robbery.—Where the defendant with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire: the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery.—R. vs. Gascoigne, 2 East P. C. 709.—Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand from him, gave him some money to desist, which he put into his pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery, for the woman from violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money which it is clear she would not have given voluntarily, and the prisoner, by taking it derived that advantage to himself from his felonious conduct, though his original intent was to commit a rape.—R. vs. Blackham, 2 East P. C. 711.

And it is of no importance under what pretence the robber obtains the money, if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the Court can presume it. As for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, this

is a felonious robbery.—4 Blackst. Comm. 243.—Thieves come to rob A., and finding little about him enforce him by menace of death to swear to bring them a greater sum, which he does accordingly; this is robbery: not for the reason assigned by Hawkins, because the money was delivered while the party thought himself bound in conscience to give it by virtue of the oath, which in his fear he was compelled to take; which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath. But the true reason is given by Lord Hale and others: because the fear of that menace still continued upon him at the time he delivered the money.—2 East P. C. 714.—Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit: after some altercation, he went with the driver, under pretence of going before a magistrate and during their absence the mob pillaged the cart; this was holden to be a robbery.—Merrimam vs. Hundred of Chippenham, 2 East P. C. 709. On this case, it is well observed that the opinion that it amounted to a robbery must have been grounded upon the consideration that the first seizure of the cart and goods by the defendant, being by violence and while the owner was present, constituted the offence of a robbery.—2 Russell, 111.

So where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them, this was holden to be a robbery.—Simon's case and Spencer's case, 2 East P. C. 712.—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.—R. vs. Harman, 1 Hale, 534, and R. vs. Gnosil, *ante*. Archbold, 416.

"It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is no where defined in any of the acknowledged treatises upon the subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of* the party, and he leaves the circumstance of fear out of the question; or that at any rate, when the fact is attended with circumstances of evidence or terror, the law, *in odium spoliatoris*, will presume fear if it be necessary, where there appear to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staunford defines robbery to be a felonious taking of anything from the person or in the presence of another *openly and against his will;* and Bracton also rests it upon the latter circumstance. I have the authority of the Judges, as mentioned by Willes, J., in delivering their opinion in Donnelly's case, in 1779, to justify me in not attempting to draw the exact line in this case; but thus much, I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury, and on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an

actual taking by violence, or assault upon the person."—2 East P. C. 713.

It has been seen, *ante*, R. vs. Astley, 2 East P. C. 729, that a threat to destroy the prosecutor's house, is deemed sufficient by law to constitute robbery, if money is obtained by the prisoner in consequence of it. Bishop, 2 Cr. L. 1171, says that this is no exception to the law, which requires violence or fear of bodily injury, because one without a house is exposed to the inclement elements: so that to deprive a man of his house, is equivalent to inflicting personal injury upon him. In general terms, the person robbed must be, in legal phrase, put in fear. But if force is used, there need be no other fear than the law will imply from it: there need be no fear in fact. The proposition is sometimes stated to be, that there must be either force or fear, while there need not be both. The true distinction is doubtless that, where there is no actual force, there must be actual fear, but where there is actual force, the fear is conclusively inferred by the law. And within this distinction, assaults, where there is no actual battery, are probably to be deemed actual force. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear.—Bishop, 2 Cr. Law, 1174. Thus to constitute a robbery from the person, if there is no violence, actual or constructive, the party beset must give up his money through fear; and when his fears are not excited, but his secret motive for yielding is to prosecute the offender, this crime is not committed. When, however, there is an assault, such as would furnish a reasonable ground for fear, the offence of robbery is held to be complete, though the person assaulted parts with his money for the purpose of appre-

hending and bringing to punishment the wrong doer.—Bishop, 1 Cr. Law, 438.

From the person.—The goods must be proved to have been taken *from the person* of the prosecutor. The legal meaning of the word *person*, however, is not here, that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection, that will suffice. Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the personal presence extends. If a thief, says Lord Hale, (1 Vol. 533) come into the presence of A., and with violence and putting A. in fear, drives away his horse, cattle or sheep, he commits robbery. But if the taking be not either directly from his person, or in his presence, it is no robbery.—Bishop, 2 Cr. Law, 1178; Blackst. Comment, 4 Vol. 242. In robbery, says East, 2 P. C. 707, it is sufficient if the property be taken in the presence of the owner: it need not be taken immediately from his person, so that there be violence to his person, or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush. Or, adds Hawkins, rob my servant of my money before my face, *after having first assaulted me.*—1 Hawkins, 214.—Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoner assaulted the prosecutor, upon which his brother laid down his bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under

these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence: the bundle in this case was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it.—R. vs. Fallows, 2 Russell, 107. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as it was the violence of the prisoners that made him put it down and it was taken in his presence. In R. vs. Wright, Styles, 156, it was holden that if a man's servant be robbed of his master's goods in the sight of his master, this is robbery of the master. —Note by Greaves.

Where on an indictment for robbery and stealing from the person, it was proved that the prosecutor who was paralyzed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room: it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say whether the cash-box was under the protection of the prosecutor at the time it was stolen.—8 Cox, 235.

Indictment.—The offence of robbery being felony, it is necessary for the indictment to charge the act to have been committed "feloniously." There is some reason to suppose that, if this word "feloniously" is prefixed to the first material allegation, its force will extend

through and qualify the rest.—Reg. vs. Nicholson, 1 East 346. But, however this may be, if the violence which enters into the offence, as one of its ingredients, is the first thing stated in the indictment, and the word "feloniously" is not employed to qualify it, but is inserted in a subsequent part of the indictment, the whole will be insufficient. Thus, if the allegation is that the defendant "in the king's highway, therein and upon one.....did make an assault, and him the said.....in corporeal fear and danger of his life, then and there feloniously did put, and one metal watch of the property of the said..... then and there feloniously did steal, take and carry away" .....it will be inadequate, because it does not charge the assault to have been feloniously made.—R. vs. Pelfryman and Randall, 2 Leach, 563; Bishop, 2 Cr. Proced. 1003. The taking must be charged to be with violence from the person, and against the will of the party; but it does not appear certain that the indictment should also charge that he was put in fear, though this is usual, and therefore, safest to be done.

But in the conference on Donnolly's case, where the subject was much considered, it was observed by Eyre, B., that the more ancient precedents did not state the putting in fear, and that though others stated the putting in corporeal fear, yet the putting in fear of life was of modern introduction. Other judges considered that the gist of the offence was the taking by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appears to have been committed with violence against the will of the party—2 East. P. C. 783.

The ownership of the property must be alleged the same as in an indictment for larceny. The value of the articles stolen need not be stated. In Reg. vs. Bingley, 5 C. & P. 602, the prisoner robbed the prosecutor of a piece of paper, containing a memorandum of money that a person owed him, and it was held sufficient to constitute robbery.

By sect. 40, if the robbery be not proved, the jury may return a verdict of an assault with intent to rob, if the evidence warrants it, and then the defendant is punishable as under sect. 41. By sect. 51 of the Procedure Act of 1869, if the intent be not proved, a verdict of common assault may be given. Reg. vs. Archer, 2 Mood. 283; Reg. vs. Hagan, 8 C. & P. 174; Reg. vs. Ellis, 8 C. & P. 654; Reg. vs. Nicholls, 8 C. & P. 269. Reg. vs. Woodhall, 12 Cox, 240, is not to be followed here, as the enactment to the same effect is, now, in England, repealed.

ROBBERY, WITH AGGRAVATED CIRCUMSTANCES.

Sect. 42.—Whosoever being armed with any offensive weapon or instrument, robs or assaults with intent to rob any person, or together with one or more other person or persons, robs or assaults with intent to rob any person, or robs any person, and at the time of or immediately before or immediately after such robbery, wounds, beats, strikes, or uses any other personal violence to any person, is guilty of felony; and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 43, Imp.

As to recognizances and sureties for keeping the peace in felonies under this Act, see *post*, sect. 122. As to

solitary confinement, see sect. 94 of the Procedure Act of 1869.

This clause provides for five offences: 1. Being armed with any offensive weapon or instrument, robbing any person.

2. Being so armed, assaulting any person with intent to rob this person.

3. Together with one or more person or persons, robbing any other person.

4. Together with one or more person or persons, assaulting any person with intent to rob this person.

5. Robbing any person, and at the time of or immediately before, or immediately after such robbery, wounding, beating, striking, or using any other personal violence to *any* person.

1. *Indictment for a robbery by a person armed.*—That J. S. on.... at .... being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one D. feloniously did make an assault, and him the said D. in bodily fear and danger of his life then feloniously did put, and, a sum of money, to wit, the sum of ten pounds, of the moneys, of the said D. then feloniously and violently did steal, take and carry away against....

2. *Indictment for an assault by a person armed with intent to commit robbery.*—That J. S. on ..... at ..... being then armed with a certain offensive weapon and instrument, called a bludgeon, in and upon one D. feloniously did make an assault, with intent the moneys, goods and chattels of the said D. from the person and against the will of him the said D., then feloniously and violently to steal, take and carry away, against the form....

3. *Indictment for robbery by two or more persons in company.*— That A. B. and D. H. together, in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there together feloniously did put, and the moneys of the said J. N. to the amount of .... from the person and against the will of the said J. N., then feloniously and violently together did steal, take and carry away, against the form..... (If one only of them be apprehended, it will charge him by name *together with a certain other person, or certain other persons, to the jurors aforesaid unknown*) —Archbold, 418; 2 Russell, 142.

4. *Indictment for, together with one or more person, or persons, assaulting with intent to rob.*—Can be drawn on forms 2 and 3.

5. *Robbery, accompanied by wounding, etc., etc.*—That J N. at .... on .... in and upon one A. M. feloniously did make an assault, and him the said A. M. in bodily fear and danger of his life then feloniously did put, and the moneys of the said A. M. to the amount of ten pounds, and one gold watch, of the goods and chattels of the said A. M. from the person and against the will of the said A. M. then feloniously and violently did steal, take and carry away; and that the said J. N. immediately before he so robbed the said A. M. as aforesaid, the said A. M. feloniously did wound, against .... It will be immaterial, in any of these indictments, if the place where the robbery was committed be stated incorrectly.—Archbold, 412.

The observation *ante*, applicable to robbery generally, will apply to these offences.

Under indictment number 1, the defendant may be convicted of the robbery only, or of an assault with intent to rob. The same, under sections number 3 and 5.—And wherever a robbery with aggravated circumstances,

that is to say, either by a person armed, or by several persons together, or accompanied with wounding is charged in the indictment, the jury may convict of an assault with intent to rob, attended with the like aggravation, the assault following the nature of the robbery.—Reg. vs. Mitchell, 2 Den. 468, and remarks upon it, in Dears. C. C. 19.

By sect. 51 of the Procedure Act of 1869, a verdict of common assault may be returned, if the evidence warrants it. And by sect. 49, if the offence has not been completed, a verdict of guilty of the attempt to commit the offence charged may be given, if the evidence warrants it.

Upon an indictment for robbery charging a wounding, the jury may under the 32–33 Vict., ch. 20, s. 19, *an Act respecting offences against the person*, see *ante*, p. 249, convict of unlawfully wounding and thereupon the prisoner is liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or in any other gaol for any term less than two years.—2 Russell, 144.

Letters demanding money with menaces.

Sect. 43.—Whosoever sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 44, Imp.

As to requiring recognizances and sureties for keeping the peace, in felonies under this Act, see *post*, s. 122. As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

An indictment on this clause should always contain a count for uttering without stating the person to whom the letter or writing is uttered.—Greaves, Cons. Acts, 135. As to the meaning of the words "property," "valuable security" see *ante*, sect. 1.

Indictment for sending a letter, demanding money with menaces.———The Jurors for Our Lady the Queen, upon their oath present, that J. S. on.....feloniously did send to one J. N. a certain letter, directed to the said J. N. by the name and description of Mr. J. N. of.....demanding money from the said J. N. with menaces, and without reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say, (*here set out the letter verbatim*) against the form..... .....And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. on the day and in the year aforesaid, feloniously did utter a certain writing demanding money from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing; and which said writing is as follows, that is to say (*here set out the writing verbatim,*) against the form....Archbold, 422.

See remarks under sect. 15, ch. 20, 32–33 Vict., on clause relating to letters threatening to murder, of the *Act respecting offences against the person.*

Where the letter contained a request only, but intimated, that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing

the prosecutor of murder, this was holden to amount to a demand.—R. vs. Robinson, 2 Leach, 749. The demand must be with menaces, and without any reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is, therefore, immaterial in point of law, whether the accusation be true or not.—R. vs. Hamilton, 1 C. & K. 212; R. vs. Gardner, 1 C. & P. 479.—A letter written to a banker, stating that it was intended by a cracksman to burn his books and cause his bank to stop, and that if 250 pounds were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there, it would happen, was held to be a letter demanding money with menaces.—R. vs. Smith, 1 Den. 510. The judges seemed to think that this decision did not interfere with R. vs. Pickford, 4 C. & P. 227. Nevertheless, it is said, in Archbold 424, that it is difficult to admit that. In R. vs. Pickford, the injury threatened was to be done by a third person. Now, sect. 49 would cover that case, see *post*. It is immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender, or by any other person.

DEMANDING MONEY WITH MENACES OR BY FORCE WITH INTENT TO STEAL.

Sect. 44—Whosoever with menaces or by force demands any property, chattel, money, valuable security or other valuable thing, of any person with intent to steal the same is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for the term of two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 45, Imp.

See observations under last preceding section.

Indictment.—. . . .feloniously with menaces did demand of J. N. the money of him the said J. N. with intent the said money from the said J. N. feloniously to steal, take and carry away, against. . . .Archbold, 421.

The prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment "by menaces or force" with intent to steal it. It is not necessary to prove an express demand in words: the Statute says "whosoever with menaces or by force demands," and menaces are of two kinds, by words or by gestures: so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. —R. vs. Jackson, 1 Leach, 269.—If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the Statute; but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise.—R. vs. Edwards, 6 C. & P. 515.

The intent to steal must of course be presumed from circumstances: it is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the demand, the expression or gestures of the prisoner, when he made it, and the like.—Archbold, 422.

In order to bring a case within this section, the demand, if successful, must amount to stealing, and to constitute a menace within this 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 on the prosecutor: and in this case, the Judge having directed the jury as a matter of law, that the conduct of the prisoner constituted a menace within the statute, the conviction must be quashed.—R. vs. Walton, L. & Cave, 288.

In Reg. vs. Robinson, L. & Cave, 483, 10 Cox, 9, it was holden that a threat by a policeman to imprison a man upon a fictitious charge is a menace within this section, and though the money had in fact been obtained and the prisoner could, in consequence, also have been indicted for stealing the money, yet the conviction, under the present section, was right. On the ruling in Reg. vs. Walton, *suprà*, Greaves remarks: "This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it necessary that the menaces should be such that if property were obtained by them, the offence would be larceny. Now the words of the clause warrant no such construction."

The words are "Whosover shall by menaces or by force, demand any property with intent to steal the same." (*With menaces* not *by* menaces): any menaces or any force therefore, clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that on an indictment for an assault with intent to rob or for wounding with intent to murder, it was necessary to prove such an assault in the one case, or such wounding in the other, as would be sufficient to effectuate the

intent, and yet it has never been doubted that any assault, however slight, or any wound however trivial, was sufficient, provided the intent were proved. In truth, the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative, for where the menaces have not obtained the money, it is plain the jury will be very reluctant to find that they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner: and it is quite beside that to consider what the effect on the prosecutor might be.—3 Russell 203, note by Greaves.

LETTERS THREATENING TO ACCUSE OF A CRIME, WITH INTENT TO EXTORT &c., &c., &c.

Sect. 45.—Whosoever sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse or cause to be accused any other person of any crime punishable by law with death or imprisonment in the Penitentiary for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security or other valuable thing from any person, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every

attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat, offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act, *and every species of parting with any such letter to the end that it may come, or whereby it comes into the hands of the person for whom it is intended shall be deemed a sending of such letter.*—24–25 Vict., ch. 96, sect. 46, Imp.

The words in *italics* are not in the English Act: they are superfluous: the words "directly or indirectly causes to be received" at the beginning of the clause have been held to mean all what is intended by these additional words. See remarks under sect. 15, of ch. 20, 32–33 Vict. *Act concerning offences against the person.*

Indictment.—The jurors for Our Lady the Queen, upon their oath present, that J. S. on....feloniously did send to one J. N. a certain letter, directed to the said J. N. by the name and description of Mr. J. N., threatening to accuse him the said J. N. of having attempted and endeavoured to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S. then well knowing the contents of the said letter, and which said letter is as follows, to wit (*here set out the letter verbatim*) against the form.... And the jurors aforesaid upon their oath aforesaid do further present, that the said J. S. on the day and in the year aforesaid feloniously did utter a certain writing threatening to accuse him the said J. N. of having attempted and endeavoured to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said

J. S. then well knowing the contents of the said letter, and which said letter is as follows, to wit (*here set out the letter verbatim* (against the form..... Archbold, 426.

An indictment for sending a letter threatening to accuse a man of an infamous crime, need not specify such crime, for the specific crime the defendant threatened to charge might intentionally by him be left in doubt.—R. vs. Tucker, 1 Mood. 134.—The threat may be to accuse another person than the one to whom the letter was sent.—Archbold, loc. cit.—It is immaterial whether the prosecutor be innocent or guilty of the offence threatened to be imputed to him.—R. vs. Gardner, 1 C. & P. 479; Reg. vs. Richards, 11 Cox, 43.

Where it was doubtful from the letter what charge was intended, parol evidence was admitted to explain it, and the prosecutor proved that having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person: the judges held the conviction to be right.—R. vs. Tucker, 1 Mood. 134.

The Court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it.—R. vs. Harris, 6 C. & P. 105.

ACCUSING OR THREATENING TO ACCUSE, WITH INTENT TO EXTORT.

Sect. 46.—Whosoever accuses or threatens to accuse either the person to whom such accusation or threat is made, or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be accused, or from any other person, any property,

chattel, money, valuable security or other valuable thing, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 96, sect. 47, Imp.

As to the interpretation of the words "property" and "valuable security," see *ante*, sect. 1.

By sect. 48, *post*, it is enacted that "it shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation, to be caused or made by the offender or by any other person."

The words "crimes lastly before mentioned" in sect. 46, mean all those mentioned in sect. 45.—Archbold, 425.

Indictment.—. . . .feloniously did threaten one J. N. to accuse him the said J. N. of having attempted and endeavoured to commit the abominable crime of sodomy with the said J. S., with a view and intent thereby then to extort and gain money from the said J. N. against the form [illegible] Archbold, 425.

See the remarks under sections 43, 44, 45, *ante*. It must be a threat to accuse, or an accusation: if J. N. be indicted or in custody for an offence, and the defendant threaten to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute.—R. vs. Gill, Archbold, 425. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient.—R. vs. Robinson, 2 M. & Rob. 14. It is immaterial whether the prosecutor be innocent or guilty of the offence charged, and therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence

will be allowed to be given, even in cross-examination by another witness, to prove that the prosecutor was guilty of such offence.—R. vs. Gardner, 1 C. & P. 479; R. vs. Cracknell, 10 Cox, 408. Whether the crime of which the prosecutor was accused by the prisoner was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money: but it is material in considering the question, whether, under the circumstances of the case, the intention of the prisoner was to extort money or merely to compound a felony.—Reg. vs. Richards, 11 Cox, 43. In Archbold, 425, this last decision seems not to be approved of.—A person threatening A.'s father that he would accuse A. of having committed an abominable offence upon a mare for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge to buy and pay for her at the prisoner's price, is guilty of threatening to accuse within this section.—Reg. vs. Redman, 10 Cox, 159. On the trial of an indictment for threatening to accuse a person of an abominable crime, with intent to extort money, and by intimidating the party by the threat, in fact obtaining the money, the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expression are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody.—Reg. vs. Kain, 8 C. & P. 187.

OBTAINING THE EXECUTION OF A DEED, ETC., ETC., BY THREATS OR VIOLENCE.

Sect. 47.—Whosoever, with intent to defraud or injure any other person, by any unlawful violence to or restraint of, or threat of violence to or restraint of the person of another, or by accusing or threatening to accuse any

person of any treason, felony, or infamous crime as hereinbefore defined, compels or induces any person to execute, make, accept, indorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix his name, or the name of any other person, or of any company, firm or co-partnership, or the seal of any body corporate, company or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 48, Imp.

As to requiring recognizances and sureties for keeping the peace in felonies under this Act, see *post*, sect. 122.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

On this clause, Greaves says: "This clause is new. It will meet all such cases as Reg. vs. Phipoe, 2 Leach, 673, and R. vs. Edwards, 6 C. & P. 521, where persons by violence to the person or by threats of accusation of crimes, induce others to execute deeds, bills of exchange or other securities.

GENERAL CLAUSE ON THREATS, MENACES, ETC., ETC.

Sect. 48.—It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender or by any other person.—24-25 Vict., ch. 96, sect. 49, Imp.

This clause is new, says Greaves; it is intended to meet cases where a letter may be sent by one person

and may contain menaces of injury by another, and to remove the doubts occasioned by Rex. vs. Pickford, 4 C. & P. 227. In Reg. vs. Smith, 1 Den. 510, the threat by a person writing a letter of an injury to be made by a third person was held within the Statute, before this clause. Of course, now, this is clear law, whatever doubts may have existed heretofore.

BURGLARY.

GENERAL REMARKS.

Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law, was called *hamesecken*, has always been looked upon as a very heinous offence. For it always tends to occasion a frightful alarm, and often leads by natural consequence to the crime of murder itself. Its malignity also is strongly illustrated by considering how particular and tender a regard is paid by the laws of England to the immunity of a man's house, which it styles its castle, and will never suffer to be violated with impunity; agreeing herein with the sentiments of Ancient Rome, as expressed in the words of Tully (*Pro Domo*, 41) "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can, *in general*, be broken open to execute any civil process, though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries; and to this principle, it must be assigned, that a man may assemble people together lawfully, (at least if they do not exceed eleven) without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. Stephen's Comment, Vol. 4, 104; Blackst. Comment, Vol. 4, 223.

Burglary is 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.—2 Russell, 1; Chitty, 1101. In which definition there are four things to be considered, the *time*, the *place*, the *manner*, and the *intent*.

The time.—The time must be by night and not by day, for in the day time there is no burglary. As to what is reckoned night and what day for this purpose, anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion afterwards was that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary. But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all creation is at rest. But the doctrines of the common law on this subject are no longer of practical importance, as it is enacted by 32–33 Vict., ch. 21, sect. 1, that for the purposes of that Act, and in reference to the crime now under consideration, "the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day, and the day shall include the remainder of the twenty-four hours." 4 Blackst. 224; 4 Steph. Com. 105; 2 Russell, 39. The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or *vice versa*, it is no burglary.—1 Hale, 551. But the breaking and entering need not be both done in the same night: for if thieves break a hole in a house one night, with intent to enter another night and commit felony and come accordingly another night and commit a felony,

seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night.—2 Russell, 39. The breaking on Friday night with intent to enter at a future time, and the entering on the Sunday night constitute burglary.—R. vs. Smith, Russ. & Ry. 417. And then, the burglary is supposed to have taken place on the night of the entry, and is to be charged as such. —1 Hale, 551. In Jordan's case, 7 C. & P. 432, it was held that where the breaking is on one night and the entry on another, a party present at the breaking, but absent at the entry, is a principal.

The place. — The breaking and entering must take place in a *mansion* or *dwelling-house* to constitute burglary. At the common law, Lord Hale says that a church may be the subject of burglary, 1 Hale, 559, on the ground, according to Lord Coke, that a church is the mansion house of God, though Hawkins, 1 vol. 133, does not approve of that *nicety*, as he calls it, and thinks that burglary in a church seems to be taken as a distinct burglary from that in a house. However, this offence is now provided for by sections 49 and 56 of the Larceny Act.

What is a *dwelling house*? — From all the cases, it appears that it must be a place of actual *residence*. Thus a house under repairs, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed, R. vs. Lyons, 1 Leach, 185: in this case, the proprietor of the house, nor any of his family, nor any person whatever had yet occupied the house.

In Fuller's case, 1 Leach, note, loc cit., the defendant was charged of a burglary in the dwelling-house of Henry Holland. The house was new built, and nearly finished: a workman who was constantly employed by Holland

slept in it for the purpose of protecting it: but none of Holland's family had yet taken possession of the house, and the Court held that it was not the dwelling-house of Holland,— and where the owner has never by himself or by any of his family, slept in the house, it is not his dwelling-house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business.—R. vs. Martin, Russ & Ry. 108.

If a porter lie in a warehouse for the purpose of protecting goods, R. vs. Smith, 2 East, 497, or a servant lie in a barn in order to watch thieves, R. vs. Brown, 2 East, 501, this does not make the warehouse or barn a dwelling-house in which burglary can be committed. But if the agent of a public company reside at a warehouse belonging to his employers, this crime may be committed by breaking it, and he may be stated to be the owner.—R. vs. Margetts, 2 Leach, 931. Where the landlord of a dwelling-house, after the tenant, whose furniture he had bought, had quitted it put a servant into it, to sleep there at night, until he should re-let it to another tenant, but had no intention to reside in it himself: the judges held that it could not be deemed the dwelling-house of the landlord.—R. vs. Davis, 2 Leach, 876. So where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it, it was holden not to be a dwelling-house in which burglary can be committed. R. vs. Hallard, 2 East, 498; R. vs. Thompson, 2 Leach, 771. And the same has been ruled, when under such circumstances, the tenant had put a person, not being one of the family, into the house, for the protection of the goods and furniture in it, until it should be ready for his residence.—R. vs. Harris, 2 Leach, 701; R. vs. Fuller, 1 Leach, 187.

A house will not cease to be the house of its owner, on account of his occasional or temporary absence, even if no one sleep in it, provided the owner has an *animus revertendi*.—R. vs. Murray, 2 East, 496; and in R. vs. Kirkham, 2 Starkie, Ev. 279; Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture and intending to return.—Idem, Mitbrown's case, 2 East, 496. And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets his servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house.—R. vs. Gibbons, R. &. Ry. 442. But where the prosecutor, an upholsterer, left the house in which he had resided with his family, without any intent of returning to live in it and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; two women employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house, for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor.—R. vs. Flannagan, R. &. R. 187. The occupation of a servant in that capacity, and not as tenant, is in many cases the occupation of a master, and will be a sufficient residence to render it the dwelling-house of the master.—R. vs. Stock, R. & R. 185; R. vs. Wilson, R. & R. 115. Where the prisoner was indicted for burglary in the dwelling-house of J. B. J. B. worked for one W. who did carpenter's work for a public company and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining: J. B. received no more wages after than before he went to live in the house. It was held not rightly laid.—R. vs. Rawlings, 7 C. & P. 150.—If a servant live in a house of his master's at a yearly rent, the house cannot be described as the master's house.—R. vs. Jarvis, 1 Mood. 7.—Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose.—Archbold, 490. And it will be sufficient if any part of his family reside in the house. Thus where a servant boy of the prosecutor always slept over his brew-house, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an indictment for burglary, that the brew-house was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be part of the house in which he himself actually dwelt.—R. vs. Westwood, R. & R. 495. Burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it, because it is a temporary, not a permanent edifice, 1 Hale, 557; but if it be a permanent building, though used only for the purpose of a fair it is a dwelling-house.—R. vs. Smith, 1 M. & Rob. 256. So even a loft, over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken.—R. vs. Turner, 1 Leach, 305. If a house be divided, so as to form two or more dwelling-houses, within the meaning of the word in the definition of burglary and all internal communication be

cut off, the partitions become distinct houses and each part will be regarded as a mansion.—R. vs. Jones, 1 Leach, 537. But a house the joint property of partners in trade in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it.—R. vs. Athea, 1 Mood. 329. If the owner, who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer-doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year.—2 East, 505. If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary: it is not his dwelling-house, for he does not dwell in it, nor can it be deemed the dwelling-house of the tenant, for it forms no part of his lodging.—R. vs. Rodgers, R. vs. Carrell, R. vs. Trapshaw, 1 Leach, 89, 237, 427. If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with each other internally or not.—R. vs. Bailey, 1 Mood. 23; R. vs. Jenkins, R. & R. 244; R. vs. Carroll, 1 Leach, 237.

The term "dwelling-house" includes in its legal signification all out-houses occupied with and immediately

communicating with the dwelling-house. But by 32–33 Vict., ch 21, sect. 52, (24–25 Vict., ch. 96, sect. 53, Imp.) no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground floor, and of three bed-rooms up-stairs, one of them over the wash-house, and the bedroom over the house-place communicated with that over the wash-house, but there was no internal communcation between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition-wall between the wash-house and the house-place, it was holden that the defendant was properly convicted of burglary in breaking the house.—R. vs. Burrowes, 1 Mood. 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy.—R. vs. Higgs, 2 C. & K. 322. To be within the meaning of this section, the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building

pould not be considered a part of the dwelling-house of A.—R. vs. Jenkins, R. & R. 224. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage, under sect. 54, *post*.

It is necessary to state with accuracy in the indictment, to whom the dwelling-house belongs.—1 Burn's, Just., 554. But in all cases of doubt, the pleader should vary in different counts the name of the owner, although there can be little doubt that a variance in this respect would be amended at the trial.—Archbold, 496; 2 Russel, 47, 49.—As to the local description of the house, it must be proved as laid: if there be a variance between the indictment and evidence in the parish, &c., &c., where the house is alleged to be situate, the defendant must be acquitted of the burglary, unless an amendment be made. To avoid difficulty, different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house, the defendant must be acquitted of the burglary but found guilty of the simple larceny, if larceny is proved.—Archbold, 489, 496.

The manner.—There must be both a *breaking* and an *entering* of the house. The breaking is either actual or constructive. Every entrance into the house by a trespasser is not a breaking in this case. As if the door of a mansion-house stand open, and the thief enter, this is not breaking; so if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and, with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house.—1 Hale, 551. Where a window

was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be no sufficient breaking.—R. vs. Smith, 1 Mood. 178.

If there be an aperture in a cellar window to admit light, through which a thief enter in the night, this is not burglary.—R. vs. Lewis, 2 C. & P. 628; R. vs. Spriggs, 1 Mood. & R. 357.—There is no need of any demolition of the walls or any manual violence to constitute a breaking. Lord Hale says "and these acts amount to an actual breaking, *viz.*, opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger." In Robert's alias Chamber's case, 2 East 487, where a glass window was broken, and the window opened with the hand, but the shutters on the inside were not broken, this was ruled to be burglary by Ward, Powis and Tracey, justices, and the Recorder; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C.J., and Powel, C.J., doubting and inclining to another opinion, no judgment was given. In Bailey's case, R. & R. 341, it was held by nine judges that introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. If a thief enter by the chimney, it is a breaking; for that is as much closed as the nature of things will permit. And it is a burglarious breaking, though none of the rooms of the house are entered. Thus in R. vs. Brice, R. & Ry. 450—the prisoner got in at a chimney and lowered himself a considerable way down, just above the mantel piece of a room on the ground floor. Two of the judges thought

he was not in the dwelling-house, till he was below the chimney-piece. The rest of the judges, however, held otherwise; that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself was an entry therein.

Where the prisoner effected an entry, by pulling down the upper sash of a window, which had not been fastened, but merely kept in its place by the pulley weight: the judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time.—R. vs. Haines, R. & R. 451.—Where an entry was effected, first into an outer cellar, by lifting up a heavy iron grating that led into it, and then into the house by a window, and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could, notwithstanding, easily be opened by pushing, the judges held that opening the window, so secured, was a breaking sufficient to constitute burglary.—R. vs. Hall, R. & R. 355.—So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it.—R. vs. Robinson, 1 Mood. 327.

But, if a window thus opening on hinges, or a door, be not fastened at all, opening them would not be a breaking within the definition of burglary. Even where the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened: it had bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time, the judges were divided in opinion whether the opening of this door was

such a breaking of the house as constituted burglary: six thinking that it was, and six that it was not. R. vs. Callan, R. & R. 157.—It was holden in Brown's case that it was.—2 East, 487.—In R. vs. Lawrence, 4 C. & P. 231, it was holden that it was not.—In R. vs. Russell, 1 Mood. 377, it was holden that it was.

Where the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it, he will be guilty of burglary, for this is a constructive breaking. Thus, where thieves, having an intent to rob, raised the hue-and-cry, and brought the constable, to whom the owner opened the door; and when they came in, they bound the constable and robbed the owner,—this was held a burglary. So if admission be gained under pretence of business, or if one take lodging with a like felonious intent, and afterwards rob the landlord, or get possession of a dwelling-house, by false affidavits, without any colour of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. In Hawkin's case, she was indicted for burglary: upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country, and, meeting with the boy who kept the key, she prevailed upon him to go with her to the house, by the promise of a pot of ale; the boy accordingly went with her, opened the door and let her in, whereupon she sent the boy for the pot of ale, robbed the house and went off, and this being in the night time it was adjudged that the prisoner was clearly guilty of burglary.—2 East P. C. 485. If a servant conspire with a robber, and let him into the house by night, this is burglary in both, 1 Hale, 553, for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates

the guilt. 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.—Reg. vs. Johnson, C. & M. 218.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall or doors, or windows of a house: if the thief get admission into the house by the outer door or windows being open, and afterwards breaks or unlocks an inner door, for the purpose of entering one of the rooms in the house, this is burglary, 1 Hale, 553; 2 East P. C. 488. So if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary. —2 East P. C. 491; 1 Hale, 553;—Reg vs. Wenmouth, 8 Cox, 348.—The breaking open chests is not burglary. 1 Hale, 554.—The breaking must be of some part of the house; and, therefore, where the defendant opened an area gate with a skeleton key, and then passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep.—R. vs. Davis, R. & R. 322; R. vs. Bennett, R. & R. 289; R. vs. Paine 7 C. & P., 135.—It is essential that there should be an entry as well as a breaking, and the entry must be connected with the breaking.—1 Hale, 555; Reg. vs. Davis, 6 Cox, 369; R. vs. Smith, R. & R. 417, *ante*. It is deemed an entry when the thief breaketh the house, and his body or any part thereof, as his foot or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, though the hand be not in, or into a hole of the house which he hath

made, with intent to murder or kill; this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary. 3 Inst. 64; 2 East, P C. 490.—Thieves came by night to rob a house: the owner went out and struck one of them, another made a pass with a sword at persons he saw in the entry, and, in so doing, his hand was over the threshold: this was adjudged burglary by great advice. 2 East. P. C., 490.

In Gibbon's case, evidence that the prisoner in the night time cut a hole in the window-shutters of a shop, part of a dwelling-house, and putting his hand through the hole took out watches, &c., &c., was holden to be burglary, although no other entry was proved.—2 East, P. C. 490. Introducing the hand through a pane of glass, broken by the prisoner, between the outer window and an inner shutter, for the purpose of undoing the window latch, is a sufficient entry.—R. vs. Bailey, R. & R. 341. So would the mere introduction of the offender's finger.—R. vs. Davis, R. & R. 499. So an entry down a chimney is a sufficient entry in the house, for a chimney is part of the house.—R. vs. Brice, R. & R. 450.

It is even said that discharging a loaded gun into a house is a sufficient entry.—1 Hawkins, 132. Lord Hale, 1 vol. 155, is of a contrary opinion, but adds *quære*? East 2, P. C. 490, seems to incline towards Hawkins' opinion. —Where thieves bored a hole through the door with a centre-bit, and parts of the chips were found in the inside of the house, this was holden not a sufficient entry to constitute burglary.—R. vs. Hughes, 2 East, P. C. 491. If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all.—1 Burn's Just. 550.

The entry need not be at the same time as the breaking.—R. vs. Smith, R. & R. 417, *supra.*

In Reg. vs. Spanner, 12 Cox, 155, Bramwell B. held, that an attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there be no proof of an actual entry. The prisoner was indicted for burglary, but no entry having been proved, a verdict for an attempt to commit a burglary was given.

The intent.—There can be no burglary but where the indictment both expressly alleges, and the verdict also finds an intention to commit some felony; for if it appear that the offender meant only to commit a trespass, as to beat the party or the like, he is not guilty of burglary.—1 Hale, 561: whether a felony at common law or by statute is immaterial.—The intent must be proved as laid. Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was holden fatal.—R. vs. Dobbs, 2 East., P. C. 513. It is immaterial whether the felonious intent be executed or not: thus, they are burglars, who, with a felonious intent, break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, though it be not material of what value. The felonious intent with which the prisoner broke and entered the house cannot be proved by positive testimony: it can only be proved by the admission of the party, or by circumstances from which the jury may presume it. Where it appears that the prisoner actually committed a felony after he entered the house, this is satisfactory evidence, and almost conclusive, that the intent with which he broke and entered the house was to commit that felony. Indeed, the very

fact of a man's breaking and entering a dwelling-house in the night time is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty upon this evidence merely.—R. vs. Brice, R. & R. 450; Reg. vs. Spanner, 12 Cox, 155. If the intent be at all doubtful, it may be laid in different ways in different counts.—R. vs. Thomson, 2 East, P. C. 515; 2 Russell, 45. It seems sufficient in all cases where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of the intention. But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement.—R. vs. Furnival, R. & R. 445.

As to punishment, indictment, &c., &c., see *post*, on sect. 51.

It will be observed that the entry may be before the breaking as well as after: for, though there were once different opinions upon the question as to whether the breaking *out* of a house to escape, by a man who had previously entered by an open door with intent to commit a felony, was burglary, all doubts are now removed by sect. 50 of the Larceny Act, *post.*

BREAKING AND ENTERING A CHURCH OR CHAPEL, AND THEREIN COMMITTING A FELONY.

Sect. 49.—Whosoever breaks and enters any church, chapel, meeting-house, or other place of Divine worship, and commits any felony therein, and breaks out of the same, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years,

with or without hard labour, and with or without solitary confinement.—24-25 Vict. ch. 96, sect. 50, Imp.

Greaves says: "This clause clearly includes every place of public worship, the former enactments were confined not only to stealing, but to stealing any chattel.—(Sect. 17, ch. 92, (Cons. Stat. Can.) Therefore stealing fixtures was not within them.—Reg. vs. Barker, 3 Cox, 581. The present clause includes *any* felony, and this clause and the eight subsequent clauses are in this respect made uniform."

The breaking and entering required to constitute an offence under this section are of the same nature as in burglary, except that they need not be in the night time.

If the breaking is with intent to commit a felony, but no felony be actually committed, the offence falls under sect. 56, *post*. A tower of a parish church is parcel of a church, R. vs. Wheeler, 3 C. & P. 585; so is the vestry, R. vs. Evans, C. & Mar. 298.

The goods of a dissenting chapel, vested in trustees, cannot be described as the goods of a servant, put in charge of the chapel and the things in it —R. vs. Hutchinson, R. & R. 412. Where the goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners—2 Russell, 73. As to requiring sureties, in felonies under this Act, see *post* sect. 122.—As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment for breaking and entering a church and stealing therein.—..... the church of the parish of.... in the county of.... feloniously did break and enter, and then, in the said church, one silver cup of the goods and chattels, of the parishioners of the said parish feloniously did steal, take and carry away against the form.... Archbold, 395.

Indictment for stealing in and breaking out of a church.—.... one silver cup, of the goods and chattels of the parishioners of the parish of....in the county of.... in the church of the said parish there situate, feloniously did steal, take and carry away; and that the said (*defendant*) so being in the said church as aforesaid, afterwards, and after he had so committed the said felony in the said church, as aforesaid, on the day and year aforesaid, feloniously did break out of the said church, against the form..... Archbold, 397.

If a chapel which is private property be broken and entered, lay the property as in other cases of larceny. If the evidence fails to prove the breaking and entering a church, &c., &c., the defendant may be convicted of simple larceny.—Archbold, 396. Upon the trial of any offence under this section, the jury may, under sect. 49 of the Procedure Act of 1869, convict of an attempt to commit such offence.—2 Russell, 74.

BURGLARY BY BREAKING OUT.

Sect 50.—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.—24-25 Vict., ch. 96, sect 51, Imp.

Sect. 1, *ante*, declares what is night, in the interpretation of this Act.

There was some doubt, at common-law, on this point. Lord Bacon thought it was burglary, and Sir Matthew Hale, that it was not.—4 Steph., Comment 109.

If a person commits a felony in a house, and afterwards breaks out of it in the night-time, this is burglary, although he might have been lawfully in the house; if,

therefore, a lodger has committed a larceny in the house and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglariously breaking out of the house.—Reg. vs. Wheeldon, 8 C. & P. 747. Bishop, 2 Cr. L. 99, thinks, this is carrying the doctrine very far. It has been held that getting out of a house by pushing up a new trap door, which was merely kept down by its own weight, and on which fastenings had not yet been put, but the old trap-door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house.—R. vs. Lawrence, 4 C. & P. 231. On this case Greaves says : unless a breaking *out* of a house can be distinguished from the breaking *into* a house, this case seems overruled by R. vs. Russell, 1 Mood, 377.

If the felon, to get out of the dwelling-house, should break an inside door, the case would plainly enough be within the Statute. But the facts of the cases seem not to have raised the question, absolutely to settle it, whether where the intent is not to get out, the breach of an inner door by a person already within, having made what is tantamount to a felonious entry, but not by breaking, is sufficient to constitute burglary, if there is no entry through the inner door thus broken. There are indications that the breaking alone in such circumstances may be deemed enough.—(Reg vs. Wheeldon, *supra*). On the other hand, in an English case, it was held that burglary is not committed by an entry, with felonious intent, into a dwelling-house, without breaking, followed by a mere breaking, without entry, of an inside door.—Reg. vs. Davis, 6 Cox, 369 ; 2 Bishop Cr. L. 100. But in Sir T. Kelyng's Cr. C. 104, *Stevens & Haynes' re-print*, it is said : A servant in the house, lodging in a room remote from his master in the night-time,

draweth the latch of a door to come into his master's chamber, with an intent to kill him, this, on a special verdict, agreed by all the judges, to be burglary.

See, next section for punishment and form of indictment.

PUNISHMENT FOR BURGLARY.

Sect. 51.—Whosoever is convicted of the crime of burglary shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. —24-25 Vict, ch. 96, sect. 52, Imp.

As to requiring recognizances and sureties for keeping the peace in felonies punishable under this Act, see *post* sect. 122.—As to solitary confinement see sect. 94 of the Procedure Act of 1869.—See remarks under head "*Burglary.*"

Indictment for burglary and larceny to the value of five pounds.—The jurors for Our Lady the Queen upon their oath present, that J. S. on ..... about the hour of eleven of the clock, of the night of the same day, the dwelling-house of J. N., situate ..... feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O. in the said dwelling-house then being, feloniously and burglariously to steal, take and carry away; and then, in the said dwelling-house, one silver sugar basin, of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of the said K. O. in the said dwelling-house then being found, feloniously and burglariously did steal, take and carry away, against the form of the Statute in

such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 489.

Upon this indictment, the defendant, if all the facts are proved as alleged, may be convicted of burglary; if they are all proved, with the exception that the breaking was by night, the defendant may be convicted of house-breaking, under sect. 55, *post;* if no breaking be proved, but the value of the property stolen proved to be as alleged, over twenty-five dollars, the verdict may be of stealing in a dwelling-house to that amount, under sect. 61, *post;* if no satisfactory evidence be offered to show, either that the house was a dwelling-house, or some building communicating therewith, or that it was the dwelling-house of the party named in the indictment, or that it was locally situated as therein alleged, or that the stolen property was of the value of five pounds, still the defendant may be convicted of a simple larceny—1 Taylor, evid. 216; Archbold, 489; R. vs. Withal, 1 Leach, 88; R. vs. Comer, 1 Leach, 36; R. vs. Hungerford, 2 East P. C. 518.—Where several persons are indicted together for burglary and larceny, the offence of some may be burglary, and of the others only larceny.—R. vs. Butterworth; R. & R. 520. See *post* remarks under. sect. 53.

If no felony was committed in the house, the indictment should be as follows:—

That A. B. on ..... about the hour of eleven in the night of the same day, at ..... the dwelling-house of J. N. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said J. N. in the said dwelling-house then and there being found, then and there feloniously and burglariously to steal, take and carry away, against ..... (*as in the last precedent* Chitty, 1118.

See post sections 56 and 57, which apply undoubtedly to burglary, where an intent to commit a felony only is charged in the indictment, as in this last form.

The terms of art. usually expressed by the averment "feloniously and burglariously did break and enter" are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner broke and entered is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary. 2 Russell, 50. The offence must be laid to have been committed in a mansion-house or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. It will not be sufficient to say a *house*.—2 Russell, 46; 1 Hale, 550. It has been said that the indictment need not state whose goods were intended to be stolen, or were stolen.—Reg. vs. Clarke, 1 C. & K. 421; Reg. vs. Nicholas, 1 Cox, 218; Reg. vs. Lawes, 1 C. & K. 62; nor to specify which goods, if an attempt or an intent to steal only is charged.—Reg. vs. Johnson, Leigh & Cave, 489.

It is better to state at what hour of the night the acts complained of took place, though it is not necessary that the evidence should correspond with the allegation as to the exact hour; it will be sufficient if it shows the acts to have been committed in the night, as this word is interpreted by the Statute. However, in Reg. vs. Thompson, 2 Cox, 377, it was held thatthe hour need not be specified, and that it will be sufficient if the indictment alleges *in the night*.—Bishop, 2 Crim. Proced. 131, is also of this opinion.

The particular felony intended must be specified in the indictment.—Bishop, 2 Crim. Proced. 142.

Indictment under sect. 50, *for burglary by breaking out.*

—The Jurors for our lady the Queen upon their oath present, that J. S. on.....about the hour of eleven in the night of the same day, being in the dwelling-house of K. O. situate.... one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of the said K. O. in the said dwelling-house of the said K. O., then being in the said dwelling-house, feloniously did steal, take and carry away; and that he, the said J. S. being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, feloniously and burglariously did break out of the said dwelling-house of the said K. O.; against the form of the statute in such case,made and provided, and against the peace of our lady the Queen, her crown and dignity. —Archbold, 500.

An indictment alleging "did break to get out" or "did break and get out" is bad: the words of the Statute are "break out" R. vs. Compton, 7. C. & P. 139.—See *ante*, R. vs. Lawrence, 4 C. & P. 231; R. vs. Wheeldon, 8 C. & P. 747, and remarks on burglary.—If it be doubtful whether a felony can be proved, but there be sufficient evidence of an intent to commit a felony, a count may be added stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.—Archbold, 501.

Upon the trial of any offence hereinbefore mentioned, the jury may convict of an attempt to commit such offence, if the evidence warrants it, under sect. 49, of the Procedure Act of 1869.

WHAT BUILDING WITHIN CURTILAGE ARE DEEMED PART OF DWELLING-HOUSE.

Sect 52.—No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.—24-25 Vict., ch. 96, sect. 53, Imp.

See remarks on Burglary, and under sect. 54 *post*.

Where the burglary is in an outhouse, falling within this clause, it must still be laid to have been done in the dwelling-house.—2 East, P. C. 512; R. vs. Garland; 2 East, P. C. 493.

"Curtilage" is a court-yard, enclosure or piece of land near and belonging to a dwelling-house. Toml. law dict.

ENTERING A DWELLING-HOUSE IN THE NIGHT WITH INTENT, ETC., ETC.

Sect. 53.—Whosoever enters any dwelling-house in the night, with intent to commit any felony therein, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict. ch. 96, sect. 54, Imp.

As to recognizances and sureties in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

Greaves says:.."This clause is new, and contains a very great improvement of the law. It frequently happened

on the trial of an indictment for burglary where no property had been stolen that the prisoner escaped altogether for want of sufficient proof of the house having been broken into, though there was no moral doubt that it had been so. This clause will meet all such cases. It will also meet all cases where any door or window has been left open, and the prisoner has entered by it in the night. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, the proof of a breaking should fail, the prisoner might nevertheless be convicted of the offence created by this clause for such an indictment contains everything that is required to constitute an offence under this clause, in addition to the allegation of the breaking, and the prisoner may be acquitted of the breaking and convicted of the entering with intent to commit felony, in the same way as on an indictment for burglary and stealing, he may be acquitted of the breaking, and convicted of the stealing. And this affords an additional reason why in an indictment for burglary and committing a felony, there should always be introduced an averment of an intent to commit a felony, so that if the proof of the commission of the felony and of the breaking fail, the prisoner may nevertheless be convicted of entering by night with intent to commit it."

Indictment.—.... That J. S. on.... about the hour of eleven in the night of that same day, the dwelling of K. O. situate..... feloniously did enter, with intent the goods and chattels of the said K. O. in the said dwelling-house then being, feloniously to steal, take and carry away, against the form..... Archbold, 489.

As to what is night, and what is a dwelling-house, in the interpretation of this clause, the same rules as for burglary must be followed. Under sect. 49 of the Pro-

cedure Act of 1869, the jury may, if the evidence warrants it, convict of an attempt to commit the offence charged, upon an indictment under this section.

BREAKING, ETC., ETC., ETC., A BUILDING WITHIN THE CURTILAGE, NOT FORMING PART OF THE HOUSE, AND COMMITTING ANY FELONY THEREIN.

Sect. 54.—Whosoever breaks and enters any building and commits any felony therein, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building, commits any felony therein and breaks out of the same, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement —24–25 Vict., ch. 96, sect. 55 Imp.

As to recognizances and sureties, in felonies under this Act, see *post*, sect. 122.—As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

The breaking and entering must be proved in the same manner as in burglary, except that it is immaterial whether it was done in the day or night. If this proof fail, the defendant may be convicted of simple larceny.

The building described in the Statute is "any building within the *curtilage* of a dwelling-house, and occupied therewith, not being part of the dwelling-house, according to the provision hereinbefore mentioned" that is, not communicating with the dwelling-house, either immediately or by means of a covered and enclosed pas-

sage leading from the one to the other."—Sect. 52, *ante*. To break and enter such a building was, before the present Statute, burglary, or house-breaking, and, although this enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house, and being occupied therewith, although not within any common enclosure or curtilage, yet some of the cases decided upon these subjects may afford some guide to the construction of the present section.—Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house. —R. vs. Clayburn, R. & R. 360.—Where the prosecutor's house was at the corner of the street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was holden to be a parcel of the dwelling-house.—R. vs. Chalking, R. & R. 334.—So, a warehouse which had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied, but was under the same roof, and had a back door opening into the yard, into which the

house also opened and which enclosed both, was holden to be part of the dwelling-house.—R. vs. Lithgo, R. & R. 357.—So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard, it was holden that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house, and remained so afterwards.—R. vs. Walters, 1 Mood. 13. —And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner, and the factory opened into an open passage, into which the outer door of the dwelling-house also opened, it was holden that the factory was properly described as the dwelling-house of the prosecutor.—R. vs. Hancock, R. & R. 170.—But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house.—R. vs. Westwood, R. & R. 495.—So neither is a wall, gate or other fence, being part of the outward fence of the curtilage, and opening into no building but into the yard only, part of the dwelling-house.—R. vs. Bennett, R. & R. 289.—Nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at that time.—R. vs. Davis, R. & R. 322.

Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates, it was held that the building was within the curtilage.—R. vs. Gilbert, 1 C. & K. 84; See R. vs. Egginton, 2 Leach, 913; Archbold, 405.

Indictment.—.... a certain building of one J. N. situate .... feloniously did break and enter, the said building then being within the curtilage of the dwelling-house of the said J. N. there situate, and by the said J. N. then and there occupied therewith, and there being then and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other, with intent the goods and chattels of the said J. N., in the said building then being, feloniously to steal, take and carry away, and that the said J. S. then and there, in the said building, one silver watch, of the goods and chattels of the said J. N. feloniously did steal, take and carry away, against the form ..... This count may be added to an indictment for burglary, housebreaking or stealing in a dwelling-house to the amount of five pounds, and should be added, whenever it is doubtful whether the building is in strictness a dwelling-house. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted, under this indictment, of the felony described in sect. 56, post, as this indictment alleges the intent as well as the act.—Archbold, 404.

Under sect. 49 of the Procedure Act of 1869, a verdict of guilty of an attempt to commit the offence charged may be given upon an indictment on this section, if the evidence warrants it.

HOUSEBREAKING AND COMMITTING ANY FELONY INTO ANY HOUSE, ETC., ETC., ETC.

Sect. 55. Whosoever breaks and enters any dwelling-house, school-house, shop, warehouse or counting-house, and commits any felony therein and breaks out of the same, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, s. 56, Imp.

See *post*, Sect. 122, as to recognizances and sureties in felonies under this act; and sect. 94 of the Procedure Act of 1869 as to solitary confinement.

The breaking and entering must be proved in the same manner as in burglary, except that it need not be proved to have been done in the night-time. But if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may, notwithstanding, be convicted upon this indictment.—R. vs. Pearce, R. & R. 174; R. vs. Robinson, R. & R. 321; Archbold, 399.—And so, also, any breaking and entering, which would be sufficient in a case of burglary, would be sufficient under this section. Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop, in order to steal money from the till, it was held that

this was a sufficient breaking to support an indictment for housebreaking—Reg. vs. Wenmouth, 8 Cox, 348.—The value of the goods is immaterial, if a breaking and entry be proved: but if proved and alleged to be of the value of twenty-five dollars, the prisoner may be convicted of the felony described in sect. 61, *post:* if the prosecutor succeed in proving the larceny, but fail in proving any of the other aggravating circumstances, the defendant may be convicted of simple larceny.—Archbold, 399. The same accuracy in the statement of the ownership and situation of the dwelling-house is necessary in an indictment for this offence as in burglary. But it must be remembered that any error in these matters may now be amended, under the Procedure Act of 1869.—2 Russell, 76.

Sect. 52, *ante*, applies to this clause, as well as the rules which govern the interpretation of the words *dwelling-house* in burglary.—2 Russell, 76.

As in simple larceny, the least removal of the goods from the place where the thief found them, though they are not carried out of the house, is sufficient upon an indictment for house-breaking. It appeared that the prisoner, after having broken into the house, took two half-sovereigns out of a bureau in one of the rooms, but being detected, he threw them under the grate in that room; it was held that if they were taken with a felonious intent, this was a sufficient removal of them to constitute the offence.—R. vs. Amier, 6 C. & P. 344.

As to what is a shop under this section, it was once said that it must be a shop for the sale of goods, and that a mere workshop was not within the clause.—Reg. vs. Sanders, 9 C. & P. 79; but in Reg. vs. Carter, 1 C. & K. 173, Lord Denman, C. J., declined to be governed by the preceding case, and held that a blacksmith's shop, used as a workshop only, was within the Statute. A warehouse means a place where a man stores or keeps his goods, which are not immediately wanted for sale.—Reg. vs. Hill, 2 Russell, 95.—Upon an indictment for breaking and entering a counting-house, owned by Gamble, and stealing therein, it appeared that Gamble was the proprietor of extensive chemical works, and that the prisoner broke and entered a building, part of the premises, which was commonly called the machine-house, and stole therein a large quantity of money. In this building, there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building and their wages were paid there; the books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times, they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected that this was not a counting-house; but, upon a case reserved, the judges held that it was a counting-house within the Statute.—Reg. vs. Potter, 2 Den. 235.

An indictment for house-breaking is good, if it alleges that the prisoner broke and entered the dwelling-house, and the goods of..... in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house") feloniously did steal, take and carry away.—Reg. vs. Andrews, C. & M. 121, overruling Reg. vs. Smith, 2 M. & Rob. 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided.—2 Russell, 76, note by Greaves

Indictment.—on....the dwelling-house of J. N., situ-

ate.....feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, feloniously to steal, take and carry away, and one dressing-case of the value of twenty-five dollars, of the goods and chattels of the said J. N., then in the said dwelling-house, then feloniously did steal, take and carry away, against the form.....Archbold, 398.

Upon the trial of an indictment for an offence under this section the jury may, under sect. 49 of the Procedure Act of 1869, convict the defendant of an attempt to commit the same, if the evidence warrants it. But they can only convict of the attempt to commit the identical offence charged in the indictment: the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, the property of the prosecutor. It was proved at the trial that, at the time of the breaking, the goods specified were not in the house but there were other goods there, the property of the prosecutor; the prisoner had not had time to steal anything, having been caught immediately after his entering the house. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling house of the prosecutor, and attempting to steal his goods therein. *Held* that the conviction was wrong, and that an attempt must be to do that which, if successful, would amount to the felony charged.—Reg. vs. McPherson, Dears. & B. 197. Bishop, 1 Cr. Law, 757, does not approve of this decision. As said in Archbold, 399, the prisoner, under such circumstances, may be convicted of breaking and entering *with intent* to commit a felony, under sect 56, *post*. But only if, as in the form above given, the intent is alleged, which was not the case in Reg. vs. McPherson, *ubi supra*.

A second count to an indictment under sect. 55 may be taken on the form of indictment given, *ante*, under sect. 54.

HOUSE-BREAKING WITH INTENT TO COMMIT A FELONY.

Sect. 56.—Whosoever breaks and enters 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, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years nor less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 57, Imp.

As to recognizances and sureties in felonies under this Act, see *post*, sect. 122.—As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—.....on.....the dwelling-house of J. N., situate.....feloniously did break and enter, with intent to commit a felony therein, to wit, the goods and chattels of the said J. N. in the said dwelling-house then being, then feloniously to steal, take and carry away, against the form of the Statute in such case made and provided.—Archbold, 403.

Where there is only an attempt, it is not always possible to say what goods the would-be thief meant to steal, and an indictment for an attempt to commit larceny need not specify the goods intended to be stolen.—Reg. vs. Johnson, L. & C. 489.

Upon an indictment under this section the prisoner may be convicted, under sect. 49 of the Procedure Act of 1869, of the misdemeanor of attempting to commit the

felony charged.—Reg. vs. Bain, L. & C. 129, and reporter's note, 2 Russell, 97.

Greaves says: "This clause is new, and contains a very important improvement in the law. Formely the offence here provided was only a misdemeanor at common law. Now, it often happened that such an offence was very inadequately punished as a misdemeanor, especially since the night was made to commence at nine in the evening; for at that time, in the winter, in rural districts, the poor were often in bed. Nor could anything be much more unreasonable than that the same acts done just after nine o'clock at night should be liable to penal servitude for life, but if done just before nine they should only be punishable as a misdemeanor. It is clear that if, on the trial of an indictment for burglary, with intent to commit a felony, it should appear that the breaking and entry were before nine o'clock, the prisoner might be convicted under this clause. But upon an indictment *in the ordinary form* for house breaking, the prisoner could not be convicted under this clause, because it does not allege an intent to commit a felony; (as in McPherson's case, *ante*, under last preceding section.) It will be well, however, to alter the form of these indictments, and to allege a breaking and entry with intent to commit some felony, in the same manner as in an indictment for burglary with intent to commit felony, and then to allege the felony that is supposed to have been committed in the house. If this be done, then, if the evidence fail to prove the commission of that felony, but prove that the prisoner broke and entered with intent to commit it, he may be convicted under this clause."—The form of indictment given under the last preceding section is in conformity with these remarks.

See the following sections, 57 and 58, which refer to this one.

WHEN BURGLARY NOT CLEARLY PROVEN, CONVICTION MAY BE UNDER SECT. 56.

Sect. 57.—Whosoever is indicted for any burglary, where the breaking and entering are proved at the trial to have been made in the day-time 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.

This clause is not in the English Act, as remarked *ante*, under sect. 51, it applies to cases of burglary where an intent only to commit a felony is charged.—

It will be seen by Greaves' remarks under the last section, that he is of opinion that even without this enactment, such a verdict could be given, upon such an indictment for burglary.

IF, UPON INDICTMENT UNDER SECT. 56, BURGLARY IS PROVED.

Sect. 58.—It shall not be available by way of defence to 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 together with the verdict; and such acquittal hall not then avail as a bar or defence upon an indictment for such burglary.

This clause is not in the English Act—it seems a superfluous enactment. As the law stands, in cases of doubt, the prosecution would indict for burglary.

BEING FOUND BY NIGHT ARMED WITH INTENT TO BREAK A DWELLING-HOUSE, ETC., ETC., ETC., OR HAVING IN POSSESSION, BY NIGHT IMPLEMENTS OF HOUSE-BREAKING.

Sect. 59.—Whosoever is found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or is found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any pick-lock key, crow, jack, bit, or other implement of house-breaking, or any match, or combustible or explosive substance; or is found by night having his face blackened or otherwise disguised, with intent to commit any felony; or is found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years with or without hard labour.—24–25 Vict., ch. 96, sect. 58, Imp.

As to fining the offender, and requiring him to enter into recognizances and find sureties for keeping the peace, in misdemeanors under this Act, see *post.*, sect. 122.

The distinction between this clause and sect. 53, as far as relates to being in a dwelling-house with intent to

commit a felony, is this, that, under sect. 53, the entry must be proved to have been in the night, but under this clause, proof that the prisoner was in the dwelling-house by night with the intent to commit felony is enough, and it is unnecessary to prove whether he entered by day or by night.—Greaves, Cons. Acts 150.

Indictment for being found by night armed, with intent, etc., etc., etc.—The jurors for Our Lady the Queen upon their oath present, that J. S. on .... about the hour of eleven in the night of the same day, at —— was found unlawfully armed with a certain dangerous and offensive instrument, that is to say, a crow-bar, with intent then to break and enter into a certain dwelling-house of A. B there situate, and the goods and chattels in the said dwelling-house then being, feloniously to steal, take and carry away, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 501.

It is not necessary to aver that the goods and chattels were the property of any particular person.—R. vs. Lawes, 1 C. & K. 62; Reg. vs. Nicholas, 1 Cox, 218; Reg. vs. Clarke, 1 C. & K. 421.

See *ante*, sect. 1, as to the interpretation of the word "night."

In Reg. vs. Tarrald, L. & C. 301, it was held, upon a case reserved, that an indictment under this section, for being found by night armed with a dangerous and offensive weapon and instrument with intent to break and enter into a building, and commit a felony therein, must specify, as in burglary, the building to be broken into. Crompton, J., was of opinion that the particular felony intended must also be specified.

On this case, Greaves, 2 Russell, 70, note *g.*, says: "With all deference it is submitted that this decision is

clearly erroneous. The ground on which Cockburn, C. J., rests the decision of the first point (as to a particular house to be specified) is answered by the second clause of the same section; for, under it, the mere possession without lawful excuse, of any instrument of house-breaking in the night, constitutes the offence without any intent to commit any felony at all; (See *post*, as to this part of the clause) and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet fixed ..... As to the rules of criminal pleading, these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify them. Wherever this is the case the rules allow general or other statements instead ..... It cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it, for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony....."

To this, Cave answers, (3 Burn's just. 252, note *a*): "....But a close consideration of the Statute appears to confirm it: (the decision in Tarrald's case) it may well be that in all the other cases except "having implements of housebreaking" an intent must be clearly proved; for the "being armed with a dangerous weapon" or "having the face blacked" or "being by night in a dwelling-house" are clearly no offences unless done for a felonious purpose, and the very essence of the offence is such felonious purpose. But, with regard to "having instruments of house-breaking" the Statute implies the intent from the nature of the instrument, and throws the proof of innocence upon the prisoner. The general

intention of the Statute is thus well carried out; for if a man be found by night anywhere with house-breaking implements, or such as the jury shall think he intended to use as such, he may be indicted for that offence.—Reg. vs. Oldham, 2 Den. 472, *post*, but if he has not any house-breaking implements: but is "armed with a dangerous weapon" not usable for house-breaking, or has "his face blacked" or is "in a dwelling-house" without instruments of house-breaking, then the particular intent must be laid and proved as laid."

Indictment for having in possession, by night, implements of house-breaking .... on .... about the hour of eleven in the night of the same day, at .... was found, he the said (*defendant*) then and there, by night as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of house-breaking, that is to say, two crows, three jacks and one bit, against the form .... Archbold, 502.

Any instrument, capable of being used for lawful purposes, is within the Statute, if the jury find that such instrument may also be used for the purposes of housebreaking, and that the prisoner intended to use it as an implement of house-breaking, when found, at night, in possession of it.—Reg. vs. Oldham, 2 Den. 472. It would have been better, in our Statute, to meet a doubt raised by Maule, and Cresswell, J.J., in this last case, to put a comma between pick-lock and key. What is a *picklock-key*?—What have the translators done with the word *key* in the French version of the Statute?

Where, on an indictment for having in possession without lawful excuse certain implements of housebreaking the jury found the prisoners guilty of the possession without lawful excuse, but that there was no evidence of an intent to commit a felony, and the indict-

ment omitted the words "with intent to commit a felony," it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony. Reg. vs. Bailey, Dears. 244.

OFFENCE UNDER SECT. 59, AFTER A PREVIOUS CONVICTION.

Sect. 60.—Whosoever is convicted of any such misdemeanor as in the last preceding section mentioned committed after a previous conviction, either for felony or such misdemeanor shall, on such subsequent conviction be liable to be imprisoned in the Penitentiary for any term not exceeding ten years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24-25 Vict., ch. 96, s. 59, Imp.

See Procedure Act of 1869, sect. 26, as to indictments for a subsequent offence.

STEALING IN A DWELLING-HOUSE TO THE VALUE OF $25.

Sect. 61.—Whosoever steals in any dwelling-house any chattel, money or valuable security to the value, in the whole, of twenty-five dollars or more, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 60, Imp.

As to the meaning of the words "valuable security," see *ante*, sect. 1. As to sureties for the peace, in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment ..... one silver sugar basin, of the value of twenty-five dollars of the goods and chattels of A. B., in the dwelling-house of the said A. B., situate .... feloniously did steal, take and carry away, against the form .... Archbold, 401.

If no larceny is proved the defendant must of course be acquitted altogether, except if the jury should find him guilty of the attempt to commit the offence *charged*, under sect. 49 of the Procedure Act of 1869; but the jury could not find him guilty of an attempt to commit simple larceny.—Reg. vs. McPherson, Dears. & B. 197, see *supra*, under sect. 55.

The word "*dwelling-house*" has the same meaning as in burglary and sect. 52. *ante*. If the proof fails to prove the larceny to have been committed in a dwelling-house or in the dwelling-house described, or that the value of the things stolen at any one time amounts to twenty-five dollars, the defendant must be acquitted of the compound offence, and may be found guilty of the simple larceny only.—Archbold ,402.

The goods must be stolen to the amount of twenty-five dollars or more at one and the same time.—R. vs. Petrie, 1 Leach, 294; R. vs. Hamilton, 1 Leach, 348; 2 Russell, 85.

It had been held in several cases that, if a man steal the goods of another in his own house, R. vs. Thompson, R. vs. Gould, 1 Leach, 338, it is not within the Statute, but these cases appear to be overruled by R. vs. Bowden, 2 Mood. 285. Bowden was charged with having stolen Seagall's goods, in his, Bowden's, house, and having been found guilty, the conviction was affirmed.—Where a lodger invited an acquaintance to sleep at his lodgings,

without the knowledge of his landlord, and during the night, stole his watch from his bed's head, it was doubted at the trial whether the lodger was not to be considered as the owner of the house with respect to the prosecutor; but the judges held that the defendant was properly convicted of stealing in the dwelling-house of the landlord: the goods were under the protection of the dwelling-house.—R. vs. Taylor, R. & R. 418.—If the goods be under the protection of the *person* of the prosecutor, at the time they were stolen, the case will not be within the Statute: as, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it.—R. vs. Campbell, 2 Leach, 264, and so, where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon the table, and the defendant took it up and carried it away.—R. vs. Owen, 2 Leach, 572.—For a case to be within the Statute, the goods must be under the protection of the house. But property left at a house for a person supposed to reside there, will be under the protection of the house, within the Statute. Two boxes belonging to A., who resided at 38 Rupert street, were delivered by a porter, whether by mistake or design did not appear, at No. 33 in the same street; the owner of the house imagining that they were for the defendant who lodged there, delivered them to him: the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the Statute, but the judges held that they were.—R. vs. Carroll, 1 Mood. 89.—If one on going to bed put his clothes and money by the bedside, these are under the protection of the dwelling-house and not of the person; and the question whether goods

are under the protection of the dwelling-house, or in the personal care of the owner, is a question for the Court, and not for the jury.—R. vs. Thomas, Carr. Supp. 295.—So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in a dwelling-house, and not a stealing from the person.—R. vs. Hamilton, 8, C. & P. 49.—But if money be stolen from under the pillow of a person sleeping in a dwelling-house, this is not stealing in the dwelling-house within the meaning of the Act.—2 Russell, 84.—In ascertaining the value of the articles stolen, the jury may use that general knowledge which any man can bring to the subject, but if it depends on any particular knowledge of the trade by one of the jurymen, this juryman must be sworn and examined as a witness.—R. vs. Rosser, 7 C. & P. 648.

STEALING IN A DWELLING HOUSE, ANY PERSON THEREIN BEING PUT IN FEAR.

Sect. 62.—Whosoever steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat, put any one therein in bodily fear, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 61, Imp.

As to requiring sureties for keeping the peace in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869. As to the meaning of the words "valuable security," see *ante*, sect. 1.

The indictment must expressly allege that some person in the house was put in fear by the defendant.—R. vs. Etherington, 2 Leach, 671.

Sect. 52, *ante*, and the observations under the head "Burglary" upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence under this clause.—2 Russell, 78.

The value, if amounting to twenty-five dollars had better always be inserted, as then, if no menace or threat, or no person in the house being put in fear, are proved, the defendant may be convicted of stealing in the dwelling-house to the value of twenty-five dollars, under sect. 61. If there is no proof of a larceny in a dwelling-house, or the dwelling-house alleged, or if the goods stolen are not laid and proved to be of the value of twenty-five dollars, the defendant may still be convicted of simple larceny, if the other aggravating circumstances are not proved.

The value is immaterial, if some person was in the house at the time, and was put in bodily fear by a menace or threat of the defendant, which may be either by words or gestures.— R. vs. Jackson, 1 Leach, 269.

It is clear that no breaking of the house is necessary to constitute this offence; and it should seem that property might be considered as stolen in the dwelling-house within the meaning of the Statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some persons therein should be put in fear. But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief. Where, however, the prosecutor in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was holden not to be a

stealing in the dwelling-house.—Reg. vs. Leonard, Cheshire Special Com. 1842; 2 Russell, 78. But Greaves adds: "It is submitted with all deference that this decision is erroneous; the law looks on an act done under the compulsion of terror as the act of the person causing that terror just as much as if he had done it actually with his own hands. Any asportation, therefore, of a chattel under the effects of terror is in contemplation of law the asportation of the party causing the terror."—Note g, 2 Russell, loc. cit. If so, in Leonard's case, suppose the prisoner had been taken up by the police just before the prosecutor gave him the provisions, and as he, the prosecutor, was coming with them towards the prisoner, under the influence of terror, the offence would have been larceny, according to Greaves, as the asportation by the prosecutor was in law the asportation of the prisoner; this would be going far.

It does not appear to have been expressly decided by the Repealed Statute whether or not it was necessary to prove the actual sensation of fear felt by some person in the house, or whether fear was to be implied, if some person in the house were conscious of the fact at the time of the robbery. But it was suggested as the better opinion, and was said to have been the practice, that proof should be given of an actual fear excited by the fact, when committed out of the presence of the party, so as not to amount to a robbery at common law. And it was observed that where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied; but that clearly, if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case was not within that Statute. But, now,

by the express words of the Statute, the putting in fear must have been by an actual menace or threat.—2 Russell, 79; Archbold, 401.

A person outside a house may be a principal in the second degree to menaces used in the house: menaces used out of the house may be taken into consideration with menaces used in the house.—Reg. vs. Murphy, 6 Cox, 340.

Upon the trial of any offence mentioned in this section the jury may, under sect. 49 of the Procedure Act of 1869, convict of an attempt to commit such offence.—2 Russell, 81.

Indictment.—..... one silver basin (*of the value of twenty-five dollars*) of the goods and chattels of J. N., in the dwelling-house of the said J. N., situate.... feloniously did steal, take and carry away: one A. B. then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house, and therein by the said ..... (*defendant*) by a certain menace and threat then used by the said.... (*defendant*) then being put in bodily fear, against the form.... Archbold, 401. (As to value, see *ante*.)

LARCENY IN MANUFACTORIES.

Sect. 63.—Whosoever steals to the value of two dollars any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in

any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 62, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

If you prove the larceny, but fail to prove the other circumstances so as to bring the case within the Statute, the defendant may be found guilty of the simple larceny only.—Archbold, 407.

Goods remain in "a stage, process or progress of manufacture," though the texture be complete, if they be not yet brought into a condition fit for sale.—R. vs. Woodhead, 1 M. & Rob. 549.—See R. vs. Hugill, 2 Russell 517; R. vs. Dixon, R. & R. 53.

Upon the trial of any offence mentioned in this section, the jury may, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 518.

Indictment.—.... on .... thirty yards of linen cloth, of the value of four dollars, of the goods and chattels of J. N., in a certain building of the said J. N., situate.... feloniously did steal, take and carry away, whilst the same were laid, placed and exposed in the said building, during a certain state, process and progress of manufacture, against the form of the Statute in such case made and provided.—Other counts may be added, stating the particular process and progress of manufacture in which the goods were when stolen.—Archbold, 407.

STEALING GOODS INTRUSTED FOR MANUFACTURE.

Sect 64.—Whosoever, having been intrusted for the

purpose of manufacture, or for a special purpose connected with manufacture, or employed to make any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, cotton, silk, or any such materials mixed with one another, or having been so intrusted as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, sells, pawns, purloins, secrets, embezzles, exchanges, or otherwise fraudulently disposes of the same, or any part thereof, where the case does not fall within the last preceding section hereof, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement.

This clause is not in the English Act. See *post*, sect. 122, as to fine and sureties for the peace, in misdemeanors under this Act. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

LARCENY IN SHIPS, WHARVES, ETC., ETC.

Sect. 65.—Whosoever steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal, or steals any goods or merchandise from any dock, wharf or quay, adjacent to any such haven, port, river, canal, creek or basin, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than

two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 63, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment for stealing from a vessel on a navigable river .....on ..... twenty pounds weight of indigo of the goods and merchandise of J. N., then being in a certain ship called the Rattler upon the navigable river Thames, in the said ship, feloniously did steal, take and carry away, against the form.... Archbold, 408.

Indictment for stealing from a dock—....*on*..... twenty pounds weight of indigo of the goods and merchandise of J. M., then being in and upon a certain dock adjacent to a certain navigable river called the Thames, from the said dock, feloniously did steal, take and carry away, against the form.... Archbold, 409.

The value is immaterial, and need not be laid. If the prosecutor fails to prove any of the circumstances necessary to bring the case within the Statute, but proves a larceny, the defendant may be convicted of the simple larceny.—Archbold, 409.

The construction of the Repealed Statute was generally confined to such goods and merchandises as are usually lodged in ships, or on wharves or quays; and therefore where Grimes was indicted on this Statute for stealing a considerable sum of money out of a ship in port, though great part of it consisted in Portugal money, not made current by proclamation, but commonly current; it was ruled not to be within the Statute.—R. vs. Grimes, Foster, 79; R. vs. Leigh, 1 Leach, 52. The same may be said of the present Statute, by reason of the substitution of the words "goods and merchandise" for the words

"chattel, money or valuable security" which are used in other parts of the Act."—Archbold, 408.

It would not be sufficient, in an indictment for stealing goods from any vessel on a certain navigable river to prove in evidence that the vessel was aground in a dock in a creek of the river, unless the indictment were amended.—R. vs. Pike, 1 Leach, 417. The words of the Statute are "*in* any vessel," and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny.—3 Burn's Just. 254.

The words of the Statute are "from the dock," so that, upon an indictment for stealing from a dock, wharf, &c., &c., a mere removal will not suffice; there must be an actual removal *from* the dock, &c., &c.—Archbold, 409.

A man cannot be guilty of this offence in his own ship.—R. vs. Madox, R. & R. 92; but see Reg. vs. Bowden, 2 Mood. 285, *ante*, under sect. 61. And now, sect. 3, *ante*, would apply to such a case, being larceny by a bailee.

The luggage of a passenger going by steamer is within the Statute. The prisoners were indicted for stealing a portmanteau, two coats and various other articles, in a vessel, upon the navigable river Thames. The property in question was the luggage of a passenger going on board the Columbian steamer from London to Hamburg; and it was held that the object of the Statute was to protect things on board a ship, and that the luggage of a passenger came within the general description of goods. —R. vs. Wright, 7 C. & P., 159.

Upon an indictment for any offence mentioned in this section, the jury may convict of an attempt to commit the same, under sect. 49 of the Procedure Act of 1869, if the evidence warrants it.—2 Russell, 381.

STEALING FROM SHIPWRECKED VESSELS. POSSESSION OF SHIPWRECKED GOODS. ETC., ETC., ETC.

Sect. 66.—Whosoever plunders or steals any part of any ship or vessel in distress or wrecked, stranded or cast on shore, or any goods, merchandise or articles of any kind belonging to such ship or vessel, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and the offender may be indicted and tried either in the district, county or place in which the offence has been committed, or in any district, county or place next adjoining, *or in which he has been apprehended or is in custody*..—24–25 Vict., ch 96, sect. 64, Imp.

The words in *italics* are not in the English Act.

Sect. 67.—If any goods, merchandise or articles of any kind belonging to any ship or vessel in distress or wrecked, stranded or cast on shore, are found in the possession of any person, or on the premises of any person with his knowledge, and such person being taken or summoned before a Justice of the Peace, does not satisfy the Justice that he came lawfully by the same, then the same shall, by order of the Justice, be forthwith delivered over to or for the use of the rightful owner thereof, and the offender shall on conviction of such offence before the Justice, at the discretion of the Justice, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the value of the goods, merchandise or articles, such sum of money not

exceeding twenty dollars, as to the Justice may seem meet.—24–25 Vict., ch. 96, sect. 65, Imp.

Sect. 68—If any person offers or exposes for sale any goods, merchandise or articles whatsoever, unlawfully taken or reasonably suspected so to have been taken from any ship or vessel in distress, or wrecked, stranded or cast on shore, in every such case any person to whom the same are offered for sale, or any officer of customs, or excise or peace officer may lawfully seize the same, and shall, with all convenient speed carry the same or give notice of such seizure to some Justice of the Peace, and if the person who has offered or exposed the same for sale, being summoned by such Justice, does not appear and satisfy the Justice that he came lawfully by such goods, merchandise or articles, then the same shall, by order of the Justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward to be ascertained by the Justice, to the person who seized the same, and the offender shall, on conviction of such offence by the Justice, at the discretion of the Justice, either be committed to the common gaol or house of correction there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the value of the goods, merchandise or articles, such sum of money not exceeding twenty dollars as to the Justice seems meet.—24–25 Vict., ch. 96, sect. 66, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 122.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.—As to prosecution of offences punishable on summary convictions by this Act, see *post*, sect. 123.

Indictment under sect. 66.—The jurors for Our Lady the Queen upon their oath present, that on ..... a certain ship, the property of a person or persons to the jurors aforesaid unknown, was stranded, and that J. S., on the day and year aforesaid, ten pieces of oak plank, being parts of the said ship (or twenty pounds weight of cotton, of the goods and merchandise of a person or persons to the jurors aforesaid unknown, belonging to the said ship) so then stranded as aforesaid, feloniously did plunder, steal, take and carry away, against the form...—You may add a second count stating the ship to have been "in distress," a third count stating the ship to have been "wrecked," and a fourth count stating the ship to have been "cast on shore." If the name of the ship be known, it should be stated in the indictment, and if the name of the owner be known, the ship should be described as his property.—Archbold, 384.

As to what shall be deemed "having in possession" under this Act, see *ante*, sect. 1.

By the 36 Vict., ch. 55, sects. 19 and 20, *an Act respecting Wreck and Salvage*, provisions are made concerning offences in respect of wreck, which, in many cases would clash with the above sections of the Larceny Act; but by sect. 33 of the said 36 Vict., ch. 55, it is enacted that, "Any person committing an offence against this Act, which is also an offence against some other Act, may be prosecuted, tried, and if convicted, punished under either Act.

LARCENY BY CLERKS OR SERVANTS.

Sect. 69.—Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals any chattel, money or valuable security belonging to or in the possession or power of

his master or employer, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 67, Imp.

As to sureties for the peace in felonies, under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869. As to what is a "valuable security," see *ante*, sect. 1.

See next section, and the cases there cited.

Indictment.— ..... on ..... was clerk to J. N., and that the said J. S., whilst he was such clerk to the said J. N. as aforesaid, to wit on the day and year aforesaid, certain money to the amount of ten pounds, ten yards of linen cloth, and one hat, of and belonging to the said J. N., his master, feloniously did steal, take and carry away, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 346.

If the defendant is not shown to be the clerk or servant of J. N. but a larceny is proved, he may be convicted of the larceny merely.—Archbold, 348; Reg. vs. Jennings, Dears. & B. 447. It is not necessary by the Statute that the goods stolen should be the property of the master: the words of the Statute are, belonging to, or in the possession or power of the master. A second count stating the goods "then being in the possession and power" of the master may be added. If it appear that the money, &c., &c., &c., was received by the clerk for and on account of his master, and was not received into the possession of the master otherwise than by the actual possession of the clerk so as not to amount to larceny

but to embezzlement, the defendant is nevertheless not entitled to be acquitted, but the jury may return as their verdict that the defendant was not guilty of larceny, but was guilty of embezzlement, and thereupon he shall be liable to be punished in the same manner as if he had been convicted on an indictment for embezzlement; but he cannot be afterwards prosecuted for embezzlement on the same facts; see *post*, sect. 74.

Upon the trial of any offence under this section, the jury, if the evidence warrants it, may convict of an attempt to commit the same, under sect. 49 of the Procedure Act of 1869.

As to what is sufficient evidence of an attempt to steal, see Reg. vs. Cheeseman, L. &. C. 140.

EMBEZZLEMENT BY CLERKS OR SERVANTS.

Sect. 70.—Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, fraudulently embezzles any chattel, money, or valuable security, delivered to or received, or taken into possession by him, for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant or other person so employed, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 68, Imp.

Sect. 73.—For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition not exceeding three, which may have been committed by him against Her Majesty, or against the same municipality, master or employer within the space of six months from the first to the last of such acts, and in every such indictment, where the offence relates to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained. if the offender be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed, is not proved, or if he is proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security has been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to some other person, and such part has been returned accordingly.—24-25 Vict., ch. 96, sect. 71, Imp.

Sect. 74.—If upon the trial of any person indicted for embezzlement or fraudulent application or disposition as aforesaid, it is proved that he took the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict

that such person is not guilty of embezzlement or fraudulent application or disposition, but is guilty of simple larceny or larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, (as the case may be) and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny, and if upon the trial of any person indicted for larceny, it is proved that he took the property in question, in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition or embezzlement upon the same facts.—24-25 Vict., ch. 96, sect. 72, Imp.

A verdict may also be given under section 110, *post*.—As to sureties for keeping the peace in felonies under this Act, see *post*, sect. 122.—As to solitary confinement, see sect. 94 of the Procedure Act of 1869.—As to the meaning of the words "valuable security," see *ante*, sect. 1, and *post*, sect. 110, for punishment, when value of property is over $200.

Embezzlement is the appropriation to his own use by a servant or clerk of money or chattels received by him

for or on account of his master or employer. Embezzlement differs from larceny in this, that in the former the property misappropriated is not at the time in the actual or legal possession of the owner, whilst in the latter it is. The distinctions between larceny and embezzlement are often extremely nice and subtle; and it is sometimes difficult to say under which head the offence ranges. —Wharton, law lexicon, verb: *embezzlement;* 4 Stephen's Comment. 130.

Greaves says: "The words of the former enactments were "shall *by virtue of such employment* receive or take into his possession any chattel, &c., &c., for, or in the name, or on the account of his master." In the present clause, the words "by virtue of such employment" are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, &c., &c., is delivered to, received or taken possession of by the clerk or servant, for *or* in the name *or* on account of the master. If therefore a man pay a servant money for his master, the case will be within the Statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for, if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement, if he converts it to his own use. The cases of R. vs. Snowley, 4 C. & P. 390; Crow's case, 1 Lew. 88; R. vs. Thorley, 1 Mood. 343; R. vs. Hawtin, 7 C. & P. 281; R. vs. Mellish, R. & R.

80, and similar cases are consequently no authorities on this clause. It is clear that the omission of the words in question, and the change in the terms in this clause render it no longer necessary to prove that the property was received by the defendant by virtue of his employment; in other words that it is no longer necessary to prove that the defendant had authority to receive it...." Greaves adds: Mr. Davis says "still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretences or otherwise:" this is plainly incorrect. A.'s servant goes to B., who owes A. £10, and falsely states that A. has sent him for the money, whereupon B. pays him the money. This case is clearly within the clause; for the money is delivered to *and* received *and* taken into possession by him for *and* in the name *and* on the account of his master, so that the case comes within every one of the categories of the clause, and if it came within any one it would suffice; in fact, no case can be put where property is delivered to a servant for his master that does not come within the clause, and it is perfectly immaterial what the moving cause of the delivery was.—Greaves, Cons. Acts, 156.

In larceny a wrongful taking is essential, whilst in embezzlement the offence consists in some actual fraudulent appropriation of that which is not unlawfully in the possession of the offender.—Cr. Law Com. 4th Rep. LV, LXXVIII.

By sect. 74, *ante*, it would seem that the distinction, often so difficult to establish, between larceny and embezzlement, is no more of practical importance as if upon an indictment for embezzlement, a larceny is proved, the jury shall be at liberty to return a verdict of guilty of larceny, and vice versâ. But practically, this distinction

has still to be made, as the jury must specify by their verdict, of which special offence they find the defendant guilty; and, if, for instance, upon an indictment for larceny, the jury return a general verdict of guilty, when the evidence proves an embezzlement and not a larceny, the conviction will be illegal.—Reg. vs. Gorbutt, Dears. & B. 166; Reg. vs. Betts, Bell, 90; Broom's Comment. 973.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S. on ..... being then employed as clerk to A. B., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money, to a large amount, to wit, to the amount of ..... for and in the name and on the account of the said A. B. his master, and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid do say that the said J. S. then, in the manner and form aforesaid, the said money, the property of the said A. B., his said master, from the said A. B., his said master, feloniously did steal, take and carry away, against the form .....

If the defendant has been guilty of other acts of embezzlement within the period of six months against the same master, the same, not exceeding three in number, may be charged in the same indictment in separate counts, (sect. 73, *ante*) as follows: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on .... in the year aforesaid, being then employed as clerk to the said A. B., did then, and whilst he was so employed as last aforesaid,

receive and take into his possession certain other money to a large amount, to wit, to the amount of .... for and in the name and on the account of the said A. B., his said master, and the said last mentioned money then, and within the said six calendar months, fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid do say, that the said J. S. then, in manner and form aforesaid, the said money, the property of the said A. B., his said master, from the said A. B., his said master, feloniously did steal, take and carry away, against the form ..... And so on, for a third count, if required.—Archbold, 444.

The indictment must show *by express words* that the different sums were embezzled within the six months.—R. vs. Noake, 2 C. & K. 620; R. vs. Purchase, C. & Mar. 617.—It was the duty of the defendant an agent and collector of a coal club, to receive payment, by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each Tuesday to pay the gross amount received into the bank to the credit of the club: the defendant was a shareholder and co-partner in the society, and indicted as such; the indictment charged him with three different acts of embezzlement during six months: each amount as charged was proved by the different payments of smaller sums, making altogether each amount charged: *held*, that the indictment might properly charge the embezzlement of a gross sum and be proved by evidence of smaller sums received at different times by the prisoner, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only. Reg. vs. Balls,

12 Cox, 96.—R. vs. Furneaux, R. & R. 325, R. vs. Flower, 8 D. & R. 512, R. vs. Tyers, R. & R. 402, holding it necessary in all cases of embezzlement to state specifically in the indictment some article embezzled, are not now law, as now, by sect. 73, *ante*, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security, except where the offence relates to a chattel, which must be described as in an indictment for larceny. In case the indictment alleges the embezzlement of money, such allegation, so far as regards the description of the property, is sustained by proof that the offender embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or by proof that he embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly; sect. 73, *ante*; but an indictment for embezzling money is not proved by showing merely that the prisoner embezzled a cheque without evidence that the cheque had been converted into money. —Reg. vs. Keena, 11 Cox, 123.—The indictment must allege the goods embezzled to be the property of the master, Rex. vs. McGregor, 3 Bos. & P. 106, R. & R. 23; R. vs. Beacall, 1 Mood. 15, and it has been said that it must show that the defendant was servant at the time.—R. vs. Somerton, 7 B. & C. 463. See, however, R. vs. Lovell, 2 M. & Rob. 236.—It is usual and prudent to state that the defendant *feloniously* did embezzle, but it is not absolutely necessary, if the conclusion state that he *feloniously* stole.—R. vs. Crighton, R. & R. 62.—It is not

necessary to state from whom the money was received.—R. vs. Beacall, 1 C. & P. 454; and note in R. vs. Crighton, R. & R. 62. But the judge may order a particular of the charge to be furnished to the prisoner.—R. vs. Bootyman, 5 C. & P. 300; R. vs. Hodgson, 3 C. & P. 422; Archbold, 445.

A female servant is within the meaning of the Act, R. vs. Smith, R. & R. 267; so is an apprentice though under age, R. vs. Mellish, R. & R. 80; and any clerk or servant, whether to person in trade or otherwise.—R. vs. Squire, R. & R. 349; R. vs. Townsend, 1 Den. 167; R. vs. Adey, 1 Den. 571.—A clerk of a savings-bank, though elected by the managers, was held to be properly described as clerk to the trustees.—R. vs. Jenson, 1 Mood. 434. The mode by which the defendant is remunerated for his services is immaterial, and now, if he has a share or is a co-partner in the society whose monies or chattels he embezzled, he may be indicted as if he was not such shareholder or co-partner; sect. 38, *ante*.—R. vs. Hartley, R. & R. 139; R. vs. Macdonald, L. & C. 85; Reg. vs. Balls, 12 Cox, 96.—So, where the defendant was employed as a traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as a traveller by other persons also, he was holden to be a clerk of the prosecutors within the meaning of the Act.—R. vs. Carr, R. & R. 198; R. vs. Hoggins, R. & R. 145; R. vs. Tite, L. & C. 29; 8 Cox, 458.—Where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect monies in connection with his orders, but he was at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose, he was held not to be a clerk or servant within the

Statute.—Reg. vs. Bowers, 10 Cox, 254. In delivering judgment in that case, Erle, C. J., observed: "The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the monies of his employer, to be within the Statute; but if a man be intrusted to get orders and to receive money, getting the orders where and when he chooses, and getting the money where and when he chooses, he is not a clerk or servant within the Statute."—See R. vs. Walker, Dears. & B. 600; R. vs. May, L. & C. 13.—A person whose duty it is to obtain orders where and when he likes, and forward them to his principal for execution, and then has three months within which to collect the money for the goods sent is not a clerk or servant; if such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has had nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement, if he does not pay over or account for the money so received. Reg. vs. Mayle, 11 Cox, 150.—The prisoner was employed by a coal merchant under an agreement whereby "he was to receive one shilling per ton procuration fee, payable out of the first payment, four per cent for collecting, and three pence on the last payment; collections to be paid on Friday evening before 5 P.M., or Saturday before 2 P.M." He received no salary, was not obliged to be at the office except on the Friday or Saturday to account for what he had received: he was at liberty to go where he pleased for orders: *held*, that the prisoner was not a clerk or servant within the Statute relating to embezzlement.—Reg. vs. Marshall, 11 Cox, 490.—Prisoner was engaged by U. at weekly wages to manage a shop; U. then assigned all his estate and effects to R., and a notice was served on prisoner to act as the agent of R. in the

management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. Prisoner received his weekly wages from U. during the whole time. Some time after a composition deed was executed by R. and U. and U.'s creditors, by which R. re-conveyed the estate and effects to U.; but this deed was not registered until after the embezzlement charged against the prisoner: *held*, that prisoner was the servant of U. at the time of the embezzlement.—Reg. vs. Dixon, 11 Cox, 178.—The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town, in England, Ireland and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the prosecutor, and that he would not, without the consent in writing of the prosecutor, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement, *held*, that he was a clerk or servant of the prosecutor within the meaning of the Statute.—Reg. vs. Turner, 11 Cox, 551. Lush, J., in this case, said: "If a person says to another carrying on an independent trade, 'if you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a *clerk or servant*, but if a man says 'I employ you and will pay you, not by salary, but by commission' the person employed is a servant. In the first case, the

person employing has no control over the person employed; in the second case, the person employed is subject to the control of the employer. And on this, this case was distinguished from Reg. vs. Bowers, and Reg. vs. Marshall, *supra*.—So, in Reg. vs. Bailey, 12 Cox, 56, the prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary but was paid by commission. The prisoner might get orders where and when he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time, the whole of every day, to their service; *held*, that the prisoner was a clerk and servant within the Statute.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, was at liberty to apply for orders, when he thought most convenient, and was not to employ himself for any other persons: *held*, not a clerk or servant within the Statute: the prisoner was not under the control and bound to obey the orders of the prosecutors.—Reg. vs. Negus, 12 Cox, 492.

Prisoner was employed by B. to navigate a barge, and was entitled to half the earnings after deducting the expenses. His whole time was to be at O.'s service, and his duty was to account to O. on his return after every voyage. In October, prisoner was sent with a barge load of bricks to London, and was there forbidden by O. to take back manure for P. Notwithstanding this, prisoner took the manure, and received £4 for the freight, which he appropriated to his own use. It was not proved that he carried the manure, or received the freight for his master, and the person who paid the £4 did not know for

whom it was paid: *held*, that the prisoner could not be convicted of embezzlement, as the money was not received by him in the name, or for, or on account of his master.—Reg. vs. Cullum, 12 Cox, 469.

It is not necessary that the employment should be permanent: if it be only occasional, it will be sufficient. Where the prosecutor having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was holden to be a servant within the meaning of the Act.—R. vs. Spencer, R. & R. 299; R. vs. Smith, R. & R. 516. And in R. vs. Hughes, 1 Mood. 370, where a drover, who was employed to drive two cows to a purchaser, and receive the purchase money, embezzled it, he was holden to be a servant within the meaning of the Act, by the judges; but the judge presiding the trial seemed to be of a contrary opinion, and R. vs. Nettleton, 1 Mood. 259, R. vs. Burton, 1 Mood. 237, appear to be adverse to R. vs. Hughes.—See R. vs. Tongue, Bell, 289; R. vs. Hall, 1 Mood. 374; R. vs. Miller, 2 Mood. 249; R. vs. Proud, Leigh & Cave, 97; 9 Cox, 22.—The treasurer of a friendly society, into whose hands the monies received on behalf of the society were to be paid, and who was to pay no money except by an order signed by the secretary and counter-signed by the chairman or a trustee, and who by the Statute was bound to render an account to the trustees, and to pay over the balance on such accounting when required, but was not paid for his services, is not a clerk or servant, and cannot be indicted for embezzlement of such balance.—Reg. vs. Tyrie, 11 Cox, 241.—And before the Statute making it larceny or embezzlement for a partner to steal or embezzle any of the

co-partnership property, the secretary of a friendly society, and himself a member of it, could not be convicted on an indictment for embezzling the society's monies, laying the property in, and describing him as the servant of A. B. (another member of the society) and others, because the "others" would have comprised himself, and so the indictment would in fact have charged him with embezzling his own money, as his own servant. —R. vs. Diprose, 11 Cox, 185; R. vs. Taffs, 4 Cox, 169; R. vs. Bren. L. & C. 346. But a stealing or embezzlement by a partner is now provided for by sect. 38, *ante*.

The trustees of a benefit building society borrowed money for the purpose of their society on their individual responsibility: the money, on one occasion, was received by their secretary and embezzled by him: *held*, that the secretary might be charged in the indictment for embezzlement of the property of W. and others, W. being one of the trustees, and a member of the society.—Reg. vs. Bedford, 11 Cox, 367.—A person cannot be convicted of embezzlement as clerk or servant to a society, which, in consequence of administering an unlawful oath to its members, is unlawful, and prohibited by law.—R. vs. Hunt, 8 C. & P. 642.—But an unregistered friendly society or trades union may prosecute its servants for embezzlement of its property, though some of its rules may be void as being in restraint of trade, and contrary to public policy. Rules in a trades union or society imposing fines upon members for working beyond certain hours, or for applying for work at a firm where there is no vacancy, or for taking a person into a shop to learn weaving where no vacant loom exists, though void as being in restraint of trade, do not render the society criminally responsible. —Reg. vs. Stainer, 11 Cox, 489.—If the clerk of several partners embezzle the private money of one of them, it

is an embezzlement within the Act, for he is a servant of each. So where a traveller is employed by several persons and paid wages, to receive money, he is the individual servant of each.—R. vs. Carr, R. & R. 198; R. vs. Batty, 2 Mood. 257; R. vs. Leach, Archbold, 450.—So a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners.—R. vs. White, 2 Mood. 91.

In R. vs. Glover, L. & C. 466, it was held that a county court bailiff, who has fraudulently misappropriated the proceeds of levies, made under county court process, cannot be indicted for embezzling the monies of the high-bailiff, his master; these monies are not the property of the high-bailiff.—A distraining broker employed exclusively by the prosecutor, and paid by a weekly salary and by a commission, is a servant within the Statute. —R. vs. Flanagan, 10 Cox, 561.

Where the prisoner was charged with embezzlement, but his employer who made the engagement with him was not called to prove the terms thereof, but only his managing clerk, who knew them through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor.—R. vs. Taylor, 10 Cox, 544.

Money received by the defendant from his master himself, for the purpose of paying it to a third person, is not within the embezzlement section; it is larceny.—R. vs. Peck, 2 Russell, 449; R. vs. Smith, R. & R. 267; R. vs. Hawkins, 1 Den. 584; R. vs. Goodenough, Dears. 210. The principle in these and the following cases, is

that in law, the possession by the servant is possession by the master, and that the master who places money in his servant's hands for paying bills, &c., &c., &c., does not loose the possession of his money; so, that the servant, in fraudulently misappropriating this money, takes it wrongfully, in law, in his master's possession, *inde*, commits larceny, not embezzlement. And the principle is the same, when money is constructively in the possession of the master by the hands of any other clerk or servant.—R. vs. Murray, 1 Mood. 276; R. vs. Watts, 2 Den. 15; R. vs. Read, Dears. 168–257.

So, where the defendant's duty was to place every night in an iron safe, provided by his employer for that purpose, in an office where he conducted the business of his employer, though in his own house, the monies received by him on his employer's account and not used during the day, it was held that by placing it there, he determined his own exclusive possession of the money, and that, by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny.—R. vs. Wright, Dears. & B. 431.—The fraudulent appropriation of money, which has never been in the master's own possession, and which the defendant has received from a fellow-servant to give to his master, is embezzlement.—R. vs. Masters, 1 Den. 332. Greaves, note *d*, 2 Russell, 450, thinks this is a wrong decision.—Where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity; the stranger bought the goods, and the shopman embezzled the money, the judges held this to be a case within the Act.—R. vs. Headge, R. & R. 160; R. vs. Gill, Dears. 289.—Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling accounts with his master weekly,

and upon such a sale the defendant fraudulently omitted to make an entry of it in the book, and appropriated the money which he received from the buyer, this was held to be embezzlement and not larceny.—R. vs. Betts, Bell, 90.—A defendant, whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who at the end of the week paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute: the Judges held the conviction right.—R. vs. Hoggins, R. & R. 145.

But where it appeared that the defendant was employed as a town traveller and collector, to receive orders from customers, and enter them in the books and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of goods from his master's shop, and a customer having ordered two articles of the defendant, he entered one of them only in the order book, for which an invoice was made out by the prosecutor for the customer; but the defendant entered the price of the other at the bottom of the invoice, and having caused both to be delivered to the customer, received the price of both, and accounted to the prosecutor only for the former; this was held not to be embezzlement but larceny.—R. vs. Wilson, 9 C. & P. 27.—The prisoner, as foreman, by fraudulently misrepresenting that twenty-one pounds, eighteen shillings was due for wages to the men under him, obtained that sum from his

master's cashier. On the pay-sheet made out by the prisoner, one pound, ten shillings and four pence was set down as due to W., whereas only one pound, eight shillings was due, and that amount only was paid by prisoner to W. out of the twenty-one pounds, eighteen shillings; the excess, two shillings and four pence, was appropriated, out of the twenty-one pounds eighteen shillings, to the prisoner's own use, he intending so to appropriate it at the time he received the twenty-one pounds eighteen shillings: *held*, that the prisoner was guilty of larceny of his master's two shillings and four pence.—Reg. vs. Cooke, 12 Cox, 10. See R. vs. Beaumont, Dears 270; R. vs. Thorp, Dears & B. 262; R. vs. Harris, Dears. 344; R. vs. Sullens, 1 Mood. 129. A correct entry of money received in one book out of several is no answer to a charge of embezzlement, where the prisoner has actually appropriated the money.—Reg. vs. Lister, Dears. & B. 118.

The usual presumptive evidence of embezzlement is that the defendant never accounted with his master for the money, &c., &c., received by him, or that he denied his having received it. But merely accounting for the money is not sufficient, if there is a misappropriation of it.—Reg. vs. Lister, *supra*. Greaves says, note *n*, 2 Russell, 455: "A fallacy is perpetually put forward in cases of embezzlement: the offence consists in the conversion of the *thing* received: no entry or statement is anything more than evidence bearing on the character of the disposal of the thing; and yet entries are constantly treated as the offence itself. If a man made every entry in due course, it would only, at most, amount to evidence that he did not, when he made them, intend to convert the money; and yet he might have converted it before, or might do so afterwards. If he were proved

to have converted it before he made the entries, the offence would be complete, and no entry afterwards made could alter it. So, on the other hand, if he made no entries or false entries but actually paid the money to his master, he would be innocent." See Reg. vs. Guelder, Bell, 284, and Brett's, J., remarks in Reg. vs. Walstenholme, 11 Cox, 313; R. vs. Jackson, 1 C. & K. 384.—The fact of not paying over monies received by a servant is proof of embezzlement, even if no precise time can be fixed at which it was his duty to pay them over, if his not accounting for them is found by the jury to have been done fraudulently.—R. vs. Welch, 1 Den. 199; R. vs. Wortley, 2 Den, 333.

In R. vs. Grove, 1 Mood. 447, a majority of the judges (eight against seven) are reported to have held that an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. See also, R. vs. Lambert, 2 Cox, 309; R. vs. Moah, Dears. 626. But in R. vs. Jones, 8 C. & P. 288, where, upon an indictment for embezzlement, it was opened that proof of a general deficiency in the prisoner's accounts would be given, but none of the appropriation of a specific sum, Alderson, B., said: "Whatever difference of opinion there might be in R. vs. Grove, (*ubi supra*) that proceeded more upon the particular facts of that case than upon the law: it is not sufficient to prove at the trial a general deficiency in account: some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen. See also R. vs. Chapman, 1 C. & K. 119, 2 Russell, 460, and Reg. vs. Wolstenholme, 11 Cox, 313.

A conductor of a tramway car was charged with

embezzling three shillings. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been £3 1 9, according to his way bills for the day, but he paid in only £3 0 8: *held*, that there was sufficient evidence of the receipt of seven shillings and eleven pence, the total amount of fares of the particular journey, and of the embezzlement of three shillings, part thereof.—Reg. vs. King, 12 Cox, 73.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day.—R. vs. Williams, 6 C. & P. 626.

Upon the trial for any offence, mentioned in these sections, the jury may convict of an attempt to commit the same, under sect. 49 of the Procedure Act of 1869, if the evidence warrants it.

LARCENY BY PUBLIC OFFICERS, ETC. EMBEZZLEMENT BY PUBLIC OFFICERS, ETC.

Sect. 71.—Whosoever being employed in the public service of Her Majesty, or of the Lieutenant Governor or Government of any Province of Canada or of any municipality, steals any chattel, money or valuable security belonging to or in the possession or power of Her Majesty, or of such Lieutenant Governor, Government or

municipality, or intrusted to or received or taken into possession by him by virtue of his employment, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 69, Imp.

Sect. 72—Whosoever being employed in the public service of Her Majesty, or of the Lieutenant Governor or Government of any Province of Canada, or of any municipality, and intrusted by virtue of such employment with the receipt, custody, management or control of any chattel, money or valuable security, embezzles any chattel, money or valuable security entrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any "*matter*," (manner) fraudulently applies or disposes of the same, or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service, or the service of such Lieutenant Governor, Government or municipality, shall be deemed to have feloniously stolen the same from Her Majesty, or from such municipality, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and every offender against this and the last preceding section may be dealt with, indicted, tried and punished either in the district, county or place in which he is apprehended or is in custody, or in which he has committed the offence; and in every case of larceny, embezzlement or fraudulent application or dis-

position of any chattel, money or valuable security, in this and the last preceding section mentioned, it shall be lawful in the warrant of commitment by the Justice of the Peace, before whom the offender is charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money or valuable security in Her Majesty, or in the municipality, as the case may be.—24–25 Vict., ch. 96, sect. 70, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869. As to the interpretation of the words "valuable security," see *ante*, sect. 1.

These clauses have the effect of extending sections 69 and 70, as to larceny and embezzlement by clerks or servants, to public and municipal officers, and the remarks under the said sections 69 and 70, *ante*, may be applied here. Sections 73 and 74, *ante*, apply also to sections 71 and 72.

Indictment under sect. 71.—..... on ..... at .... being then employed in the public service of Her Majesty, to wit, being then and there .... one .... belonging to Her Majesty, feloniously did steal, take and carry away, against the form ..... 3 Burn's Just. 319.

This form has not the word "feloniously" in 3 Burn's Just., loc. cit.

Indictment under sect. 72.— .... on ..... at ..... being employed in the public service of Her Majesty, and being entrusted, by virtue of such employment with the receipt, custody, management and control of a certain valuable security, to wit ..... did then and there, whilst he was so employed as aforesaid, receive and take into his possession the said valuable security, and the said valuable security then fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath

aforesaid do say, that .... *(defendant)* in manner and form aforesaid, the said valuable security, the property of Her Majesty, from Her Majesty, feloniously did steal, take and carry away, against the form ..... 3 Burn's Just. 319: *see note to last form.* A second count laying what particular office the defendant held may be added.

Evidence of acting in the capacity of an officer employed by the crown is sufficient to support an indictment: and the appointment need not be regularly proved.—Reg. vs. Townsend, C. & M. 178; R. vs. Borrett, 6 C. & P. 124. Proof of a general deficiency in account would probably not be sufficient: the embezzlement of a specific sum would have to be proved.—See cases on this subject, *ante*, under sect. 70.

LARCENY BY TENANTS OR LODGERS.

Sect. 75.—Whosoever steals any chattel or fixture, let to be used by him or her, in or with any house or lodging, whether the contract has been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, is guilty of felony, and shall be liable to be imprisoned for any term less than two years, with or without hard labour, and with or without solitary confinement; and in case the value of such chattel or fixture exceeds the sum of twenty-five dollars, shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture, in this section men-

tioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.—24-25 Vict., ch. 96, sect. 74, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

If the indictment be for stealing a chattel, it may be, by the clause itself, in the common form for larceny, and in case of stealing a fixture, the indictment may be in the same form as if the offender were not a tenant or lodger, and the property may be laid either in the owner or person letting to hire. If the indictment be for stealing a fixture, use form under sect. 20, *ante*, and describe the dwelling-house as that of the landlord, as in burglary.—3 Burn's Just. 319.

There may be a conviction of an attempt to commit any offence mentioned in this section, upon a trial for that offence.—Sect. 49 of the Procedure Act of 1869.

By common law, a lodger had a special property in the goods which were let with his lodgings: during the lease he, and not the landlord, had the possession: therefore the landlord could not maintain trespass for taking the goods: in consequence, the taking by the lodger was not felonious.—Meere's case, 2 Russell, 519; R. vs. Belstead, R. & R. 411. Hence, the statutory enactments on the subject.

FRAUDS BY AGENTS, BANKERS OR FACTORS.

Sect. 76.—Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant or broker, attorney or other agent, with any money, or security for the payment of money, with any direction in writing, to apply, pay or

deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose or to any person specified in such direction, in violation of good faith, and contrary to the terms of such direction, in any wise converts to his own use or benefit or the use or benefit of any person other than the person by whom he has been so intrusted, such money, security or proceeds, or any part thereof respectively, and whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of this Dominion of Canada, or any Province thereof, or of any British colony or possession, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer, or pledge, in violation of good faith and contrary to the object or purpose for which such chattel, security or power of attorney has been intrusted to him, sells, negotiates, transfers, pledges or in any manner converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such chattel, or security or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney relates, or any part thereof, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without

solitary confinement, but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect to any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money due or to become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof in such manner as he might have done, if this Act had not been passed, nor from selling, transferring or otherwise disposing of any securities or effects in his possession, upon which he has any lien, claim or demand entitling him by law so to do, unless such sale, transfer or other disposal extends to a greater number or part of such securities or effects than are requisite for satisfying such lien, claim or demand.—24-25 Vict., ch. 96, sect. 75, Imp.

Greaves says:—"The former enactments did not extend to a direction to apply any security for the payment of money; the present clause is extended to that case, and the words "pay or deliver" "to any person" are introduced to include cases where the direction is to pay or deliver a bill of exchange or other security to a particular person. The words "or the use or benefit of any person other than the person" are introduced to include cases where the banker, &c., &c., &c., converts the property not to his own use, but to that of some person other than the person employing him. If it should be suggested that these words are too large, as they would include a payment to the use of A. by the direction of the party intrusting the money to the banker; the answer is, that to bring a case within this clause,

three things must concur: the property must be disposed of, first, in violation of good faith; secondly, contrary to the term of the direction; thirdly, to the use of the banker or of some one other than the party intrusting the banker, and consequently no case where the banker obeys the direction of the party intrusting him can come within the clause.

See *post*, under section 92.

Sect. 77.—Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted either solely or jointly with any other person, with the property of any other person for safe custody, with intent to defraud, sells, negotiates, transfers, pledges, or in any other manner converts or appropriates the same or part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.—24-25 Vict., ch. 96, sect. 76, Imp.

See *post*, under section 92.

Sect. 78.—Whosoever, being intrusted, either solely or jointly with any other person, with any power of attorney, for the sale or transfer of any property, fraudulently sells or transfers, or otherwise converts the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.—24-25 Vict., ch. 96, sect. 77, Imp.

See *post*, under section 92.

Sect. 79.—Whosoever being a factor or agent intrusted, either solely or jointly, with any other person,

for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, makes any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien or security for any money or valuable security, borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer or delivery, or intended to be thereafter borrowed or received, or contrary to, or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer or *delivery of any* (deliver any) such goods or document of title, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned; and every clerk or other person who knowingly and wilfully acts and assists in making any such consignment, deposit, transfer or delivery, or in accepting or procuring such advance as aforesaid, is guilty of a misdemeanor, and shall be liable to any of the same punishments; provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, in case the same are not made as security for, or subject to the payment of any greater sum of money than the amount, which at the time of such consignment, deposit, transfer or delivery

was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.—24–25 Vict., ch. 96, sect. 78, Imp.

See *post*, under section 92.

Sect. 80—Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title, and every contract pledging or giving a lien upon such document of title as aforesaid, shall be deemed to be a pledge of and lien upon the goods to which the same relates, and such factor or agent shall be deemed to be possessed of such goods or document whether the same are in his actual custody or held by any other person subject to his control, or for him, or on his behalf, and where any loan or advance is *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods or document of title, and such goods or document of title is or are actually received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title, within the meaning of the last preceding section, though such goods or document of title are not actually received by the person making such loan or advance, till a period subse-

quent thereto, and any contract or agreement whether made, direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent, and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section, and a factor or agent, in possession, as aforesaid, of such goods or document, shall be taken for the purpose of the last preceding section to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.—24–25 Vict., ch. 96, sect. 79, Imp.

See *post*, under section 92.

Sect. 81.—Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose, as aforesaid, or otherwise disposes of or destroys such property or any part thereof, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned. Provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of the Attorney General or Solicitor General for that Province in which the same is to be instituted, provided also that when any civil proceeding has been taken against any person to whom the provisions of this section may apply, no person who has taken such civil proceeding shall commence any prosecution under this section without the sanction of the Court or Judge

before whom such civil proceeding has been had or is pending.—24–25 Vict., ch. 96, sect. 80, Imp.

See *post*, under section 92.

Sect. 82.—Whosoever, being a director, member, manager or public officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purpose other than the use or purposes of such body corporate or public company any of the property of such body corporate or public company, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.—24–25 Vict., ch. 96, sect. 81, Imp.

See *post*, under section 92.

Sect. 83.—Whosoever, being a director, member, manager, or public officer of any body corporate or public company, as such, receives or possesses himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, is guilty of a misdemeanor and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.—24–25 Vict., ch. 96, sect. 82, Imp.

See *post*, under section 92.

Sect. 84.—Whosoever, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or public company, or makes or concurs in the making of any false entry, or omits, or concurs in omitting any material par-

ticular in any book of account or document, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned.—24–25 Vict., ch. 96, sect. 83, Imp.

See *post* under section 92.

Sect. 85.—Whosoever, being a director, manager or public officer or member of any body corporate or public company, makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.—24–25 Vict., ch. 96, sect. 84, Imp.

See *post.*, under section 92.

Sect. 86.—Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in the said sections mentioned by any evidence whatever in respect of any act done by him, if, any time previously to his being charged with such offence, he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding, *bona*

fide instituted by any party aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any Court, upon the hearing of any matter in bankruptcy or insolvency.—24–25 Vict., ch. 96, sect. 85, Imp.

See *post*, under section 92.

Sect. 87.—Nothing in the last eleven preceding sections of this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated. —24–25 Vict., ch. 96, sect. 86, Imp.

See *post*, under section 92.

Sect. 88.—If the keeper of any warehouse, or any forwarder, common carrier, agent, clerk, or other person employed in or about any warehouse, or if any other factor or agent, or any clerk or other person employed in or about the business of such factor or agent, knowingly and wilfully gives to any person a writing purporting to be a receipt for or an acknowledgment of any goods or other property as having been received in his warehouse, or in the warehouse in or about which he is employed, or in any other manner received by him or by the person in or about whose business he is employed, before the goods or other property named in such receipt or acknowledgment have

been actually delivered to him as aforesaid, with intent to mislead, deceive, injure or defraud any person or persons whomsoever, although such person or persons may be then unknown, or if any person knowingly and wilfully accepts, or transmits, or uses any such false receipt or acknowledgment, the person giving and the person accepting, transmitting or using such receipt or acknowledgment, are severally guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years but not less than one year. (*Not in the English Act.*)

Sect. 89.—If any merchandise has, in the name of the owner or of any other person, been shipped or delivered to the keeper of any warehouse or to any other factor, agent or carrier, to be shipped or carried, and the consignee afterwards advances any moneys or gives any negotiable security to such owner or other person, then, if after any such advance, the said owner or other person for his own benefit, and in violation of good faith, and without the consent of such consignee first had and obtained, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between such owner or other person aforesaid, and such consignee at the time of or before such money being so advanced or such negotiable security being so given, with the intent to deceive, defraud or injure such consignee, the owner or other person aforesaid, and each and every other person knowingly and wilfully acting and assisting in making such disposition for the purpose of deceiving, defrauding or injuring such consignee, is or are guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding

three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, but not less than one year; but no person shall be subject to prosecution under this section, who had, before making a disposition of the merchandise aforesaid, paid or tendered to the consignee the full amount of any advance made thereon. (*Not in the English Act.*)

Sect. 90.—Any miller, warehouseman, factor, agent, or other person, who, after having given, or after any clerk or person in his employ has to his knowledge given, as having been received by him, in any mill, warehouse, vessel, cove, or other place, any receipt, certificate or acknowledgment, for grain, timber or other goods or property, which can be used for any of the purposes mentioned in the Act passed in thirty-first year of Her Majesty's reign and intituled: "An Act respecting Banks," or any person, who, after having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards and without the consent of the holder, or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates, or parts with, or does not deliver to such holder or endorsee of such receipt, certificate or acknowledgment, the grain, timber, goods or property therein mentioned, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, ("*but not less than two years*" is omitted) or in any other gaol or place of confinement for any term less than two years, but not less than one year; provided that nothing in this section shall prevent the offender from being indicted and punished for larceny,

instead of misdemeanor, if, as being a bailee, his offence amounts to larceny. (*Not in the English Act.*)

Sect. 91.—If any offence in the last three preceding sections mentioned be committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, shall be deemed guilty of the offence, and not any other person. (*Not in the English Act.*)

Sect. 92.—No misdemeanor against any of the sixteen last preceding sections of this Act shall be prosecuted or tried at any Court of General or Quarter Sessions of the Peace; *and if upon the trial of any person under any of the said sections, it appears that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under the said sections.*—24-25 Vict., ch. 96, sect. 87, Imp.

The words in *italics* in this last clause are not in the English Act. They were there omitted (though contained in the Repealed Statute) because the case was provided for by 14-15 Vict., ch. 100, sect. 12. The same reason should have induced the framers of our Statute to leave out these words, as sect. 50 of the Procedure Act of 1869 provides for the same case.

As to the meaning of the words "property," "valuable security," "document of title to goods," in these seventeen preceding sections, see *ante*, sect. 1.

As to fining the offender *and* requiring him to enter into recognizances and give sureties for keeping the peace in misdemeanors under this Act, see *post*, sect. 122.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

W. deposited title deeds with D., as security for a loan,

and requiring a further loan, the defendant, an attorney, obtained for W. a sum of money from T. and delivered to her a mortgage deed as security. There were no directions in writing to the defendant to apply the money to any purpose, and he was entrusted with the mortgage deed, with authority to hand it over to T. on receipt of the mortgage money, which was to be paid to D. and W., less costs of preparing the deed. The defendant fraudulently converted a substantial part of the money to his own use: *held*, that as there was no direction in writing, the defendant was not guilty of a misdemeanor under sect. 75 of the Larceny Act, sect. 76 of our Statute: *held* also, that he was not guilty under sect. 76, sect. 77 of our Statute.—Reg. vs. Cooper, 12 Cox, 600 See R. vs. Golde, 2 Russell, 481; R. vs. Prince, 2 C. & P. 517; R. vs. White, 4 C. & P. 46; Reg. vs. Gomm, 3 Cox, 64; Reg. vs. Fletcher, Leigh & Cave, 180.

A stock and share dealer was in the habit of buying for S. gratuitously and receiving cheques on account. On the 27th of November, he wrote informing S. that £300 Japanese bonds had been offered to him in one lot, and that he had secured them for her, and that he had no doubt of her ratifying what he had done, and enclosing her a sold note for £336, signed in his own name. S. wrote in reply "that she had received the contract note for Japan shares and had inclosed a cheque for £336 in payment, and that she was perfectly satisfied that he had purchased the shares for her." In fact, the bonds had not been offered to the dealer in one lot, but he had applied to a stock jobber, and agreed to buy three at £112 each, but never completed the purchase. *Held* that S.'s letter was a sufficient written direction, within the meaning of 24-25 Vict., ch. 96, sect. 75 (sect. 76, *ante*, of Canadian Statute) to apply the cheque to a par-

ticular purpose, viz., in payment for the bonds.—Reg. vs. Christian, 12 Cox, 502.

Indictment, under sect. 76, *against a banker for a fraudulent conversion of money intrusted to him.*—..... that A. B. on ..... did intrust C. D. as a banker, with a certain large sum of money, to wit, the sum of one hundred pounds, with a direction to the said C. D. in writing to pay the said sum of money to a certain person specified in the said direction, and that the said C. D. as such banker as aforesaid, afterwards, to wit, on ..... in violation of good faith and contrary to the terms of such direction, unlawfully did convert to his own use and benefit the said sum of money so to him intrusted as aforesaid against..... (In case of a security for money, the indictment must allege a written direction as to the application of the proceeds. A count should be added stating particularly the purpose to which the money was to be applied, and the person to whom it was to be paid.)—3 Burn's Just. 320.

Indictment, under sect. 76, *against a banker, for selling or converting goods or valuable securities intrusted to him for safe keeping, or for a special purpose "not" in writing.*—.....that A. B. on ..... did intrust to C. D. as a banker, for safe custody, a certain bill of exchange the property of the said A. B. drawn by..... on .... dated .... for the payment of the sum of one hundred pounds, without any authority to sell, negotiate, transfer or pledge the same; and that the said C. D. then being such banker, as aforesaid, and being so intrusted, as aforesaid, in violation of good faith and contrary to the object and purpose for which the said bill of exchange so intrusted to him as aforesaid, and whilst so intrusted as aforesaid, unlawfully did negotiate, transfer and convert to his own use and benefit, the said bill of exchange,

against ..... (Add other counts, as the case may suggest.)—3 Burn's Just. 320.

Indictments, under sections 77 and 78, may readily be framed from the above, omitting the special allegations as to safe custody, &c., &c.—3 Burn's Just. 320.

Indictment, under sect. 79, *against a factor for pledging goods.*—.... that A. B. on ..... did intrust to C. D., he, the said C. D. then being a factor and agent, one hundred bales of cotton, of the value of one thousand pounds, for the purpose of selling the same, and that the said C. D. afterwards, contrary to and without the authority of the said A. B., for his own benefit, and in violation of good faith, unlawfully did deposit the said cotton with E. F. of .... as and by way of a pledge, lien and security, for a sum of money, to wit, one hundred pounds, by the said C. D. then borrowed and received of and from the said E. F. against the ..... 3 Burn's Just. 320.

Indictment, under sect. 81, *against a trustee for fraudulent conversion.*—The Jurors for Our Lady the Queen upon their oath present, that, before and at the time of the committing of the offences hereinafter mentioned, to wit, on ... .. C. D. was a trustee for certain property, to wit, five thousand pounds three per centum consolidated bank annuities wholly (or partially) for the benefit of J. N., and that he, the said C. D., so being such trustee as aforesaid, on the day and year aforesaid, unlawfully and wilfully did convert and appropriate the said property to his own use, with intent thereby then to defraud, against the form ..... (Add counts alleging that the defendant disposed of, showing the mode of disposition, or destroyed the property, if necessary).—3 Burn's Just. 321.

Indictment, under sect. 82, *against a director for fraud-*

ulent conversion of the company's money.—The jurors for Our Lady the Queen upon their oath present, that before and at the time of the committing of the offence hereinafter mentioned, C. D. was a director of a certain public company, called .... and that he, the said C. D., so being such director as aforesaid, on the ..... did unlawfully and fraudulently take and apply for his own use and benefit, certain money, to wit, one thousand pounds, of and belonging to the said Company, against the ..... —3 Burn's Just. 321.

Indictment, under sect. 83, *against directors for keeping fraudulent accounts.*—..... that C. D. on ..... then being a director of a certain body corporate, called .... unlawfully did, as such director, receive and possess himself of certain of the property of the said body corporate, otherwise than in payment of a just debt or demand, to wit, the sum of one hundred pounds, and unlawfully, with intent to defraud, did omit to make a full and true entry of the said sum, in the books and accounts of the said body corporate, against ..... 3 Burn's Just. 321.

Indictment, under sect. 84, *against a director for destroying or falsifying books,* &c., &c.—.... that C. D. on .... then being a director of a certain body corporate called ..... unlawfully, with intent to defraud, did destroy (*alter, or mutilate, or falsify*) a certain book (*or paper, or writing, or valuable security*) to wit .... belonging to the said body corporate, against the form ..... —3 Burn's Just. 321.

Indictment, under sect. 85, *against a director for publishing fraudulent statements.*—..... that before and at the time of the committing of the offences hereinafter mentioned, C. D. was a director of a certain public company, called ....., and that he, the said C. D., so being such director as aforesaid, on ..... did unlawfully circulate and publish a certain written statement and account, which said written statement was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that (*state the particulars*), he the said C. D. then well knowing the said written statement and account to be false in the several particulars aforesaid, with intent thereby then to deceive and defraud J. N., then being a shareholder of the said public company (*or with intent....*) against the form ..... Add counts stating the intent to be to deceive and defraud "certain persons to the jurors aforesaid unknown, being shareholders of the said public company," and also varying the allegation of the intent as in the section.—3 Burn's Just. 321; Archbold, 467.

FALSE PRETENCES.

Sect. 93.—Whosoever by any false pretence obtains from any other person any chattel, money or valuable security, with intent to defraud, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; provided, that if, upon the trial of any person indicted for such misdemeanor, it is proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts; provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege

that the party accused did the act with intent to defraud, and without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.—24–25 Vict., ch. 96, sect. 88, Imp.

See *post*, sect. 94.

As to the meaning of the words "valuable security," see *ante*, sect. 1.

As to fining the offender and requiring him to give sureties for the peace, in misdemeanors under this Act, see *post*, sect. 122, and sect. 110, *post*, for additional punishment, where value of property is over $200.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

By sect. 49, of the Procedure Act of 1869, upon an indictment under any of these sections, the jury may return a verdict of guilty of an attempt to commit the offence charged, if the evidence warrants it.—Reg. vs. Roebuck, Dears. & B. 24; Reg. vs. Eagleton, Dears. 376, 515; Reg. vs Hensler, 11 Cox, 570; Archbold, 484. A verdict under sect. 110, *post*, may also be given. No indictment can be preferred for obtaining money or other property by false pretences, unless one or other of the preliminary steps required by sect. 28 of the Procedure Act of 1869 has been taken.

Cheats and frauds, heretofore punishable at common law, are now punishable under sect. 86 of the Procedure Act of 1869.

The following is quoted from an American case, reported in 12 Cox, 208, *the Commonwealth vs. Yerker:*

"The distinction between larceny and false pretences is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time these cases were decided larceny was a capital felony in England, and the judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life. But whatever may have been the cause, the law has come down to us with such distinctions The distinction between larceny and false pretences is well stated in Russell, on Crimes, 2nd Vol., 4th Edit., p. 200: "The correct description in cases of this kind seems to be that, if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences."

Indictment.—.....that J. S. on ..... unlawfully, knowingly and designedly did falsely pretend to one A. B. that the said J. S. then was the servant of one O. K., of ..... tailor, (the said O. K. then and long before being well known to the said A. B. and a customer of the said A. B. in his business and way of trade as a woollen draper), and that the said J. S. was then sent by the said O. K. to the said A. B. for five yards of superfine woollen cloth, by means of which said false pretences, the said J. S. did then unlawfully obtain from the said A. B. five yards of superfine woollen cloth, with intent to defraud; whereas, in truth and in fact, the said J. S. was not then the servant of the said O. K., and whereas in truth and

in fact the said J. S. was not then sent by the said O. K. to the said A. B. for the said cloth, or for any cloth whatsoever, as he the said J. S. well knew at the time when he did so falsely pretend as aforesaid, against the form ..... Archbold, 469.

It has been seen, by sect. 93, *ante*, that if, upon the trial for the misdemeanor provided for by this section, a larceny is proved, on the facts as alleged, the prisoner is not, by reason thereof, entitled to an acquittal. So far, this is in conformity with the English Act, but our Statute goes further, and, by section 99, see *post*, whose provisions are not in the English Act, provides that, if upon an indictment for larceny, the facts proved establish an obtaining by false pretences, the jury may find the defendant *guilty of such obtaining by false pretences.* This constitutes an important difference between the English Statute and our own Statute on the subject. But it is probable that the rule laid down in Reg. vs. Gorbutt, Dears & B. 166, would apply here, and that, upon an indictment for larceny, if the facts proved constitute an obtaining by false pretences, a general verdict of guilty would be wrong. It would be finding the defendant guilty of a felony, where a misdemeanor only has been proved against him.—Reg. vs. Adams, 1 Den. 38.

Moreover, in such a case, the only verdict authorized by the Statute, is "guilty of obtaining such property by false pretences with intent to defraud," and such must be the words of a verdict, under such circumstances Under section 93, the words of the Statute are different, and, if larceny is proved, upon an indictment for obtaining by false pretences, the verdict must be for the latter. "Shall not by reason thereof be entitled to be acquitted of *such misdemeanor*" are the words of the Statute. See Greaves' note to Reg. vs. Bryan, 2 Russell, 664. It

would have been impossible and against the spirit of the law to allow a verdict for a felony upon an indictment for a misdemeanor.—See sect. 50 of the Procedure Act of 1869.

The pretence must be set out in the indictment, R. vs. Mason, 2 T. R. 581; and it must be stated to be false, R. vs. Airey, 2 East, P. C. 30. And it must be of some existing fact; a pretence that the defendant will do some act, or that he has got to do some act is not sufficient. R. vs. Goodall, R. & R. 461; Reg. vs. Johnston, 2 Mood. 254; Reg. vs. Lee, L. & C. 309. Where the pretence is partly a misrepresentation of an existing fact, and partly a promise to do some act, the defendant may be convicted, if the property is parted with in consequence of the misrepresentation of fact, although the promise also acted upon the prosecutor's mind.—Reg. vs. Fry, Dears. & B. 449; Reg. vs. West, Dears. & B. 575; Reg. vs. Jennison, L. & C. 157.

Where the pretence, gathered from all the circumstances, was that the prisoner had power to bring back the husband of the prosecutrix, though the words used were merely promissory that she, the prisoner, would bring him back, it was held a sufficient pretence of an existing fact, and that it is not necessary that the false pretence should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property.—Reg. vs. Giles, L. & C. 502.

An indictment for obtaining money by false pretences must state the false pretences with certainty, so that it may clearly appear that there was a false pretence of an existing fact: where the indictment alleged that the prisoner pretended to A.'s representative that she was to give him twenty shillings for B., and that A. was going to allow B. ten shillings a week, it was held that it did

not sufficiently appear that there was any false pretence of an existing fact.—Reg. vs. Henshaw, L. & C. 444.

An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value £0 14 6, of which £0 4 6 had been paid on account, and £0 10 0 only was due, was a bill of parcels of another coat of the value of twenty-two shillings. The evidence was that the prisoner's wife had selected the £0 14 6 coat for him subject to its fitting him, and had paid £0 4 6 on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat, it was found to be too small, and the prisoner was then measured for one to cost twenty-two shillings. When that was made, it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner when the coat was given to him handed the bill of parcels for the £0 14 6 and also £0 10 0 to the prosecutor, saying "There is £0 10 0 to pay." The bill was receipted, and the prisoner took the twenty-two shillings coat away with him. The prosecutor stated that believing the bill of parcels to refer to the twenty-two shillings coat, he parted with that coat on payment of £0 10 0, otherwise he should not have done so; *held*, that there was evidence to support a conviction on the indictment.—Reg. vs. Steels, 11 Cox, 5.

So the defendant may be convicted, although the pretence is of some existing fact, the falsehood of which might have been ascertained by inquiry by the party defrauded, R. vs. Wickham, 10 Ad. & Ed. 34; Reg. vs. Woolley, 1 Den., 559; Reg. vs. Ball, Car. & M. 249; Reg. vs. Roebuck, Dears. & B. 24; or against which common prudence might have guarded, R. vs. Young, 3 T. R. 98; Reg. vs. Jessop, Dears. & B. 442; Reg. vs. Hughes, 1 F. & F. 355. If, however, the prosecutor

knows the pretence to be false, Reg. vs. Mills, Dears. & B. 205, or does not part with the goods in consequence of defendant's representation, Reg. vs. Roebuck, Dears. & B. 24, or parts with them before the representation is made, Reg. vs. Brooks, 1 F. & F. 502, or in consequence of a representation as to some future fact, R. vs. Dale, 7 Car. & P. 352, or if the obtaining of the goods is too remotely connected with the false pretence, which is a question for the jury, Reg. vs. Gardner, Dears. & B. 40; Reg. vs. Martin, 10 Cox, 383, or if the prosecutor continues to be interested in the money alleged to have been obtained, as partner with the defendant, Reg. vs. Watson, Dears. & B. 348; Reg. vs. Evans, L. & C. 252, or the object of the false pretence is something else than the obtaining of the money, Reg. vs. Stone, 1 F. & F. 311, the defendant cannot be convicted.

Falsely pretending that he has bought goods to a certain amount, and presenting a check-ticket for them, R. vs. Barnes, 2 Den. 59; or overstating a sum due for dock dues or custom duties, Reg. vs. Thompson, L. & C. 233, will render the prisoner liable to be convicted under the Statute. (See Reporter's note to this last case.)

The pretence need not be in words, but may consist of the acts and conduct of the defendant. Thus the giving a cheque on a banker, with whom the defendant has no account, R. vs. Flint, R. & R. 460; R. vs. Jackson, 3 Campb. 370; R. vs. Parker, 2 Mood. 1; R. vs. Spencer, 3 Car. & P. 420; Reg. vs. Wickham, 10 Ad. & E. 34; Reg. vs. Philpott, 1 Car. & K. 112; R. vs. Freeth, R. & R. 127, or the fraudulently assuming the name of another to whom money is payable, R. vs. Story, R. & R. 81; Reg. vs. Jones, 1 Den. 551; or the fraudulently assuming the dress of a member of one of the universities, R.

vs. Barnard, 2 Car. & P. 784, is a false pretence within the Statute.

The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all: *held*, that this was an indictable false pretence.—Reg. vs. Crab, 11 Cox, 85.

The defendant, knowing that some old country bank notes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes, and the defendant obtained value for them. It appears that the bankers were made bankrupt: *held*, that the defendant was guilty of obtaining money by false pretences, and that the bankruptcy proceedings need not be proved.—Reg. vs. Dowey, 11 Cox, 115.

The indictment alleged that the prisoner was living apart from her husband under a deed of separation, and was in receipt of an income from her husband, and that he was not to be liable for her debts, yet that she falsely pretended to the prosecutor that she was living with her husband, and was authorized to apply for and receive from the prosecutor goods on the account and credit of her husband, and that her husband was then ready and willing to pay for the goods. The evidence at the trial was that the prisoner went to the prosecutor's shop and selected the goods, and said that her husband would give a cheque for them as soon as they were delivered, and that she would send the person bringing the goods to her husband's office, and that he would give

a cheque. When all the goods were delivered, the prisoner told the man who delivered them to go to her husband's office, and that he would pay for them. The man went, but could not see her husband, and ascertained that there was a deed of separation between the prisoner and her husband, which was shown to him. He communicated what he had learnt to the prisoner, who denied the deed of separation. The goods were shortly after removed and pawned by the prisoner. The deed of separation between the prisoner and her husband was put in evidence, by which it was stipulated that the husband was not to pay her debts; and it was proved that she was living apart from her husband, and receiving an annuity from him, and that she was also cohabiting with another man; *held*, that the false pretences charged were sufficiently proved by this evidence.—Reg. vs. Davis, 11 Cox, 181.

On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well known practice was for buyers to engage a room at a public house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief: *held*, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, the conviction could not be sustained.—Reg. vs. Burrows, 11 Cox, 258.

On the trial of an indictment against the prisoner for pretending that his goods were unencumbered, and obtaining thereby eight pounds from the prosecutor with intent to defraud, it appeared that the prosecutor lent

money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of prisoner and another person and a declaration made by prisoner that the furniture was unencumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value: *held*, that there was evidence to go to the jury in support of a charge of obtaining money by false pretences.—Reg. vs. Meakin, 11 Cox, 270.

A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences. On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless and he had been bankrupt; *held*, that the indictment could not be sustained upon either of the representations.—Reg. vs. Williamson, 11 Cox, 328.

It has been seen, *ante*, that in Reg. vs. Mills, Dears. & B. 205, it was held, that the defendant cannot be convicted, if the prosecutor knows the pretence to be false. The defendant, however, in such cases may, under sect. 49, of the Procedure Act of 1869, be found guilty of an attempt to commit the offence charged. Or be, in the first instance, indicted for the attempt. In Reg. vs. Hensler, 11 Cox, 570, the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner five shillings; but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue: it was held, upon a case reserved that

the prisoner might be convicted, on this evidence, of attempting to obtain money by false pretences.

But an indictment for an attempt to obtain property by false pretences must specify the attempt.—Reg. vs. Marsh, 1 Den., 505. The proper course is to allege the false pretences, and to deny their truth in the same manner as in an indictment for obtaining property by false pretences, and then to allege that by means of the false pretences, the prisoner attempted to obtain the property. Note by Greaves, 2 Russell, 698. But it must be remembered that by sect. 52 of the Procedure Act of 1869, "no person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor, who has been previously tried for committing the same offence."

An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T., and was going to furnish it: *held*, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction.—Reg. vs. Howarth, 11 Cox, 588.

Prisoner was indicted for obtaining from George Hislop, the master of the warehouse of the Strand Union, one pint of milk and one egg, by falsely pretending that a certain child then brought by him had been by

him found in Leicester-Square, whereas these facts were untrue. The facts were that the prisoner was waiter at an hotel in George street, Hanover-Square. A female servant there, named Spires, had been delivered of a child by him, which was put out to nurse. The child falling ill, the nurse brought it to the hotel, and the prisoner, saying that he would find another nurse, took the woman with him to Westminster, where the nurse put the child into his arms and went away. He took it to the workhouse of St. Martin-in-the-Fields, which is in the Strand Union, and delivered it to the master, stating that he had found it in Leicester-Square. It was by the master delivered to the nurse to be taken care of, and the nurse fed it with the pint of milk and egg which was the subject of the charge of the indictment as the property obtained by the false pretences alleged: *held*, that this evidence did not sustain the indictment, and that the food given to the child was too remote an object.—Reg. vs. Carpenter, 11 Cox, 600.

In Reg. vs. Walne, 11 Cox, 647, the conviction was also quashed, on the deficiency of the evidence, as no false pretence of an existing fact was proved.

Prisoner by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to E. obtained the horse. The prisoner returned in the same evening but did not pay for the hire: *held*, that this was not an obtaining of a chattel with intent to defraud within the meaning of the Statute. To constitute such an offence, there must be an intention to deprive the owner of the property.—Reg. vs. Kilham, 11 Cox, 561. But see now, for Canada, sect. 110 *post*.

There may be a false pretence made in the course of a contract, by which money is obtained under the contract, Reg. vs. Kinrick, D. & M. 208; Reg. vs. Abbott, 2 Cox,

430; Reg. vs. Burgon, Dears. & B. 11; Reg. vs. Roebuck, Dears. & B. 24; as to weight or quantity of goods sold when sold by weight or quantity, Reg. vs. Sherwood, Dears. & B. 251; Reg. vs. Bryan, Dears. & B. 265; Reg. vs. Ragg, Bell, 214; Reg. vs. Goss, Bell, 208; Reg. vs. Lees, L. & C. 418; Reg. vs. Ridgway, 3 F. & F. 838; but, in all such cases, there must be a misrepresentation of a definite fact.

But a mere false representation as to quality is not indictable, Reg. vs. Bryan, Dears. & B. 265, and the comments upon it by the judges, in Ragg's case, Bell, 214; Reg. vs. Pratt, 8 Cox, 334. Thus representing a chain to be gold, which turns out to be made of brass, silver and gold, the latter very minute in quantity, is not within the Statute.—Reg. vs. Lee, 8 Cox, 233; *sed quære*; 3 Burn's Just. 275. And see Greaves' observations, 2 Russell, 664, and R. vs. Suter, 10 Cox, 577: also, Reg. vs. Ardley, 12 Cox, 23, *post*.

It is not a false pretence, within the Statute, that more money is due for executing certain work than is actually due; for that is a mere wrongful overcharge.—Reg. vs. Oates, Dears. 459. So, where the defendant pretended to a parish officer, as an excuse for not working, that he had no clothes, and thereby obtained some from the officer, it was held that he was not indictable, the statement being rather a false excuse for not working than a false pretence to obtain goods.—R. vs. Wakeling, R. & R. 504.

Where the prisoner pretended, first, that he was a single man, and next that he had a right to bring an action for breach of promise, and the prosecutrix said that she was induced to pay him money by the threat of the action, but she would not have paid it had she known the defendant to be a married man, it was *held* that either

of these two false pretences was sufficient to bring the case within the Statute.—Reg. vs. Copeland, C. & M. 516; Reg. vs. Jennison, Leigh & Cave, 157.

Where the prisoner represented that he was connected with J. S., and that J. S. was a very rich man, and obtained goods by that false representation, it was held within the Statute.—Reg. vs. Archer, Dears. 449. Obtaining by falsely pretending to be a medical man or an attorney is within the Statute.—Reg. vs. Bloomfield, C. & M. 537; R. vs. Asterley, 7 C. & P. 191.

It is no objection that the moneys have been obtained only by way of a loan, R. vs. Crossley, 2 M. & Rob. 17; but perhaps this is true only of moneys, and not of other goods, 2 Russell, 668, and Reg. vs. Kilham, 11 Cox, 561.

Obtaining goods by false pretences intending to pay for them is within the Statute.—Reg. vs. Naylor, 10 Cox, 151.

It must be alleged and proved that the defendant knew the pretence to be false at the time of making it.—Reg. vs. Henderson, 2 Mood. 192; Reg. vs. Philpotts, 1 C. & K. 112. After verdict, however, an indictment following the words of the Statute is sufficient.—Reg. vs. Bowen, 3 Cox, 483; Hamilton vs. Reg. in error, 2 Cox, 11. It is no defence that the prosecutor laid a trap to draw the prisoner into the commission of the offence.—Reg. vs. Adamson, 2 Mood. 286; R. vs. Ady, 7 C. & P. 140.

Upon a charge of obtaining money by false pretences it is sufficient if the actual substantial pretence, which is the main inducement to part with the money, is alleged in the indictment, and proved, although it may be shewn by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement for him to part with his money.—Reg. vs. Hewgill, Dears. 315. The indictment must

negative the pretences by special averment, and the false pretence must be proved as laid.—Any variance will be fatal, unless amended. 3 Burn's Just. 277. But proof of part of the pretence, and that the money was obtained by such proof is sufficient.—R. vs. Hill, R. & R. 190; Reg. vs. Wickham, 10 Ad. & E. 34; Reg. vs. Bates, 3 Cox, 201.

But the goods must be obtained by means of some of the pretences laid.—Reg. vs. Dale, 7 C. & P. 352; Reg. vs. Hunt, 8 Cox, 495. And where the indictment alleged a pretence which in fact the prisoner did at first pretend, but the prosecutor parted with his property in consequence of a subsequent pretence, which was not alleged, it was held that the evidence did not support the indictment.—R. vs. Bulmer, L. & C. 476.

Where money is obtained by the joint effect of several misstatements, some of which are not and some are false pretences within the Statute, the defendant may be convicted, Reg. vs. Jennison, L. & C. 157; but the property must be obtained by means of one of the false pretences charged, and a subsequent pretence will not support the indictment.—Reg. vs. Brooks, 1 F. & F. 502.

Parol evidence of the false pretence may be given, although a deed between the parties, stating a different consideration for parting with the money is produced, such deed having been made for the purpose of the fraud. —Reg. vs. Adamson, 2 Mood. 286. So also parol evidence of a lost written pretence may be given.—R. vs. Chadwick, 6 C. & P. 181.—On an indictment for obtaining money from A., evidence that the prisoner about the same time obtained money from other persons by similar false pretences is not admissible.—Reg. vs. Holt, 8 Cox, 411; Bell, 280. But other false pretences at other times to the same person are admissible, if they are so connected as

to form one continuing representation, which it is the province of the jury to determine.—Reg. vs. Welman, Dears. 188; 6 Cox, 153.

Inducing a person by a false pretence to accept a bill of exchange is notwithin this section.—Reg. vs. Danger, Dears. & B. 307. In such a case, the indictment should be under sect. 95, *post*.

A railway ticket obtained by false pretences is within the Statute, Reg. vs. Boulton, 1 Den. 508; Reg. vs. Beecham, 5 Cox, 181; and so is an order by the president of a burial society on a treasurer for the payment of money, Reg. vs. Greenhaigh, Dears. 267.

Where the defendant only obtains credit and not any specific sum by the false pretences, it is not within the Statute.—R. vs. Wavill, 1 Mood. 224; Reg. vs. Garrett, Dears. 233; Reg. vs. Crosby, 1 Cox, 10.

There must be an intent to defraud. Where C. B.'s servant obtained goods from A.'s wife by false pretence, in order to enable B. his master, to pay himself a debt due from A., of which he could not obtain payment from A., it was held that C. could not be convicted.—R. vs. Williams, 7 Car. & P. 554. But it shall not be necessary to allege nor to prove the intent to defraud any person in particular. *With intent to defraud* are the words of the Statute, sect. 93, *ante*.

But these words "with intent to defraud" are a material and necessary part of the indictment; their omission is fatal, and cannot be remedied by an amendment inserting them. By Lush, J., Reg. vs. James, 12 Cox, 127.

An indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that defendant saw prosecutor and gave him his card, "J. W. and

Co., Timber and Coal Merchants," and said that he was largely in the coal and timber way, and inspected some coal bags, but objected to the price. The next day, he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage, at the station; there was evidence as to the defendant having taken premises, and doing a small business in coal, but he had no trucks of coal on demurrage at the station. The jury convicted the prisoner, and on a case reserved, the judges held that the false pretence charged was not too remote to support the indictment, and that the evidence was sufficient to maintain it.—Reg. vs. Willot, 12 Cox, 68.

The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting, *inter alia*, "it is a 15-carat fine gold, and you will see it stamped on every link." In point of fact, it was little more than 6-carat gold: *held*, upon a case reserved, that the above assertion was sufficient evidence of the false representation of a definite matter of fact to support a conviction for false pretences.—Reg. vs. Ardley, 12 Cox, 23. Reg. vs. Bryan, Dears. & B. 265, 7 Cox, 313, *ante*, was said by the judges not to be a different decision, but that there, there was no definite matter of fact falsely represented.

On an indictment for inducing the prosecutor, by means of false pretences, to enter into an agreement to take a field for the purpose of brick making, in the belief that the soil of the field was fit to make bricks, whereas

it was not, he being himself a brickmaker, and having inspected the field and examined the soil: *held* that, nevertheless, if he had been induced to take the field by false and fraudulent representations by the defendant of the specific matters of fact relating to the quality and character of the soil, as, for instance, that he had himself made good bricks therefrom, the indictment would be sustained; *held*, also, that it would be sufficient, if he was partly and materially, though not entirely, influenced by the false pretences.—Reg. vs. English, 12 Cox, 171.

The prisoner was convicted on an indictment charging that he did falsely pretend that he then lived at, and was the landlord of a beerhouse, and thereby obtained goods. The evidence was, that prisoner said he was the nephew of a man in prosecutor's employ which was true; and that he lived at the beerhouse, but he did not say that he was the landlord of that house. Prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of his servant, and the statement that he lived at the beerhouse; he believed him to be the landlord of the beerhouse; *held*, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant; *held*, also, that the allegation that the prisoner lived at and was the landlord of the beerhouse was divisible, and that the fact, "that he lived at the beerhouse," being false, he was rightly convicted.—Reg. vs. Lince, 12 Cox, 451.

If the possession only and not the property has been passed by the prosecutor, the offence is larceny and not false pretences.—Reg. vs. Radcliffe, 12 Cox, 474.

All persons who concur and assist in the fraud are principles, though not present at the time of making the pretence or obtaining the property.—Reg. vs. Mooland,

2 Mood. 376; Reg. vs. Kerrigan, L. & C. 383: see *post*, sect. 107.

If, upon the trial of an indictment for obtaining by false pretences, a forgery is proved, the prisoner nevertheless, if the fact proved include the misdemeanor, may be convicted of the misdemeanor, unless the Court sees fit to discharge the jury, and direct the prisoner to be indicted for the felony: sect. 50 of the Procedure Act of 1869. And it is prudent, in consequence of this section, to indict for obtaining money by false pretences, wherever it is doubtful whether an instrument be a forgery or not.—2 Russell, 677.

OTHER CASES OF FALSE PRETENCES.

Sect. 94.—Whosoever, by any false pretence, causes or procures any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit, or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel or valuable security, within the meaning of the last preceding section.—24-25 Vict., ch. 96, sect 89, Imp.

Greaves says: "This clause is new. It is intended to meet all cases where any person by means of any false pretence, induces another to part with property to any person other than the party making the pretence. It was introduced to get rid of the narrow meaning which was given to the word "obtain" in the judgments in Reg. vs. Garrett, Dears. 232, according to which it would have been necessary that the property should either have been actually obtained by the party himself, or for his benefit. ..... This clause includes every case where a defendant by any false pretence causes property to be delivered to *any other person*, for the use either of the person making

the pretence, or *of any other person.* It, therefore is, a very wide extension of the law as laid down in Reg. vs. Garret, and plainly includes every case where any one, with intent to defraud, causes any person by means of any false pretence to part with any property to any person whatsoever."

INDUCING PERSONS, BY FRAUDULENT MEANS, TO SIGN DEEDS, PAPERS, ETC., ETC.

Sect. 95.—Whosoever, with intent to defraud or injure any other person, by any false pretence, fraudulently causes or induces any other person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix his name, or the name of any other person, or of any company, firm or co-partnership, or the seal of any body corporate, company or society, upon any paper or parchment, in order that the same may be afterwards made or converted into, or used, or dealt with as a valuable security, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 90, Imp.

As to fine and sureties for the peace, see *post*, sect. 122. As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

Greaves says: "This clause is principally new ..... it will include such cases as Reg. vs. Danger, Dears. & B. 307."

Indictment.—..... that A. B. on ..... unlawfully, knowingly and designedly did falsely pretend to one J.N. that .... by means of which false pretence the said A. B.

did then unlawfully and fraudulently induce the said J.N. to accept a certain bill of exchange, that is to say a bill of exchange for one hundred pounds, with intent thereby then to defraud and injure the said J. N., whereas, in truth and in fact (here negative the false pretences, as in the form, under sect. 93, *ante*) against the form ..... —Archbold, 485.

FALSELY PRETENDING TO HAVE INCLOSED MONEY OR OTHER PROPERTY IN A POST LETTER.

Sect. 96.—Whosoever for any purpose, or with any intent, wrongfully and with wilful falsehood, pretends or alleges that he enclosed and sent or caused to be enclosed and sent in any post letter any money, valuable security or chattel, which in fact he did not so enclose and send, or cause to be enclosed and sent therein, is guilty of a misdemeanor, and shall be liable to be punished as if he had obtained the money, valuable security or chattel so pretended to be enclosed or sent, by false pretences; and it shall not be necessary to allege in the indictment, or to prove on the trial that the act was done with intent to defraud.

This clause is not in the English Act.

WINNING MONEY BY CHEATING AT A GAME.

Sect. 97.—Whosoever by any fraud or unlawful device or ill practice in playing at any game of cards or dice, or any other kind, or at any race, or in betting on any event, wins or obtains any money, or property from any other person, shall be held to have unlawfully obtained the same by false pretences, and shall be punishable accordingly.—8–9 Vict., ch. 109, sect. 17, Imp.

Misdemeanor: see *post*, sect. 122;—and *ante*, sect. 93.

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that W. M. on ..... by fraud,

unlawful device and ill-practice in playing at and with cards, unlawfully did win from one A. B., and obtain for himself, the said W.. M, a sum of money, to wit, fifty pounds, of the monies of the said A. B., and so the jurors aforesaid, upon their oath aforesaid, do say that the said W. M. then, in manner and form aforesaid, unlawfully did obtain the said sum of money, to wit, fifty pounds, so being the monies of the said A. B. as aforesaid, from the said A. B. by a false pretence, with intent to cheat and defraud the said A. B. of the said sum of money, to wit, fifty pounds, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity. (2nd count): And the jurors aforesaid, upon their oath aforesaid do further present, that the said W. M. afterwards, to wit, on the day and year aforesaid, by fraud, unlawful device and ill-practice, in playing at and with cards, unlawfully did win from the said A. B. and obtain for himself, the said W. M., a certain sum of money with intent to cheat him, the said A. B., to the evil example of all others in the like case offending, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 921.

An indictment in the form contained in the above second count was held good after verdict, although it was objected that it should have alleged that the money won was the property of the person defrauded.—R. vs. Moss, Dears. & B. 104.

Where the offence was committed by two or more, and there is any doubt whether the game or fraud comes within this section, a count should be added as in—R. vs. Hudson, Bell, 263, charging a conspiracy to cheat.

The fraud or unlawful device, or ill-practice must be proved.—R. vs. Darmley, 1 Stark. R. 359; R. vs. Rogier, 2 D. & R. 431. It does not seem necessary to state the name of the game.—Archbold, 922. See R. vs. Bailey, 4 Cox, 390.

OBTAINING STEAMER OR RAILWAY PASSAGE BY FALSE TICKET.

Sect. 98—Whosoever by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any railway, or in any steam, or other vessel, is guilty of a misdemeanor, and shall be liable to be imprisoned in any common gaol or house of correction, with or without hard labour, for any period not exceeding six months.

This clause is not in the English Act.

See *post*, sect. 122, as to fine and sureties for the peace in misdemeanors under this Act.

The clause provides for the offence and the attempt to commit the offence .... Under sect. 49 of the Procedure Act of 1869, upon the trial of an indictment for any offence against this clause, not including the attempt provided for thereby, the jury may convict of the attempt to commit the offence charged, if the evidence warrants it.

CONVICTION OF OBTAINING BY FALSE PRETENCES, ON INDICTMENT FOR LARCENY.

Sect. 99.—If upon the trial of any person for larceny, it appears that the property taken was obtained by such person by fraud under circumstances which do not amount to such taking as constitutes larceny, such person shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict, that such person is not guilty of larceny, but is guilty of obtaining such property by false pretences, with intent to defraud, if the evidence prove such to have been the case, and thereupon such person shall be punished in the same

manner as if he had been convicted upon an indictment for obtaining property under false pretences, and no person so tried for larceny as aforesaid shall be afterwards prosecuted for obtaining property by false pretences upon the same facts.

This very important clause is not in the English Act. It was in the 14–15 Vict., ch. 100, as the bill was introduced, but was struck out. See observations upon it, under sect. 93, *ante*. In Reg. vs. Adams, 1 Den. 38, the judges held the conviction wrong, because the indictment was for larceny, and the facts established an obtaining by false pretences; now, under the above clause, the jury, in such a case, may find the defendant guilty of the obtaining by false pretences.

RECEIVING STOLEN GOODS.

Sect. 100.—Whosoever receives any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, and otherwise disposing whereof amounts to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled or disposed of, is guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; provided that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.—24–25 Vict., ch. 96, sect. 91, Imp.

This clause applies to all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of, within the meaning of any section of this Act.—Greaves, Consol. Acts, 179.

Sect. 101.—In any indictment *containing a charge of* feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen; and in any indictment for feloniously receiving any property, knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment has been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment has been preferred and found against two or more persons, it shall be lawful for the jury who try the same to find all or any of the said persons guilty either of stealing the property or receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.—24–25 Vict., ch. 96, sect. 92, Imp.

The words "containing a charge of" are substituted for the word "for" in the former Act, in order that a count for receiving may be added in *any* indictment containing a charge of stealing any property. It will there-

fore apply to burglary with stealing, housebreaking, robbery, &c., &c., &c. It is also provided, by this clause, for cases which frequently occur, and were not within the former clause; where different prisoners may be proved to have had possession of different parts of the stolen property.—Greaves, Consol. Acts, 180.

Sect. 102.—Whenever any property whatsoever has been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in any such a manner as to amount to a felony, either at common law, or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.—24–25 Vict., ch. 96, sect. 93, Imp.

See sect. 7, of 31 Vict., ch. 72, *an Act respecting accessories to and abettors of indictable offences.* (1868.)

Sect. 103.—If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property.—24–25 Vict., ch. 96, sect. 94, Imp.

Sect. 104.—Whosoever receives any chattel, money, valuable security or other property whatsoever, the stealing, taking, obtaining, converting or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, is guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor has or has not

been previously convicted thereof, or is or is not amenable to justice; and every such receiver shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 96, sect. 95, Imp.

Sect. 105.—Whosoever receives any chattel, money, valuable security or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any country, district or place in which he has or has had any such property in his possession, or in any county, district or place in which the party guilty of the principal felony, or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the country, district or place where he actually received such property.—24–25 Vict., ch. 96, sect. 96, Imp.

Sect. 106.—Where the stealing or taking of any property whatsoever is by this Act punishable on summary conviction, either for every offence, or for the first or second offence only, or for the first offence only, any person who receives any such property, knowing the same to be unlawfully come by, shall on conviction thereof before a Justice of the Peace, be liable, for every first, second or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence of stealing or taking such property is by this Act made liable.—24–25 Vict., ch. 96, sect. 97, Imp.

As to the meaning of the words "valuable security," "property" and "having in possession" under this Act, see *ante*, sect. 1.

As to other and additional punishments in felonies and misdemeanors under this Act, see *post*, sect. 122.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

Indictment against a receiver of stolen goods, under sect. 100, *as for a substantive felony.*—.... that A. B. on .... at .... one silver tankard, of the goods and chattels of J. N. before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid then well knowing the same to have been feloniously stolen, taken and carried away, against the form.... Archbold, 434.

Any number of receivers at different times of stolen property may now be charged with substantive felonies in the same indictment.—Sect. 102, *ante*.

And where the indictment contains several counts for larceny, describing the goods stolen as the property of different persons, it may contain the like number of counts, with the same variations, for receiving the same goods.—R. vs. Beeton, 1 Den. 415. It is not necessary to state by whom the principal felony was committed, R. vs. Jervis, 6 C. & P. 156; and, if stated, it is not necessary to aver that the principal has not been convicted., R. vs. Baxter, 5 T. R. 83. Where an indictment charged Woolford with stealing a gelding, and Lewis with receiving it, knowing it to have been "so feloniously stolen as aforesaid," and Woolford was acquitted, Patteson, J., held that Lewis could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding,

knowing it to have been stolen by some person unknown —R. vs. Woolford, 1 M. & Rob. 384; 2 Russell, 556.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods, knowing them to be stolen, was holden good against the receivers, as for a substantive felony.—R. vs. Caspar, 2 Mood. 101. The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving.—R. vs. Hughes, Bell, 242.—The first count of the indictment charged the prisoner with stealing certain goods and chattels; and the second count charged him with receiving "the goods and chattels aforesaid of the value aforesaid, so as aforesaid feloniously stolen." After objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury, and the prisoner was acquitted upon the first count, and convicted upon the second: *held*, that the conviction was good.—Reg. vs. Huntley, Bell, 238; Reg. vs. Craddock, 2 Den. 31.

Indictment against the principal and receiver jointly.—The jurors for Our Lady the Queen, upon their oath present, that C. D. on ..... at .... one silver spoon and one table-cloth, of the goods and chattels of A. B., feloniously did steal, take and carry away, against the peace of Our Lady the Queen, her crown and dignity; and the jurors aforesaid, upon their oath aforesaid, do further present, that J. S. afterwards, on ..... the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he the said J. S. then well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the form..... Archbold, 440; 3 Burn's Just. 323.

Indictment against the receiver as accessory, the principal having been convicted.—The jurors for Our Lady the Queen upon their oath present, that heretofore, to wit, at the general sessions of the ..... holden at .... on ..... it was presented, that one J. T. (*continuing the former indictment to the end; reciting it, however, in the past and not in the present tense:*) upon which said indictment the said J. T. at ..... aforesaid, was duly convicted of the felony and larceny aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. after the committing of the said larceny and felony as aforesaid, to wit, on ..... the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he the said A. B. then well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the form ..... Archbold, 440.

Indictment against a receiver, under sect. 104, *where the principal offence is a misdemeanor.*— ..... on .... at ..... one silver tankard of the goods and chattels of J. N. then lately before unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences, unlawfully did receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences, against the form..... Archbold, 439.

The indictment must allege the goods to have been obtained by false pretences, and known to have been so: it is not enough to allege them to have been "unlawfully obtained, taken and carried away."—R. vs. Wilson, 2 Mood. 52.

In Reg. vs. Goldsmith, 12 Cox, 479, upon an indictment under this section, an objection was taken that the indictment did not set out what the particular false pretences were, as in the form, from Archbold, above given. In Goldsmith's case, it was held that the objection, not having been taken before plea, was cured by the verdict of guilty, but the judges did not adjudicate upon the merit of the objection itself; Bramwell, B., intimated, that, for the future, it might be safer, in indictments of this nature, to state specifically what the false pretences were, as in indictments for obtaining under false pretences; see Reg. vs. Hill, note *r*, 2 Russell, 554, where it was held that an indictment, for so receiving goods obtained by false pretences would be held bad on demurrer (or motion to quash) if it did not allege what were the false pretences.

It must be remarked, that the provisions for charging the receiver with a substantive offence do not extend to cases under sect. 104, where the offence of the principal is a misdemeanor.—2 Russell, loc. cit.

At common law, receivers of stolen goods were only guilty of a misdemeanor, even when the thief had been convicted of felony.—Foster, 373.

The goods must be so received as to divest the possession out of the thief.—Reg. vs. Wiley, 2 Den. 37. But a person having a joint possession with the thief may be convicted as a receiver.—Reg. vs. Smith, Dears. 494. Manual possession is unnecessary, it is sufficient if the receiver has a control over the goods.—Reg. vs. Hobson, Dears. 400; Reg. vs. Smith, Dears. 494; see *ante*, sect. 1, as to the words "having in possession." The defendant may be convicted of receiving, although he assisted in the theft.—R. vs. Dyer, 2 East, 767; Reg. vs. Craddock, 2 Den. 31; Reg. vs. Hilton, Bell, 20; Reg. vs.

Hughes, Bell, 242. But not if he actually stole the goods.—Reg. vs. Perkins, 2 Den. 459. Where the jury found that a wife received the goods without the knowledge or control of her husband, and apart from him, and that he afterwards adopted his wife's receipt, no active receipt on his part being shown, it was held that the conviction of the husband could not be sustained.—Reg. vs. Dring; Dears. & B. 329; but see Reg. vs. Woodward, L. & C. 122.

There must be a receiving of the thing stolen, or of part of it, and where A. stole six notes of £100 each, and having changed them into notes of £20 each, gave some of them to B.; it was held that B. could not be convicted of receiving the said notes, for he did not receive the notes that were stolen.—R. vs. Walkley, 4 Car. & P. 132. But where the principal was charged with sheep-stealing, and the accessory with receiving "twenty pounds of mutton, parcel of the goods," it was held good. —R. vs. Cowell, 2 East, P. C. 617, 781. In the last case, the thing received is the same, for part, as the thing stolen, though passed under a new denomination, whilst in the first case nothing of the article or articles stolen have been received, but only the proceeds thereof. And says Greaves, note, 2 Russell, 561, it is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold or silver, if it were melted after the stealing, an indictment for receiving it might be supported, because it would still be the *same* chattel, though altered by the melting; but where a £100 note is changed for other notes, the identical chattel is gone and a person might as well be indicted for receiving the money, for which a stolen horse was sold, as for receiving the proceeds of a stolen note.

The receiving must be subsequent to the theft. If a servant commit a larceny at the time the goods are received both servant and receiver are principals, but if the goods are received subsequently to the act of larceny, it becomes a case of principal and receiver.—R. vs. Butteris, 6 C. & P. 147; Reg. vs. Gunnell, 9 C. & P. 365; Reg. vs. Roberts, 3 Cox, 74.

The receiving need not be *lucri causa*: if it is to conceal the thief, it is sufficient.—R. vs. Richardson, 6 C & P. 365; R. vs. Davis, 6 C. & P. 177.

There must be some evidence that the goods were stolen by another person.—R. vs. Densley, 6 C. & P. 399; R. vs. Cordy, 2 Russell, 556.

A husband may be convicted of receiving property which his wife has voluntarily stolen, Reg. vs. M'Athey, L. & C. 250, if he receives it, knowing it to have been stolen.

The principal felon is a competent witness to prove the larceny.—R. vs. Haslam, 1 Leach, 418. But his confession is not evidence against the receiver, R. vs. Turner, 1 Mood. 347, unless made in his presence and assented to by him.—Reg. vs. Cox, 1 F. & F. 90. If the principal has been convicted, the conviction, although erroneous, is evidence against the receiver until reversed. —R. vs. Baldwin, R. & R. 241.

To prove guilty knowledge, other instances of receiving similar goods stolen from the same person may be given in evidence, although they form the subject of other indictments, or are antecedent to the receiving in question.—R. vs. Dunn, 1 Mood. 146; R. vs. Davis, 6 Car. & P. 177; Reg. vs. Nicholls, 1 F. & F. 51; Reg. vs. Mansfield, C. & M. 140. But evidence cannot be given

of the possession of goods stolen from a different person.—Reg. vs. Oddy, 2 Den. 264. Where the stolen goods are goods that have been found, the jury must be satisfied that the prisoner knew that the circumstances of the finding were such as to constitute larceny.—R. vs. Adams, 1 F. & F. 86. Belief that the goods are stolen, without actual knowledge that they are so, is sufficient to sustain a conviction.—Reg. vs. White, 1 F. & F. 665.

Recent possession of stolen property is not generally alone sufficient to support an indictment under this section,—2 Russell, 555. However, in Reg. vs. Langmead, L. & C. 427, the judges would not admit this as law, and maintained the conviction for receiving stolen goods, grounded on the recent possession by the defendant of stolen property.—See also Reg. vs. Deer, L. & C. 240.

A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon, under the 31-32 Vict., ch. 116 (sect. 38, *ante*, of Canadian Larceny Act) and sold the same to the prisoner, who knew of their having been stolen. *Held*, that the prisoner could not be convicted on an indictment for feloniously receiving under the 24-25 Vict., ch. 96, s. 91, (sect. 100 of Canadian Larceny Act) but might have been convicted as an accessory after the fact under the 24-25 Vict., ch. 94, sect. 3, (31 Vict., ch. 72, sect. 4, Canada) on an indictment properly framed.—Reg. vs. Smith, 11 Cox, 511. It is observed, in Archbold, 436, that in this last case, if the only thing that could have been proved against the prisoner was the receiving with a guilty knowledge, he ought to have been indicted for the common law misdemeanor of receiving stolen property. *Sed quære?*

An indictment charged S. with stealing eighteen shillings and sixpence, and G. with receiving the same. The

facts were: S. was a barman at a refreshment bar, and G. went up to the bar, called for refreshments and put down a florin: S. served G. took up the florin, and took from his employer's till some money, and gave G. as his change eighteen shillings and six pence, which G. put in his pocket and went away with it. On leaving the place he took some silver from his pocket, and was counting it when he was arrested. On entering the bar, signs of recognition took place between S. and G., and G. was present when S. took the money from the till. The jury convicted S. of stealing and G. of receiving. *Held*, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which G. might have been convicted as a principal in the second degree, and that therefore the conviction for receiving could not be sustained.—Reg. vs. Coggins, 12 Cox, 517.

PRINCIPALS IN THE SECOND DEGREE AND ACCESSORIES, HOW PUNISHABLE. ABETTORS IN MISDEMEANORS, AND IN OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

Sect. 107.—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is punishable, and every accessory after the fact to any felony punishable under this Act, except only a receiver of stolen property, shall be liable to be imprisoned for any term less than two years, with or without hard labour, and with or without solitary confinement, and every person aiding, abetting, counselling, or procuring the commission of any misdemeanor punishable under this Act, shall be liable to be indicted and punished as a principal offender.—24-25 Vict., ch. 96, sect. 98, Imp.

Sect. 108.—Whosoever aids, abets, counsels or pro-

cures the commission of any offence, which is by this Act punishable on summary conviction, either for every time of its commission, or for the first or second time only, or for the first time only, shall, on conviction before a Justice of the Peace, be liable for every first, second or subsequent offence of aiding, abetting, counselling or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender is made liable.—24-25 Vict., ch. 96, sect. 99, Imp.

See *post*, sect. 122, as to fine and sureties for the peace in misdemeanors under this Act, and sureties for the peace in felonies under this Act. See sect. 94 of the Procedure Act of 1869, as to solitary confinement. See *post*, sect. 123, as to summary convictions under this Act.

See 31 Vict., ch. 72, *an Act respecting accessories to and abettors of indictable offences.* (1868).

REGULATIONS FOR DEALERS IN MARINE STORES.

Sect. 109.—Every person dealing in the purchase of old marine stores of any description, including anchors, cables, sails, junk, iron, copper, brass, lead, and other marine stores, shall conform to the following regulations:

1st.—He shall not, by himself or his agent, purchase any old marine stores from any person under the age of sixteen years, and on conviction of any such offence before a Justice of the Peace, shall be liable to a penalty of four dollars for the first offence, and of six dollars for every subsequent offence.

2dly.—He shall not purchase or receive into his stores, premises or places of deposit, any old marine stores except in the day-time, between sunrise and sunset, under a penalty of five dollars for the first offence, and of seven dollars for every subsequent one, and if any old marine

stores, which had been stolen, are found secreted in the premises of any person purporting to be a dealer in such stores, such persons shall be guilty of a misdemeanor, and shall be punishable therefor in any manner by law prescribed for misdemeanor.

This clause is not in the English Act. It seems rather defective.—The punishment for misdemeanor, under it, would be by fine and imprisonment, either or both at the discretion of the Court. By this clause, it would appear, the simple fact of a dealer in marine stores having in his premises any stolen old marine stores would constitute him guilty, whether he knows that they have been stolen or not. But, undoubtedly, no Court nor jury would condemn a man who would innocently and without fraud or guilty knowledge be found with such stores in his possession, and the word "secreted" might then be distinguished from "found."

As to summary convictions under this Act, see *post*, sect. 122.

DEFRAUDING A PERSON OF THE ADVANTAGE, POSSESSION OR USE OF HIS PROPERTY.

Sect. 110.—Whosoever unlawfully and with intent to defraud, by taking, by embezzlement, by obtaining by false pretences, or in any other manner whatever, appropriates to his own use or to the use of any other person, any property whatsoever, real or personal, in possession or in action, so as to deprive any other person temporarily, or absolutely of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person may have therein, is guilty of a misdemeanor punishable in like manner as simple larceny, and if the value of such property exceeds two hundred dollars, then such misdemeanor shall be

punishable by imprisonment in the Penitentiary for any term not exceeding fourteen years or in any manner in which simple larceny is punishable; and if on the trial of any person for larceny, for embezzlement, or for obtaining by false pretences, the jury are of opinion that such person is not guilty of the offence charged in the indictment but are of opinion that he is guilty of an offence against this section, they may find him so guilty, and he shall be liable to be punished as herein provided, as if he had been convicted on an indictment under this section; and in any case in which any person is convicted of an offence against this Act by stealing, embezzling or obtaining by false pretences any property whatever, then if the value of the property be over two hundred dollars, the offender shall be liable to be punished by imprisonment in the Penitentiary for a term not exceeding seven years, *in addition* to any punishment to which he would be otherwise liable for such offence.

This clause is not in the English Act.

It is probable that no Court would feel authorized to inflict the additional punishment provided for in the last part of this clause, unless it be *alleged in the indictment* and duly *proved upon the trial* that the property stolen, embezzled or obtained by false pretences is over two hundred dollars in value. See Bishop, 1 Cr. Proced. 79, 538, and 2 Cr. Proced. 569, 713.

As to the punishment for the misdemeanor created by this section, see *ante*, sect. 4, and *post*, sect. 122.

As to the meaning of the word "property," see *ante*, sect. 1.

As to the meaning of the words "property in possession" and "property in action," see 2 Stephen's Commt. 10.

It has been remarked that the most striking defect of

the English Criminal Statutes Consolidation Acts is the great want of uniformity in the punishments annexed to offences of the same class. (*Welsby's preface to Archbold's fifteenth edition.*) The Canadian Acts are not free from censure in that respect, and the present clause affords a striking illustration of it. By the last part of the clause, if a man is convicted of simple larceny of three hundred dollars, *a felony*, he cannot have more than ten years in the Penitentiary: and by the first part, if he appropriates unlawfully the *possession or use* only of a property worth three hundred dollars, *a misdemeanor*, he can have fourteen years in the Penitentiary.

As remarked *ante*, a court of justice would not feel authorized to inflict the punishment increased by the value of the property being of an amount exceeding two hundred dollars, unless such value be stated in the indictment and duly proved at the trial.

The words "or in any manner in which simple larceny is punishable," after the words "fourteen years" seem to have been erroneously inserted. It makes the clause, in fact, read "Whosoever unlawfully takes..... is guilty of a misdemeanor *punishable in like manner as simple larceny*, and if the value of such property exceeds two hundred dollars, then such misdemeanor shall be punishable *in any manner in which simple larceny is punishable.*"

The offence created by this section is unknown in the English Criminal Law, and, it is believed, was unknown throughout the whole of the Dominion of Canada before this enactment.

In answer to our enquiries about it, Mr. R. J. Wicksteed, of the Law Department of the House of Commons, the author of the valuable "Table of the Statutes of the Dominion of Canada," had the kindness to give us the following information, inserted here with his permission:

"..... Chap. 21 of 32–33 Vict., (1869) or the Act respecting larceny, was prepared, as well as the other criminal Acts, by the Law Clerk. In the preparation, old materials were used as much as possible, the provisions found in the laws of the various Provinces of the Dominion, and the English Acts being freely used; but, in some instances, new sections were written to meet cases at that time unprovided for.—Section 110 of chap. 21, as to which you enquire 'whence taken, &c., &c.,' was new, written by my father to supply a deficiency. He informs me that it was suggested to him by some work on English Criminal Law, and thinks it was the book entitled 'General View of the Criminal Law of England,' by J. Fitz. Stephen. This book, having been removed from the Parliamentary library, I cannot give you the writer's exact arguments, but the sense you have in section 110 of chap. 21. The English Commissioners on Criminal Law, in their fourth report to Her Majesty, of 8th of March, 1839, (Vol. 1,) remarking on the Law of England as to theft or larceny, observe, page 52: 'It is further observable, that the intent essential to the offence must extend to the fraudulent appropriation of the whole property, and that the mere intent to deprive the owner of the temporary possession only is not sufficient to constitute the offence. For, although, under particular circumstances, a fraudulent privation of possession may justly be made penal, such an offence cannot, without great inconvenience, be included with so general a predicament as that of theft. A law designed for the protection of the right of property would be far too general in its operation, were it to be extended to mere temporary privations of possession. In practice, this would be to injure, if not to destroy, the important boundary between the crime of theft and a mere civil trespass.'

And again, on page 56: 'And although the intent be not to commit a collateral fraud, but to enjoy the temporary possession in fraud of another's right of possession, the offence cannot properly constitute a theft; for this is an offence, as we have already observed, against the right of property, as distinguished from the mere right of possession, and the Law of England does not, as the Roman law did, notice the *furtum possessionis* as constituting a branch of the law of theft. The offence properly consists in the unlawful appropriation of that which belongs to another, which cannot be where another has not the property, but only the right of temporary possession. A law might no doubt be made to comprehend mere wrongs to the temporary right of possession; but the same principles of policy and convenience, which occasion the distribution of offences into defined classes, must also regulate the limits of each separate class of offences, and we have already observed that to extend the class of thefts to mere injuries to the possession, would be to extend its boundaries too widely, and render the limits between theft, and a mere trespass indistinct.' But, see Bishop, on Criminal Law, 2nd Edition, vol. 1, section 429: (section 579 of the fifth edition). 'Then we have a very extensive influence exerted by the universal rule that the law does not regard small things. We have seen that in the application of this rule, the general, rather than the particular, consequence of the Act is to be regarded. Therefore, although it is criminal to steal personal property which is of some value, however small the value may be, yet it is not so for a trespasser to take and carry away such property, be the value great or small, with the intent of appropriating to himself, not the property itself, but its mere *use*, too small a thing, in respect of the general consequence, for the criminal

law, not for the civil, to notice. But this rule of small things can be accurately understood only as we see it applied in the cases: for the decisions are not harmonious with any general principle. There is no reason, in principle, why many things deemed too small for the law to notice, should not in fact be noticed by it; for instance, if a man converts to his own use, with a bad motive, a valuable thing, which he takes intending to return it after he has served his end, there is no reason of principle why he should not be as severely punished as he who converts the entire property in a piece of paper worth one mill.' It was upon reasoning similar to this of Mr. Bishop, that my father submitted section 110 to Sir John Macdonald, then Minister of Justice, who approved of it, and the Act passed with it included ....."

Certainly, Bishop's observations are entitled to great consideration, but it must be admitted, that, in practice, the legislation contained in the clause in question, "destroys the important boundary between the crime of theft and a mere civil trespass."—Crim. L. Comm. Report, loc. cit. And is it very clear, as stated by Bishop, that the rule of the English criminal law, that *possession* or *use* of property is not the subject of larceny, is based on the maxim "*de minimis non curat lex.*" Then Bishop says that, *in principle*, a man unlawfully defrauding another of the *use* or *possession* of a valuable thing, ought to be punishable, but does not go so far as to say, that, in practice, such a legislation would work well. And the English Commissioners, in a foot note to page 56 of their Report, cited *ante*, say: "It is worthy of remark, that the necessity of abandoning this principle of the Roman law has been felt in nations whose systems depend more immediately upon that law than our own, inasmuch as the doctrine of the *furtum possessionis*, as

well as the *furtum usus*, has no place in any of the modern German codes."

Is the full extent of the Roman law, on the subject, to be now considered as forming part of our Criminal law system? "*Furtum autem fit, non solum quum quis intercipiendi causâ rem alienam amovet, sed generaliter quum quis alienam rem invito domino contractat. Itaque, sive creditor pignore, sive is apud quem res deposita est, eâ re utatur; sive is qui rem utendam accepit, in alium usum eam transferat quam cujus gratiâ ei data est, furtum committat: veluti, si quis argentum utendum acceperit quasi amicos ad cœnam invitaturus, et id peregre secum tulerit, aut si quis equum, gestandi causâ commodatum sibi, longuis aliquo duxerit.*" Instit. lib. 4, tit. 1, par. 6.

Would the defendants in R. vs. Phillips, 2 East, P. C. 662; Reg. vs. Holloway, 1 Den. 370; Reg. vs. Poole, Dears. & B. 345, Reg. vs. Kilham, 11 Cox, 561, have been convicted under this clause? And then, let it be noticed that the clause applies to *real* as well as to personal property.

This enactment of doubtful merit in principle may certainly be said to be *unexpected* in a "*larceny*" Act: and the more so, when the preamble of this larceny Act reads "Whereas it is expedient to assimilate, amend and consolidate *the Statute law relating to larceny and other similar offences.*"

OFFENCES CONCERNING TIMBER FOUND ADRIFT.

Sect. 111.—Whosoever wilfully and unlawfully conceals or appropriates any timber, mast, spars, saw-logs, or other description of lumber, which, having been adrift in any river or lake, is found so adrift in any such river or lake, or cast ashore on the bank or beach of any such river or lake, or wilfully and unlawfully defaces or adds any mark or number, on any such article or thing, or

makes any false or counterfeit mark thereon, or refuses to deliver up to the proper owner thereof or to the person in charge thereof on behalf of such owner, any such article or thing, is guilty of a misdemeanor punishable in like manner as simple larceny.

Of course, this clause is not in the English Statute. If the facts warrant it, the defendant could be indicted for larceny, notwithstanding this clause. As to the punishment for the misdemeanor under this clause, see *ante*, sect. 4, and *post*, sect. 122. No intent to defraud seems necessary, under this clause. It is only on timber, logs, &c., &c., &c., *adrift* or *cast on shore*, that it is an offence, by this clause, to deface or add any mark or number, or make any false or counterfeit mark. The offence of refusing to deliver up any *such* article or thing, applies also only to timber, logs, &c., &c., &c., adrift or cast on shore. The indictment, therefore, must aver these material elements of the offence.

BRINGING INTO CANADA PROPERTY STOLEN, EMBEZZLED OR UNLAWFULLY OBTAINED ELSEWHERE.

Sect 112.—If any person brings into Canada, or has in his possession therein, any property, stolen, embezzled, converted or obtained by fraud or false pretence, in any other country, in such manner, that the stealing, embezzling, converting, or obtaining it in like manner in Canada, would by the laws of Canada, be a felony or misdemeanor; then, the bringing such property into Canada, or the having it in possession therein, knowing it to have been so stolen, embezzled or converted, or unlawfully obtained, shall be an offence of the same nature, and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada, and such person may be tried and

convicted in any district, county or place in Canada, into or in which he brings such property, or has it in possession.

This clause is not in the English Act. Under sect. 8, chap. 158, of the Revised Statutes of New Brunswick, it was held that, upon an indictment in New Brunswick, for a larceny committed in Maine, the goods stolen having been brought in New Brunswick, it was necessary to prove that the taking was larceny, *according to the law of Maine*.—Clark's Crim. L. 317. This clause was as follows: When any person shall be feloniously hurt or injured at any place out of this Province, and shall die in this Province of such hurt or injury, or when any person shall steal any property out of this Province and shall bring the same within the Province, any such offence, whether committed by any person as principal or accessory before or after the fact, may be dealt with in the county in which such death may happen, or such property shall be brought.—Sect. 8, ch. 158, Revised Stat. New Bruns. The words "in such manner that the stealing, &c., &c., &c., would by the laws of Canada, be a felony or misdemeanor," in the present Act, sect. 112, *ante*, constitute a wide difference with this New Brunswick Act, and the case noticed by Mr. Clarke would probably not now be followed.

RESTITUTION OF STOLEN PROPERTY.

Sect. 113.—If any person, guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, appropriating, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, is indicted for such offence, by or on behalf of the owner of the property, or his executor, or admin-

strator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person is tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner, *and the Court may also, if it see fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such felony or misdemeanor, although the person indicted is not convicted thereof, if the jury declare, as they may do, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such felony or misdemeanor;* Provided that if it appear before any award or order made, that any valuable security has been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case the Court shall not award or order the restitution of such security; Provided also that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possesion of goods or documents of title to goods, for any misdemeanor against this Act.—24–25 Vict., ch. 96, sect. 100, Imp.

It is to be observed that the proviso as to trustees, bankers, &c., only excepts cases of misdemeanors from the operation of this section, and leaves all cases of felony

within it.—2 Russell, 355. The words in *italics* are not in the English Act; they were in the bill as passed in the House of Lords, but were struck out by the select Committee of the Commons. Greaves, Consol. Acts, 185.

The prisoners were convicted of feloniously stealing certain property. The Judges who presided at the trial made an order directing that property found in the possession of one of the prisoners, not part of the property stolen, should be disposed of in a particular manner. *Held*, that the order was illegal, and that a judge has no power either by common law or by statute to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor.—Reg. vs. Pierce, Bell, 235.

The case of Walker vs. Corporation of London, 11 Cox, 280, is of no application in Canada. In Reg. vs. Stancliffe, 11 Cox, 318, it was held that the present section applies to cases of false pretences as well as felony, and that the fact that the prisoner parted with the goods to a *bonâ fide* pawnee did not disentitle the original owner to the restitution of the goods.—See 2 Russell, 355.

The Court is bound by the Statute to order restitution of property obtained by false pretences and the subject of the prosecution, in whose hands soever it is found: and so likewise of property received by a person knowing it to have been stolen or obtained by false pretences; but the order is strictly limited to property identified at the trial as being the subject of the charge, therefore it does not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment.—Reg. vs. Goldsmith, 12 Cox, 594.

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the Court.—Reg. vs. Smith, 12 Cox, 597.

It has been held, on this clause, in a recent case, in Montreal, (Reg. vs. Atkin, April, 1874,) that the court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the Civil Courts. Mr. Justice Ramsay's remarks in this case are as follows:

"In this case an application was made for the restitution of the goods to Cassils & Stimson, under the 32–33 Vict., ch. 21, sect. 113. In England, it seems, it is not usual to grant a writ of restitution, R. vs. Macklin, 5 Cox, 216. It therefore only remains to be seen whether we should give a summary order. The difficulty in this case arises from the fact that the goods in question have been seized in the hands of the High-Constable by civil process of revendication. It is said on the part of the applicant that we have no discretion, and that we are bound to give the order. We are not of that opinion. 'Shall be restored to the owner' is only a waiving of the rights of the Crown. It does not decide any right between other parties. Scattergood vs. Sylvester, 19 L. J. Q. B. 447. Were it considered otherwise, should an enactment be beyond the jurisdiction of Parliament. It would be a matter of civil law. The other words, 'the Court shall have power to award,' are evidently permissive. It has been said that they are permissive in form because of the proviso of the section; but the proviso is an absolute exception, and therefore, unless it

was intended to leave the granting of the order discretionary with the Court, it was not necessary to use the permissive form. Again, the Statute says, 'from time to time;' this shows the intention of the Legislature to leave it discretionary when this order was to be given. The objection to granting the order now is not so much that it might affect the rights of third parties, but because it would place our officer in an awkward position. He would be between two fires. On one hand he would have our order to make restitution: on the other hand, he would be open to civil liabilities if he delivered up. It does not alter the question that the applicants say they won't press the delivery till the civil suit is decided. We are asked for an order, and we must see what it may lead to. Nor can we see any inconvenience in delaying to give the order, for any Judge holding the Court might give it when the obstacle created by the seizure is removed."—18 Low. Can. Jur., p. 213.

The case of Reg. vs. Macklin, cited *supra*, by Mr. Justice Ramsay is noticed by Greaves, in 2 Russell, 356.

Sect. 114.—When any prisoner has been convicted either summarily or otherwise, of any larceny or other offence including the stealing *or unlawfully obtaining any property*, and it appears to the Court, by evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the Court may on the application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, a sum not exceeding the amount of

the proceeds of the sale be delivered to such purchaser. —30-31 Vict., ch. 35, sect. 9, Imp.

The English Act does not, expressly, provide by the corresponding clause, for cases of obtaining by false pretences.

The section provides for the *sale* only of the stolen property. Reg. vs. Stancliffe, 11 Cox, 318, *supra*, would not be affected by it.

TAKING A REWARD FOR HELPING TO THE RECOVERY OF STOLEN PROPERTY, ETC., ETC.

Sect. 115.—Whosoever corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security or other property whatsoever, which by any felony or misdemeanor has been stolen, taken obtained, extorted, embezzled, converted, or disposed of as in this Act before mentioned, unless he has used all due diligence to cause the offender to be brought to trial for the same, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24-25 Vict., ch. 96, sect. 101, Imp.

As to the meaning of the words "valuable security" and "property," see *ante*, sect. 1. As to sureties for the peace in felonies under this Act, see *post*, sect. 122. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—The jurors for Our Lady the Queen upon their oath present that A. B. on ..... feloniously, unlawfully and corruptly did take and receive from one J.

N. certain money and reward, to wit, the sum of five pounds of the monies of the said J. N. under pretence of helping the said J. N. to certain goods and chattels of him the said J. N. before then feloniouly stolen, taken and carried away, the said A. B. not having used all due diligence to cause the person by whom the said goods and chattels were so stolen, taken and carried away as aforesaid, to be brought to trial for the same; against the form ..... Archbold, 837.

It was held to be an offence within the Repealed Statute to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them.—R. vs. Ledbitter, 1 Mood. 76. The section of the Repealed Statute, under which this case was decided, was similar to the present section. —2 Russell, 575.

If a person know the persons who have stolen any property, and receive a sum of money to purchase such property from the thieves, not meaning to bring them to justice, he is within the Statute, although the jury find that he did not mean to screen the thieves, or to share the money with them, and did not mean to assist the thieves in getting rid of the property by procuring the prosecutrix to buy it.—Reg. vs. Pascoe, 1 Den. 456.

A person may be convicted of taking money on account of helping a person to a stolen horse, though the money be paid after the return of the horse; Reg. vs. O'Donnell, 7 Cox, 337. As to the meaning of the words "*corruptly* takes," see Reg. vs. King, 1 Cox, 36.

ADVERTISING A REWARD FOR THE RETURN OF STOLEN PROPERTY, ETC., ETC.

Sect. 116.—Whosoever publicly advertises a reward for the return of any property whatsoever, which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked, or makes use of any words, in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property, or promises or offers in any such public advertisement to return to any pawnbroker or other person, who may have bought or advanced money by way of any loan on any property stolen or lost, the money so paid or advanced, or any other sum of money for the return of such property, or prints or publishes any such advertisement, shall forfeit the sum of two hundred and fifty dollars for any such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.—24–25 Vict., ch. 96, sect. 102, Imp.

The Canadian Act is amended as follows by 35 Vict., ch. 35, sect. 3.—Every action against the printer or publisher of a news-paper to recover a forfeiture, under sect. 116 of the Larceny Act of 1869, shall be brought within six months after the forfeiture is incurred.—33–34 Vict., ch. 65, sect. 3, Imp. (*The English Act requires the authorization of the law officers of the Crown.*)

35 V. ch. 35, section 2.—In this Act the term "newspaper" means a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post.—33–34 Vict., ch. 65, sect. 2, Imp.

APPREHENSION OF OFFENDERS, SEARCH WARRANT, ETC., ETC., ETC.

Sect. 117.—Any person found committing any offence punishable either upon indictment or upon summary conviction by virtue of this Act, may be immediately apprehended *without* a warrant by *any* person, and forthwith taken, together with the property, if any, on or with respect to which the offence is committed, before some neighbouring Justice of the Peace to be dealt with according to law; and if any credible witness proves upon oath before a Justice of the Peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this Act, has been committed, the Justice may grant a warrant to search for such property as in the case of stolen goods; and any person to whom any property is offered to be sold, pawned or delivered, if he has reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power is required, to apprehend and forthwith to take before a Justice of the Peace the party offering the same, together with such property to be dealt with according to law.—24–25 Vict., ch. 96, sect. 103, Imp.

See sections 2, 3, 4, 5 and 6 of the Procedure Act of 1869.

Greaves had proposed an amendment to this clause, which, though rejected by the House of Commons in England, ought to have been inserted in our Statute. As it is, the following example given by Greaves shows the unsatisfactory state of the law. Any one who has obtained a drove of oxen or a flock of sheep by false pre-

tences, may go quietly on his way, and no one, not even a peace officer, can apprehend him without a warrant; but if a man offer to sell any person a bit of a dead fence supposed to have been stolen, he not only may, but is required to be apprehended by that person.

PROCEEDINGS ON SUMMARY CONVICTIONS.

Sect. 118.—In every case of a summary conviction under this Act, where the sum forfeited for the value of the property stolen or taken, or for the amount of the injury done, or imposed as a penalty by the Justice, is not paid either immediately after the conviction, or within such period as the Justice shall, at the time of the conconviction, appoint, the convicting Justice, unless where otherwise specially directed, may commit the offender to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour, according to the discretion of the Justice, for any term not exceeding two months, where the amount of the sum forfeited or of the penalty imposed, or of both as the case may be, together with the costs, does not exceed twenty-five dollars, and for any term not exceeding three months where the amount, with costs, exceeds twenty-five dollars; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.—24–25 Vict., ch. 96, sect. 107, Imp.

Sect. 119.—Where any person is summarily convicted before a Justice of the Peace, of any offence against this Act, and it is a first conviction, the Justice may, if he so thinks fit, discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by the Justice.—24–25 Vict., ch. 96, sect. 108, Imp.

Sect. 120.—In case any person convicted of any offence punishable upon summary conviction, by virtue of this Act, has paid the sum adjudged to be paid, together with costs, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or has been so discharged from his first conviction by any Justice as aforesaid, in every such case, he shall be released from all further or other proceedings for the same cause.—24–25 Vict., ch. 96, sect. 109, Imp.

See *post*, sect. 123, on summary proceedings under this Act.

VENUE IN CERTAIN CASES.—PUNISHMENT. &c., &c.

Sect. 121.—If any person has in his possession in any one part of Canada, any chattel, money, valuable security or other property whatsoever, which he has stolen or otherwise feloniously *or unlawfully* taken *or obtained, by any offence against this Act*, in any other part of Canada, he may be dealt with, indicted, tried and punished for larceny or theft in that part of Canada where he so has such property, in the same manner as if he had actually stolen, or taken *or obtained* it in that part; and if any person in any one part of Canada receives or has any chattel, money, valuable security or other property whatsoever which has been stolen, or otherwise feloniously *or unlawfully* taken *or obtained* in any other part of Canada, such person knowing such property to have been stolen or otherwise feloniously *or unlawfully* taken *or obtained*, he may be dealt with, indicted, tried and punished for such offence in that part of Canada where he so receives or has such property, in the same manner as if it had been origin-

ally stolen, or taken, *or obtained* in that part.—24–25 Vict., ch. 96, sect. 114, Imp.

The words in *italics* are not in the English Act. To complete the change and additional effect of these words, the words " or for so unlawfully having taken or obtained such chattel, &c., &c," should be inserted after the words " and punished for larceny or theft." As the clause reads, it gives power to indict, try and punish for *larceny or theft* a person guilty of obtaining under false pretences!

Sect. 122.—Whenever any person is convicted of any indictable misdemeanor punishable under this Act, the Court may, if it thinks fit, in addition to, or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the Court may, if it thinks fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; Provided that no person shall, under this section, be imprisoned for any period exceeding one year for not finding sureties.—24–25 Vict., ch. 96, sect. 117, Imp.

See remarks under sect. 74, of the *Act concerning malicious injuries to property*, 32–33 Vict., ch. 22.

Sect. 123.—Every offence hereby made punishable on summary conviction may be prosecuted, in the manner directed by the Act of the present session, intituled: *An Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, so far as no other provision is hereby made for any matter or

thing which may be required to be done in the *cause* (course) of such prosecution; and all provisions contained in the said Act shall be applicable to such prosecution in the same manner as if they were incorporated in this Act.

The Act referred to is the 32–33 Vict., ch. 31.

Sect. 124.—This Act shall commence and take effect on the first day of January, one thousand eight hundred and seventy.

AN ACT FOR THE AVOIDANCE OF DOUBTS RESPECTING LARCENY OF STAMPS.

35 VICT., CHAP. 33.

For the avoidance of doubts under the Act passed in the Session held in the thirty-second and thirty-third years of Her Majesty's reign and intituled " An Act respecting larceny and other similar offences," and " the Post-Office Act, 1867," Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every postal card, postage stamp and every other stamp issued or prepared for issue by the authority of the Parliament of Canada or of the Legislature of any Province in Canada, for the payment of any rate or duty on bills of exchange, or promissory notes, or law proceedings, or of any rate or duty whatever, and whether still in the possession of the Crown, or of any person or corporation or (or) any officer or agent of the Government of Canada or of the Province by the authority of the Legislature whereof it was issued or prepared for issue, shall be held to be a chattel and " property" within the meaning of the Acts cited in the Preamble to this Act, and of

the enactments and provisions thereof, and to be equal in value to the amount of the postage, rate or duty which can be paid by it, and is expressed on its face in words or figures, or both ; and in any indictment or proceeding for larceny, or any other offence against either of the said acts, in respect of anysuch stamp, the property thereof may be laid in the person in whose possession, as the owner thereof, it was, when the larceny or offence was committed, or in the Crown, if it was then unissued or in the possession of any officer or agent of the Government of the Dominion, or of the Province by the authority of the Legislature whereof it was issued or prepared for issue.

2.—Nothing in this Act shall be construed as intending that such stamps as aforesaid were not, without this act, chattel property and subjects of larceny at common law, and under the Acts cited in the Preamble.

AN ACT RESPECTING MALICIOUS INJURIES TO PROPERTY.

32–33 VICT. CHAP. 22.

Whereas it is expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, relating to malicious injuries to property, and to extend the same as so consolidated to all Canada: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.

SETTING FIRE TO A CHURCH OR CHAPEL, ETC., ETC.

Sect. 1.—Whosoever unlawfully and maliciously sets fire to any church, chapel, meeting-house, or other place

of divine worship, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 1, Imp.

As to sureties for the peace, see sect. 74, *post*. As to solitary confinement, see 32-33 Vict., ch. 29, s. 94, Procedure Act of 1869.

Indictment.—The jurors for Our Lady the Queen, upon their oath present that J. S. on the ..... in the year ..... feloniously, unlawfully and maliciously did set fire to a certain church, situate at ..... in the parish of ..... in the district of ..... against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

Though it is not necessary to prove malice against the owner, yet the indictment must allege the act to have been done "unlawfully and maliciously." If a Statute makes it criminal to do an act unlawfully and maliciously, an indictment must state it to have been done so: stating that it was done feloniously; voluntarily and maliciously is not enough.—1 Mood. 239, Rex. vs. Turner; 2 Russel, 1062, R. vs. Lewis.

The definition of arson at common law is as follows: Arson is the malicious and wilful burning the house of another, and to constitute the offence there must be an actual burning of some part of the house, though it is

not necessary that any flames should appear.—3 Burn's Just. 768. But now the words of the Statute are *set fire to*, merely; and, therefore it is not necessary in an indictment to aver that the house was burnt, nor need it be proved that the house was actually consumed. But within the Statute, as well as 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. But the burning or consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. Where on an indictment it was proved that the floor of a room was scorched: that it was charred in a trifling way: that it had been at a red heat but not in a blaze, this was held a sufficient burning to support the indictment. But 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 consumed, this was held not sufficient. —Archbold, 509.

The time stated in the indictment need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment by the grand jury, it is sufficient. Where the indictment alleged the offence to have been committed in the night time and it was proved to have been committed in the day time, the judges held the difference to be immaterial. The parish is material, for it is stated as part of the description of the house burnt. Wherefore, if the house be proved to be situate in another parish, the defendant must be acquitted, unless the variance be amended. If a man intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson. If intending to set fire to the house of A. he accidentally set fire to that of B,, it is

felony. Even if a man by wilfully setting fire to his own house, burns also the house of one of his neighbour, it will be felony: for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. And generally, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved.—Archbold, 508.

It is seldom that the wilful burning by the defendant can be made out by direct proof: the jury, in general, have to adjudicate on circumstantial evidence. Where a house was robbed and burnt, the defendant's being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. So where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion, the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. But on a charge of arson, where the question was as to the identity of the prisoner, evidence that a few days previous to the fire in question, another building of the prosecutor's was on fire and that the prisoner was then standing by with a demeanour which showed indifference or gratification, was rejected.—Archbold, 509.

Upon an indictment for any offence mentioned in this chapter (except the attempts specially provided for as such) the jury may, under s. 49, 32-33 Vict., ch. 29, (Procedure Act, 1869) convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt. 2 Russell, 1054.

SETTING FIRE TO A DWELLING-HOUSE, ANY PERSON BEING THEREIN.

Sect. 2.—Whosoever unlawfully and maliciously sets fire to any dwelling-house, any person being therein, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 2, Imp.

This offence was formerly punishable with death.

As to solitary confinement, see Procedure Act of 1869, sect. 94.

As to requiring the offender to enter into a recognizance and give sureties for the peace, see sect. 74, *post*.

As to verdict for an attempt to commit the offence charged upon an indictment for the offence, see Procedure Act, of 1869, sect. 49.

Indictment.—.... feloniously, unlawfully and maliciously did set fire to a certain dwelling-house of J. N. situate in the parish of ..... in the district of..... one J. L. and M. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house; against the form .....

In this section, no mention is made of the intent with which the act is done; and it seems it is not necessary to show that the prisoner knew that any person was in the house. It must be shown that some one was in the house at the time the house caught fire; and where a person was in a house at the time the prisoner set fire to an outhouse, but left the house before the fire reached it, it was held that the offence was not proved within this section.—Reg. vs. Warren, 1 Cox, 68; Reg. vs. Fletcher, 2 C. & K. 215.

Under the Repealed Statute, a common gaol was held to be a dwelling-house, Donnavan's case, 1 Leach, 69; but a mere lock-up where persons are never detained more than a night or two was held not to be a house.—Reg. vs. Connor, 2 Cox, 65.

A building intended for a dwelling-house but used as a place to deposit straw, etc., is neither a house, out-house nor barn.—Elsmore vs. St. Briavels, 8 B. & C. 461. A dwelling-house must be one in which a person dwells, Reg. vs. Allison, 1 Cox, 64; but temporary absence is not sufficient to take the building out of the protection of the statute.—Reg vs. Kimbrey, 6 Cox, 464. A building not intended for a dwelling-house, but slept in by some one without the leave of the owner, and a cellar under a cottage separately occupied, were held not to be houses.—Reg. vs. England, 1 C. & K. 533; Anon. 1 Lew. 8.

What is understood by the *house*? This extends at common law not only to the very dwelling-house, but to all out-houses which are parcel thereof, though not adjoining thereto, nor under the same roof.—2 East P. C. 1020.

SETTING FIRE TO A HOUSE, OUT-HOUSE, MANUFACTORY, FARM-BUILDING, ETC., ETC.

Sect. 3.—Whosoever unlawfully and maliciously sets fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same is then in the possession of the offender, or in the possession of any other person, with the intent thereby to injure or defraud any person, is guilty of felony, and shall be liable to be imprison-

ed in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term (the word *not* struck off, 35 Vict., ch. 34) less than two years, with or without hard labour, and with or without solitary confinement. —24–25 Vict., ch. 97, s. 3, Imp.

See sect. 74, *post*, as to requiring the offender to enter into a recognizance and to give sureties for the peace.

See sect. 94, Procedure Act of 1869, as to solitary confinement, and sect. 49 of the same Act, as to verdict for an attempt to commit the offence charged, in certain cases, upon an indictment for the offence.

Indictment.—.....feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house of J. N. situate ....., with intent thereby then to injure the said J. N., *(or to defraud a certain insurance company called.....* against the form. ....

A. was indicted for setting fire to an out-house. The building set on fire was a thatched pigsty, situate in a yard in the possession of the prosecutor, into which yard the back door of his house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn which were lent to him by a tenant, but which did not open into this yard: *held*, that this pigsty was an out-house within the Repealed Statute.—Reg. vs. Jones, 2 Mood. 308.

A. was indicted for having set fire to a building twenty-four feet square, the sides of which were composed of wood with glass windows; it was roofed and was used by a gentleman, who built houses on his own property, for the purpose of disposing of them, as a storehouse for seasoned timber, as a place of deposit for tools, and as a place where timber was prepared for use: *held*, that this

was a shed, and also an erection used in carrying on trade. —Reg. vs. Amos, 5 Cox, 222.

Burning a stable is not supported by proof of burning a shed, which has been built for and used as a stable originally, but has latterly been used as a lumber shed only.—Reg. vs. Colley, 2 M. & Rob. 475.

An unfinished structure intended to be used as a house is not a house within the meaning of this section.—Reg. vs. Edgell, 11 Cox, 132.

An indictment under this section, for setting fire to a house, shop, etc., etc., need not allege the ownership of the house. The evidence in support of the intent to injure was that the prisoner N. was under notice to quit, and a week before the fire was asked to leave but did not. Of the intent to defraud, the evidence was that in 1867 he called on an agent about effecting an insurance, and that in 1871, he called on him again, and said he had come to *renew* his policy for £500, and paid ten shillings: *held*, that the evidence was sufficient to prove the intent to injure the owner of the house, and the intent to defraud the insurance company: though the policy of insurance was not produced, there was sufficient evidence of it by the defendant's implied admission of its existence by saying he wished to *renew* his policy.—Reg. vs. Newboult, 12 Cox, 148.

Malice against owner is unnecessary, see sect. 66, *post*, and intent to injure or defraud any particular person need not be stated in the indictment, nor proved on the trial.

In Harrington's case, R. vs. R. 207, no motive of ill-feeling whatsoever against the owner of the property burnt could be proved against the prisoner: he was proved to be a harmless, inoffensive man; but upon a case reserved it was held that an injury to the burnt building being the necessary consequence of setting fire to

it, the *intent to injure* might be inferred, for a man is supposed to intend the necessary consequence of his own act.

Under the Statute, it is immaterial whether the building, house, &c., &c., be that of a third person or of the defendant himself; but in the latter case, the intent to defraud cannot be inferred from the act itself, but it must be proved by other evidence. In Reg. vs. Kitson, Dears. 187, the prisoner was indicted for arson, in setting fire to his own house, with intent to defraud an insurance office. Notice to produce the policy was served too late on the defendant, and it was held that secondary evidence of the policy was not admissible. "But it must not, however, be understood, said Jervis, C. J., that it is absolutely necessary in all cases to produce the policy, but the intent to defraud alleged in the indictment must be proved by proper evidence."

A married woman cannot be indicted for setting fire to the house of her husband with intent to injure him.—R. vs. March, 1 Mood. 182. But this decision would now be considered doubtful.

See remarks under sects. 1 and 2, *ante*.

SETTING FIRE TO ANY RAILWAY STATION, ETC., ETC., ETC.

Sect. 4.—Whosoever unlawfully and maliciously sets fire to any station, engine-house, warehouse or other building, belonging or appertaining to any railway, port, dock or harbor, or to any canal or other navigation, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 4, Imp.

As to verdict for an attempt to commit the offence charged in certain cases, solitary confinement and requiring the offender to give sureties, as under sects. 1 and 2, *ante*. Indictment, as under sect. 1, need not allege *with intent to injure or defraud*.

As to destroying or injuring by fire or otherwise any custom-house, or any building whatsoever in which seized, forfeited or bonded goods are deposited, see 31 Vict., ch. 6, sect. 97, *an Act respecting the customs*.

SETTING FIRE TO THE QUEEN'S DOCK YARDS, SHIPS, ETC., ETC., ETC.

Sect 5.—Whosoever unlawfully and maliciously sets on fire or burns, or otherwise destroys or causes to be set on fire or burnt, or otherwise destroyed, or aids, procures, abets, or assists, in the setting on fire or burning, or otherwise destroying, of any of Her Majesty's ships or vessels of war, whether afloat or building, or begun to be built in any of Her Majesty's dock-yards, or building or repairing by contract in any private yard for the use of Her Majesty's arsenals, magazines, dock-yards, rope yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or material there placed, for building, repairing or fitting out of ships or vessels, or any of Her Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war are kept, placed or deposited, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

This clause is taken from 12 Geo. 3, ch. 24, sect. 1, Imp.

SETTING FIRE TO ANY PUBLIC BUILDING.

Sect. 6.—Whosoever unlawfully and maliciously sets fire to any building, other than such as are in this Act before mentioned, belonging to the Queen, or to any county, riding, division, city, town, village, parish or place, or belonging to any university or college or hall of any university, or to any corporation, or to any unincorporated body or society of persons, associated together for any lawful purpose, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 5, Imp.

Greaves says "This clause is new, and an extremely great amendment of the law. Before this Act passed, there was no Statute applicable to the burning of any public building, however important, unless it could be held to fall within the term "house." It would be easy to point out such buildings, the burning of which would have been looked upon as a national calamity. This section therefore has been introduced to protect all such buildings, as well as all the others specified in it,"

SETTING FIRE TO OTHER BUILDINGS.

Sect. 7.—Whosoever unlawfully and maliciously sets fire to any building other than such as are in this Act before mentioned, is guilty of felony, and shall be liable

to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 6, Imp.

Greaves says, "This clause is new. It will include every building not falling within any of the previous sections of the Act. It will include ornamental buildings in parks and pleasure grounds, hot houses, pineries, and all those buildings which not being within the curtilage of a dwelling-house, and not falling within any term previously mentioned, were unprotected before this Act passed. The term 'building' is no doubt very indefinite. . . . but it was thought much better to adopt this term, and leave it to be interpreted as each case might arise, than to attempt to define it, as any such attempt would probably have failed in producing any expression more certain than the term 'building' itself."

In Reg. vs. Edgell, 11 Cox, 132, it was doubted whether an unfinished structure intended to be used as a house was a *building* within this section. The point was not determined.

But in Reg. vs. Manning, 12 Cox, 106, upon a case reserved, it was held that an unfinished dwelling-house of which the external and internal walls were built, and the roof covered in, and a considerable part of the flooring laid, and the walls and ceilings prepared for plastering, is a building, within this section. In this case, Lush, J., presiding the trial, left it to the jury whether as a question of fact, the erection was a building, and the Court of Crown cases reserved seemed to be of opinion that this had been correctly done.—No intent to injure

or defraud need be alleged in an indictment under this section.

SETTING FIRE TO GOODS IN ANY BUILDING, THE SETTING FIRE OF WHICH WOULD BE FELONY.

Sect. 8.—Whosoever unlawfully and maliciously sets 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 guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24-25 Vict., ch. 97, sect. 7, Imp.

Greaves says: The terms "under such circumstances that if the building were thereby set fire to the offence would amount to felony" were advisably substituted instead of the terms used (*before*) in consequence of the case of Reg. vs. Lyons, 1 Bell, 38. Some of the enactments as to setting fire to buildings, ships, &c., &c., &c., make an intent to injure or defraud necessary, but others do not; and the terms in question were adopted in order to include both categories; so that if goods are set fire to in a building where an intent to injure or defraud is necessary to constitute the offence of the setting fire to such building (as in the cases included in sect. 3) the case will fall within this clause; as well as where no intent is necessary to constitute the offence of setting fire to the building in which the goods are set fire to (as in the cases included in sects. 4, 5, 6, 7). An indictment under this clause where no intent is necessary to constitute the offence of setting fire to the building in which the

goods are set fire to, it will be sufficient to allege the setting fire to the goods in that building: but where an intent to injure or defraud is necessary to constitute the offence of setting fire to the building, it would seem necessary to allege in addition an intent to injure or defraud as the case may be; and the evidence in the former case will suffice, if it prove the setting fire to the goods in the building, but in the latter case, it must also be sufficient to satisfy the jury that the prisoner had the intent alleged in the indictment.

Indictment.— ..... feloniously, unlawfully and maliciously did set fire to a certain heap of straw in a certain building of J. N. situate at ..... in the district of ..... against the form .....3 Burn's Justice, 799.—According to Greaves, if the heap of straw was in a *house*, (as under sect. 3) the intent to injure or defraud should be added. But see Reg. vs. Heseltine, 12 Cox, 404 *Post.*

Where the prisoners were indicted for setting fire to letters in a post-office, divers persons being in the house, it was held that there was no evidence of any intent, but it was what is vulgarly called a lark, and even if the house had been burned, they would not have been guilty.—Reg. vs. Batstone, 10 Cox, 20.

A person maliciously set fire to goods in a house with intent to injure the owner of the goods, but he had no malicious intention to burn the house, or to injure the owner of it. The house did not take fire, but would have done so, if the fire had not been extinguished: *held*, that if the house had thereby caught fire, the setting fire to it would not have been within this section, as, under the circumstances, it would not have amounted to felony.—Reg. vs. Child, 12 Cox, 64. This case would perhaps bear reconsideration.

It is not necessary in a count in an indictment laid under this section to allege an intent to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular circumstances relied on as constituting the offence. Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to.—Reg. vs. Heseltine, 12 Cox, 404.

As to verdict for an attempt to commit the offence charged in certain cases, solitary confinement and requiring sureties for the peace, same as under sect. 1, *ante*.

SETTING FIRE BY NEGLIGENCE TO ANY FOREST, TREE, LUMBER, ETC., ETC., ETC.

Sect. 9.—Whosoever by such negligence as shall show him to be reckless or wantonly regardless of consequences, or in contravention of a municipal law of the locality; sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the crown domain or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek, or river, or roll-way, beach or wharf, so that the same be injured or destroyed, is guilty of a misdemeanor, and shall be liable to imprisonment in any gaol or place of confinement for any term not longer than two years, with or without hard labour.

Sect. 10.—When in the opinion of the magistrate investigating the charge under the preceding section the consequences have not been serious, he may in his discretion dispose of the matter summarily without sending the offender for trial, by imposing such a fine not exceeding fifty dollars, as he may deem right to impose, or in default of payment by committal to gaol for any period not exceeding six months, or until the fine be paid, and with or without hard labour.

Sect. 11.—Whosoever unlawfully and maliciously sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the Crown domain, or on land leased or lawfully held for the purpose of cutting timber, or on private property or on any creek, or river, or rollway, beach or wharf, so that the same be injured or destroyed, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

These three clauses are not in the English Statute. Sects. 9 and 11, both apply to forest, tree, lumber, &c., &c., &c.; but under the former, the act must have been done carelessly, or in contravention to a municipal law, whilst under the latter, it must have been done *unlawfully and maliciously*.

See sect. 75, *post*, as to summary conviction authorized by sect. 10, and sect. 74, *post*, as to additional or other punishment in misdemeanors and felonies under this Act. As to solitary confinement, under sect. 11, see sect. 94, Procedure Act of 1869.

An attempt to commit the felony under sect. 11 would probably be tried and punished under sect. 12, see *post*.

ATTEMPTING TO SET FIRE TO BUILDINGS.

Sect. 12.—Whosoever, unlawfully and maliciously, by any overt act, attempts to set fire to any building, or any matter or thing in *the last preceding section mentioned*, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years.

and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, sect. 8, Imp.

To give to this clause the same effect as sect. 8 of the English Act, it should have been the *ninth* of our Statute, so as to refer to our sect. 8, (sect. 7 of the English Act,) by the words "*the last preceding section.*" As it is, the English section, by the words "*or any matter or thing in the last preceding section mentioned*" refers to 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, whilst our section, by the same words, refers to unlawfully and maliciously setting fire to any forest, tree, &c., &c., &c. So that with us, the attempt to set fire to any matter or thing, under the circumstances mentioned in sect. 8, not being provided for by Statute, would be, by the common law, a misdemeanor; and the attempt to set fire to any forest, tree, &c., &c., &c., would be a felony, by the said sect. 12.

As to the attempt to set fire to any building, our section is useless as no building is mentioned in the last preceding section.

Indictment.— ..... feloniously, unlawfully and maliciously did attempt, by then (*state the overt act*) feloniously, unlawfully and maliciously to set fire to a certain dwelling-house (*building*) of J. N. situate at the parish of ..... in the ..... with intent thereby then to injure the said J. N. against the form .....Archbold, 517.

The intent to injure is perhaps unnecessarily alleged in this form.

By the erroneous transposition above referred to, or rather by the insertion into our Statute of clauses 9, 10, 11, the words "under such circumstances, &c., &c., &c.," in this sect. 12, have no meaning.

As to solitary confinement, see sect. 94, Procedure Act of 1869.

As to requiring the offender to enter into a recognizance and give sureties for the peace, see sect. 74, *infra.*

Lighting a match by the side of a stack with intent to set fire to it is an attempt to set fire to it, because it is an act immediately and directly tending to the execution of the crime.—Reg. vs. Taylor, 1 F. & F. 511.—On an indictment against two prisoners for attempting to set fire, one prisoner had not assisted in the attempt, but had counselled and encouraged the other: both were convicted.—Reg. vs. Clayton, 1 C. & K. 128.

INJURIES BY EXPLOSIVE SUBSTANCES TO BUILDINGS AND GOODS THEREIN.

Sect. 13.—Whosoever unlawfully and maliciously, by the explosion of gunpowder, or other explosive substance, destroys, throws down, or damages the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person is endangered, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, sect. 9, Imp.

Sect. 14.—Whosoever unlawfully and maliciously places or throws in, into, upon, under, against or near

any building any gunpowder or other explosive substance with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods or chattels, whether or not any explosion takes place, and whether or not any damage is caused, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, sect. 10, Imp.

Indictment for destroying by explosion part of a dwelling-house, some person being therein.—.... feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy a certain part of the dwelling-house of J. N. situate ....one A. N. then being in the said dwelling-house, against the form..... Add counts for *throwing down* and *damaging* part of the dwelling-house.—Archbold, 521.

Prove that the defendant by himself or with others destroyed or was present aiding and abetting in the destruction of some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. It is apprehended that a destruction of some part of the *freehold* must be shown.—R. vs. Howell, 9 C. & P. 437. It has been held that firing a gun loaded with powder through the keyhole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, is not within this section.—R. vs. Brown, 3 F. & F. 821. But Greaves is of opinion that this case deserves reconsideration.—2 Russell, 1045, note. Prove

that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously, that is, wilfully and not by accident. Prove also that J. N. was in the house at the time of the committing the offence. No intent need be laid or proved.—Archbold, 522. In Reg. vs. Sheppard, 11 Cox, 302, it was held that, in order to support an indictment under this section, it is not enough to show simply that gunpowder or other explosive substance was thrown against the house, but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion should result.

Indictment for blowing up a house, whereby life was endangered.—.... feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy the dwelling-house of J. N. situate.... whereby the life of one A. N. was then endangered, against the form.... Add a count for *damaging* the house with a like consequence.—Archbold, 522.

Same proof as under last preceding indictment, and that the life of A. N. was endangered by the defendant's act.

Indictment for throwing gunpowder into a house with intent, &c., &c.—.... feloniously, unlawfully and maliciously did throw into the dwelling-house of J. N., situate .... a large quantity, to wit, two pounds of a certain explosive substance, that is to say, gunpowder, with intent thereby then to destroy the said dwelling-house, against the form..... Add counts varying the statement of the act, and also stating the intent to be to *damage* the house.—Archbold, 522. See Reg. vs. Sheppard, 11 Cox, 302, *ante*. Prove as under sect. 13, and

prove circumstances from which the jury may infer the intent as laid.

RIOTOUSLY DEMOLISHING OR INJURING BUILDINGS., ETC., ETC., ETC.

Sect. 15.—If any *person* riotously and tumultuously assembled together to the disturbance of the public peace unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down or destroy, any church, chapel, meeting-house or other place of divine worship, or any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are in this section before mentioned, belonging to Her Majesty, or to any county, riding, city, town, village, parish or place, or to any university, or college, or hall of any university, *or to any corporation or to any unincorporated body or society or persons associated for any lawful purpose*, or devoted, or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon way or trunk for conveying minerals from any mine, every such offender is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 11, Imp.

Sect. 16.—If any persons riotously and tumultuously assembled together to the disturbance of the public peace unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way or trunk, as in the last preceding section mentioned, every such offender is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, provided that if upon the trial of any person for any felony in the last preceding section mentioned the jury are not satisfied that such person is guilty thereof, but are satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly.—24–25 Vict., ch. 97, s. 12, Imp.

By a misprint, the word *person* is inserted for *persons*, in the beginning of sect. 15. The other words in *italics* in the said section are not in the English Act.

Indictment under sect. 15.—That on.....at.....J. S., J. W. and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace; and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully and with force begin to demolish and pull down the dwelling-house of one J. N. there situate, against the form.....

Indictment under sect. 16.—That on.....at..... J. S., J. W. and E. W., together with divers other evil-disposed persons, to the said jurors unknown, unlawfully, riotously, and tumultuously did assemble together to the disturbance of the public peace, and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully and with force injure a certain dwelling-house of one J. N. there situate, against the form..... Add a count stating *damage* instead of *injure*.

The riotous character of the assembly must be proved. It must be proved that these three or more, but not less than three, persons assembled together, and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. It is a sufficient terror and alarm, if *any one* of the Queen's subjects be in fact terrified.—Archbold, 842. Then prove that the assembly began with force to demolish the house in question. It must appear that they began to demolish some part of the *freehold;* for instance the demolition of moveable shutters is not sufficient.—R. vs. Howell, 9 C. & P. 437. A demolition by fire is within the Statute. Prove that the defendants were either active in demolishing the house, or present, aiding and abetting. To convict under sect. 15, the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away, as having completed their purpose, it is not a beginning to demolish within

this section. But a total demolition is not necessary, though the parties were not interrupted, and the fact that the rioters left a chimney remaining will not prevent the Statute from applying.—Archbold, 525. But if the demolishing or intent to demolish be not proved, and evidence of riot and injury or damage to the building is produced, the jury may find the defendant guilty of the misdemeanor created by sect. 16, by the proviso contained in the said sect. 16, on which Greaves says: This clause is intended to provide both for cases where there is no sufficient evidence of an intention to proceed to the total demolition of the house, etc., etc., etc., and also for cases where no such intent ever existed, provided there be a riot and injury done within the terms of the clause.

As to solitary confinement, see sect. 94, Procedure Act of 1869; as to sureties in felonies, and fine and sureties in misdemeanors under this Act., see post, s. 74.

INJURIES TO BUILDINGS BY TENANTS.

Sect. 17.—Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, unlawfully and maliciously pulls down or demolishes, or unlawfully and maliciously begins to pull down or demolish the same or any part thereof, or unlawfully *or* maliciously pulls down or severs from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, is guilty of a misdemeanor.—24–25 Vict., ch. 97, s. 13, Imp.

The word *or* is, by an error, substituted for *and*, in unlawfully "*or*" maliciously pulls down or severs, etc.,

etc.; such errors may lead to very grave consequences.

Indictment.—..... that on .... J. S. was possessed of a certain dwelling-house, situate ..... then held by him the said J. S. for a term of years then unexpired; and that the said J. S. being so possessed as aforesaid, on the day and year aforesaid did unlawfully and maliciously pull down and demolish the said dwelling-house (or begin to pull down or demolish the said dwelling-house or any part thereof) against the form .... Archbold, 526.

Greaves says: "This clause is a very important improvement in the law of England, as tenants have very frequently, especially when under notice to quit, wilfully injured houses and buildings to a great extent." Mr. Cox says: "Malice is of the essence of this offence. It is not enough that it be unlawfully done, there must be a design to injure the owner." This is clearly wrong by the express terms of sect. 58, *post*, (66 of our Statute). Mr. Welsby perfectly correctly says "prove that the act was done maliciously, that is wilfully and without any claim or pretence of right to do it."—Archbold, 526. No punishment for the offence created by this section was inserted, because it was thought that the common law punishment of fine or imprisonment, or both, was the proper punishment." By the common law, when a fine is imposed, the offender may be imprisoned till the fine is paid.—Greaves, Consol. Acts, 9.

This section only applies to any dwelling-house or building, but sect. 3, *ante*, provides for cases of setting fire to any of the things therein mentioned, whether in the offender's possession or not, and sect. 67, *post*, extends the provisions of the Act generally to all offenders, whether

in the possession of the property or not, if there be an intent to injure or defraud.—3 Burn's Justice, 775.

DESTROYING GOODS IN PROCESS OF MANUFACTURE, OR CERTAIN MACHINERY, &C., &C., &C.

Sect. 18.—Whosoever unlawfully and maliciously cuts, breaks, or destroys, or damages with intent to destroy or to render useless any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process or progress of manufacture, or unlawfully and maliciously cuts, breaks, or destroys, or damages with intent to destroy or render useless any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or unlawfully and maliciously cuts, breaks or destroys or damages with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or by force enters into any house, shop, building or place, with intent to commit any of the offences in this section mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 14, Imp.

Sect. 19.—Whosoever unlawfully and maliciously cuts, breaks or destroys, or damages with intent to destroy or render useless, any machine or engine whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair or alpaca goods or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose or lace) is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 15, Imp.

As to solitary confinement, see sect. 94, Procedure Act of 1869. As to requiring sureties for the peace, see *post*, sect. 74. As to verdict for an attempt to commit the offence charged upon an indictment for the offence itself, in certain cases, see sect. 49, Procedure Act of 1869. It is not necessary to prove malice against owner; *post*, sect. 66. To prove that the act was done maliciously, it is sufficient to prove that it was done wilfully.

Taking away part of a frame and thereby rendering it useless, R. vs. Tacey, R. & R. 452, and screwing up parts of an engine, and reversing the plug of the pump, thereby rendering it useless and liable to burst, Reg. vs. Fisher, 10 Cox, 146, are damaging within the Act, although no actual permanent injury be done.—If a thrashing machine be taken to pieces and separated by the owner, the destruction

of any part of it is within the Statute.—R. vs. Mackerel, 4 C. & P. 448.—So is the destruction of a water-wheel, by which a thrashing machine is worked. R. vs. Fidler, 4 C. & P. 449.—So though the side boards of the machine be wanting, without which it will act, but not perfectly, it is within the Statute.—R. vs. Bartlett, 2 Deacon, 1517. But if the machine be taken to pieces, and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the Statute.—R. vs. West, Id. 1518.—It is not necessary that any part of the machine should be broken: a dislocation or disarrangement is sufficient.—R. vs. Foster, 6 Cox, 25.—A table with a hole in it for water, used in the manufacture of bricks, was held not to be a machine "prepared for or employed in any manufacture" within the Repealed Statute; but it would no doubt now be held to be within the words *tool or implement* contained in the present section.—3 Burn's Justice, 776.

Indictment for cutting goods in the loom.—.... twenty-five yards of woollen cloth of the goods and chattels of J. N. in a certain loom then being, feloniously, unlawfully and maliciously did cut and destroy, against the form .....

Indictment for breaking warp of silk.— .... a certain warp of silk, of the goods and chattels of J.N., feloniously maliciously and unlawfully did cut and destroy, against the form ....

Indictment for entering by force into a house with intent to cut or destroy woollen goods.— .... into a certain house of J. N. situate ..... feloniously and by force did enter, with intent certain woollen goods of the said J. N. in a certain loom then and there being, feloniously, unlawfully and maliciously to cut and destroy, against the form ....

Indictment for destroying a thrashing machine.— .... a certain thrashing machine, the property of J. N., feloniously, unlawfully and maliciously did cut, break and destroy, against the form ..... Archbold, 527, 529.

SETTING FIRE TO CROPS, STACKS, &C., &C., &C.

Sect. 20.—Whosoever unlawfully and maliciously sets fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice or plantation of trees, or to any heath, gorse, furze or fern, wheresoever the same may be growing, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement—24–25 Vict., ch. 97, s. 16, Imp.

Sect. 21.—Whosoever unlawfully and maliciously sets fire to any stack of corn, grain, pulse, tares, hay, straw, haulm or stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or to any steer or pile of wood or bark, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 97, s. 17, Imp.

Sect. 22.—Whosoever unlawfully and maliciously, by any overt act, attempts to set fire to any such matter or thing, as in either of the last two preceding sections mentioned, under such circumstances that if the same

were thereby set fire to the offender would be, under either of such sections, guilty of felony, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 18, Imp.

As to requiring the offender to enter into recognizances, and find sureties for keeping the peace, see sect. 74, *post.* As to solitary confinement, see sect. 94, Procedure Act of 1869.

Indictment for setting fire to a stack of wheat.—..... feloniously, unlawfully and maliciously did set fire to a certain stack of wheat, of J. N., against the form .....

Where the word *unlawfully* was omitted, the judges held the indictment to be bad.—R. vs. Turner, 1 Mood. 239.—No intent need be stated. Archbold, 519; R. vs. Newill, 1 Mood 458; R. vs. Woodward, 1 Mood. 323.

Prove that the defendant wilfully set fire to the stack of wheat, as stated in the indictment, and prove the ownership of the property. An indictment for setting fire to a stack of beans, R. vs. Woodward, 1 Mood. 323, or barley, R. vs. Swatkins, 4 C. & P. 548, is good; for the Court will take notice that beans are pulse, and barley, corn.—A stack composed of the flax-plant with the seed or grain in it, the jury finding that the flax-seed is a grain, was held to be a stack of grain.—R. vs. Spencer, Dears. & B. 131.—The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway, *held*, this not to be a stack of wood.—R. vs. Aris, 6 C. & P. 348.—Where the defendant set fire to a summer-

house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood.—R. vs. Price, 9 C. & P. 729. An indictment for setting fire to a cock of hay cannot be sustained under a Statute making it an offence to set fire to a stack of hay.—Reg. vs. McKeever, 5 Ir. R. C. L. 86, Q. B.. A quantity of straw, packed on a lory, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within 24–25 Vict., ch. 97, s. 17, (Imp.) and the setting fire thereto wilfully and maliciously is not felony.—Reg. vs. Satchwell, 12 Cox, 449.

DESTROYING HOP-BINDS, GRAPE-VINES, &c., &c., &c.

Sect. 23.—Whosoever unlawfully and maliciously cuts or otherwise destroys any hop-binds growing on poles in any plantation of hops, *or any grape-vines growing in any vineyard*, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24 25 Vict., ch. 97, sect. 19, Imp.

The words in *Italics* are not in the English Act.

As to requiring sureties for the peace, see *post*, sect. 74. As to solitary confinement, see sect. 94, Procedure Act of 1869. As to verdict for an attempt to commit the felony charged upon an indictment under this section, see sect. 49, Procedure Act of 1869.

Indictment.—..... one thousand hop-binds, the property of J. N., then growing on poles in a certain plantation of hops of the said J. N. situate.... feloniously, unlawfully and maliciously did cut and destroy; against the form..... Archbold, 548.

Prove that the defendant cut or otherwise destroyed the hop-binds, or some part of them, as alleged: that they were at the time growing in a plantation of hops, situate as described, belonging to J. N. Prove also that the act was done maliciously, that is to say, wilfully, and without the belief of a supposed right.—Archbold, loc. cit.

DESTROYING TREES, ETC., ETC., ETC.

Sect. 24.—Whosoever unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, in case the amount of the injury done exceeds the sum of five dollars, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, sect. 20, Imp.

Sect. 25.—Whosoever unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood growing in any public street, or place, or elsewhere than in any park, pleasure-ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, in case the amount of injury done exceeds the sum of twenty dollars, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other

gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, sect. 21, Imp.

Indictment under sect. 24.—..... two elm trees, the property of J. N.; then growing in a certain park, of the said J. N. situate in..... feloniously, unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N. to an amount exceeding the sum of five dollars, to wit, the amount of ten dollars, against the form..... A count may be added for cutting with intent to steal the trees, under sect. 21 of the Larceny Act.—Archbold, 549.

Indictment under sect. 25.—..... ten elm trees; the property of J. N., then growing in a certain close of the said J. N. situate..... feloniously, unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N. to an amount exceeding the sum of twenty dollars, to wit, the sum of twenty-five dollars, against the form..... Add a count, under sect. 21 of the Larceny Act.

As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see *post*, sect. 74. As to solitary confinement, see sect. 94, Procedure Act of 1869; and sect. 49, of the same Act, as to a verdict for an attempt to commit the offence charged upon an indictment for the offence, in certain cases.

A variance in the number of trees is not material. It must be proved, under sect. 24, that the tree was growing in a park, and the damage done to exceed five dollars.

Under sect. 25, the damage must exceed twenty dollars, and the trees growing elsewhere than in a park. The amount of injury done means the actual injury done

to the trees, by the defendant's act: it is not sufficient to bring the case within the Statute, that, although the amount of such actual injury is less than twenty dollars, the amount of *consequential* damage would exceed twenty dollars.—R. vs. Whiteman, Dears. 353. An indictment under these sections is defective, if it does not allege the act to have been done *unlawfully and maliciously*, and it is not sufficient to state that it was done *feloniously*.—Reg. vs. Lewis, 2 Russell, 1067.

DAMAGING TREES TO THE AMOUNT OF TWENTY-FIVE CENTS. —SECOND OFFENCE.—THIRD OFFENCE.—

Sect. 26.—Whosoever unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of twenty-five cents at the least, shall, on conviction thereof before any Justice of the Peace, at the discretion of the Justice, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding five dollars as to the Justice seems meet, and whosoever having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof in like manner, shall for such second offence, be liable to be committed to the common gaol or other place of confinement, there to be kept at hard labour for such term, not exceeding three months, as the convicting Justice thinks fit, or else shall forfeit and pay, over and above the amount of the injury done, such sum

of money, not exceeding twenty dollars, as to the Justice seems meet, and whosoever having been twice convicted of any such offence, whether both or either of such convictions have taken place before or after the passing of this Act, afterwards commits any of the said offences in this section before mentioned, is guilty of a misdemeanor and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 22, Imp.

As to summary convictions under this Act, see *post*, sect. 75,—and sect. 74, as to fine and sureties in misdemeanors, at the discretion of the Court. As to solitary confinement, see sect. 94, Procedure Act of 1869.

If the injury done does not amount to twenty-five cents, the defendant may be punished under sects. 60 and 61, *post*.—Reg. vs. Dodson, 9 Ad. & El. 704.

If a tree is cut or damaged, that is sufficient: it need not be totally destroyed.—Taylor's case, R. & R. 373.

Indictment after two previous convictions for cutting or damaging trees to the value of twenty-five cents, wheresoever growing—.....that J. S., on .... one elm tree, the property of J. N., then growing on a certain land of the said J. N., in the .... unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N., to the amount of forty cents, against the form of the Statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned *(stating the two previous convictions.)* See sect. 26, Procedure Act of 1869, as to indictments and procedure, in indictable offences committed after previous

convictions, and for which a greater punishment may be inflicted on that account.

DESTROYING PLANTS, VEGETABLES, ETC., IN A GARDEN, ETC.

Sect. 27.—Whosoever unlawfully and maliciously destroys, or damages with intent to destroy, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory, shall, on conviction thereof before a Justice of the Peace, at the discretion of the Justice, either be committed to the common gaol or other place of confinement, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty dollars, as to the Justice seems meet, and whosoever having been convicted of any such offence either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for the term of two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. —24-25 Vict., ch. 97, s. 23, Imp.

As to summary convictions under this Act, see *post*, sect. 75. As to sureties for the peace, in felonies, see *post*, sect. 74. As to solitary confinement, see sect. 94, Procedure Act of 1869, and sect. 49, as to a verdict for an attempt to commit the offence charged in certain cases. Sect. 26, of the Procedure Act of 1869, provides for the form of indictment and the procedure in cases of offences committed after a previous conviction, and for which, on that account, a greater punishment may be inflicted.

In England there is no such clause applying to the Act concerning malicious injuries to property, and the form in Archbold, page 552, would be defective here. The indictment, with us, must be in accordance with what is said by Greaves, Consol. Acts, 200, and Archbold, 364. The law laid down in Reg. vs. Martin, 11 Cox, 343, applies, with us, to any indictment for a subsequent offence.

Indictment for destroying plants after a previous conviction—....that J. S., on .... one dozen heads of celery, the property of J. N., in a certain garden of the said J. N. situate .... then growing, unlawfully and maliciously did destroy, against the form of the Statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore mentioned *(state the previous conviction)* And so, the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, one dozen heads of celery, the property of J. N. in a certain garden of the said J. N. situate .... then growing, feloniously, unlawfully and maliciously did destroy, against the form....

DESTROYING PLANTS, VEGETABLES, NOT IN A GARDEN.

Sect. 28.—Whosoever unlawfully and maliciously destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground, shall on, conviction thereof before a Justice of the Peace at the discretion of the Justice, either be committed to the common gaol or other place of confinement, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one

month, or else shall forfeit and pay over and above the amount of the injury done, such sum of money, not exceeding five dollars, as to the Justice seems meet; and in default of payment thereof, together with the costs if ordered, shall, be committed as aforesaid, for any term not exceeding one month, unless payment be sooner made, and whosoever, having been convicted of any such offence, either against this or any former Act or Law, afterwards commits any of the said offences in this section before mentioned and is convicted thereof in like manner, shall be committed to the common gaol or other place of confinement, there to be kept to hard labour for such term, not exceeding three months, as the convicting Justice thinks fit.—24-25 Vict., ch. 97, s. 24, Imp.

All offences against this clause are punishable summarily.—See sect. 75, *post*.

INJURIES TO FENCES, GATES, ETC., ETC., ETC.

Sect. 29.—Whosoever unlawfully and maliciously cuts, breaks, throws down, or in anywise destroys any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof before a Justice of the Peace, for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five dollars, as to the Justice seems meet; and whosoever, having been convicted of any such offence, either against this or any former act or law, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof in like manner, shall be committed to the common gaol or other place of confinement, there to be kept to hard labour for such term, not exceeding three months, as the convicting Justice thinks fit.—24-25 Vict., ch. 27, s. 25, Imp.

All offences against this clause are punishable summarily.— See *post*, sect. 75.

INJURIES TO MINES.

Sect. 30.—Whosoever unlawfully and maliciously sets fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, *or to any mine or well of oil or other combustible substance*, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 26, Imp.

Sect. 31.—Whosoever unlawfully and maliciously, by any overt act, attempts to set fire to any mine, *or to any such oil well*, as aforesaid, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. —24–25 Vict.-ch. 97, s. 27, Imp.

The words in *italics* are additions to the English Act.

As to solitary confinement, see sect. 94, Procedure Act of 1869. As to sureties for the peace, see sect. 74, *post*.

It is equally an offence within this section to set fire to a mine in the possession of the party himself, provided it is proved to be done with intent to injure or defraud any other person. The mine may be laid as the property of the person in possession of or working it, though only as agent.—Reg. vs. Jones, 2 Mood. 293.

Indictment.— ..... feloniously, unlawfully and maliciously did set fire to a certain mine of coal of J. N. situate at ..... against the form .....

DROWNING MINES, ETC., ETC., ETC.

Sect. 32.—Whosoever unlawfully and maliciously causes any water, earth, rubbish or other substance to be conveyed or run or fall into any mine, *or into any oil well*, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine *or well*, or to hinder or delay the working thereof, or, with the like intent, unlawfully and maliciously pulls down, fills up, or obstructs, or damages with intent to destroy, obstruct or render useless, any airway, waterway, drain, pit, level or shaft, of or belonging to any mine *or well*, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement; provided that this section shall not extend to any damage committed underground by any owner of any adjoining mine *or well* in working the same, or by any person duly employed in such working.—24–25 Vict., ch. 97, s. 28, Imp.

The words in *italics* are additions to the English Statute, and intended, no doubt, as in the last two preceding sections, to protect petroleum wells.

See the remarks under these two sections.

Indictment for drowning a mine.— .... feloniously, unlawfully and maliciously did cause a quantity of water to be conveyed into a certain mine of J. N., situate ..... with intent thereby then feloniously to destroy the said mine, against the form of the Statute.....

DESTROYING ENGINES, ERECTIONS, ETC., ETC., ETC., USED IN MINES.

Sect. 33.—Whosoever unlawfully and maliciously

pulls down, or destroys, or damages with intent to destroy or render useless, any steam engine, or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine *or well*, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building or erection used in conducting the business of any mine *or well*, or any bridge, waggon-way or trunk for conveying minerals *or oil* from any mine *or well*, whether such engine, staith, building, erection, bridge, waggon-way or trunk be completed or in an unfinished state, or unlawfully and maliciously stops, obstructs or hinders the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy *or* damage any mine *or well*, or to hinder, obstruct or delay the working thereof, or unlawfully and maliciously wholly or partially cuts through, severs, breaks, or unfastens, or damages with intent to destroy or render useless, any rope, chain or tackle, of whatsoever material the same shall be made, used in any mine *or well*, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine *or well*, or the working or business thereof, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 29, Imp.

The words in *italics* are not in the English Act. As to solitary confinement, see sect. 94, Procedure Act of 1869, also sect. 49, of the same Act as to a verdict for an

attempt to commit the felony charged, upon an indictment for the felony itself, in certain cases. See *post*, sect. 74, as to sureties for the peace.

Prove that the defendant pulled down or destroyed the engine, as alleged. A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold was holden to be an *erection* used in conducting the business of the mine, within the meaning of the Statute.—R. vs. Whittingham, 9 C. & P. 234.—Wrongfully setting a steam-engine in motion, without its proper machinery attached to it, and thereby damaging it and rendering it useless, is within this section.—R. vs. Norris, 9 C. & P. 241. Damaging a drum moved by a steam-engine, but of which it forms no part, is not damaging a steam-engine.—R. vs. Whittingham, *supra*.—A trunk of wood used to convey water to wash the earth from the ore was held to be an erection used in conducting the business of a mine within the meaning of the Statute.—Barwell vs. Winterstoke, 14 Q. B. 704.

Indictment.— ..... a certain steam-engine, the property of J. N. for the draining and working of a certain mine of the said J. N., situate ..... feloniously, unlawfully and maliciously did pull down and destroy, against the form .....

INJURIES TO SEA AND RIVER BANKS, ETC., ETC., ETC.

Sect. 34.—Whosoever unlawfully and maliciously breaks down or cuts down, or otherwise damages or destroys any sea-bank, sea-wall, dyke or aboiteau or the bank, dam or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building is or is in danger of being overflowed or damaged, or unlawfully and maliciously throws, breaks, or cuts down, levels, undermines, or otherwise destroys

any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, water-course or other work belonging to any port, harbour, dock or reservoir, or on or belonging to any navigable river or canal, or any dam or structure erected to create or utilize any hydraulic power, or any embankment for the support thereof, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 30, Imp.

Sect. 35.—Whosoever unlawfully and maliciously cuts off, draws up or removes any piles, stone, or other materials fixed in the ground and used for securing any sea-bank or sea-wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty or lock, or unlawfully and maliciously opens or draws up any floodgate or sluice, or does any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 97, s. 31, Imp.

As to solitary confinement, verdict for an attempt, and sureties for the peace, same as under sect. 33, *ante*.

Indictment under sect. 34.— .... a certain part of the bank of a certain river called the river ..... situate ..... feloniously, unlawfully and maliciously did cut down and break down, by means whereof certain lands were then overflowed and damaged (*or was in danger* ....) against .....

Indictment under sect. 35.—.....a certain pile, then fixed in the ground, and then used for securing the bank of a certain river called the river ..... situate ..... feloniously, unlawfully and maliciously did cut off, against the form .....

INJURIES TO PONDS.

Sect. 36.—Whosoever unlawfully and maliciously cuts through, breaks down, or otherwise destroys the dam, floodgate or sluice of any fish-pond, or of any water which is private property, or in which there is any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or unlawfully and maliciously puts any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be, or that may thereafter be put therein, or unlawfully and maliciously cuts through, breaks down or otherwise destroys the dam or floodgate of any millpond, reservoir or pool, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 32, Imp.

Indictment for breaking down the dam of a fish-pond.— .....the dam of a certain fish-pond of one J. N., situate ..... unlawfully and maliciously did break down and destroy with intent thereby then to take and destroy the

fish in the said pond then being, against the form.....

Indictment for putting lime into a fish pond.—..... unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime, into a certain fish-pond of one J. N., situate ..... with intent thereby then to destroy the fish in the said pond then being, against the form .....

Indictment for breaking down a mill dam.— ..... the dam of a certain mill-pond of J. N., situate ..... unlawfully and maliciously did break down and destroy, against the .....

Maliciously in all cases under this Act means a wrongful act done intentionally without just cause or excuse.—2 Russell, 1073, note by Greaves.—See Procedure Act of 1869, sect. 94, as to solitary confinement, and sect. 49 of the same Act as to a verdict for an attempt to commit the misdemeanor charged in certain cases, upon an indictment for the misdemeanor itself. See *post*, sect. 74, as to fine *in lieu* or in addition to any punishment authorized by this Act, and sureties for the peace.

INJURIES TO BRIDGES, VIADUCTS, ETC., ETC.

Sect. 37.—Whosoever unlawfully and maliciously pulls or throws down, or in any wise destroys, any bridge, whether over any stream of water or not, or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct, any highway, railway or canal passes, or does any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof dangerous or impassable, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or

without solitary confinement.—24–25 Vict., ch. 97, s. 33, Imp.

This clause by the words *over any stream of water or not* does away with the difficulties raised in Rex. vs. Oxfordshire, 1 B. & Ad. 289–297, and Reg. vs. Derbyshire, 2 Q. B. 745.

The clause does not apply to private bridges, but any injury to a private bridge exceeding the sum of twenty dollars would bring the case within sect. 59, *post*, and if less than that sum within sect. 60, *post*.

Indictment for pulling down a bridge.—..... a certain bridge, situate ..... feloniously, unlawfully and maliciously did pull down and destroy, against the form .....

Indictment for injuring a bridge.— ..... feloniously, unlawfully and maliciously did (*state the injury*) a certain bridge, situate ..... with intent thereby to render the said bridge dangerous and impassable, against the form ..... Archbold, 541.

The intent, under this part of the section must be laid and proved, but if the bridge be proved to have been rendered dangerous or impassable, by the act of the defendant, it will be sufficient proof of the intent. Archbold, loc. cit.

See sect. 94, Procedure Act of 1869, as to solitary confinement, and sect. 49 of the same Act as to a verdict for an attempt to commit the offence charged, in certain cases, upon an indictment for the offence itself. See *post*, sect. 74, as to sureties for the peace.

DESTROYING TURNPIKE GATES, TOLL-BARS, ETC., ETC.

Sect. 38.—Whosoever unlawfully and maliciously throws down, levels, or otherwise destroys, in whole or in part, any turnpike gate or toll-bar, or any wall, chain,

fish in the said pond then being, against the form.....

Indictment for putting lime into a fish pond.—..... unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime, into a certain fish-pond of one J. N., situate ..... with intent thereby then to destroy the fish in the said pond then being, against the form .....

Indictment for breaking down a mill dam.— ..... the dam of a certain mill-pond of J. N., situate ..... unlawfully and maliciously did break down and destroy, against the .....

Maliciously in all cases under this Act means a wrongful act done intentionally without just cause or excuse.—2 Russell, 1073, note by Greaves.—See Procedure Act of 1869, sect. 94, as to solitary confinement, and sect. 49 of the same Act as to a verdict for an attempt to commit the misdemeanor charged in certain cases, upon an indictment for the misdemeanor itself. See *post*, sect. 74, as to fine *in lieu* or in addition to any punishment authorized by this Act, and sureties for the peace.

INJURIES TO BRIDGES, VIADUCTS, ETC., ETC.

Sect. 37.—Whosoever unlawfully and maliciously pulls or throws down, or in any wise destroys, any bridge, whether over any stream of water or not, or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct, any highway, railway or canal passes, or does any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof dangerous or impassable, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or

without solitary confinement.—24–25 Vict., ch. 97, s. 33, Imp.

This clause by the words *over any stream of water or not* does away with the difficulties raised in Rex. vs. Oxfordshire, 1 B. & Ad. 289–297, and Reg. vs. Derbyshire, 2 Q. B. 745.

The clause does not apply to private bridges, but any injury to a private bridge exceeding the sum of twenty dollars would bring the case within sect. 59, *post*, and if less than that sum within sect. 60, *post*.

Indictment for pulling down a bridge.—..... a certain bridge, situate ..... feloniously, unlawfully and maliciously did pull down and destroy, against the form .....

Indictment for injuring a bridge.— ..... feloniously, unlawfully and maliciously did (*state the injury*) a certain bridge, situate ..... with intent thereby to render the said bridge dangerous and impassable, against the form ..... Archbold, 541.

The intent, under this part of the section must be laid and proved, but if the bridge be proved to have been rendered dangerous or impassable, by the act of the defendant, it will be sufficient proof of the intent. Archbold, loc. cit.

See sect. 94, Procedure Act of 1869, as to solitary confinement, and sect. 49 of the same Act as to a verdict for an attempt to commit the offence charged, in certain cases, upon an indictment for the offence itself. See *post*, sect. 74, as to sureties for the peace.

DESTROYING TURNPIKE GATES, TOLL-BARS, ETC., ETC.

Sect. 38.—Whosoever unlawfully and maliciously throws down, levels, or otherwise destroys, in whole or in part, any turnpike gate or toll-bar, or any wall, chain,

rail, post, bar or other fence belonging to any turnpike gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act or Law relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment or security of any such toll, is guilty of a misdemeanor and shall be liable to be punished by fine or imprisonment or both in the discretion of the Court.—24–25 Vict., ch. 97, s. 34, Imp.

See sect. 90, Procedure Act of 1869, as to punishment in such cases, also sect. 49 of the same Act, as to a verdict in cases where an attempt to commit the offence charged only is proved, and sect. 74, *post*, as to sureties for keeping the peace.

Indictment.—..... a certain turnpike gate situate ..... unlawfully and maliciously did throw down, level and destroy, against the form.....

INJURIES TO RAILWAY TRAINS AND TELEGRAPHS.

Sect. 39.—Whosoever unlawfully and maliciously puts, places, casts or throws upon or across any railway, any wood, stone or other matter or thing, or unlawfully and maliciously takes up, removes or displaces any rail, sleeper or other matter or thing belonging to any railway, or unlawfully and maliciously turns, moves or diverts any point or other machinery belonging to any railway, or unlawfully and maliciously makes or shows, hides or removes any signal or light upon or near to any railway, or unlawfully and maliciously does or causes to be done any other matter or thing, with intent in any of the cases aforesaid to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage or truck using such railway, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24-25 Vict., ch. 97, sect. 35, Imp.

Sect. 40.—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, and shall be liable to be imprisoned in any gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 97, sect. 36, Imp.

Sect. 41.—Whosoever unlawfully and maliciously cuts, breaks, throws down, destroys, injures or removes, any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or unlawfully and maliciously prevents or obstructs in any manner whatsoever the sending, conveyance or delivery of any communication by any such telegraph, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour, *unless some greater punishment is provided for the offence by any other Act in force, in which case such offender may be indicted and punished under this Act.*—24–25 Vict., ch 97, s. 37, Imp.

Sect. 42.—Whosoever unlawfully and maliciously, by any overt act, attempts to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a Justice of the Peace, at the discretion of the Justice, either be committed to the common gaol or any other place of confinement, there to be imprisoned

only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money, not exceeding fifty dollars, as to the Justice seems meet.—24-25 Vict., ch. 97, s. 38, Imp.

The words in *italics* in sect. 41 are substituted to a proviso to be found in the English Statute, which empowers the Justice of the Peace summarily to convict the offender, if he is of opinion that it is not expedient to the ends of justice that the offence should be prosecuted by indictment; and as some offences against this section must be of a very trifling character, it is to be regretted that this proviso has been omitted in our Statute, though this is perhaps of no consequence, as to Ontario and Quebec, as ch. 67 of the Cons. Stat. of Canada, seems to be in force, and by sect. 1 of the General Repeal Act of 1869, proceedings for such offences may yet be taken under sect. 21 of the said ch. 67, C. S. C.

As to a verdict for an attempt to commit the felony charged, upon an indictment under sect. 39, in certain cases, see sect. 49 of the Procedure Act of 1869. As to sureties in felonies, and fine and sureties in misdemeanors, under this Act, see *post*, sect. 74.

See also remarks, under sections 31 and 33, of 32-33 Vict., ch. 20, *Act concerning offences against the person*.

Indictment under sect. 39.— .... feloniously, unlawfully and maliciously did put and place a piece of wood upon a certain railway called ..... in ..... with intent thereby then to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway, against the form ..... Archbold, 543. The intent may be laid in different ways, in different counts, if necessary.

Prove that the defendant placed the piece of wood upon or across the railroad as described in the indictment, or was present aiding and assisting in doing so. The intent may be inferred from circumstances from which the jury may presume it. In general, the act's being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *primâ facie* evidence of an intent to do so. Where the engine or carriage is in fact obstructed, or the safety of the persons conveyed therein is in fact endangered by the defendant's act, but there is no evidence of any of the intents mentioned in sect. 39, the defendant should be indicted for a misdemeanor under sect. 40.—R. vs. Bradford, Bell, 268.—A line of railway constructed under an Act of Parliament, but not yet opened for public traffic, and used only for the carriage of materials and workmen, is within the Statute.—Idem.—A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace: *held*, upon a case reserved, Martin, B. dissentiente, that this was a causing of an engine and carriage using a railway to be obstructed within the meaning of sect. 36 (40 of our Statute) of the Act in question.—Reg. vs. Hadfield, 11 Cox, 574.—A person improperly went upon a line of railway and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train: *held* that this amounted to the offence of unlawfully obstructing an engine or carriage using a railway under sect. 36 (40 of our Statute) of the Statute in question.—Reg. vs. Hardy, 11 Cox. 656.

INJURIES TO WORKS OF ART, PICTURES, STATUES, BUSTS, ETC., ETC.

Sect. 43.—Whosoever unlawfully and maliciously destroys or damages any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purpose of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other depository, which museum, gallery, cabinet, library, or other depository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, *or other monument of work of art* in any church, chapel, meeting-house or other place of divine worship, or in any building belonging to Her Majesty, or to any county, riding, city, town, village, parish or place, or to any university, or college, or hall of any university, or in any street, square, church-yard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing or fence surrounding such statue or monument, or any fountain, lamp, post or other thing of metal, glass, wood or other material in any street, square or other public place, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement for any term not exceeding one year, with or without hard labour, provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law damages for the injury so committed.—24–25 Vict., ch. 97, s. 39, Imp.

See *post*, sect. 74, as to fine and sureties for the peace, in certain cases, if the Court thinks fit. The words *or*

other monument of work of art, are replaced by *or other ornament or work of art,* in the English Statute. This is undoubtedly an error of our printer.

INJURIES TO CATTLE, KILLING OR MAIMING CATTLE.

Sect. 44.—The word *cattle* wherever used in this Act shall have the meaning assigned to it in the Act respecting larceny and other similar offences, passed in the present session.

Sect. 1 of the said larceny Act, 32–33 Vict., ch. 21, declares that the term "cattle" shall include any horse, mule, ass, swine or goat, as well as any neat cattle or animal of the bovine species, and whatever be the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it may be known, and shall apply to one animal as well as to many.

Sect. 45.—Whosoever unlawfully and maliciously kills, maims, wounds, *poisons or injures* any cattle is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 40, Imp.

Sect. 46.—Whosoever unlawfully and maliciously attempts to kill, maim, wound, *poison or injure* any cattle, or unlawfully and maliciously places poison in such a position as to be easily partaken of by any cattle, is guilty of a misdemeanor, and shall be liable to be punished by fine or imprisonment, or both, at the discretion of the Court.

This last section is not in the English Act.—The words in *italics* in section 45 are not in the English Act. Sect. 46 seems to be declaratory of the common law. As to

solitary confinement, under sect. 45, see sect. 94, of the Procedure Act of 1869. As to sureties for the peace, see sect. 74, *post.*

Indictment for killing a horse.—..... one horse of the goods and chattels of J. N. feloniously, unlawfully, and maliciously did kill, against the form.....

The particular species of cattle killed, maimed, wounded, poisoned or injured, must be specified; an allegation that the prisoner maimed certain cattle is not sufficient. —R. vs. Chalkley, R. & R. 258.

No malice against the owner is necessary: *post*, sect. 66. Other acts of administering poison to cattle are admissible in evidence to show the intent with which the drug is administered.—R. vs. Mogg, 4 C. & P. 364. The word *wound* is contradistinguished from a permanent injury, such as maiming, and a *wounding* need not be of a permanent nature.—R. vs. Haywood, 2 East, P. C., p. 1076; R. & R. 16.

In R. vs. Jeans, 1 C. & K. 539, it was held that where part of the tongue of a horse was torn off, there was no offence against the Statute, because no instrument was used. But, under the present Statute, the same act was held to be a wounding within this section.—Reg. vs. Bullock, 11 Cox, 125. Upon a case reserved, in Rex. vs. Owens, 1 Mood. 205, it was held that pouring acid into the eye of a mare, and thereby blinding her, is a a maiming.—Setting fire to a building with a cow in it, and thereby *burning the cow* to death, is a killing within the statute.—R. vs. Haughton, 5 C. & P. 559.

KILLING OR MAIMING DOGS, BIRDS, ETC., ETC., ETC.

Sect. 47.—Whosoever unlawfully and maliciously kills, maims, wounds, *poisons or injures* any dog, bird, beast or other animal not being cattle but being either the

subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any domestic purpose, *or purpose of lawful profit or advantage, or science,* shall on conviction thereof before a Justice of the Peace, at the discretion of the Justice, either be committed to the common gaol or any other place of confinement, there to be imprisoned only or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding one hundred dollars as to the Justice seems meet; and whosoever having been convicted of any such offence, afterwards commits any of the said offences in this section before mentioned, and is convicted thereof upon indictment, is guilty of a misdemeanor, and shall be liable to be punished by fine or imprisonment, or both, in the discretion of the Court; *provided always that the prosecutor may, if he sees fit, proceed before a Justice of the Peace as for a first offence.*—24-25 Vict., ch. 97, s. 41, Imp.

The words in *italics* are not in the English Act. They are altogether superfluous. As to summary convictions, see *post*, sects. 71 and 75, and sect. 90, Procedure Act of 1869, as to fine and imprisonment, when not specially determined As to indictment for the misdemeanor after a previous conviction, see sect. 26, Procedure Act of 1869, and *ante*, remarks under section 26 of this Act.

Greaves says: "This clause is new, and is a great improvement of the law, as it will protect domestic animals from malicious injuries. It includes any beast or animal not being cattle, which is the subject of larceny at common law. It also includes birds which are the subject of larceny at common law: such are all kinds of poultry, and, under certain circumstances, swans and

pigeons. So also it includes any bird, beast or other animal ordinarily kept in a state of confinement, though not the subject of larceny, such as parrots and ferrets; and it is to be observed that the words *ordinarily kept in a state of confinement*, are a description of the mode in which the animals are usually kept, and do not render it necessary to prove that the bird or animal was confined at the time when it was injured. Lastly the clause includes any bird or animal kept for any domestic purpose, which clearly embraces cats."—Consol. Acts, 242.

The words or *purpose of lawful profit* included in our Statute cover all animals kept in a circus, menagerie, etc., etc., etc.

SETTING FIRE, ETC., ETC., TO SHIPS.

Sect. 48.—Whosoever unlawfully and maliciously sets fire to, casts away or in anywise destroys any ship or vessel, whether the same be complete or in an unfinished state, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 42, Imp.

Sect. 49.—Whosoever unlawfully and maliciously sets fire to, or casts away or in any wise destroys any ship or vessel with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten, or may underwrite any policy of insurance upon such ship or vessel or on the freight thereof, or upon any goods on board the same, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any

other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 43, Imp.

Sect. 50.—Whosoever unlawfully and maliciously, by any overt act, attempts to set fire to, cast away, or destroy any ship or vessel under such circumstances that if the ship or vessel were thereby set fire to, cast away or destroyed, the offender would be guilty of felony, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 44, Imp.

As to solitary confinement, see Procedure Act of 1869, sect. 94. As to sureties for the peace, see *post*, sect. 74.

Indictment under sect. 48.— ..... that J. S. on ..... feloniously, unlawfully and maliciously did set fire to a certain ship called "the Rattler," the property of J. N., against the form.....

As to setting fire, etc., etc., etc., see notes under sections 1, 2 and 3, *ante*.—A pleasure boat, eighteen feet long was set fire to, and Patteson, J., inclined to think that it was a vessel within the meaning of the Act, but the prisoner was acquitted on the merits, and no decided opinion was given.—R. vs. Bowyer, 4 C. & P. 559.—Upon an indictment for firing a barge, Alderson, J., seemed to doubt if a barge was within the meaning of the Statute. —R. vs. Smith, 4 C. & P. 569.—The burning of a ship of which the defendant was a part owner is within the statute.—R. vs. Wallace, C. & Mar. 200. See *post*, sect. 67. Archbold, 516.

Indictment under sect. 49.— .... that J. S. on .... on

board a certain ship called "the Rattler," the property of J. N., on a certain voyage upon the high seas, then being upon the high seas, feloniously, unlawfully and maliciously did set fire to the said ship, with intent thereby to prejudice the said J. N., the owner of the said ship, against the form . . . The intent may be stated in different ways, in different counts.

In R. vs. Philp, 1 Mood. 263, there was no proof of malice against the owners, and the ship was insured for more than its value, but the judge thought that the defendant must be understood to contemplate the consequences of his act, and the judges held that, as to this point, the conviction was right.—See R. vs. Newill, 1 Mood. 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners should have the benefit thereof.—Idem. The underwriters on a policy of goods fraudulently made are within the Statute, though no goods be put on board.—Idem. If the intent be laid to prejudice the underwriters, then prove the policy, and that the ship sailed on her voyage.—R. vs. Gilson, R. & R. 138. It would seem, however, that the general provision of the 48th section of this Statute renders unnecessary in any case the allegation or the proof of the intent mentioned in the 49th section.—Archbold, 517. Proof that it was done wilfully is of itself evidence that it was done with intent to prejudice.

PLACING GUNPOWDER NEAR A VESSEL WITH INTENT, ETC.

Sect. 51.—Whosoever unlawfully and maliciously places or throws in, into, upon, against or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, whether or not any explosion takes place, and whether or not any

injury is effected, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 45, Imp.

Sect. 52.—Whosoever unlawfully and maliciously damages, otherwise than by fire, gunpowder or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 97, s. 46, Imp.

See remarks under sects. 48, 49, 50, and under sects. 13 and 14; also under sect. 29 of ch. 20, *an Act concerning offences against the person.*

EXHIBITING FALSE SIGNALS, ETC.

Sect. 53.—Whosoever unlawfully masks, alters or removes any light or signal, or unlawfully exhibits any false light or signal, with intent to bring any ship, vessel or boat into danger, or unlawfully and maliciously does anything tending to the immediate loss or destruction of any ship, vessel or boat, and for which no punishment is hereinbefore provided, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 97, s. 47, Imp.

As to solitary confinement, see sect. 94, Procedure Act of 1869, and sect. 49, of the said Act, as to verdict when the offence is not completed. As to sureties for the peace, see *post*, sect. 74.

It is to be remarked that the first part of the section says "*unlawfully*" only.

Indictment for exhibiting false signals.—The jurors for Our Lady the Queen upon their oath present, that before and at the time of committing the felony hereinafter mentioned, a certain ship, the property of some person or persons to the jurors aforesaid unknown, was sailing on a certain river called ..... near unto .... and that J. S. on ..... well knowing the premises, whilst the said ship was so sailing on ..... near unto the said parish as aforesaid, feloniously and unlawfully did exhibit a false light, with intent thereby to bring the said ship into danger, against the form ..... Archbold, 535.

Indictment for doing an act tending to the immediate danger of a ship.—..... near unto the parish of ..... and that J. S. on ..... well knowing the premises, whilst the said ship was so sailing near the said parish as aforesaid, feloniously, unlawfully and maliciously did....(*state the act done*), the said act so done by the said J. S. as aforesaid then tending to the immediate loss of the said ship, against the form ..... Archbold, 536.

CUTTING AWAY, ETC., ETC., ETC., BUOYS.

Sect. 54.—Whosoever unlawfully and maliciously cuts away, casts adrift, removes, alters, defaces, sinks or destroys, or unlawfully and maliciously does any act with intent to cut away, cast adrift, remove, alter, deface, sink or destroy, or in any other manner unlawfully and maliciously injures or conceals any boat, buoy, buoy-rope, perch or mark used or intended for the guidance of seamen

or the purpose of navigation, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 97, s. 48, Imp.

No intent need be charged in the indictment. Maliciously means wilfully. This section includes the offence and the attempt to commit the offence. As to solitary confinement and sureties for the peace, as under last preceding section.

Indictment.— ..... that J. S. on ..... upon the river called ..... feloniously, unlawfully and maliciously did cut away a certain buoy then used for the guidance of seamen and for the purpose of navigation, against the form ..... Archbold, 537.

We have, in our Statute Book, an enactment, which, is certainly contradictory with the above clause: it is sect. 5, 31 Vict., ch. 59, *an Act relating to light-houses, buoys and beacons*, extended by sect. 4, 33 Vict., sect. 18, as follows:

"Whoever shall wilfully take away, destroy, deface, extinguish or remove any light-house, light-ship, floating or other light, lantern, or other signal, buoy or beacon, anchor or landmark constructed, created, laid down, placed or replaced, under this Act, shall be guilty of a misdemeanor, for which he may be tried, either on an indictment in the usual way, before any Court having cognizance of cases of misdemeanor in the county or district in which the offence is committed, or summarily before any Stipendiary Magistrate, or Police Magistrate or Judge of the Sessions of the Peace, or two Justices, within the limits of whose jurisdiction the offence is committed.

PENALTY FOR MAKING VESSELS FAST TO BUOYS, BEACONS ETC.

Sect. 55.—Whosoever makes fast any vessel or boat to any such buoy, beacon or sea mark, shall, on conviction thereof before any Justice of the Peace, forfeit a sum not exceeding ten dollars, and in default of payment shall be liable to be imprisoned in any gaol or place of confinement for any term not exceeding one month.

This clause is not in the English Act.

As to summary convictions for offences against this Act. see *post*, sect. 75.

CUTTING BOOMS, RAFTS, ETC., ETC., ETC., ADRIFT.

Sect. 56.—Whosoever unlawfully and maliciously cuts or loosens any boom on any river, or other water, or breaks or cuts loose any raft or crib of timber or sawlogs, is guilty of a misdemeanor, and shall be liable to be punished by fine *and* imprisonment for *not less than two years*, or both, in the discretion of the Court.

This clause is not in the English Act. There are two errors in it: the first is the word "*and*" instead of *or* in *fine* "*and*" *imprisonment*: it ought to be *fine* "*or*" *imprisonment*. The second is imprisonment for *not less* than two years, instead of not *more*; which makes a great difference. As it is, a sentence for less than two years would undoubtedly be wrong. And then sect. 96, of the Procedure Act of 1869 enacts that whenever any offender is punishable by imprisonment, such imprisonment if it be for two years or any longer term shall be in the Penitentiary. So that, sect. 56 in question authorizes a sentence to *imprisonment for life in the Penitentiary*, for a misdemeanor!

Malice against owner is unneceessary, and the clause applies to every person in possession of the property injured, if act done with intent to injure or defraud. But in such a case, it is not necessary to allege that the

intent was to injure or defraud any particular person—Sections 66, 67, 68, *post*.

Indictment.— ..... that A. B. on..... in .... unlawfully and maliciously did cut a certain boom then and there lying on the river called ..... the said boom being then and there the property of J. S. of ..... against the form.....

DESTROYING PARTS OF SHIPS IN DISTRESS, ETC., ETC.

Sect. 57.—Whosoever unlawfully and maliciously destroys any part of *the* ship or vessel in distress, or wrecked, stranded or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24-25 [Vict., ch. 97, s. 49, Imp.

The word "*the*" is erroneously substituted for "*any*" in "any part of *the* ship or vessel in distress."

Indictment.—..... the property of some person or persons to the jurors aforesaid unknown was stranded and cast on shore at ..... and that J. S. .... on .... and while the said ship was so stranded and cast on shore as aforesaid, the hull of the said ship feloniously, unlawfully and maliciously did destroy, against the form ..... Archbold, 536.

As to solitary confinement, see sect. 94, Procedure Act of 1869, and sect. 49 of the same Act, as to cases where the offence is not completed. See *post*, sect. 74, as to sureties for the peace in certain cases.

By the 36 Vict., ch. 55, sections 19 and 20, *an Act respecting wrecks and salvage*, other enactments on offences

in respect of wrecks are made, which would, in many cases, come in contact with the above section; but by sect. 33 of the said Act, it is ordered that "any person committing an offence against this Act, which is also an offence against some other Act, may be prosecuted, tried, and, if convicted, punished under either Act."

LETTERS THREATENING TO BURN HOUSES, ETC., ETC., OR TO KILL, MAIM, ETC., ETC., ANY CATTLE.

Sect. 58.—Whosoever sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw, or other agricultural produce, or any grain, hay or straw, or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, wound, *poison or injure* any cattle, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding ten years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 97, s. 50, Imp.

The words *poison or injure* are not in the English Act.

See remarks under sect. 15, of chap. 20, *Act concerning offences against the person.* As to solitary confinement and sureties for the peace, same as under the last preceding section.

A threat to burn standing corn is not within the Statute. —Reg. vs. Hill, 5 Cox, 233.

It was held that a letter the necessary construction of which was not a threat to burn was not within the Statute.—R. vs. Jepson, 2 East, 1115, note *a*.

Indictment may be easily framed, on the form given under sect. 15 of chap. 20, above referred to.

MALICIOUS INJURIES NOT BEFORE PROVIDED FOR TO AMOUNT EXCEEDING TWENTY DOLLARS.

Sect. 59.—Whosoever unlawfully and maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, the damage, injury or spoil being to an amount exceeding twenty dollars, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding five years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 97, s. 51, Imp.

If an attempt to commit the offence only is proved, see sect. 49, Procedure Act of 1869. See *post*, sect. 74, as to fine and sureties, at the discretion of the Court. The English Act has an additional enactment giving a greater punishment for offences committed in the night.—Under this section, evidence of damage committed at several times, in the aggregate, but not at any one time exceeding five pounds will not sustain an indictment.—Reg. vs. Williams, 9 Cox, 338.

The injury must directly amount to five pounds: consequential damage cannot be taken in consideration, to make up that amount.—Reg. vs. Whiteman, 6 Cox, 370; Dears. 353. In Reg. vs. Thoman, 12 Cox, 54, the indictment was as follows ..... That Margaret Thoman on the 30th of January, 1871, in and upon three frocks, six petticoats, one flannel petticoat, one flannel vest, one pinafore, one jacket of the value of twenty pounds, of the property of ..... unlawfully and maliciously did commit certain damage, injury and spoil to an amount exceeding five pounds, by unlawfully cutting and destroying the same against the form of the Statute in such case made and provided. At the trial, the prisoner's

counsel objected that the indictment was bad, because the value of the articles damaged was ascribed to them collectively and not individually. But upon a case reserved, the indictment was held good, and Bovill, C. J., said: "We are all of opinion that it was not material to allege the value of the several articles in the indictment, but only that the amount of the damage exceeded five pounds."

Defendant was indicted for unlawfully and maliciously committing damage upon a window, in the house of the prosecutor, against this section. Defendant who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone, which he threw at them. The stone missed them, passed over their heads, and broke a window in the house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window: *held*, that upon this finding the prisoner was not guilty of the charge within this section: to support a conviction of this nature, there must be a wilful and intentional doing of an unlawful act in relation to the property damaged.—Reg. vs. Pembliton, 12 Cox, 607.

MALICIOUS INJURIES NOT BEFORE PROVIDED FOR, NOT EXCEEDING TWENTY DOLLARS.

Sect. 60.—Whosoever *unlawfully* or maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the Peace, forfeit and pay such sum of money not exceeding twenty dollars as to the Justice seems meet, and also such further sum of money as appears to the Justice to be a reasonable compensation for the damage, injury

or spoil so committed, not exceeding the sum of twenty dollars; which last mentioned sum of money shall, in the case of private property, be paid to the party aggrieved; and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a Justice of the Peace under this Act; and if such sum of money, together with the costs if ordered, are not paid, either immediately after the conviction, or within such period as the Justice shall at the time of the conviction appoint, the Justice may commit the offender to the common gaol or other place of confinement there to be imprisoned only, or to be imprisoned and kept to hard labour, as the Justice thinks fit, for any term not exceeding two months, unless such sum and costs be sooner paid; provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing or in the pursuit of game, but every such trespass shall be punishable in the same manner as if this Act had not been passed.—24–25 Vict., ch. 97, s. 52, Imp.

Sect. 61.—The provisions in the last preceding section contained shall extend to any person who *unlawfully* or maliciously commits any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided.—24–25 Vict., ch. 97, s. 53, Imp.

In these two clauses it ought to be "unlawfully *and* maliciously.

In the English Act the word *wilfully* stands in lieu of *unlawfully*, in these two clauses.

As to summary convictions under this Act, see *post*, sect. 75.

W. was summoned before the Justices under this clause. He was in the employment of D., and by his order, he forcibly entered a garden belonging to and in the occupation of F. accompanied by thirteen other men, and cut a small ditch, from forty to fifty yards in length, through the soil. F. and his predecessors in title had occupied the garden for thirty-six years, and during the whole time, there had been no ditch upon the site of part of that cut by D. For the defence D. was called, who stated that, fifteen years before, there had been an open ditch in the land, which received the drainage from the highway, and that he gave directions for the ditch to be cut by W. in the exercise of what he considered to be a public right. The Justices found that W. had no fair and reasonable supposition that he had a right to do the act complained of, and accordingly convicted him: *held*, that by the express words of the section and proviso, the jurisdiction of the justices was not ousted by the mere bonâ fide belief of W. that his act was legal, and that there was evidence on which they might properly find that he did not act under the fair and reasonable supposition required by the Statute.—White vs. Feast, 7 L. R. Q. B. 353.

A conviction by Justices under sect. 52, ch. 97, 24-25 Vict., cannot be brought up by certiorari on the ground that they had no jurisdiction inasmuch as the defendant had set up a bonâ fide claim of right, but the exemption is impliedly restricted to cases where the Justices are reasonably satisfied of the fair and reasonable character of the claim.—Reg. vs. Essex, Reg. vs. Mussett, 26, L. J., N. S. 429.

MAKING GUNPOWDER TO COMMIT OFFENCES, SEARCHING FOR THE SAME.

Sect. 62.—Whosoever makes or manufactures, or knowingly has in his possession any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing with intent thereby, or by means thereof to commit, or for the purpose of enabling any other person to commit any of the felonies in this Act mentioned, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 97, s. 54. Imp.

Sect. 63.—Any Justice of the Peace of any district, county or place, in which any machine, engine, implement or thing, or any gunpowder or other explosive, dangerous or noxious substance is suspected to be made, kept or carried, for the purpose of being used for committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal, for searching in the day time any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf or other place, or any carriage, waggon, cart, ship, boat or vessel, in which the same is suspected to be made, kept or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant *may seize any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine or instrument or thing which he has good cause to suspect is intended to be used in committing or enabling any other person to commit any offence against this Act, and with all convenient speed after the seizure shall remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of one of Her Majesty's Superior Courts of criminal juris-*

diction to restore it to the person who may claim the same. —24–25 Vict., ch. 97, s. 55, Imp.

The words in *italics* are new; in the English Act, the same powers and protection are given to any person acting in the execution of any such warrant as are given to persons searching for unlawful quantities of gunpowder, in virtue of 23–24 Vict., ch. 139, Imp.

Sect. 64.—The searcher or seizer shall not be liable to any suit for such detainer, or for any loss of or damage which may happen to the property, other than by the wilful act or neglect of himself or of the persons whom he intrusts with the keeping thereof.

This clause is not in the English Act.

Sect. 65.—Any gunpowder, explosive substance or dangerous or noxious thing, or any machine, engine, instrument or thing intended to be used in committing or enabling any other person to commit any offence against this Act, and seized and taken possession of under the provisions hereof, shall, in the event of the person in whose possession the same may be found, or of the owner thereof being convicted for any offence against this Act, be forfeited, and the same shall be sold under the direction of the Court before which any such person is convicted, and the proceeds thereof shall belong to the Province in which the offender is convicted, and shall be paid to the chief financial officer thereof for the use of such Province.

This clause is not in the English Act.

See remarks under sections 66, 67 and 68 of ch. 20, 32–33 Vict., *an Act concerning offences against the person.*

These sections provide for the making, etc., of gunpowder intended to be used to commit any of the felonies in this Act, *or in any other Act mentioned;* so that their re-enactment in ch. 22 was unnecessary.

OTHER MATTERS.—GENERAL CLAUSES.

Sect. 66.—Every punishment and forfeiture by this Act imposed on any person *maliciously* committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be in force, whether the offence be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.—24–25 Vict., ch. 97, s. 58, Imp.

Sect. 67.—Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any person, does any of the acts hereinbefore made penal, although the offender be in possession of the property against or in respect of which such act is done.—24–25 Vict., ch. 97, s. 59, Imp.

Greaves says: "This clause is new and a very important amendment. It extends every clause of the Act not already so extended, (see sect. 3) to persons in possession of the property injured, provided they intend to injure or defraud any other person. It therefore brings tenants within the provisions of the Act, whenever they injure the demised premises, or anything growing on or annexed to them, with intent to injure their landlords."

Sect. 68.—It shall be sufficient in any indictment for any offence against this Act where it is necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud, as the case may be, without alleging an intent to injure or defraud any particular person: and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud, as the case may be.—24–25 Vict., ch. 97, s. 60, Imp.

This clause places the law on this matter in the same position as in cases of forgery and false pretences.

Sect. 69.—Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant by any peace officer, or the owner of the property injured, or his servant or any person authorized by him, and forthwith taken before some neighbouring Justice of the Peace, to be dealt with according to law.—24-25 Vict., ch. 97, sect. 61, Imp.

There is a similar clause applying to all offences generally, in the Procedure Act of 1869, sect. 2.

Sect. 70.—Whosoever aids, abets, counsels or procures the commission of any offence which is by this Act punishable on summary conviction, either for every time of its conviction, or for the first and second time only, or for the first time only, shall, on conviction before a Justice of the Peace, be liable for every first, second or subsequent offence, of aiding, abetting, counselling or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender is by this Act made liable.—24-25 Vict., ch. 97, sect. 63, Imp.

Sect. 71.—In every case of a summary conviction under this Act, where the sum forfeited for the amount of the injury done, or imposed as a penalty by the Justice, is not paid, either immediately after the conviction or within such period as the Justice shall at the time of the conviction appoint, the convicting Justice, unless where otherwise specially directed, may commit the offender to the common gaol or other place of confinement, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the Justice, for any term not exceeding two months, where the amount of the sum forfeited or of the penalty imposed,

or of both, as the case may be, together with the costs does not exceed twenty dollars; and for any term not exceeding three months, when the amount, with costs exceeds twenty dollars; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.—24-25 Vict., ch. 97, sect. 65, Imp.

Sect. 72.—Where any person is summarily convicted before any Justice of the Peace of any offence against this Act, and it is a first conviction, the Justice may, if he so thinks fit, discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved, for damages and costs or either of them, as shall be ascertained by the Justice.—24-25 Vict., ch. 97, sect. 66, Imp.

Sect. 73.—When any person convicted of any offence punishable upon summary conviction by virtue of this Act, has paid the sum adjudged to be paid, together with costs, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been so discharged from his conviction by any Justice as aforesaid, he shall be released from all further or other proceedings for the same cause.—24-25 Vict., ch. 97, s. 67, Imp.

Sect. 74.—Whenever any person is convicted of any indictable misdemeanor punishable under this Act, the Court may, if it think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender and require him to enter his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the Court may, if it thinks fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the

peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned under this section for not finding sureties for any period exceeding one year.—24–25 Vict., ch. 97, s. 73, Imp.

This enactment is repeated in chapters 18, 19, 20, 21, of 32–33 Vict., (1869); it is so repeated, in England, in each of the Consolidated Criminal Statutes of 1861.

Several articles censuring this clause having been published in England, when it was enacted there as part of the Consolidated Criminal Acts, Mr. Greaves, Q.C., the learned framer of these Acts, and of this particular clause, answered these criticisms by the following remarks:—

"This is a new enactment.—A fine is, at common law, one of the punishments for a misdemeanor, and by this clause, the Court may, in addition to, or in lieu of, any of the punishments assigned to any misdemeanor by these Acts, fine the offender. It may be as well to observe that a fine ought not to be imposed on a married woman, because in presumption of law she has no property wherewith to pay it.—Rex. vs. Thomas, Rep. T. Hard. 278."

"In all cases of misdemeanor the Court might, by the common law, add to the sentence of imprisonment, by ordering the defendant to find security for his good behaviour and for keeping the peace, and might order him to be imprisoned until such security were found, Reg. vs. Dunn, 12 Q. B. 1026; but as this power was not generally known, it was thought better to insert it in this clause."

"As it sometimes happens in cases of felony, that it may be expedient to require sureties for keeping the peace after the expiration of any imprisonment awarded, this clause empowers the Court to require such sureties. It is easy to see that it may frequently be highly advisable

to pass a very short sentence of imprisonment on a youth, and to direct him to be delivered to his friends on their entering in the proper recognizances. And it may be well worth making the experiment whether requiring adults to find such sureties may not prove beneficial. The great difficulty with which convicts have to contend immediately after their discharge, is the want of some check that may tend to prevent them from relapsing into their former habits; and the knowledge that their sureties would be liable to forfeit their recognisances might, and probably would, in some cases at least, operate as a check upon their conduct. In cases of assault and other breaches of the peace, it has been found highly beneficial to require the parties to find sureties for their future good behaviour; and this leads to the hope that even in cases of felony a similar result may follow from requiring sureties for keeping the peace, especially where the felony has been accompanied by any personal violence."

"As an attack was made by Mr. Saunders in the *Law Times* of the 21st of September last on these clauses, which might, peradventure, cause some magistrates, who have not had a professional education, to doubt, we answered that attack in the *addenda* to the first edition, and as a reply to that answer was made by Mr. Saunders in the *Law Times* of the 30th November last, we shall answer that reply here. In order to render the matters plain, we will first state the objections raised, then our answers, then the reply, if any, to them; and, lastly, our answers to that reply."

"1. Mr. Saunders asserted that the difficulties of these clauses were 'of so formidable a character as to render it exceedingly dangerous for any magistrate to encounter them.' Now, the power conferred by these clauses is

only conferred on courts which try criminals by indictment; and if there be any point of law peculiarly clear, it is that no action will lie against any of the members of such a Court for any error in any judgment pronounced by that Court. The Courts of Quarter Sessions, therefore, may act on these clauses with the most perfect safety. To this answer no reply has been given, and no doubt for the best possible reason, viz., that it admitted of none."

"2. Mr. Saunders said, 'it is difficult to understand why the infliction of a fine should be inflexibly associated with the entering into recognizances to keep the peace,' and *vice versa*. As the clause was originally framed, the Court might either impose a fine on the offender, or require him to find sureties; but the select Committee of the Commons altered the clause in that respect. Nor is there the slightest difficulty occasioned by the alteration. The fine may be as low; and the recognizances for as short a time, and in as small an amount as the Court thinks fit; and, consequently, the Court may, in any case, if it think fit, impose a nominal fine on the offender, and require him to find sureties in a large amount; or the Court may, if it think fit, impose a heavy fine on the offender, and take his own recognizances alone in a small sum and for a short time. So that the alteration made by the select Committee of the Commons can cause no practical difficulty whatever. To this answer Mr. Saunders replied, that the objection taken was that 'the hands of the Court were fettered for no practical advantage.' It is sufficient to rejoin that, *practically*, the hands of the Court are not fettered at all; for the Court may impose a nominal fine, or require recognizances for a nominal term."

"3. Mr. Saunders said, 'as regards the fine itself, the section makes no provision in the event of its not being paid. Suppose the fine is not paid, what is to be done with the offender? Is he to be committed to gaol in default? What authority is there for this? And if committed, for how long? and if for a time certain, is it to be with, or without hard labour? These are difficulties which the framers of the section have evidently not foreseen, and most certainly have not provided for.' The answer is, all these supposed difficulties have no existence whatever. When an offender is convicted and receives judgment, he is in the custody of the sheriff, and the question is not whether he is to be committed to prison, for he is actually in prison, but how he is to get out of prison; and the only means by which he can lawfully get out of prison, is by doing and suffering whatever the Court may lawfully adjudge him to do or to suffer."

"It is a general rule, also, that when a statute creates a new felony or misdemeanor, all the common law incidents are impliedly attached to it. Where therefore, a statute creates a misdemeanor, it at once is liable to the common law punishments for misdemeanor, of which fine and sureties of the peace, and imprisonment in default of paying the one or finding the other, are part. So where a statute creates an offence and specifies its punishment, that punishment is to be carried into execution according to the course of the common law. Thus wherever a Statute creates a capital felony the offender may be sentenced and executed according to the course of the common law. So, where a statute authorizes the Court to impose a fine, the offender may be imprisoned according to the course of the common law till the fine is paid. For, as Lord Coke says, a fine signifieth a pecuniary punishment for an offence, and regularly to it imprisonment appertaineth.—1 Inst. 126 b. And

hence it is that the Statutes simply authorize the Courts to impose the fine, and its payment is enforced according to the course of the common law. The framers of the 9 Geo. 4, c. 31, were well aware that this was the law, and by s. 9, in the case of manslaughter, by s. 20, in the case of taking away girls under sixteen years of age, and by s. 23, in the case of assault upon clergymen, the Court was empowered to adjudge the offender to pay a fine; but no provision was made in any of these cases as to what was to be done in default of payment. No one will doubt that Lord Campbell knew the law in this respect; and it is well known that he drew his Libel Act, 5 and 6 Vict., c. 96, with his own hand; and by ss. 4 and 5 of that Act the Court may impose a fine, and there is no provision in default of payment. It would be waste of time to refer to other like enactments on a point so perfectly clear. All the preceding observations, except those founded on the 9 Geo. 4, c. 31, and 5 and 6 Vict., c. 96, apply equally to detaining an offender in prison till he finds sureties. But one precedent in point may be added. The 37 Geo. 3, c. 126, s. 4, makes every person uttering coins liable to six months' imprisonment and to find sureties for good behaviour for six months after the end of such imprisonment, and in, case of a second conviction, sureties are required for two years; but no power of commitment is given in either case. Again, both the 1 and 2 Phil. and Mary, c. 13, s. 5; and the 2 and 3 Phil. and Mary, c. 10, s. 2, gave justices who examined persons charged with felony, 'authority to bind all such by recognizances as do declare anything material to prove' the felony, and contained no provision as to what was to be done if the witness refused to be bound. Now, in Bennett v. Watson, 3 Maule & S. 1, it was held that under those statutes a justice might law-

fully commit a person who was a material witness upon a charge of felony brought before him, and who refused to appear at the Sessions to give evidence, in order that her evidence might be secured at the trial, and Dampier, J., said 'the power of commitment is absolutely necessary to the existence of the Statute of Phil. and Mary; for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then, if he could further avoid being served with a subpœna, the delinquent might escape unpunished.' This is a very much stronger case than the case of a convict required to find sureties, for he is already in prison, whereas the witness is at liberty, and, therefore in his case, the power both to apprehend and commit has to be implied."

"It is perfectly clear, then, that the Courts have power under these clauses to order an offender to be detained in prison until he pay a fine and find sureties. But supposing a provision had been introduced expressly empowering the Court to award imprisonment until the fine was paid and the sureties found, it would have made these clauses inconsistent with s. 5 of the offences against the Person Act, which follows s. 9 of the 9 Geo. 4, c. 31; and if that had been altered likewise, both would have been made inconsistent with Lord Campbell's Libel Act, and the other Acts containing similar clauses. To this answer Mr. Saunders replied, 'Taking Mr. Greaves' exposition to be correct that the common law incident of imprisonment attaches upon non-payment of the fine, the objection, that the imprisonment is indefinite still remains in force. If the fine is not paid, is imprisonment in default to be everlasting?' We rejoin that imprisonment for non-payment of a fine under this clause, is and was intended to be exactly the same as for non-payment

of a fine upon a conviction for any common law misdemeanor; that the object of this clause in this respect was to place all misdemeanors against these Acts precisely on the same footing as Common law misdemeanors; that no complaint had ever been made of the common law on this subject, and therefore, there was not only no reason for any alteration in it, but its long use without objection afforded a very good ground for extending it to all similar cases, and that any alteration in these Acts would have rendered the law on the subject inconsistent; for it would have rendered the law different in misdemeanors under these Acts from what it was with like offences at common law."

"4. But, Mr. Saunders asked, is the offender to be committed to hard labour, and for a time certain? Undoubtedly neither the one nor the other. The imprisonment for non-payment of a fine or not finding sureties is not by way of punishment, but in order to compel the payment of the one and the finding of the other, and therefore it is merely imprisonment until he pay the fine or find the sureties, exactly the same as it is in cases of common law misdemeanors. To this Mr. Saunders replied, that 'it was further objected that upon imprisonment in default of paying the fine, the Court has no power to impose hard labour. This Mr. Greaves admits.' Now, this is a misrepresentation. Mr. Saunders originally merely asked, 'Is it (the imprisonment) to be with or without hard labour?' and we, having answered that question conclusively, Mr. Saunders puts this new objection, and adds, 'surely the power of imposing hard labour would be in many cases an active stimulant towards accomplishing the end desired.' It might just as well be said that the Court ought to have been empowered to order the defendant to be whipped every day until he paid

the fine, which would, we conceive, have been a more active stimulant than hard labour. The question is not, however, what is the best stimulant to make the offender pay the fine; but what is the proper substitute for non-payment of the fine. By the common law, simple imprisonment has always been that substitute. We have shown that in summary cases, however, wherever justices have authority either to fine, and imprison, whether with or without hard labour, they never ought to have power to award imprisonment with hard labour for non-payment of a fine, *Introduction to 1st Ed., ante, P. xxxiii.*, and our reasoning is completely supported by the high Authority of Chief Justice Cockburn, in Reg. vs. Willmott, 1. E. B. & S. 27. We will now apply the same reasoning to imprisonment for non-payment of a fine on conviction for a misdemeanor against these Acts, and we cannot do better than take the example of dog-stealing under the 24 & 25 Vict., c. 96, s. 18; by which any person who steals a dog may either be imprisoned with or without hard labour for not exceeding six months, or shall forfeit over the value of the dog not exceeding 20l., and by sec. 107, in default of payment he may be imprisoned either with or without hard labour. For a second offence of dog-stealing, the defendant is to be guilty of a misdemeanor, and liable to imprisonment for not exceeding eighteen months, with or without hard labour, and by the general clause in question the Court may impose a fine either in addition to or in lieu of these punishments. Now, if the Court under this clause adjudges imprisonment without hard labour, it is tantamount to adjudging that the offence does not deserve even imprisonment, and to give the Court power to imprison with hard labour for non-payment of the fine would be almost equivalent to giving it power, *uno flatu*, to

adjudge the offender not deserving and deserving of hard labour.—Nay, more, it would be giving the Court power, after adjudging that the defendant merely deserved to be fined for an indictable offence, to adjudge him to be imprisoned with hard labour for mere non-payment of money, no criminal offence at all. Mr. Saunders, however, says that 'such an anomaly' as not giving the Court power to award hard labour for non-payment of a fine imposed for a second offence of dog-stealing, 'clearly shows the defectiveness of the section;' and he arrives at this conclusion thus. After stating the punishment for the first offence, he proceeds: 'then in default of payment he may, under Jervis's Act, 11 & 12 Vict., c. 43, s. 19, be committed to prison with or without hard labour.' In which short passage there are two mis-statements. That section only applies where, by the Statute in that behalf, no mode of enforcing the payment of the penalty is provided. Now sec. 107 of the Larceny Act does provide for enforcing the payment of the penalty for dog-stealing; and consequently Jervis's Act has nothing to do with the case. But even if it did apply, a distress warrant must be issued in the first instance, unless its issuing would be ruinous to the defendant, or it appeared that he had no goods. It is therefore incorrect to state generally that the defendant may under that section be committed at all. So that we have both a wrong Statute cited, and that Statute wrongly stated. It is true that a similar argument might have been founded on sec. 107 of the Larceny Act, but it would be completely answered by what we have said here and in the Introduction."

"5. Next, Mr. Saunders said that 'the Court will have no authority to take the recognizance of one surety only since the Statute speaks only of sureties.' Now

the Court of Queen's Bench never takes less than two sureties in any case, and generally four in cases of felony, and with very good reason, for one surety may die, become insolvent, or quit the country; but it is much less likely that two or more sureties should do so. Therefore, there was an excellent precedent founded on good reason for requiring more than one surety. The Select Committee of the Commons introduced the power to take the offender's own recognizances. Mr. Saunders in reply admits 'that the Queen's Bench usually requires two sureties,' 'but thinks that circumstances may occur, particularly in the case of a young person, where one surety (the parent) need alone be required.' We reply that the admitted practice, invariably followed from time immemorial by the Court of Queen's Bench, was an infinitely better guide to follow than any other."

"Lastly, Mr. Saunders said that the proviso, which was introduced by the Committee of the Commons, 'means that if any person is required to find sureties for more than a year, he shall not be imprisoned for not doing it. According to this reading, every person required to find sureties for a less term than a year would be liable to be imprisoned for life unless he found them: whilst a person required to find them for more than a year would not be liable to be imprisoned at all. The objector, therefore, may well admit that that cannot be the intention of the section. The Committee of the Commons thought that the clause clearly meant that no one was to be imprisoned for more than a year for not finding sureties. They framed it, and they are at least as competent as the objector to understand its meaning. In reply Mr. Saunders says, that Mr. Greaves admits that the meaning of the Legislature was 'that no person shall be imprisoned under this clause for any period exceeding one

year for not finding sureties. That being so, we will only add, that it is very much to be regretted that the British Legislature has not said what it meant, instead of saying what it did not mean.' But has it done so? The words are, 'No person shall be imprisoned under this clause for not finding sureties for any period exceeding one year,' and the objection rests on reading 'sureties' together with "for any period exceeding one year." Now, 'sureties to keep the peace or to be of good behaviour for any term,' is a perfectly well-known expression; but 'sureties for any period' is a very unusual, if not an altogether unknown expression, and it therefore ought not to be supposed to be used in any case, especially where it makes nonsense of a sentence. Again, in pronouncing sentence nothing is more common than to insert the cause of imprisonment between the word 'imprisoned,' and the term of imprisonment awarded, e.g., 'The sentence of the Court, is that you be imprisoned for this your offence for the term of one year,' and if the clause be so read it is perfectly free from objection. If the clause had run 'imprisoned for not paying a fine for any period exceeding one year,' no doubt would have existed as to its meaning, and there is equally little as to the meaning of the clause as it stands; for where a clause is capable of being read in two ways, one of which leads to a manifest absurdity, and the other makes perfectly good sense, it is obvious that the latter is the right reading."

"We said and repeat, that there was nothing whatever in any one of these numerous objections, and unquestionably nothing to justify a writer in saying that the clause was 'so slovenly drawn;' 'it is astonishing that a section so loose as this one should have been permitted to have found its way into this Act;' 'taken altogether

this section is a most unfavourable specimen of legal workmanship, and will cause very great embarrassments to those whose duty it will be to carry it into effect.'"

"Not satisfied, however, with 'attacking' this clause in the *Law Times*, Mr. Saunders returns to the charge in his and Mr. Cox's Edition of the Statutes, p. 97, where he starts the additional objection, that 'the section contains new and very extensive powers.' Surely Mr. Saunders cannot but know that the power to fine and require sureties for keeping the peace and being of good behaviour on a conviction for misdemeanor is one of the oldest powers known to the common law. Then Mr. Saunders says, 'it may well be questioned whether when a criminal has suffered his appointed punishment, it is judicious to impose upon him the further inconvenience of providing bondsmen for his future good behaviour.' It would be enough to answer that such has been the case in common law misdemeanors from time immemorial, and no one ever heard a complaint against it; but it may be well to add, that neither fines nor sureties are ever awarded 'when a criminal has suffered his appointed punishment;' on the contrary, the Court always considers them as part of the punishment, and this power is always used in mercy towards the criminal, and a less term of imprisonment awarded, where it is exercised. In fact, instead of the clause being open to this objection, it is a most humane and merciful provision founded on that 'nursing mother,' the common law."

"Mr. Saunders again returns to the charge, p. 244, with the further objection that this clause 'in effect amounts to a bestowal of unlimited powers of mitigation of punishment, and when we find that unlawfully and maliciously wounding, &c., &c., are all misdemeanors,

the powers thus given to impose a fine in lieu of any other punishment, looks very like jesting with criminal punishment.'—This is a note to sec. 71 of the offences against the Person Act. Had Mr. Saunders forgotten that by sec. 5 of the same Act any person convicted of manslaughter (a crime infinitely greater in many cases than any misdemeanor) may be sentenced to pay a fine either in addition to or without any other punishment? So under the 9 Geo. 4, c. 31, s. 9, the Court might have awarded a fine on a conviction for manslaughter, without any other punishment." Greaves' Cr. Acts, 6.

Sect. 75.—Every offence hereby made punishable on summary conviction may be prosecuted in the manner directed by the Act of this Session *respecting the duties of Justices of the Peace out of sessions in relation to summary convictions and order*, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution.—24-25 Vict., ch. 97, s. 76, Imp.

The Act referred to is the 32-33 Vict., ch. 31, (1869.)

Sect. 76.—This Act shall commence and take effect on the first day of January, one thousand eight hundred and seventy.

See page 730

AN ACT RESPECTING PERJURY.

32-33 VICT., CH. 23.

Whereas it is expedient to assimilate, amend and consolidate the Statute law relating to perjury, in force in the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, and to extend the same as so consolidated to all Canada; Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 1.—Perjury or subornation of perjury is a misdemeanor; and any person guilty thereof shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, and to pay such fine as the Court may award.

Sect. 2.—In every case in which, by any Act or Law now or hereafter to be in force in the Dominion of Canada, or in any Province forming part of the Dominion of Canada, it is required or authorized that facts, matters or things be verified, or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of some or any person, if any person having in any such case taken or made any oath, affirmation or declaration so required or authorized, knowingly, wilfully and corruptly, upon such oath, affirmation, or declaration,

deposes, swears to or makes any false statement as to any such fact, matter or thing; or if any person knowingly, wilfully and corruptly, upon oath or affirmation, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing, such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof, or knowingly, wilfully and corruptly omits from any such affidavit, affirmation or declaration, sworn or made under the provisions of any law, any matter which, by the provisions of such law, is required to be stated in such affidavit, affirmation or declaration, such person shall be deemed to be guilty of wilful and corrupt perjury, and be punished accordingly; Provided that nothing herein contained shall affect any case amounting to perjury at the common law, or the case of any offence in respect of which other or special provision is made by any Act.

Sect. 7.—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.

Perjury, by the common law, appears 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.—3 Russell, 1.

Hawkins, Vol. 1, p. 429, has the word "*course*" of justice, instead of "*court*" of justice.

Bishop, Cr. Law, Vol. 2, 1015, says a "*course*" of justice, and thinks that the word "*court*" in Russell is a misprint for "*course.*" Though Bacon's abridgement, verb: *perjury*, also has "*court.*" Roscoe, 747, has also "*court*" of justice, but says the proceedings are not confined to courts of justice, and a note by the editor of the American sixth edition says a "*course*" of justice is a more accurate expression than a "*court*" of justice.

There is no doubt, however, that, according to all the definitions of this offence, by the common law, the party must be lawfully sworn, the proceeding in which the oath is taken must relate to the administration of justice, the assertion sworn to must be false, the intention to swear falsely must be wilful, and the falsehood material to the matter in question. Promissory oaths, such as those taken by officers for the faithful performance of duties, cannot be the subject of perjury.—Cr. L. Comrs., 5th Report, 51.

False swearing, under a variety of circumstances, has been declared by numerous Statutes to amount to perjury, and to be punishable as such. But at common law, false swearing was very different from perjury. The offence of perjury, at the common law, is of a very peculiar description, say the Cr. L. Comrs., 5th Rep. 23, and differs in some of its essential qualities from the crime of false testimony, or false swearing as defined in all the modern Codes of Europe. The definition of the word too, in its popular acceptation, by no means denotes its legal signification. Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding, respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence

is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony.

Here, in Canada, we have now a general enactment, declaring to be perjury all oaths, &c., taken or subscribed in virtue of any law, sect. 2, ch. 23, 32–33 Vict., *supra*, required or authorized by any such law: and voluntary and extra-judicial oaths having been prohibited by 37 Vict., ch. 37, see *post*, it may perhaps be said that, with us, every false oath, *knowingly, wilfully, and corruptly* taken amounts to perjury, and is punishable as such. The interpretation Act, 31 Vict., ch. 31, at *sixtecnthly*, of sect. 6, enacts moreover as follows: "The word 'oath' shall be construed as meaning a solemn affirmation whenever the context applies to any person and case by whom and in which a solemn affirmation may be made instead of an oath, and in like cases the word *sworn* shall include the word *affirmed*. And in every case where an oath or affirmation is directed to be made before any person or officer, such person or officer shall have full power and authority to administer the same and to certify its having been made; and the wilful making of any false statement in any such oath or affirmation shall be wilful and corrupt perjury, and the wilful making of any false statement in any declaration required or authorized by any Act shall be a misdemeanor punishable as wilful and corrupt perjury."

Of course, this section applied only to oaths, affirmations or declarations required or authorized by an Act of the *Parliament of Canada*, but by sect. 2, *supra*, of the Act respecting Perjury, it is extended to all such oaths, &c., &c., required or authorized *by any Act or law now or hereafter to be in force in the Dominion of Canada, or in any Province forming part of the Dominion of Canada.*—

Sect. 4, ch. 71, 31 Vict., also declares that oaths taken in virtue of any Provincial Act shall be as binding as if taken under an Act of the Dominion Parliament, and if falsely taken will be subject to the same rules concerning perjury.

Sect. 7, 32–33 Vict. ch. 23, *supra*, is an important alteration of the law on perjury as it stood before with us, and as it stands now in England. As stated before, by the Common Law, to constitute perjury, the false swearing must be, besides the other requisites, in *a matter material* to the point in question. The above section may be said to have virtually abolished this necessary ingredient of perjury. A reference to the following late decisions, in England, will show the wisdom of the Canadian legislation on this matter: Reg. vs. Tate, 12 Cox, 7; Reg. vs. Lewis, 12 Cox, 163; Reg. vs. Holden, 12 Cox, 166. In these three cases, the defendants, guilty of perjury *in foro conscientiæ*, were acquitted, because the falsehoods by them said upon oath were not material to the contestations, in which their evidence had been given. Most extraordinary system, of which we may well be satisfied to be delivered.

This clause 7 of our Perjury Act has been taken from clause 272 of the Criminal Laws of Victoria, Australia.

As our law now stands, perjury may be defined a false oath, knowingly, wilfully and corruptly given by one, in some judicial proceeding, or on some other occasion where an oath is imposed, required, or sanctioned by law.

1st. *There must be a lawful oath.* And therefore, it must be taken before a competent jurisdiction or before an officer who had legal jurisdiction to administer the particular oath in question. And though it is sufficient *primâ facie* to show the ostensible capacity in which the

judge or officer acted when the oath was taken, the presumption may be rebutted by other evidence, and the defendant, if he succeed, will be entitled to an acquittal. —2 Chitty, 304; Archbold, 815.

2nd. *The oath must be false.* By this, it is intended that the party must believe that what he is swearing is fictitious; for, it is said, that if, intending to deceive, he asserts of his own knowledge that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him.—2 Chitty, 303. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false.—R. vs. Pedley, 1 Leach, 327.

3rd. *The false oath must be knowingly, wilfully, and corruptly taken.* The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made, for if it seems rather to have been occasioned by inadvertency or surprise, or a mistake in the import of the question, the party will not be subjected to those penalties which a corrupt motive alone can deserve.—2 Chitty, 303. If an oath is false to the knowledge of the party giving it, it is, in law, wilful and corrupt.—2 Bishop, Cr. L. 1043 and seq.

It hath been holden not to be material, upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended were, in the event, any way aggrieved by it or not; insomuch as this is not a prosecution grounded on the damage of the party but on the abuse of public justice.—3 Burn's Justice, 1227.

Indictment for perjury.—The Jurors for Our Lady the Queen, upon their oath present, that heretofore, to wit, at the (*assizes*) holden for the County (*or District*) of. . . .

on the . . . day of . . . . . in the year of Our Lord, one thousand . . . . . before . . . . . (*one of the judges of Our Lady the Queen*) a certain issue between one E. F. and one J. H. in a certain action of *covenant* was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F. and was then and there duly *sworn* before the said . . . . . , and did then and there, upon his *oath* aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought,*" whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt *perjury.—Schedule A of the Procedure Act of* 1869.

Section 9, of ch. 23, 32–33 Vict., enacts as follows, concerning the form of indictment in perjury: "In any indictment for perjury, or for unlawfully, illegally, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing was taken, made, signed or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed."—14–15 Vict., ch. 100, sect. 20, Imp.

No indictment for perjury can be preferred, unless one or other of the preliminary steps required by 32–33

Vict., ch. 29, sect. 28, (Procedure Act of 1869) has been taken.

Perjury is not triable at Quarter Sessions.—2 Hawkins, ch. 8, sect, 38; R. vs. Bainton, 2 Str. 1088; Reg. vs. Yarrington, 1 Salk. 406; Dickinson's Quarter Sessions, 156; R. vs. Higgins, 2 East R. 18.

The indictment must allege that the defendant swore falsely, wilfully and corruptly; where the word *feloniously* was inserted instead of *falsely*, the indictment, though it alleged that the defendant swore wilfully, corruptly and maliciously, was held bad in substance, and not amendable.—R. Oxley, 3 C. & K. 317, Cresswell J.—Archbold, 812.

If the same person swears contrary at different times, it should be averred on which occasion he swore wilfully, falsely and corruptly.—R. vs. Harris, 5 B. & Ald. 926.

As to assignments of perjury, the indictment must assign positively the manner in which the matter sworn to is false. A general averment that the defendant falsely swore, etc., etc., upon the whole matter is not sufficient: the indictment must proceed by special averment, to negative that which is false.—3 Burn's Justice, 1235.

Proof.—It seems to have been formerly thought that in proof of the crime of perjury, two witnesses were necessary; but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence. The oath of the opposing witness therefore will not avail, unless it be corroborated by material and independent circumstances; for otherwise there would

be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, it is considered that the jury cannot safely convict. So far the rule is founded on substantial justice. But it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would, suffice for that purpose. Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still, evidence confirmatory of the single accusing witness in some slight particulars only, will not be sufficient to warrant a conviction, but it must at least be strongly corroborative of his testimony, or to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant." When several assignments of perjury are included in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each; but the better opinion is that such proof is necessary; and that too, although all the perjuries assigned were committed at one time and place. For instance, if a person, on putting in his schedule in the Bankruptcy Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence. The principal that one witness, with corroborating circumstances, is sufficient to estab-

lish the charge of perjury, leads to the conclusion, that without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America, that a man may be convicted of perjury on documentary and circumstantial evidence alone, *first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner, when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true, the falsehood being shown by his own letters, relating to the fact sworn to, or by any other writings, which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.

If the evidence adduced in proof of the crime of perjury consists of two opposing statements by the prisoner, and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error or a falsehood; though, the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If, indeed, it can be

shown that, before making the statement on which perjury is assigned, the accused had been tampered with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained, and provided the nature of the statement was such, that one of them must have been false *to the prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong and swear to the reverse, without meaning to swear falsely either time. Moreover when a man merely swears to the best of his memory and belief, it of course requires very strong proof to show that he is wilfully perjured. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the falsity of the matter on which the perjury is assigned. Therefore the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will

be sufficient proof of the assignment of perjury.—2, Taylor, on Evidence, par. 876 and seq.

On an indictment for perjury alleged to have been committed at the Quarter Sessions, the chairman of the Quarter Sessions ought not to be called upon to give evidence as to what the defendant swore at the Quarter Sessions.—Reg. vs. Gazard, 8 C. & P. 595.

But the above ruling is criticized by Greaves, note *n*, 3 Russ. 86, and Byles, J., in Reg. vs. Harvey, 8 Cox, 99, said that though the judges of Superior Courts ought not to be called upon to produce their notes, yet the same objection was not applicable to the judges of inferior Courts, especially where the judge is willing to appear. —3 Burn's Justice, 1243.

The following is a list of the principal cases, on perjury, lately reported, in England. The difference now existing between the English law and our own law thereon renders these decisions less interesting for us; however, in some of these cases, as published, will be found the discussion of various questions of law, on this subject of perjury, which may be useful to the Canadian practitioner:—Reg. vs. Tyson, 11 Cox, 1; Reg. vs. Smith, 11 Cox, 10; Reg. vs. Naylor, 11 Cox, 13; Reg. vs. Western, 11 Cox, 93; Reg. vs. Alsop, 11 Cox, 264; Reg. vs. Hodgkins, 11 Cox, 365; Reg. vs. Bawn, 11 Cox, 540; Reg. vs. Chugg, 11 Cox, 558; Reg. vs. Buttle, 11 Cox, 566; Reg. vs. Timms, 11 Cox, 645; Reg. vs. Dunning, 11 Cox, 651; Reg. vs. London, 12 Cox, 50; Reg. vs. Fletcher, 12 Cox, 77; Reg. vs. Crawley, 12 Cox, 162; Reg. vs. Willis, 12 Cox, 164.

In Reg. vs. Hook, Dears, & B. 606, will also be found an interesting discussion, on the evidence necessary upon an indictment for perjury.

Sect. 3 (*as amended by* 33 *Vict., ch.* 26.)—Any person who wilfully and corruptly makes any false affidavit, affirmation or declaration, out of the Province in which it is to be used, but within the Dominion of Canada, before any functionary authorized to take the same for the purpose of being used in any Province of Canada, shall be deemed guilty of perjury in like manner as if such false affidavit, affirmation or declaration had been made in the Province in which it is used, or intended to be used, before a competent authority; and such person may be dealt with, indicted, and tried, and if convicted may be sentenced, and the offence may be laid and charged to have been committed, in that district, county or place in which he has been apprehended or is in custody.

Of course, the last part of this section is only permissive, and the defendant may also be tried and if convicted, be sentenced, in the district, county or place where the offence was in fact committed.

PERJURIES IN INSURANCE CASES.

Sect. 4.—Any affirmation, affidavit or declaration required by any Fire, Life or Marine Insurance Company authorized by law to do business in Canada, in regard to any loss of property or life insured or assured therein, may be taken before any Commissioner, authorized by any of Her Majesty's Superior Courts to take affidavits, or before any Justice of the Peace, or before any Notary Public for any Province of the Dominion; and any such officer is hereby required to take such affirmation, affidavit or declaration.

Sect. 5.—Any person knowingly, wilfully and corruptly making any affirmation, affidavit or declaration required by any Fire, Life or Marine Insurance Company, authorized by law to do business in Canada, claiming to be entitled to any Insurance money in respect of

any loss of property or life insured or assured therein or on behalf of any person making such claim containing any false statement of fact, matter or thing in regard to such loss of property or life, shall be guilty of wilful and corrupt perjury.

PROSECUTION FOR PERJURY ORDERED BY JUDGE, &c., &c.

Sect. 6.—It shall be lawful for any Judge of any Superior Court of law or of equity, or for any judge of any Court of record, or any Commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, in case it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceedings made or taken before him, to direct such persons to be prosecuted for such perjury, in case there appears to such judge or commissioner a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next term, sittings, or session of any Court having power to try for perjury, in the jurisdiction within which such perjury was committed, *or to permit such person* to enter into a recognizance with one or more sufficient surety or sureties conditioned for the appearance of such person, at such next term or session, and that he will then surrender and take his trial and not depart the Court without leave, and to require any person such judge may think fit to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.—14–15 Vict., ch. 100, s. 19, Imp.

The Imperial Statute authorizes the judge to commit such person, *unless* such person shall enter into a recognizance and give sureties: the Canadian Statute gives

power to commit *or* to permit such person to enter into a recognizance and give sureties. Whether intentional or not, this variance constitutes an important deviation from the English Act.

Greaves remarks on this clause: "The crime of perjury has become so prevalent of late years, and so many cases of impunity have arisen, either for want of prosecution, or for defective prosecution, that this and the following sections (*sects.* 9 *and* 10 *of Canadian Statute*) were introduced to check a crime, which so vitally affects the interests of the community.

"It was considered that by giving to every Court and person administering oaths a power to order a prosecution for perjury at the public expense, coupled with a power of commitment in default of bail, many persons would be deterred from committing so detestable a crime, and in order to effectuate this object, the present clause was framed, and as it passed the Lords, it was much better calculated to effect that object than as it now stands.

"As it passed the Lords it applied to any justice of the peace. The Committee in the Commons confined it to justices in petty and special sessions,—a change much to be regretted, as a large quantity of business is transacted before a single justice or one metropolitan or stipendiary magistrate who certainly ought to have power to commit under this clause for perjury committed before them.

"Again, as the clause passed the Lords, if an affidavit, &c., were made before one person, and used before another Judge or Court, &c., and it there appeared that perjury had been committed, such Judge or Court might commit. The clause has been so altered, that the evidence must be given, or the affidavit, &c., made before

the Judge, &c., who commits. The consequence is, that numerous cases are excluded; for instance, a man swears to an assault or felony before one justice, and on the hearing before two it turns out he has clearly been guilty of perjury, yet he cannot be ordered to be prosecuted under this clause. Again, an affidavit is made before a commissioner, the Court refer the case to the Master, and he reports that there has been gross perjury, or the Court see on the hearing of the case before them that there has been gross perjury committed, yet there is no authority to order a prosecution under this clause. So, again a man is committed for trial on the evidence of a witness which is proved on the trial to be false beyond all doubt, yet if such witness be not examined, and do not repeat the same evidence on the trial, the Court cannot order him to be prosecuted.

"Lastly, the Court before whom any person is tried for perjury under this clause, was *bound*, as the clause originally stood, to grant the costs. The committee of the Commons inserted the words 'unless such last mentioned Court shall specially otherwise direct,' so that, in point of law, as the clause now stands, it is clearly discretionary with that Court whether it will grant costs or not. However, the form of the clause indicates, and it certainly was the intention of the Committee of the Commons, that costs should be granted in every case *as a matter of course*, unless there were some *special and cogent reason* to prevent it; and it is to be hoped that the Courts will uniformly carry out such intention. It is perfectly idle to imagine that perjury will ever be sufficiently checked as long as it remains uncertain whether a party is to be effectively prosecuted for it or not. A prosecution for perjury under this clause stands on a very different footing from ordinary prosecutions. The Court may

compel any one *against his will* to prosecute, and such prosecution necessarily imposes expenses on the prosecutor that are much greater than in ordinary cases; an attorney, if not counsel, *must* be employed to frame the indictment and prepare the evidence. To deprive the prosecutor of his costs upon the ground that the prosecution ought not to have been ordered, would be extremely unjust, as it would be punishing one man for the error of another. The clause is silent as to what ground is to warrant a special order; the only reasonable ground would appear to be, that the prosecutor has himself been negligent, or misconducted himself in the prosecution. If such were the case, no doubt he might be justly deprived of the costs.

"It is to be observed, that before ordering a prosecution under this clause, the Court ought to be satisfied not only that perjury has been committed, but that there is a 'reasonable cause for such prosecution.' Now it must ever be remembered that two witnesses, or one witness and something that will supply the place of a second witness, are *absolutely essential* to a conviction for perjury. The Court, therefore, should not order a prosecution, unless it sees that such proof is capable of being adduced at the trial; and as the Court has the power, it would be prudent, in every case, if practicable, at once to bind over such two witnesses to give evidence on the trial, otherwise it may happen that one or both may not be then forthcoming to give evidence. It would be prudent also for the Court to give to the prosecutor a minute of the point, on which in its judgment the perjury had been committed, in order to guide the framer of the indictment, who possibly may be wholly ignorant otherwise of the precise ground on which the prosecution is ordered. It is very advisable also that where the perjury is com-

mitted in giving evidence, such evidence should be taken down in writing by some person who can prove it upon the trial, as nothing is less satisfactory or more likely to lead to an acquittal than that the evidence of what a person formerly swore should depend entirely upon mere memory. Indeed, it may well be doubted, whether it would be proper to order a prosecution in any case under this Act where there was no minute in writing of the evidence taken down at the time.

"Again, it ought to be clear, beyond all reasonable doubt, that perjury has been *wilfully* committed before a prosecution is ordered."—*Lord Campbell's Acts, by Greaves*, 22.

By the Canadian Act, this power is not given to Justices of the Peace, nor is there any enactment as to costs, in such prosecutions.

VENUE IN CASES OF PERJURY.

Sect. 8.—Any person accused of perjury may be tried, convicted and punished in any district, county or place where he is apprehended or is in custody.

This is permissive only, and any person accused of perjury may be tried, convicted and punished in the district, county or place where the offence was committed. This section does not appear to extend to subornation of perjury.

PROOF.

Sect. 11.—A certificate, containing the substance and effect only, omitting the formal part of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other

officer, shall, upon trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.—14–15 Vict., ch. 100, s. 22, Imp.

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential.—*Lord Campbell's Acts, by Greaves*, 27.

SUBORNATION OF PERJURY.

Sect. 10.—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously or corruptly, to take, make, sign or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, whenever such perjury or other offence aforesaid has been actually committed to allege the offence of the person who actually committed such perjury or other offence, in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly, did cause and procure the said person, the said offence in the manner and form aforesaid to do and commit, and whenever such perjury or other offence aforesaid has not actually been committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore re-

dered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.—14–15 Vict., ch. 100, s. 21, Imp.

Subornation of perjury is a misdemeanor, as perjury itself, and subject to the same punishment.—See remarks under sect. 1, *ante*.

Sect. 7, *ante*, declaring all evidence whatever material with respect to perjury, also applies to subornation of perjury.

Sect. 11, *ante*, as to certificate of indictment and trial, applies also to subornation of perjury.

Sect. 8, *ante*, allowing perjury to be tried, where the offender is apprehended or is in custody does not appear to apply to subornation of perjury.

Subornation of perjury, by the common law, seems to be an offence in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath.—1 Hawkins, 435.

But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment.—1 Hawkins, loc. cit.

An attempt to suborn a person to commit perjury upon a reference to the judges, was unanimously holden by them to be a misdemeanor.—1 Russell, 85.

And, upon an indictment for subornation of perjury if it appears, at the trial, that perjury was not actually committed, but that the defendant was guilty of the attempt to suborn a person to commit the offence, such defendant may be found guilty of the attempt.—32-33 Vict., ch. 29, sect. 49, (Procedure Act, 1869.)

In support of an indictment for subornation, the record of the witness's conviction for perjury is no evidence against the suborners, but the offence of the perjured witness must be again regularly proved.—Although several persons cannot be joined in an indictment for perjury, yet for subornation of perjury, they may.—3 Burn's Justice, 1246.

Indictment, same as indictment for perjury to the end, and then proceed:—And the Jurors aforesaid upon their oath aforesaid further present, that before the committing of the said offence, by the said A. B., to wit, on the..... day of ..... at .... C. D. unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in the manner and form aforesaid.—*Schedule A, of the Procedure Act of* 1869.

No indictment can be preferred for subornation of perjury unless one or other of the preliminary steps required by 32-33 Vict., ch. 29, sect. 28 (*Procedure Act*, 1869) has been taken.

As perjury, see *ante*, subornation of perjury is not triable at Quarter Sessions.

AN ACT FOR THE SUPPRESSION OF VOLUNTARY AND EXTRA JUDICIAL OATHS.

37 Vict. ch. 37, (1874.)

Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial enquiry nor in any wise required or authorized by any law; and whereas doubts have arisen whether or not such proceeding is illegal; for the suppression of such practice and removing such doubts, Her Majesty, by and with the advice, and consent of the Senate and House of Commons of Canada, enacts as follows:—

Sect. 1.—It shall not be lawful for any Justice of the Peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit or solemn affirmation, touching any matter or thing whereof such Justice or other person hath not jurisdiction or cognizance by some law in force at the time being, or authorized, or required by any such law; provided always that nothing herein contained shall be construed to extend to any oath, affidavit or solemn affirmation before any Justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, nor to any oath, affidavit or affirmation which may be

required or authorized by any law of the Dominion of Canada, or by any law of the Province wherein such oath, affidavit or affirmation is received or administered or is to be used, nor to any oath, affidavit or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively: And provided further, that it shall be lawful for any Judge, Justice of the Peace, Public Notary or other functionary authorized by law to administer an oath, to receive the solemn declaration of any person voluntarily making the same before him in the form of the schedule to this Act annexed, in attestation of the execution of any written deed or instrument, or allegations of fact, or of any account rendered in writing, and if any such declaration be false or untrue in any material particular, the person making such false declaration shall be deemed guilty of a misdemeanor.

Section 2.—Any Justice of the Peace, or other person administering or receiving, or causing or allowing to be received or administered, any oath, affidavit or solemn affirmation contrary to the provisions of this Act, shall be deemed guilty of a misdemeanor, and shall be liable to be imprisoned for any term not exceeding three months, or to a fine not exceeding fifty dollars, at the discretion of the Court.—5-6 Will. 4, ch. 62, Imp.

SCHEDULE.

I, A. B., do solemnly declare that (*state the fact or facts declared to*) and I make the solemn declaration conscientiously believing the same to be true, and by virtue of the Act passed in the thirty-seventh year of Her Majesty's reign intituled (*insert the title of this Act.*)

Is the last proviso of section 1 of this Act constitutional? Has the Federal Government the right to legislate on such matters? This proviso is in the English Act, 5 & 6 Will. 4, ch. 62, and is sect. 18 thereof, but, of course, this does not give to our Federal Parliament a power which it has not by the constitutional Act. However, if the misdemeanor mentioned in it exists, it is punishable, at common law, by fine or imprisonment, or both, at the discretion of the Court: the punishment ordered by sect. 2 of the Act does not apply to the misdemeanor created by sect. 1.

As to the first part of section 1, it contains a very much needed enactment. It is taken from sect. 13, of the said 5 and 6 Will. 4, ch. 62, of the Imperial Statutes; the preamble (the same in the Canadian and the English Acts) reads thus:

"Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial enquiry, nor in any wise required or authorized by any law; and whereas doubts have arisen whether or not such proceeding is illegal; for the suppression of such practice and removing such doubts, Her Majesty, &c., &c., &c.'

Sir William Blackstone had said: (Vol. IV, p. 137) "The law takes no notice of any perjury, but such as is committed in some Court of Justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason, it is much to be questioned, how far any magistrate is justifiable in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every

petty occasion, since it is more than possible that, by such idle oaths, a man may frequently, *in foro conscientiæ*, incur the guilt, and, at the same time, evade the temporal penalties of perjury."

"And Lord Kenyon indeed, in different cases, has expressed a doubt, whether a magistrate does not subject himself to a criminal information for taking a voluntary extra-judicial affidavit."—3 *Burn's Just., v. oath.*

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S. on .... at .... being one of the Justices of Our said Lady the Queen, assigned to keep the peace in and for the said county *(or district)*, did unlawfully administer to and receive from a certain person, to wit, one A. B., a certain oath, touching certain matters and things, whereof the said J. S., at the time and on the occasion aforesaid, had not any jurisdiction or cognizance by any law in force at the time being, to wit, at the time of administering and receiving the said oath, or authorized, or required by any such law: the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence nor being required or authorized by any law of the Dominion of Canada, or by any law of the said Province of .... wherein such oath has been so received and administered, and was to be used (*if to be used in another Province, add* "or by any law of the Province of .... wherein the said oath *(or affidavit)* was (*or is*) to be used") ; nor being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning (*state the subject-matter of the oath or affidavit, so as to show that it was not one of which the Justice had jurisdiction or cognizance, and was not within the*

exceptions) against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 829.

A County Magistrate complained to the Bishop of the diocese of the conduct of two of his clergy; and to substantiate his charge, he swore witnesses before himself, as magistrate, to the truth of the facts: *held*, that the matter before the bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the Statute against voluntary and extra-judicial oaths, and that he had unlawfully administered voluntary oaths, contrary to the enactment of the Statute.—Reg. vs. Nott, Car. & M. 288; 9 Cox, 301.

In the same case, on motion in arrest of judgment it was held, that an indictment under this Statute (5 and 6 Will. 4, ch. 62, s. 13) is bad, if it does not so far set out the deposition, that the Court may judge whether or not it is of the nature contemplated by the Statute, that the deposition and the facts attending it should have been distinctly stated, and the matter or writing relative to which the defendant was said to have acted improperly should have been stated to the Court in the indictment, so that the Court might have expressed an opinion whether the defendant had jurisdiction, the question whether the defendant had jurisdiction to administer the oath being one of law, and to be decided by the Court; but the majority of the Court thought that it was not necessary to set out the whole oath. Greaves nevertheless thinks it prudent to set it out at full length, if practicable, in some counts.—1 Russell, 193, note. At the same time, it must be remembered that by sect. 24 of the Procedure Act of 1869, it is enacted that "whenever it is necessary to make an averment in an indictment, as to any instrument, whether the same consists wholly or

in part of writing, print or figures, it shall be sufficient to describe such instruments 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* of the whole or of any part thereof."

Upon the trial, to establish that the defendant is a Justice of the Peace or other person authorized to receive oaths or affidavits, evidence of his acting as such will, *primâ facie*, be sufficient.—Archbold, 830.

And it is not necessary to show that he acted wilfully in contravention of the Statute: the doing so, even inadvertently, is punishable.—*Idem.*

PEACE ON PUBLIC WORKS.

32–33 VICT., CH. 24.

This Act entitled "*An Act for the better preservation of the Peace in the vicinity of public works,*" becomes in force only by proclamation of the Governor in Council, and for the time, and within the places designated in such Proclamation. There is an amendment to it by the 33 Vict., ch. 28, (1870.)

OFFENCES RELATIVE TO HER MAJESTY'S ARMY AND NAVY.

32–33 VICT., CH. 25.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 1.—Whosoever, not being an enlisted soldier in Her Majesty's service or a seaman in Her Majesty's Naval Service, by words or with money, or by any other means whatsoever, directly or indirectly persuades, or procures, or goes about or endeavours to persuade, prevail on or procure any such soldier or seaman to desert or leave Her Majesty's Military or Naval Service, or conceals, receives or assists any deserter from Her Majesty's Military or Naval Service, knowing him to be such deserter, may be convicted thereof in a summary manner before any two Justices of the Peace, or before the Mayor of any city and any one Justice of the Peace, or before any Recorder, Judge of the Sessions of the Peace or Police Magistrate, on the evidence of one or more credible witness or witnesses, and shall then be liable to a penalty not less than eighty dollars, nor more than two hundred dollars in the discretion of the Court before which the conviction takes place, with costs, and in default of payment may be committed to gaol for any period not exceeding six months, or until such penalty is paid.

Sect. 2.—Whosoever buys, exchanges or detains, or otherwise receives from any soldier or deserter any arms, clothing or furniture belonging to Her Majesty, or any

such articles belonging to any soldier or deserter as are generally deemed regimental necessaries, according to the custom of the army, or causes the color of such clothing or article to be changed, or exchanges, buys or receives from any soldier any provisions, without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs, may be convicted thereof in the manner mentioned in the next preceding section, and shall then be liable to a penalty of not less than twenty dollars nor more than forty dollars and costs, and in default of payment be committed to gaol for a period not exceeding nine months, or until such penalty is paid.

Sect. 3.—Whosoever buys, exchanges, or detains or otherwise receives from any seaman or marine, upon any account whatever, or has in his possession, any arms or clothing, or any such articles belonging to any seaman, marine or deserter, as are generally deemed necessaries, according to the custom of the Navy, may be convicted thereof in the manner mentioned in the next preceding section but one, and shall then be liable to a penalty not less than sixty dollars, nor more than one hundred and twenty dollars and costs, and in default of payment shall be committed to gaol for a term not exceeding nine months, or until such penalty is paid. —(See 33 Vict., ch. 31.)

Sect. 4.—One half the amount of any penalty imposed under any of the preceding sections shall be paid over to the prosecutor or person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

Sect. 5.—Every offence against the preceding sections of this Act is a misdemeanor, and may be prosecuted as such, and the offender convicted shall then be liable to

punishment by fine and imprisonment in the discretion of the Court, and nothing in this Act shall be construed to prevent any person being prosecuted, convicted and punished under any Act of the Imperial Parliament in force in Canada; but no person shall be twice punished for the same offence.

Sect. 6.—The examination of any soldier, seaman, or marine liable to be ordered from the Province, in which any offence against this Act is prosecuted, or of any witness sick, infirm, or about to leave such Province, may be taken *de bene esse* before any commissioner or other proper authority, in like manner as depositions in civil cases may be taken.

Sect. 7.—Any person reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any Justice of the Peace, and if it appears that he is a deserter, he shall be confined in gaol until claimed by the military or naval authorities, or proceeded against according to law.

Sect. 8.—No person shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a Justice of the Peace, such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building and that admittance has been demanded and refused, and any person resisting the execution of any such warrant shall thereby incur a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under this Act.

Sect. 9.—Any Justice of the Peace upon information on oath or affirmation may issue a warrant for the apprehension of any person charged with an offence against this Act, as in the case of other offences against the law.

See also 33 Vict., ch. 31, in which it seems to have

been forgotten that seamen's necessaries and clothing were already protected by sect. 3 of the said 32–33 Vict., ch. 25.

As to the Imperial Statutes on the subject, see 1 Russell, 142.

OFFENCES RESPECTING HER MAJESTY'S MILITARY AND NAVAL STORES.

32–33 VICT., CHAP. 26.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 1.—The marks described in the Schedule to this Act may be applied in or on Her Majesty's Naval, Military, Ordnance, Barrack, Hospital, and Victualling stores, to denote Her Majesty's property in stores so marked.

Sect. 2.—The Admiralty and War Department, their contractors, officers and workmen, may apply the said marks, or any of them, in or on any such stores as are described in the said Schedule.

Sect. 3.—Whosoever, without any lawful authority (proof of which authority shall lie on the party accused) applies any of the said marks in or on any such or any like stores, is guilty of a misdemeanor, and shall be liable to be imprisoned for any term less than two years, with or without hard labour.

Sect. 4.—Whosoever, with intent to conceal Her Majesty's property in any Naval, Military, Ordnance, Barrack, Hospital or Victualling stores, takes out, destroys or obliterates, wholly or in part, any such mark as aforesaid, is guilty of felony, and shall be liable to be imprisoned for any term less than two years, with or

without hard labour, and with or without solitary confinement.

Sect. 5.—Whosoever, without lawful authority (proof of which authority shall lie on the party accused) receives, possesses, keeps, sells, or delivers any Naval, Military, Ordnance, Barrack, Hospital, or Victualling stores, bearing any such mark as aforesaid, knowing them to bear such mark, is guilty of a misdemeanor, and shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour.

Sect. 6.—Where the person charged with such a misdemeanor as last aforesaid, was, at the time at which the offence is charged to have been committed, a dealer in marine stores, or a dealer in old metals, or in Her Majesty's service or employment, knowledge on his par that the stores to which the charge relates bore such mark as aforesaid shall be presumed until the contrary is shewn.

Sect. 7.—Any person charged with such misdemeanor as last aforesaid in relation to stores, the value of which does not exceed twenty-five dollars, shall be liable, on summary conviction before two Justices of the Peace, or any Recorder, Stipendiary Magistrate or Police Magistrate, or the City Court of Halifax, to a penalty not exceeding one hundred dollars, or in the discretion of the Court, or Justices, or Magistrate, to be imprisoned for any term not exceeding six months with or without hard labour.

Sect. 8.—In order to prevent a failure of justice in some cases, by reason of the difficulty of proving knowledge of the fact that stores bore such a mark as aforesaid, if any Naval, Military, Ordnance, Barrack, Hospital or Victualling stores, bearing any such mark, are found in the possession of any person not being a dealer

in marine stores, or a dealer in old metals, and not being in Her Majesty's service, and such person, when taken or summoned before two Justices of the Peace, Recorder, Stipendiary Magistrate, or Police Magistrate, or the City Court of Halifax, does not satisfy the Justices, Recorder, Magistrate, or the Court, that he came by the stores so found lawfully, he shall be liable on conviction to a penalty not exceeding twenty-five dollars, and if any such person satisfies the Justices, Recorder, Stipendiary or Police Magistrate or Court, that he came by the stores so found lawfully, the Justices, Recorder, Magistrate or Court, at their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and if any person as last aforesaid, who has had possession thereof, does not satisfy the Justices, Recorder, Stipendiary or Police Magistrate or Court, that he came by the same lawfully, he shall be liable, on conviction of having had possession thereof, to a penalty not exceeding twenty-five dollars, and in default of payment to imprisonment for any period not exceeding three months, with or without hard labour.

Sect. 9.—For the purposes of this Act, stores shall be deemed to be in the possession or keeping of any person, if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another.

Sect. 10.—It shall not be lawful for any person, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, to creep, sweep, dredge or otherwise search for stores in

the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to Her Majesty or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to Her Majesty, or from any of Her Majesty's wharves or docks, victualling or steam factory yards.

Sect. 11.—Whosoever contravenes the next preceding section shall be liable, on summary conviction before two Justices of the Peace, or any Recorder, Stipendiary or Police Magistrate, or the City Court of Halifax, to a penalty not exceeding twenty-five dollars, or to be imprisoned for any term not exceeding three months, with or without hard labour.

Sect. 12.—And it shall not be competent for any person other than the officer commanding the Naval or Military Forces in Canada or some person acting under his authority to institute or carry on under this Act any prosecution or proceeding for any offence against it.

Sect. 13.—Nothing in this Act shall prevent any person from being indicted under this Act or otherwise, for any indictable offence made punishable on summary conviction by this Act, or prevent any person from being liable under any other Act or otherwise, to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence.

Sect. 14.—The term "store" shall include any single store or article.

Sect. 15.—In all prosecutions under this Act, proof that any soldier, seaman or marine was actually doing duty in Her Majesty's service shall be *prima facie* evidence that his enlistment, entry or enrolment has been regular.

Sect. 16.—Persons convicted or sentenced to imprisonment under this Act before the City Court of Halifax, may, in the discretion of the Court, be imprisoned in the City prison with hard labour, instead of the County gaol.

Sect. 17.—This Act shall commence and take effect upon, from and after the first day of July, one thousand eight hundred and sixty-nine.

SCHEDULE.

Stores.	*Marks.*
Hempen Cordage and Wire Rope.	White, black or coloured worsted threads laid up with the yarns and the wire, respectively.
Canvas, Fearnought Hammocks and Seamen's Bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal and other stores not before enumerated.	The broad arrow with or without the letters W. D.

This Act is taken from the 30 and 31 Vict., ch. 119, and 30 and 31 Vict., ch. 128, of the Imperial Statutes: in England, the 30 and 31 Vict., ch. 119, is repealed by the 32 Vict., ch. 12.

Indictment for wrongfully applying marks on Naval Stores.—The Jurors for Our Lady the Queen upon their oath present that J. S. on ..... unlawfully and without lawful authority applied a certain mark, to wit, a double tape in the warp, in and on certain stores, to wit, five hundred yards of buntin; against the form of the Statute in such case made and provided, (*section* 3.)

Indictment for obliterating marks on Naval Stores.—The Jurors for Our Lady the Queen upon their oath pre-

sent that J.S. on ..... feloniously and with intent to conceal Her Majesty's property therein took out from one hundred yards of canvas, which said canvas was then naval stores of and belonging to Her Majesty, a certain mark, to wit, a blue line in a serpentine form which said mark was then applied thereon in order to denote her said Majesty's property in naval stores so marked, against the form of the Statute in such case made and provided, (*sect.* 4.)

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.—Add counts charging "destroying" and "obliterating."—A man is presumed to intend the necessary and reasonable consequences of his own acts, R. vs. Dixon, 3 M. & Selw. 15; R. vs. Farrington, R. & R. 207; so the mere fact of the defendant's having taken out the mark will be sufficient evidence to go to the jury, that in doing so he intended to conceal Her Majesty's property in the stores.—Archbold, 788.

Indictment for being in unlawful possession of ordnance Stores.—The Jurors for Our Lady the Queen upon their oath present that J. S. on ..... without lawful authority unlawfully possessed five hundred yards of canvas, which said canvas was then Ordnance department stores of and belonging to Her Majesty and then bore a certain mark, to wit, a blue line in a serpentine form then applied thereon, in order to denote Her Majesty's property in Ordnance department stores so marked, the said J. S. then well knowing the said canvas to bear the said mark; against the form of the Statute in such case made and provided, (*sect.* 5.)—Add counts charging "receiving" "keeping" "selling" and "delivering."

Sections 6, 7, 8, 9, of the Act relate to the necessary possession, guilty knowledge, proof, etc., etc., etc., and dispose of such questions as were raised in Reg. vs. Cohen, 8 Cox, 41; R. vs. Sleep, L. & C. 44; Reg. vs. Sunley, Bell, 145, and in the anonymous case by Foster, 439.—2 Russell, 596, 597.

Upon the trial of any indictment for any offence mentioned in this Act, which is capable of being attempted to be committed, the jury may, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 599.

AN ACT RESPECTING CRUELTY TO ANIMALS.

32-33 Vict., ch. 27.

Whereas it is expedient that provision should be made, extending to all Canada, for the punishment of cruelty to animals: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 1.—Whosoever, wantonly, cruelly, or unnecessarily beats, binds, ill-treats, abuses or tortures any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, pig, or other cattle, or any poultry, or any dog, or domestic animal or bird, or whosoever, driving any cattle or other animal, is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal, shall, upon being convicted of any or either of the said offences before any one Justice of the Peace for the district, county or place in which the offence has been committed, for every such offence, forfeit and pay (over and above the amount of the damage or injury, if any, done thereby, which damage or injury shall and may be ascertained and awarded by such Justice) such a sum of money not exceeding ten dollars, nor less than one dollar with costs, as to such Justice seems meet,—and (33 Vict., ch. 29) any person who, in any manner, encourages, aids, or assists at the fighting or baiting of any bull, bear, badger, dog, cock or other kind of animal, whether of

domestic or wild nature, shall, upon being convicted before any one Justice of the Peace for the district, county or place, in which the offence was committed, for every such offence forfeit and pay such a sum of money not exceeding forty dollars, nor less than two dollars, with costs, as to such Justice seems meet.

Sect. 2.—The offender shall, in default of payment, be committed to the common gaol or other place of confinement, for the district, county or place in which the offence was committed, there to be imprisoned for any time not exceeding thirty days.

Sect. 3.—Nothing in this Act contained shall prevent or abridge any remedy by action against the offender or his employer where the amount of the damage is not sought to be recovered by virtue of this Act.

Sect. 4.—When any offence against this Act is committed, any constable or other peace officer, or the owner of any such cattle, animal or poultry, upon view thereof, or upon the information of any other person, (who shall declare his or their name or names and place or places of abode to the said constable or other peace officer) may seize and secure by the authority of this Act, and forthwith, and without any other authority or warrant, may convey any such offender before a Justice of the Peace within whose jurisdiction the offence has been committed, to be dealt with according to law.

Sect. 5.—If any person apprehended for having committed any offence against this Act refuses to discover his name and place of abode to the Justice of the Peace before whom he is brought, such person shall be immediately delivered over to a constable or other peace officer, and shall by him be conveyed to the common gaol or place of confinement for the district, county or place within which the offence has been committed, or in which

the offender has been apprehended, there to remain for any term not exceeding one month, or until he makes known his name and place of abode to the said Justice.

Sect. 6.—The prosecution of every offence punishable under this Act must be commenced within three months next after the commission of the offence, and not otherwise.

Sect. 7.—Every offence against any of the sections of this Act is a misdemeanor, and may be punished as such, —or may be prosecuted in the manner directed by the *Act respecting the duties of Justices of the Peace, out of Sessions, in relation to summary convictions and orders* (32–33 Vict., ch. 31) so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecutions, and all the provisions contained in the said Act shall be applicable to such prosecution, in the same manner as if they were incorporated in this Act.

Sect. 8.—All pecuniary penalties recovered before any Justice of the Peace under this Act shall be divided, paid and distributed in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person, as to such Justice seems proper.

Sect. 9.—Every sum of money ascertained and awarded, adjudged, by any Justice of the Peace under this Act to be paid as the amount of any damage or injury occasioned by the commission of any of the offences hereinbefore mentioned, shall be paid to the person who has sustained such damage or injury.

Sect. 10.—Where the word "cattle" is used in this Act,

it shall have the meaning assigned to it in the Act respecting larceny and other similar offences.— *Sect.* 1, *of the Larceny Act, ante.*

Sect. 11.—This Act shall commence and take effect upon, from and after the first day of January, one thousand eight hundred and seventy.

This Statute is based on the 12–13 Vict., ch. 92, amended by 17–18 Vict., ch. 60, of the Imperial Parliament. —See Bishop, Statutory Crimes, 1094.

It would seem under section 4, *ante*, that if the offence against this Act is committed out of the view of the constable, the constable should inquire into the particulars of the complaint made to him, or should see the animal and so form a judgment as to what has occurred, and the person complaining to the constable should leave it to him to act or not as he thought proper, for if without so doing he directs the officer to take the offender into custody, he may render himself liable to an action for false imprisonment.—Hopkins vs. Crowe, 7 C. & P. 373.

AN ACT RESPECTING VAGRANTS.

32–33 VICT., CH. 28.

Sect. 1.—All idle persons, who, not having visible means of maintaining themselves, live without employment; all persons who, being able to work, and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so; all persons openly exposing or exhibiting in any street, road, public place or highway any indecent exhibition, or openly or indecently exposing their persons; all persons, who, without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two Justices of the Peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or who go about from door to door, or place themselves in the streets, highways, passages or public places to beg or receive alms; all persons loitering in the streets or highways and obstructing passengers by standing across the footpaths or by using insulting language or in any other way, or tearing down or defacing signs, breaking windows, breaking doors or door plates, or the walls of houses, roads or gardens, destroying fences, causing a disturbance in the streets or highways by screaming, swearing or singing, or being drunk, or impeding, or incommoding peaceable passengers; all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves; all keepers of bawdy houses and houses of ill fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves; all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by gaming or crime, or by the avails of prostitution,—shall be deemed vagrants, loose, idle or disorderly persons within the meaning of this Act, 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, and be punished by imprisonment in any gaol or place of confinement other than the Penitentiary for a term not exceeding *two* months (now *six* months,) 37 *Vict., ch.* 43), and with or without hard labour, or by a fine not exceeding fifty dollars, or by both, such fine and imprisonment being in the discretion of the convicting Magistrate or Justices.

Sect. 2.—Any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace upon information before them made, that any person hereinbefore described as vagrants, loose, idle and disorderly persons, are or are reasonably suspected to be harbored or concealed in any bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other Justice, all persons found therein so suspected as aforesaid.—5 Geo. 4, ch. 83, and 31–32 Vict., ch. 52, Imperial Statutes.

Procedures under this Act are regulated by the 32–33 Vict., ch. 31, *An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to summary convictions and orders.*

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