In the North West Territories it is not necessary that a trial for murder should be based upon an indictment by a grand jury or a coroner's inquest.—*The Queen* v. *O'Connor*, 2 *Man. L. R.* 235.

As to insanity as a defence in criminal cases, *see The Queen* v. *Riel*, 2 *Man. L. R.* 321.

Evidence of one crime may be given to show a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers.—*The Queen* v. *Chasson*, 3 *Pugs. (N. B.)* 546.

As to the admissibility of dying declarations, the most recent cases are: *R.* v. *Morgan*, 14 *Cox*, 337; *R.* v. *Bedingfield*, 14 *Cox*, 341; *R.* v. *Hubbard*, 14 *Cox*, 565; *R.* v. *Osmand*, 15 *Cox*, 1; *R.* v. *Goddard*, 15 *Cox*, 7; *R.* v. *Smith*, 16 *Cox*, 170.

CHAPTER 162.

AN ACT RESPECTING OFFENCES AGAINST THE PERSON.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. In this Act, unless the context otherwise requires, the expression "loaded arms" includes any gun, pistol or other arm loaded in the barrel with gunpowder or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air, and having ball, shot, slug or other destructive material in the barrel, although the attempt to discharge the same fails.—32-33 *V.*, *c.* 20, *s.* 18. *Imp. Act*, 24-25 *V.*, *c.* 100, *s.* 19.

"This clause is new, and is introduced to meet every case where a prisoner attempts to discharge a gun, etc., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause. *R.* v. *Carr*, *R. & R.* 377; *Anon*, 1 *Russ.* 979; and *R* v. *Harris*, *C. & P.* 159, cannot therefore be considered as authorities under this Act."—*Greaves' Note.*

2. Every one who is convicted of murder shall suffer death as a felon.—32-33 *V.*, *c.* 20, *s.* 1. 24-25 *V.*, *c.* 100, *s.* 1, *Imp.*

Form of indictment in second schedule of Procedure Act.

Upon this indictment, the defendant may be acquitted of the murder and found guilty of manslaughter.

Sec. 109 of Procedure Act as to form of indictment, and sec. 9 as to the venue in certain cases—Not triable at Quarter Sess. Sec. 4 Procedure Act.

3. Every one who,—

(*a.*) Conspires, confederates or agrees with any person to murder

any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within the Queen's dominions or not, or—

(*b.*) Solicits, encourages, persuades, endeavors to persuade, or proposes to any person to murder any other person, whether the person whose murder is solicited, encouraged or attempted to be procured is a subject of Her Majesty or not, or within the Queen's dominions or not,—

Is guilty of a misdemeanor, and liable to ten years' imprisonment. —32-33 *V.*, *c.* 20, *s.* 3. 24-25 *V.*, *c.* 100, *s.* 4, *Imp.*

Indictment ..... That J. S., J. T., and E. T., on ——— unlawfully and wickedly did conspire, confederate and agree together one J. N. feloniously, wilfully, and of their malice aforethought to kill and murder, against the form ..... *(you may add counts charging the defendants or any of them with "soliciting, encouraging, etc., or endeavoring to persuade, etc., if the facts warrant such a charge."—Archbold.*

See 1 *Russ.* 967; 3 *Russ.* 664.—*R.* v. *Bernard*, 1 *F. & F.* 240.

In *R.* v. *Banks*, 12 *Cox*, 393, upon an indictment under this clause, the defendants were convicted of an attempt to commit the misdemeanor charged; In *R.* v. *Most*, 14 *Cox*, 583, the defendant having written a newspaper article, encouraging the murder of foreign potentates, was found guilty of an offence under this clause.

4. Every accessory after the fact to murder is liable to imprisonment for life.—32-33 *V.*, *c.* 26, *s.* 4. 24-25 *V.*, *c.* 100, *s*, 67, *Imp.*

5. Every one who is convicted of manslaughter is liable to imprisonment for life, or to pay such fine as the Court awards, in addition to or without any such imprisonment.—32-33 *V.*, *c.* 20, *s.* 5. 24-25 *V.*, *c.* 100, *s.* 5, *Imp.*

Form of indictment in second schedule of Procedure Act. Also sec. 109, and sec. 9 of Procedure Act.

6. No punishment or forfeiture shall be incurred by anyp erson

who kills another by misfortune, or in his own defence, or in any other manner without felony.—32-33 *V.*, *c.* 20, *s.* 7. 24-25 *V.*, *c.* 100, *s.* 7, *Imp.*

Homicide in self-defence, *i.e.*, committed *se et sua defendendo* in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods. The above clause has put an end to these distinctions, which Foster says "had thrown some darkness and confusion upon this part of the law."—*Fost.* 273.

Homicide *se defendendo* seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity. And not only he, who on assault retreats to a wall or some such straight, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity; but also he who being assaulted in such a manner and such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all.—1 *Hawkins*, *c.* 11, *s.* 13-14.

In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not

obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.—*Fost.* 273.

Before a person can avail himself of the defence that he used a weapon in defence of his life, he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such cases, if he retreated as far as he could, he would be justified.—*R.* v. *Smith,* 8 *C. & P.* 160; *R.* v. *Bull,* 9 *C. & P.* 22.

Under the excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are justified; the act of the relation being construed as the act of the party himself.—1 *Hale,* 484.

Chance medley, or as it was sometimes written, *chaud medley,* has been often indiscriminately applied to any manner of homicide by misadventure; its correct interpretation seems to be a killing happening in a sudden encounter; it will be manslaughter or self-defence according to whether the slayer was actually striving and combating at the time the mortal stroke was given, or had *bonâ fide* endeavored to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction; in the latter case, it will be justifiable or excusable homicide, in the former, manslaughter.—1 *Russ.* 888.

A man is not justified in killing a mere trespasser; but

if, in attempting to turn him out of his house, he is assaulted by the trespasser he may kill him, and it will be *se defendendo,* supposing that he was not able by any other means to avoid the assault or retain his lawful possession, and in such a case, a man need not fly as far as he can as in other cases of *se defendendo,* for he has a right to the protection of his own house.—1 *Hale,* 485.

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been held an unjustifiable mode of doing so.—*Child's case,* 2 *Lewin,* 214: throwing a stone has been held a proper mode.—*Hinchcliffe's Case,* 2 *Lewin,* 161.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As if a man come to burn my house, and I shoot out of my house, or issue out of my house and kill him. So, if A. makes an assault upon B., a woman or maid, with intent to ravish her, and she kills him in the attempt, it is justifiable, because he intended to commit a felony. And not only the person upon whom a felony is attempted may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensued, the party so interposing will be justified; but the attempt to commit a felony should be apparent and not left in doubt, otherwise the homicide will be manslaughter at least; and the rule does not extend to felonies without force, such as picking pockets, nor to misdemeanors of any kind.—2 *Burn,* 1314.

It should be observed that, as the killing in these cases is only justifiable on the ground of necessity, it cannot be

justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen roost, for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him.—*R.* v. *Scully*, 1 *C. & P.* 319. Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity.—*Meade's Case*, 1 *Lewin*, 184.

As to justifiable homicide by officers of justice or other persons in arresting felons, see under the heads *Murder* and *Manslaughter*. Also, *Foster*, 258. As to homicide by misadventure, 2 *Burn*, 316.

7. Every offence which, before the abolition of the crime of petit treason, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence.—32-33 *V.*, *c.* 20, *s.* 8, *part.* 24-25 *V.*, *c.* 100, *s.* 8, *Imp.*

Petit treason was a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harboring it to have conspired in public against his liege lord and sovereign. At common law, the instances of this kind of crime were somewhat numerous and involved in some uncertainty; but by the 25 Edw. 3, ch. 2, they were reduced to the following cases: 1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed

faith and obedience. It was murder aggravated by the circumstance of the allegiance which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, the judgment upon a conviction was more grievous than in murder. Petit treason is now nothing more than murder.—*Greaves' note*, 1 *Russ.* 710.

ATTEMPTS TO MURDER.

8. Every one who, with intent to commit murder, administers or causes to be administered, or to be taken by any person, any poison or other destructive thing, or by any means whatsoever wounds or causes any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.—40 *V.*, *c.* 28, *s.* 1. 24-25 *V.*, *c.* 100, *s.* 11, *Imp.*

In *R.* v. *Lawless*, Arthabaska, Nov., 1872, Taschereau (H. E.), J. an indictment under this sect. that "..... in and upon one Rose Ann Mace unlawfully did make an assault, and the said Rose Ann Mace did beat, wound and ill-treat ..... with intent then and there, the said Rose Ann Mace wilfully, feloniously and of his malice aforethought to kill and murder" ..... was quashed upon demurrer for want of the word "feloniously" before "unlawfully," and before "did beat wound and ill treat." Amendment refused. But the indictment was good as for a misdemeanor under sec. 34, *post*.

Indictment for administering poison with intent to murder.— ..... The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... feloniously and unlawfully did administer to one A. B. (*administer or cause to be administered to or to be taken by any person*), a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*any poison or other destructive thing*), with intent thereby then feloniously, wilfully, and of his malice aforethought the said A. B. to kill and

murder, 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. (*Add counts stating that the defendant feloniously and unlawfully, "did cause to be administered to" and feloniously and unlawfully, "did cause to be taken by" a large quantity, etc., and if the description of poison be doubtful, add counts describing it in different ways and one count stating it to be "a certain destructive thing to the jurors aforesaid unknown."*)

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad.—*R.* v. *Powler*, 4 *C. & P.* 571.

If there be any doubt whether the poison was intended for A. B. add a count, stating the intent to be to "commit murder" generally.—*R.* v. *Ryan*, 2 *M. & Rob.* 213; *R.* v. *Duffin*, *R. & R.* 365.

If a person mix poison with coffee, and tell another that the coffee is for her, and she takes it in consequence, it seems that this is an administering; and, at all events, it is causing the poison to be taken. In *R.* v. *Harley*, 4 *C. & P.* 369, it appeared that a coffee pot, which was proved to contain arsenic, mixed with coffee, had been placed by the prisoner by the side of the grate: the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and it about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it was not sufficient to constitute an administering.—Park, J., said: "There has been much argument whether, in this

case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Ryan & Moody's Reports, goes that way (*R.* v. *Cadman*, 1 *Moo. C. C.* 114); but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential, but my recollection is, that the judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering it is not necessary that there should be a delivery by the hand."—1 *Russ.* 988, *and Greaves, note n. to it.*

An indictment stating that the prisoner gave and administered poison is supported by proof that the prisoner gave the poison to A. to administer as a medicine to B. with intent to murder B. and that A. neglecting to do so, it was accidentally given to B. by a child, the prisoner's intention to murder continuing.—*R.* v. *Michael*, 2 *Moo.* C. C. 120.

Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "*Mrs. Daws, Townhope,*" and left it on the counter of a tradesman, who sent it to Mrs. Daws who used some of the sugar, Gurney held it to be an administering.—*R.* v. *Lewis*, 6 *C. & P.* 161.

And if the indictment contains a count "*with intent to commit murder,*" generally, the proceeding case, *R.* v. *Lewis*, is clear law.—*Archbold*, 653.

Evidence of administering at different times may be given to show the intent.—*Archbold*, 650; 1 *Russ.* 1004 *et seq.* The intent to murder must be proved by circumstances from which that intent may be implied.

Indictment for wounding with intent to murder.—.....one J. N. feloniously and unlawfully did wound *(wound or cause any grievous bodily harm)* with intent etc. *(as in the last precedent).* Add a count " with the intent to commit murder" generally.—*Archbold*, 650.

The instrument or means by which the wound was inflicted need not be stated, and, if stated, would not confine the prosecutor to prove a wound by such means.—*R.* v. *Briggs*, 1 *Moo. C. C.* 318.

As the general term "wound" includes every "stab" and "cut" as well as other wound, that general term has alone been used in these Acts. All therefore that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab cut, or other wound. *Graves, Cons. Acts.* 45. The word " wound " includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds.—*Archbold*, 664.

But to constitute a wound, within the meaning of this statute, the continuity of the skin must be broken.—*R.* v. *Wood*, 1 *Moo. C. C.* 278.

The whole skin, not the mere cuticle or upper skin, must be divided.—*Archbold*, 665.

But a division of the internal skin, within the cheek or lip, is sufficient to constitute a wound within the statute. —*Archbold*, 665.

The statute says " by any means whatsoever", so that it is immaterial by what means the wound is inflicted, provided it be inflicted with the intent alleged.—*R.* v. *Harris, R.* v. *Stevens, R.* v. *Murrow* and *Jenning's Case*, and other similar cases cannot therefore be considered as authorities under the present law."–*Greaves, Cons. Acts*, 45.

It it not necessary that the prosecutor should be in fact wounded in a vital part, for the question is not what the wound is, but what wound was intended.—*R.* v. *Hunt*, 1 *Moo. C. C.* 93.

There does not seem any objection to insert counts on the 8th and 13th secs. (Canada); and it is in all cases advisable where it is doubtful whether the prisoner intended to murder or merely to maim.—3 *Burn*, 752.—*Archbold, form of indictment*, 650; *R.* v. *Strange*, 8 *C. & P.* 172; *R.* v. *Murphy*, 1 *Cox*, 108.

On the trial of any indictment for wounding with intent to murder, if the intent be not proved, the jury may convict of unlawfully wounding.—*Archbold.*

This verdict would fall under sec. 189 of the Procedure Act; see *post.*

Archbold, 650, says that a defendant cannot, on an indictment for the felony, *plead guilty* to the misdemeanor. In R. v. Roxburg, 12 Cox, 8, the defendant was allowed to plead guilty of a common assault.

The defendant may also be found guilty of an attempt to commit the felony charged: *Sec.* 183, *Procedure Act.*

The jury also find a verdict of common assault, if the evidence warrants it. Sec. 191, Procedure Act; *R.* v. *Cruse*, 2 *Moo. C. C.* 53; *R.* v. *Archer*, 2 *Moo. C. C.* 283; though not on an indictment for poisoning.—*R.* v. *Delaworth*, 2 *M. & Rob.* 561; *R.* v. *Draper*, 1 *C. & K.* 176.

An attempt to commit suicide remains a misdemeanor at common law, and is not an attempt to commit murder within this statute.—*R.* v. *Burgess, L. & C.* 258.

In an indictment for wounding with intent to murder, the words "feloniously and of his malice aforethought" are necessary.—*R.* v. *Bulmer*, 5 *L. N.* 287; *Ramsay's App. Cas.* 189.

9. Every one who, by the explosion of gunpowder, or other explosive substance, destroys or damages any building, with intent to commit murder, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 11. 24-25 *V.*, *c.* 100, *s.* 12, *Imp.*

Indictment ..... feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*destroy or damage*) a certain building situate ..... with intent thereby then feloniously, wilfully and of his malice aforethought, one J. N. to kill and murder, against.....(*Add a count, stating the intent to be generally "to commit murder."*)

In *R.* v. *Ryan*, 2 *M. & Rob.* 213, Parke and Alderson held that a count alleging with intent *to commit murder*, generally, is sufficient.

The jury may return a verdict of guilty of an attempt to commit the felony. Sec. 183, Procedure Act.

10. Every one who, with intent to commit murder, sets fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel or furniture thereof, or any goods or any chattels being therein, or casts away or destroys any ship or vessel, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 12. 24-25 *V.*, *c.* 100 *s.* 13, *Imp.*

Indictment. — ..... feloniously and unlawfully did set fire to *(cast away or destroy)* a certain ship called ..... with intent thereby then feloniously, wilfully and of his malice aforethought to kill and murder one ..... *(Add a count stating the intent to "commit murder" generally).*

11. Every one who, with intent to commit murder, attempts to administer to, or attempts to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person, or attempts to drown, suffocate or strangle any person, whether any bodily injury is effected or not, is guilty of felony, and is liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 13. 24-25 *V.*, *c.* 100, *s.* 14, *Imp.*

If one draws, during a quarrel, a pistol from his pocket, but is prevented from using it by another person, there is no offence against this nor the following section.—*R.* v. *St-George*, 9 *C. & P.* 483; *R.* v. *Brown*, 15 *Cox*, 199.

Greaves (Cons. Acts, 48) on this clause remarks: "Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison, within the repealed acts. R. v. Williams, 1 Den. 39; and the words 'attempt to cause to be administered to, or to be taken by' were introduced in this section to meet such cases."

Indictment for attempting to poison with intent.— ..... feloniously and unlawfully did attempt to administer (*attempt to administer to, or attempt to cause to be administered to, or to be taken by*) to one J. N. a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (*any poison or other destructive thing*), with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder, against ..... (*Add a count stating the intent "to commit murder," generally. Add counts charging that the defendant "attempted to cause to be administered to" and that he "attempted to cause to be taken by J. N. the poison."*)—*Archbold*, 651.

In *R.* v. *Cadman*, 1 *Moo. C. C.* 114, th edefendant gave the prosecutrix a cake containing poison, which the prosecutrix merely put into her mouth, and spit out again, and did not swallow any part of it. It is said in Archbold, 651, that these circumstances would now support an indictment under the above clause.

Where the prisoner put salts of sorrel in a sugar basin, in order that the prosecutor might take it with his tea, it was held an attempt to administer.—*R.* v. *Dale*, 6 *Cox*, 547.

Indictment for attempting to drown with intent to murder. — ..... feloniously and unlawfully did take one J. N. into both the hands of him the said J. S., and feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond, wherein there was a great quantity of water, and did thereby then feloniously and unlawfully attempt the said J. N. to drown and suffocate, with intent thereby then feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder, against ..... (*Add a count charging generally that the defendant did attempt to drown J. N. and counts charging the intent to be to commit murder*).—*Archbold*, 652.

It has been held upon an indictment for attempting to drown, it must be shown clearly that the acts were done with intent to drown. An indictment alleged that the prisoner assaulted two boys, and with a boat-hook made holes in a boat in which they were, with intent to drown them. The boys were attempting to land out of a boat they had punted across a river, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. He might have got into the boat and thrown them into the water; but he confined his attack to the boat itself, as if to prevent the landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion that the evidence against the prisoner showed his intention to have been

rather to prevent the landing of the boys than to do them any injury.—*Sinclair's Case*, 2 *Lew.* 49; *R.* v. *Dart*, 14 *Cox*, 143.

Indictment for shooting with intent to murder..... a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. feloniously and unlawfully did shoot, with intent thereby then feloniously ..... (*as in the last precedent.) (Add also counts stating "with intent to commit murder" generally. Also a count for shooting with intent to maim, etc., under sect.* 13, *post*).—*Archbold*, 652.

In order to bring the case within the above section, it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the conduct and expressions used by the prisoner.—*Roscoe*, 720.

Upon an indictment for wounding Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney, and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and that he intended to murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right, for though he did not intend to kill the particular person, he meant to murder the man at whom he shot.—*R.* v. *Smith*, *Dears.* 559; 1 *Russ.* 1001.

It seems doubtful whether it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued.—*Archbold*, 652.

On this question, *Graves, note g*, 1 *Russ.* 1003, remarks: "It seems probable that the intention of the Legislature, in providing for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder..... The tendency of the cases, however, seems to be that an actual intent to murder the particular individual injured must have been showed..... Where a mistake of one person for another occurs, the cases of shooting, etc., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots: it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In *R.* v. *Mister*, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence oft he prisoner; for in such case, he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the present statute, which, instead of using the words "with intent to murder such person," has the words "with intent to commit murder"..... In all cases of

doubt, as to the intention, it would be prudent to insert one count for shooting at A., with intent to murder him; another "with intent to commit murder;" and a third for shooting at A. with intent to murder the person really intended to be killed, and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown.

In *R.* v. *Stopford*, 11 *Cox*, 643, Brett, J., after consulting Mellor, J., held, following *R.* v. *Smith*, *supra*, that an indictment charging the prisoner with wounding Haley, with intent to do him, Haley, grievous bodily harm, was good, although it was proved that the prisoner intended to wound somebody else, and that he mistook Haley for another man.—*See R.* v. *Hunt*, 1 *Moo. C. C.* 93.

A bodily injury is, in cases under this section, not material, "whether any bodily injury be effected or not."

Indictment for attempting to shoot with intent, etc.—..... did, by drawing the trigger *(drawing a trigger or in any other manner)* of a certain pistol then loaded in the barrel with gunpowder and one leaden bullet, feloniously and unlawfully attempt to discharge the said pistol at and against one J. N. with intent.....*(as in the last precedent.)* *(Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to maim, under sect.* 13. *The indictment need not in the latter clause describe it as "the said pistol so loaded as aforesaid.")—Archbold; R.* v. *Baker*, 1 *C. & K.* 254.

A verdict of common assault may, in certain cases, be given, upon an indictment under this section.—Sect. 191, Procedure Act.

12. Every one who, by any means other than those specified in any of the preceding sections of this Act, attempts to commit murder, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 14. 24-25 *V.*, *c.* 100, *s.* 15, *Imp.*

See remarks under preceding section.

Indictment.—.....feloniously, unlawfully and maliciously did, by then *(state the act)* attempt feloniously, wilfully and of his malice aforethought, one J. N. to kill feloniously, wilfully and of his malice aforethought and murder against .....*(Add a count charging the intent to be to commit murder.)*—*Archbold*, 655.

Greaves, on this clause, says (Cons. Acts, 48): "This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains, or machinery used in lowering miners into mines have been injured with intent that they may break, and precipitate the miners to the bottom of the pit. So, also, all cases where steam engines are injured, set on work, stopped, or anything put into them, in order to kill any person, will fall into it. So, also, cases of sending or placing infernal machines with intent to murder. See *R.* v. *Mountford, R. & M. C. C.* 441. Indeed, the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added."

13. Every one who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person, or shoots at any person, or by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 20, *s.* 17. 24-25 *V., c.* 100, *s.* 18, *Imp.*

An indictment charging that the prisoner did "inflict" grievous bodily harm instead of "cause" is sufficient.—*R.* v. *Bray*, 15 *Cox*, 197.

See section 1, *supra*, as to what constitutes a loaded arm within the meaning of this Act.

Indictment for wounding with intent to maim—..... That J. S., on ..... one J. N. feloniously, unlawfully and maliciously did wound, with intent in so doing, him the said J. N. thereby then to maim; against ..... *(Add count stating "with intent to disfigure," and one "with intent to disable." Also one stating with "intent to do some grievous bodily harm." And if necessary one "with intent to prevent (or resist) the lawful apprehension of.")*—*Archbold.*

An indictment charging the act to have been done "feloniously, wilfully and maliciously" is bad, the words of the statute being "unlawfully and maliciously."—*R.* v. *Ryan*, 2 *Moo. C. C.* 15. In practice the first count of the indictment is generally for wounding with intent to murder. These counts are allowed to be joined in the same indictment, though the punishments of the several offences specified in them are different.—*Archbold.*

The word "maliciously" in this section does not mean with malice aforethought; for if it did the offence would be included under the 11th section. This clause includes every wounding done without lawful excuse, with any of the intents mentioned in it, for from the act itself malice will be inferred.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and, if

stated, need not be proved as laid.—*R.* v. *Briggs*, 1 *Moo. C. C.* 318. And in the same case, it was held that upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was sufficient, though it was uncertain by which of the two the injury was inflicted.

In order to convict of the felony, the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment alleged that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R.* v. *Duffin, R. & R.* 365; *R.* v. *Boyce*, 1 *Moo. C. C.* 29; unless for the purpose of effecting his escape the defendant also harbored one of the intents stated in the indictment; *R.* v. *Gillow*, 1 *Moo. C. C.* 85; for where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape.—*R.* v. *Cox, R. & R.* 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm.—*Archbold.*

An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is good, although it is proved that he mistook A. for somebody else, and that he intended to wound another person.—*R.* v. *Stopford*, 11 *Cox*, 643.

The prisoner was indicted for shooting at A. with intent to do him grievous bodily harm. He fired a pistol into a group of persons who had assaulted and annoyed him, among whom was A., without aiming at A. or any one in particular, but intending generally to do grievous bodily harm, and wounded A. *Held*, on a case reserved, that he was rightly convicted.—*R.* v. *Fretwell, L. & C.* 443.

With respect to the intents mentioned in the statute, it may be useful to observe that to *maim* is to injure any part of a man's body, which may render him in fighting less able to defend himself, or annoy his enemy. To disfigure is to do some external injury which may detract from his personal appearance; and to disable, is to do something which creates a permanent disability, and not merely temporary injury.—*Archbold*, 666. It is not necessary that a grievous bodily harm should be either permanent or dangerous; if it be such as seriously to interfere with health or comfort, that is sufficient; and, therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right.—*R.* v. *Cox, R. & R.* 362.

Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful; and where the circumstances are not such that the party must know why he is about to be apprehended, it must be proved that he was apprised of the intention to apprehend him.—*Archbold*, 667.

While the defendant was using threatening language to a third person, a constable in plain clothes came up and interfered. The defendant struck the constable with his fist, and there was a struggle between them. The constable went

away for assistance, and was absent for an hour; he changed his plain clothes for his uniform and returned to defendant's house with three other constables. They forced the door and entered the house. The defendant refused to come down, and threatened to kill the first man who came up to take him. The constables ran upstairs to take him, and he wounded one of them in the struggle that took place. *Held*, upon a case reserved, that the apprehension of the prisoner at the time was unlawful, and that he could not be convicted of wounding the constable with intent to prevent his lawful apprehension.—*R.* v. *Marsden*, 11 *Cox*, 90.

Under an indictment for a felonious assault with intent to do grievous bodily harm, a plea of guilty to a common assault may be received, if the prosecution consents.—*R.* v. *Roxburg*, 12 *Cox*, 8.

Upon an indictment for the felony under this clause, the jury may find a verdict of guilty of an attempt to commit it.—Sec. 183, Procedure Act.

A verdict of common assault may also be found.—Sec. 191, Procedure Act.

And, if the prosecutor fail in proving the intent, the defendant, in virtue of sec. 189 of the Procedure Act, may be convicted of the misdemeanor of unlawfully wounding, and sentenced under said sect.—*Archbold.*

And where three are indicted for malicious wounding with intent to do grievous bodily harm, the jury may convict two of the felony and the third of unlawfully wounding.—*R.* v. *Cunningham, Bell, C. C.* 72.

Where a prisoner was indicted for feloniously wounding with intent to do grevious bodily harm.

Held, that the intention might be inferred from the act. —*The Queen* v. *LeDante*, 2 *G. & O. (N. S.)* 401.

L. was tried on an indictment under 32-33 V., c. 20, containing four counts. The first charged that he did unlawfully, etc., kick, strike, wound and do grevious bodily harm to W., with intent, &c., to maim; the second charged assault as in first with intent to disfigure; the third charged intent to disable; the fourth charged the intent to do some grevious bodily harm. The prisoner was found guilty of a common assault. Held, that L. was rightly convicted, sec. 51 of the act. 32-33 V., c. 20, authorising such conviction.—*The Queen* v. *Laskey*, 1 *P. & B. (N. B.)* 194.

An indictment for doing grevious bodily harm, which alleged that the prisoner did "feloniously" stab, cut and wound, etc., instead of alleging, in the terms of the 17th section of 32-33 V., c. 20, that he did "unlawfully" and "maliciously" stab, etc., is good.

A defective indictment is amendable under 32-33 V., c. 29, s. 32, and any objection to it for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment before the defendant has pleaded and not afterwards.—*The Queen* v. *Flynn*, 2 *P. & B. (N. B.)* 321.

14. Every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V., c.* 20 *s.* 19, *part.* 24-25 *V., c.* 100, *s.* 18, *Imp.*

Indictment for unlawfully wounding.....one J. N. unlawfully and maliciously did wound (*wound or inflict any grievous bodily harm upon*) against the form..... (*Add a count charging that the defendant "did inflict grievous bodily harm upon J. N.")*—*Archbold*, 668.

The act must have been done maliciously. Malice would in most cases be presumed.)—3 *Burn*, 754; *R.* v. *Martin*, 14 *Cox*, 633.

But general malice alone constitutes the offence. Malice against the person wounded is not a necessary ingredient of the offence. So, if any one, intending to wound A., accidentally wounds B., he is guilty of an offence under this clause.—*R.* v. *Latimer*, 16 *Cox*, 70. See remarks under secs. 11 and 13, *ante*.

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault.—*R.* v. *Oliver, Bell, C. C.* 287.

Upon an indictment charging that the prisoner "unlawfully and maliciously did assault one H. R., and did then and there unlawfully and maliciously kick and wound him, the said H. R., and thereby then and there did unlawfully and maliciously inflict upon the said H. R. grievous bodily harm, against".....the jury may return a verdict of guilty of a common assault merely.—*R.* v. *Yeadon, L. & C.* 81.

In *R.* v. *Taylor*, 11 *Cox*, 261, the indictment was as follows:—....."That Taylor on ..... unlawfully and maliciously did wound one Thomas ..... and the jurors ..... that the said Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas." ..... Upon this indictment the jury returned a verdict of common assault, and upon a case reserved, the conviction was affirmed.

In *R.* v. *Canwell*, 11 *Cox*, 263, a verdict of common assault was also given upon an indictment containing only one count for maliciously and unlawfully inflicting grievous bodily harm, and the conviction was affirmed, upon a case reserved.

In *R.* v. *Ward*, 12 *Cox*, 123, the indictment charged a felonious wounding with intent to do grevious bodily

harm. The jury returned a verdict of unlawful wounding, under 14-15 V., c. 19, s. 5 (sec. 189 of the Procedure Act). Upon a case reserved, it was held that the words "*maliciously and*" must be understood to precede the word unlawfully in this section, and that to support the verdict, the act must have been done maliciously as well as unlawfully.

Greaves, in an article on this case, 1 *Law Magazine*, 379, censures severely this ruling. According to him, a new offence, that of unlawful wounding, was created by that clause, and the word *maliciously* had been purposely omitted from it. In a preceding number of the same magazine, p. 269, an anonymous writer attacks the decision in Ward's case from another point of view. The shooting was certainly proved not to have been intended to strike the prosecutor, but the Court, by twelve judges against three, found that there was proof of malice sufficient to support the conviction. On this appreciation of the facts of the case, this anonymous writer censures the judgment, at the same time admitting its correctness, so far as the Court held the *maliciously* as necessary as the *unlawfully* under this clause, though the word *maliciously* had been dropped in the statute.

The defendant may be found guilty of the attempt to commit the misdemeanor *charged* under sec. 183 of the Procedure Act.

And if, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, while they include such misdemeanor, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor (and the person tried for such misdemeanor, if *convicted*, shall not be liable to

be afterwards prosecuted for felony, on the same facts), unless the Court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor. (Procedure Act, sec. 184.)

15. Every one who, with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence, or by any means whatsoever attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance, is guilty of felony, and liable to imprisonment for life, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 20. 24-25 *V.*, *c.* 100, *s.* 21, *and* 26-27 *V.*, *c.* 44, *Imp.*

Indictment.—.....feloniously and unlawfully did attempt by then (*state the means or by any means whatsoever*) to choke, suffocate and strangle one J. N. (*suffocate or strangle any person, or*.....), with intent thereby then to enable him, the said A. B., the monies, goods, and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take and carry away, against the form.....(*Add counts varying the statement of the overt acts and of the intent.*)—*Archbold*, 669.

This clause is new, and is directed against those attempts at robbery which have been accompanied by violence to the throat.—*Greaves, Cons. Acts*, 54.

The clause gives the intent "to commit any *indictable* offence;" that is to say, either a misdemeanor or a felony.

In certain cases, a verdict of common assault may be given upon an indictment for this felony.—*Procedure Act, sec.* 191.

16. Every one who, with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence, unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing, is guilty of felony, and liable to imprisonment for life, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 21.

Indictment.—.....feloniously and unlawfully did apply and administer to one J. N. (*or cause*.....) certain chloroform with intent thereby *(intent as in the last precedent).*

If it be not certain that it was chloroform, or laudanum, that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter to the jurors aforesaid unknown." Add also counts varying the intent if necessary.

As to what constitutes an "administering, or attempting to administer," see remarks under sects. 8 and 11, *ante.*

17. Every one who unlawfully and maliciously administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 22. 24-25 *V.*, *c.* 100, *s.* 23, *Imp.*

See under next section.

18. Every one who unlawfully and maliciously administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 23. 24-25 *V.*, *c.* 100, *s.* 24, *Imp.*

Under an indictment under sec. 17, the jury may find prisoner guilty of offence provided for in sec. 18.—Sec. 190, Procedure Act.

Indictment for administering poison so as to endan-

ger life.—.....feloniously, unlawfully and maliciously did administer to one J. N. *(or cause.....)*, a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, and thereby then did endanger the life of the said J. N. against.....

Add a count stating that the defendant "did cause to be taken by J. N. a large quantity....." and if the kind of poison be doubtful, add counts describing it in different ways, and also stating it to be "a certain destructive thing, (or a certain noxious thing) to the jurors aforesaid unknown." There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."—Archbold.

Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connexion with her, is an administering with intent to injure, aggrieve or annoy, within the meaning of the statute.—*R.* v. *Wilkins, L. & C.* 89.

If the poison is administered merely with intent to injure, aggrieve or annoy, which in itself would merely amount to a misdemeanor under sect. 18, yet if it does in fact inflict grievous bodily harm, this amounts to a felony under section 17.—*Tulley* v. *Corrie*, 10 *Cox*, 640.

But to constitute this offence, the thing administered must be noxious in itself, and not only when taken in excess.—*R.* v. *Hennah*, 13 *Cox*, 547.

19. Every one who, being legally liable, either as a *husband, parent, guardian,* or *committee,* master or mistress, *nurse or otherwise,* to provide for any person as *wife, child, ward, lunatic* or *idiot,* apprentice or servant, *infant or otherwise,* necessary food, clothing ro lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, or unlawfully or maliciously does, or causes to be done, any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and liable to three years' imprisonment:

2. In any prosecution of any person under this section, for refusing or neglecting to provide necessary food, clothing or lodging for his wife or child, his wife shall be competent to give evidence as a witness, either for or against her husband, and the person charged shall be a competent witness in his own behalf.—32-33 *V., c.* 20, *s.* 25. 49 *V., c.* 51, *s.* 1. 24-25 *V., c.* 100, *s.* 26, *Imp.*

The words in *italics* are not in the Imperial Statute. They were in the bill as introduced in the House of Lords, but were struck out by the Commons.—*Greaves, Cons. Acts*, 56.

Indictment for not providing an apprentice with necessary food.....That J. S., on .....then being the master of J. N. his apprentice, and then being legally liable to provide for the said J. N., as his apprentice as aforesaid, necessary food *(clothing or lodging)*, unlawfully, wilfully and without lawful excuse did refuse and neglect to provide the same, so that the life of the said J. N. was thereby endangered *(or the health of the said J. N. has been or is likely to be permanently injured)* against the form ..... *(Add counts varying the statement of the injury sustained.)*

Prove the apprenticeship; if it was by deed, by production and proof of the execution of the deed, or in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it. The legal liability of the defendant to provide the prosecutor with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated for, from the apprenticeship itself. Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, etc., as stated in the indictment. Whether it be necessary to prove that by such neglect the prosecutor's life was endangered, or his health was or was likely to be

permanently injured, depends upon the construction which is to be put upon the statute. If the words "so that the life of such person shall be endangered, or, etc.," apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to allege "so that the life.....or health....." as the case may be, and to be prepared with evidence to sustain it. It would seem indeed to be the better opinion, that the words "so that, etc.," override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.—*Archbold.*

An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child five years old, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it: *Held*, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians, and that it is doubtful whether the second count is good in law.—*R.* v. *Rugg*, 12 *Cox*, 16.

It is to be remarked that the indictment in that case was under the common law, as, in England, the statute

applies only to masters and servants or apprentices. By the common law, an indictment lies for all misdemeanors of a public nature. Thus it lies, for a breach of duty, which is not a mere private injury, but an outrage upon the moral duties of society; as for the neglect to provide sufficient food or other necessaries for an infant of tender years, unable to provide for and take care of itself, for whom the defendant is obliged by duty to provide, so as thereby to injure its health.

But the parent must have a present means or ability to support the child; the possibility of obtaining such relief is not sufficient; and by the neglect of such duty, the child must have suffered a serious injury. An opportunity of applying to a relieving officer of the union, from which the mother would have received adequate relief on application, is not a sufficient proof of her having present means.—*R.* v. *Chandler*, *Dears.* 453; *R.* v. *Hogan*, 2 *Den.* 277; *R.* v. *Philpott*, *Dears.* 145. But these and similar cases, are no authorities under our present statute, in Canada.

In an indictment under this section, it is not necessary to allege that the defendant had the means and was able to provide the food or clothing, nor that his neglect to do so endangers the life or affects the health of his wife. —*R.* v. *Smith*, 2 *L. N.* 247.

A verdict of assault is legal on an indictment under this section charging bodily harm.—*R.* v. *Bissonnett*. *Ramsay's App. Cas.* 190.

In an indictment under sec. 19, it is not necessary to allege that by the refusal and neglect of the defendant to supply the food necessary, etc, ...to his wife, her life had been endangered, or her health permanently injured.—*R.* v. *Scott*, 28 *L. C. J.* 264. *Contrà.*—*R.* v. *Maher*, 7 *L. N.* 82. *See R.* v. *Nasmith*, 42 *U. C. Q. B.* 242.

Held, Armour, J. dissenting, that the evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her under 32-33 V., c. 20, s. 25. (See now, sub. sect. 2, *ante*.) *The Queen* v. *Bissell*, 1 *O. R.* 514.

20. Every one who unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V., c.* 20, *s.* 26. 24-25 *V., c.* 100, *s.* 27, *Imp.*

Greaves' Note. — This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or be likely to be, endangered. See *R.* v. *Hogan*, 2 *Den.* 277; *R.* v. *Cooper*, 1 *Den.* 459; 2 *C & K.* 876; *R.* v. *Philpot*, 1 *Dears*, 179; *R.* v. *Gray*, 1 *Dears. & B.* 303, which show the necessity for this enactment.

Indictment. — ..... unlawfully did abandon and expose a certain child called J. N., then being under the age of two years, whereby the life of the said child was endangered *(or whereby the health of such child was likely to be permanently injured)* against the form .....

This provision is new. In order to sustain an indictment under it, it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment; that the child was then under two years of age, and that its life was thereby endangered, and its health had been or then was likely to be permanently injured. — *Archbold*, 693.

A. and B. were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B. put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed "Mr. Carr's, Northoutgate, Gisbro, with care, to be delivered immediately," at which address the father of the child (a bastard) was then living. The hamper was carried by the ordinary passenger train, and delivered at its address the same evening. The child died three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled and the prisoners found guilty. *Held*, that the conviction should be affirmed.—*R.* v. *Falkingham*, 11 *Cox*, 475.

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out "Bill, here's your child; I can't keep it. I am gone." The father some time afterwards came out, stepped over the child and went away. About an hour and a half afterwards, his attention was again called to the child still lying in the road. His answer was, "it must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Later on, the child was found by the police in the road, cold and stiff; but, by care, it was restored to animation. *Held*, on a

case reserved, that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the statute.—*R.* v. *White*, 12 *Cox*, 83.

21. Every one who, unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burns, maims, disfigures, disables or does any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 27. 24-25 *V.*, *c.* 100, *s.* 28, *Imp.*

22. Every one who, with intent to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, unlawfully and maliciously causes any gunpowder or other explosive substance to explode, or sends or delivers to, or causes to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or puts or lays at any place, or casts or throws at or upon, or otherwise applies to any person, any corrosive fluid, or any destructive or explosive substance, and whether any bodily harm is effected or not, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20. *s.* 28. 24-25 *V.*, *c.* 100, *s.* 29, *Imp.*

23. Every one who unlawfully and maliciously places or throws in, into, upon, against or near any building, ship or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, *whether or not any explosion takes place*, and whether or not any bodily injury is effected, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 29. 24-25 *V. c.* 1,00, *s.* 30, *Imp.*

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

By Sec. 5 of the Procedure Act, no judge of the sessions nor recorder can try any offence against the above three sections.

Indictment for burning by gunpowder— ..... feloniously, unlawfully and maliciously, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn; against the form ..... (*Add counts, varying the statement of the injury, according to circumstances.*)—*Archbold.*

Indictment for sending an explosive substance with intent, etc ..... feloniously, unlawfully and maliciously did send *(or deliver to, or cause to be taken or received by)* to one J. N. a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn *(maim, disfigure or disable, or do some grievous bodily harm)* against ..... *(Add counts varying the injury and intent.)* — *Archbold.*

Indictment for throwing corrosive fluid, with intent, etc. ..... feloniously, unlawfully and maliciously did cast and throw upon one J. N. a certain corrosive fluid to wit, one pint of oil of vitriol, with intent in so doing him the said J. N. thereby then to burn.....*(Add counts varying the injury and the intent.)—Archbold.*

In *R.* v. *Crawford*, 1 *Den.* 100, the prisoner was indicted for maliciously throwing upon P. C. certain destructive matter, to wit, one quart of boiling water, with intent, etc. The prisoner was the wife of P. C., and when he was asleep, she, under the influence of jealousy, boiled a quart of water, and poured it over his face and into one of his ears, and ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, upon a case reserved, the judges held that the conviction was right.

In *R.* v. *Murrow*, 1 *Moo. C. C.* 456, it was held, where the defendant threw vitriol in the prosecutor's face, and so wounded him, that this wounding was not the "wounding" meant by the 9 Geo. 4, c. 31, s. 12.—*Archbold*, 665; but it would now fall under this statute.—The question of intent is for the jury.—*R.* v. *Saunders*, 14 *Cox*, 180.

Indictment charged defendants with having unlawfully, knowingly and willingly deposited in a room in a lodging or boarding house (described) in the city of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the inhabitants, etc., were in great danger.

Held, good, without alleging carelessness, or that the quantities deposited were so great that care would not produce safety.—*The Queen* v. *Holmes, et al.*, 5 *R. & G. (N. S.)* 498. *See c.* 150, *Rev. Stat.*

24. Every one who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm, upon any trespasser or other person coming in contact therewith, is guilty of a misdemeanor, and liable to three years' imprisonment;

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is, or afterwards comes into his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine, with such intent as aforesaid;

3. Nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as is usually set or placed with the intent of destroying vermin.—32-33 *V., c.* 20, *s.* 30. 24-25 *V., c.* 100, *s.* 31, *Imp.*

The English Act has the following additional proviso: "Provided also that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed from sunset to sunrise, any spring-gun, man-trap or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof."

Indictment.— ..... unlawfully did set and place, and caused to be set and placed, in a certain garden situate ..... a certain spring-gun which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser who might come in contact therewith, against.

Prove that the defendant placed or continued the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned, state it in the indictment, and prove it as laid. The intent can only be inferred from circumstances, as the position of the gun, the declarations of the defendant, and so forth; any injury actually done will, of course, be some evidence of the intent.—*Archbold.*

A dog-spear set for the purpose of preserving the game is not within the statute, if not set with the intention to do grievous bodily harm to human beings.—1 *Russ.* 1052.

The instrument must be calculated to destroy life or cause grievous bodily harm, and proved to be such; and, if the prosecutor, while searching for a fowl among some bushes in the defendant's garden, came in contact with a wire which caused a loud explosion, whereby he was knocked down, and slightly injured about the face, it was *held* that the case was not within the statute, as it was not proved what was the nature of the engine or substance which caused the explosion, and it was not enough that the instrument was one calculated to create alarm.—1 *Russ.* 1053.

25. Every one who, with intent to injure or to endanger the safety of any person travelling or being upon any railway, unlawfully and maliciously puts or throws upon or across such railway, any wood,

stone, or other matter or thing, or unlawfully and maliciously takes up, removes or displaces any rail, railway switch, sleepers, or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof, or unlawfully and maliciously turns, moves or diverts any point or other machinery belonging to such railway, or unlawfully and maliciously makes or shows, hides or removes any signal or light upon or near to such railway, or unlawfully and maliciously does or causes to be done any other matter or thing, with such intent, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 31. 42 *V.*, *c.* 9, *s.* 88, *part, and s.* 89. 44 *V.*, *c.* 25, *ss.* 116, *part, and* 117. 24-25 *V.*, *c.* 100, *s.* 32, *Imp.*

26. Every one who unlawfully and maliciously throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train, of which such first mentioned engine, tender, carriage or truck forms part, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 32. 24-25 *V.*, *c.* 100, *s.* 33, *Imp.*

27. Every one who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 33. 24-25 *V.*, *c.* 100, *s.* 34, *Imp.*

The words "of duty" in this last section are not in the English Act.

Indictment for endangering by wilful neglect the safety of railway passengers ..... that J. S. on ..... unlawfully did, by a certain wilful omission and neglect of his duty, that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called ..... in the parish ..... which points it was then the duty of him, the said J. S., to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway, against the form .....

(Add counts varying the statement of defendant's duty, etc.)—Archbold.

An acquittal of the felony under sec. 25 is no bar to an indictment for the misdemeanor of sec. 27.—*R.* v. *Gilmore*, 15 *Cox*, 85.

See post, remarks under sec. 37, c. 168. The forms of indictments there given may form a guide for indictments under the present section.

Prove that it was the duty of the defendant to turn the points; that he wilfully omitted and neglected to do so; and that, by reason of such omission and neglect, the safety of the passengers or other persons conveyed or being on the railway was endangered (which words will include not only passengers but officers and servants of the railway company).—*Archbold.*

In *R.* v. *Holroyd*, 2 *M. and Rob.* 339, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was that the earth and rubbish had been accidentally dropped on the railway: Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident, the defendant was not guilty; but "it was by no means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on one of the jury asking what was the meaning of the term "wilfully" used in the statute, the learned judge added "he should con-

sider the act to have been *wilfully* done, if the defendant *intentionally* placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish." This decision may afford a safe guide to the meaning of the term *wilful* in this clause. *Greaves, Cons. Acts*, 62, *on s.* 34. (27 *of our statute*).—In the other clauses, the word *wilfully* is now replaced by *unlawfully*.

On s. 33 (26 *of our statute.)*—Greaves says; (Cons. Acts, 61.) "The introduction of the word *at* extends this clause to cases where the missile fails to strike any engine or carriage. Other words were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In *R.* v. *Court*, 6 *Cox*, 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender, but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved; but now, this case would clearly come within this clause."

In *R.* v. *Bradford, Bell, C. C*, 268, it was held that a railway not yet opened for passengers, but used only for the carriage of materials and workmen, is a railway within the statute.

In *R.* v. *Bowray*, 10 *Jur.* 211, 1 *Russ.* 1058, on an indictment for throwing a stone on a railway, so as to endanger the safety of passengers, it was held that the intention to injure is not necessary, if the act was done

wilfully, and its effect be to endanger the safety of the persons on the railway.

It is not necessary that the defendant should have entertained any feeling of malice against the railway company, or against any person on the train; it is quite enough to support an indictment under the statute, if the act was done mischievously, and with a view to cause an obstruction of a train.—*R.* v. *Upton*, 5 *Cox*, 298.

Two boys went upon premises of a railway company, and began playing with a heavy cart, which was near the line. Having started the cart, it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "Let it go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it: *Held*, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge and so on to the railway, the boys might be properly convicted. *R.* v. *Monaghan*, 11 *Cox*, 608.

Indictment under sec. 26 ..... *Berkshire* (to wit). The Jurors for our Lady the Queen upon their oath present that on the *first* day of *May*, in the year of our Lord 1852 at the parish of *Goring*, in the county of *Berks*, A. B. feloniously, unlawfully, and maliciously did cast (*cast, throw, or cause to fall or strike against, into or upon*) upon a certain carriage (*engine, tender, carriage, or truck*), then and there used upon a certain railway there, called "*The Great Western Railway*," a certain large piece of wood (*any wood, stone, or other matter or*

thing) with intent thereby then and there to endanger the safety of one C. D., then and there being in *(in or upon)* the said carriage *(engine, tender, carriage or truck)* against the form of the statute in such case made and provided.

28. Every one who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whomsoever, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 34. 24-25 *V., c.* 100, *s.* 35, *Imp.*

Indictment.—.....being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said..... *(defendant)* cause certain bodily harm to be done to one J. N. against the form..... —*Archbold*, 677.

This section includes all carriages and vehicles of every description, both public and private. *Wilful* means *voluntary.—Greaves, Cons. Acts*, 63.

29. Every one who cuts or makes, or causes to be cut or made for the purpose of harvesting or obtaining ice for sale or use, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein, is guilty of a misdemeanor, and liable to be punished by fine or imprisonment, on summary conviction, before any justice of the peace or district magistrate, having jurisdiction in any city, judicial district or county within which, or on the borders of which, such navigable or other water is wholly or partly situate.—49 *V., c.* 53, *s.* 1.

30. Every one who is the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation in search of mines or quarries has been or is hereafter made of a sufficient area and depth to endanger human life, and who leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein, is guilty of a misdemeanor, and liable to be punished by fine or imprisonment or both, on summary conviction before any justice of the peace having jurisdiction in the locality in which the said mine or quarry is situate. —49 *V., c.* 53, *s.* 2.

31. If within five days after conviction for any offence referred to in either of the two sections next preceding, a suitable guard or fence is not constructed around or over the said exposed opening, to conform to the provisions of the said sections, the person liable for such omission may be again complained of and convicted for the said offence, and the plea of a former conviction therefor shall not avail to him as a relief from the said complaint and conviction.—49 *V., c.* 53, *s.* 3.

32. If any person loses his life by accidentally riding, driving, walking, skating or falling into any such hole, opening, aperture or place unguarded as is mentioned in either of the three sections next preceding, the person or persons whose duty it was to guard such hole, opening, aperture or place, in manner aforesaid, is guilty of manslaughter.—49 *V., c.* 53, *s.* 4.

33. Every one who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 35.

This clause is not in the English Act. It is in the same terms as s. 27, *ante*, except that this last one applies only to passengers by railway endangered by the unlawful act or neglect, or omission of duty.

An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action.—*2nd Report Cr. L. Com.* 14 *May*, 1846.

Mr. Starkie, one of the English Commissioners, in a separate report, objected strongly to such an enactment, and the framers of the Imperial Statutes have thought proper to leave it out.

ASSAULTS.

34. Every one who assaults any person with intent to commit any indictable offence,—or assaults, resists or wilfully obstructs any revenue or peace officer, or any officer seizing trees, logs, timber or other products thereof, in the due execution of his duty, or any person acting in aid of such officer,—or assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence,—or assaults, resists or wilfully obstructs any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 39. 43 *V.*, *c.* 28, *s.* 65, *part.* 46 *V.*, *c.* 16, *s.* 6, *part, and c.* 17, *s.* 66, *part.* 24-25 *V.*, *c.* 100, *s.* 38, *Imp.*

35. Every one who commits any assault which occasions actual bodily harm, is guilty of a misdemeanor, and liable to three year's imprisonment.—32-33 *V.*, *c.* 20, *s.* 47, *part.* 24-25 *V.*, *c.* 100, *s.* 47, *Imp.*

36. Every one who commits a common assault is guilty of a misdemeanor, and liable, if convicted upon an indictment, to one years' imprisonment, and, on summary conviction, to a fine not exceeding twenty dollars and costs, or to two months' imprisonment, with or without hard labor.—32-33 *V.*, *c.* 20, *ss.* 43, *part, and* 47, *part.* 24-25 *V.*, *c.* 100, *s.* 42-47, *Imp.*

As to costs as an additional punishment. See 248 of the Procedure Act.

On an indictment for assault and battery occasioning actual bodily harm, the defendant is not a competent witness on his own behalf under s. 216 of the Procedure Act.—*R.* v. *Richardson*, 46 *U. C. Q. B.* 375.

Indictment for assaulting a peace officer in the execution of his duty, ...in and upon one J. N., then being a peace officer, to wit, a constable *(any peace officer in the execution of his duty, or any revenue officer in the execution of his duty, or any person acting in aid of)* and then being in the due execution of his duty as such constable, did make an assault, and him, the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound and illtreat, and other wrongs to the said J. N., then did, to the great damage of the said J. N., against the form ..... *(Add a count for a common assault.)* —*Archbold.*

Prove that J. N. was a peace or revenue officer, as stated in the indictment, by showing that he had acted as such.

It is a maxim of law, that "*omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*," upon which ground it will be persumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed.—*R.* v. *Verelet*, 3 *Camp.* 432; *R.* v. *Gordon*, 1 *Leach*, 515; *R.* v. *Murphy*, 8 *C. & P.* 297; *R.* v. *Newton*, 1 *C. & K.* 469; *Taylor, on Evidence, per.* 139, 431. Prove that J. N. was in the due execution of his duty, and the assault. If you fail in proving that J. N. was a peace officer, or that he was acting lawfully as such, the defendant may be convicted of a common assault.

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, is no defence.—R. v. *Forbes*, 10 *Cox*, 362.

Revenue officers are not included in the corresponding clause of the English Act, assaults on them being, there, otherwise provided for.—*Greaves, Cons. Acts*, 65.

Indictment.— ..... in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat,

wound and ill-treat with intent him the said J. N. feloniously, wilfully and of his malice aforethought to kill and murder, and other wrongs to the said J. N. then did, to the great damage of the said J. N., against the form ..... *(Add a count for a common assault.)—Archbold.*

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances, that had the attempt succeeded, the defendant might have been convicted of the felony. If you fail proving the intent, but prove the assault, the defendant may be convicted of the common assault.—*Archbold.*

Indictment for an assault to prevent arrest ..... in and upon one J. N. did make an assault, and him, the said J. N., did then beat, wound and ill-treat with intent in so doing to resist and prevent (*resist or prevent*) the lawful apprehension of ..... *(himself or of any other person)* for a certain offence, that is to say *(state the offence generally)* against the ..... *(Count for common assault).—Archbold,* 685.

It must be stated and proved that the apprehension was lawful. See *R.* v. *Davis, L. & C.* 64. If this and the intent be not proved, a verdict of common assault may be given. But it must be remembered that resistance to an illegal arrest is justifiable,—and if, in a case, where a warrant is necessary, the officer making an arrest, has not the warrant with him, the party whom he tries to arrest, resists and assaults him, he cannot be convicted of an assault on an officer in the due execution of his office. —*Codd* v. *Cabe,* 13 *Cox,* 202.

A common assault may be prosecuted either by indictment or under the Summary Convictions Act: 1 *Burn,* 319.—1 *Russ.* 1035.

If the charge is before the magistrate on a legal complaint, and the evidence goes to prove an offence committed which he has no jurisdiction to hear and determine, as if, on a complaint of an assault, the evidence go to show that a rape or assault with intent to commit a felony has been committed, he may, if he disbelieves the evidence as to the rape or intent, convict as to the residue of it of an assault.—*Wilkinson* v. *Dutton,* 3 *B. & S.* 821; *Anon,* 1 *B. & Ad.* 382.

In this last case Lord Tenterden held that the magistrate had *found* that the assault was not accompanied by any attempt to commit felony, and that, *quoad hoc,* his decision was final.

In *R.* v. *Walker,* 2 *M. & Rob.* 446, Coltman, J., gave the same interpretation to the clause.

In *R.* v. *Elrington,* 1 *B. & S.* 688, it was held that the magistrate's certificate of dismissal is a bar to an indictment for an unlawful assault occasioning actual bodily harm, arising out of the same circumstances.—*See Wemyss* v. *Hopkins, L. R.* 10 *Q. B.* 378.

In *R.* v. *Stanton,* 5 *Cox,* 324, Erle, J., said that in his opinion, a summary conviction before justices of the peace (in England, the law requires two) is a bar to an indictment for a felonious assault, arising out of the same facts.

But a summary conviction for assault is no bar to a subsequent indictment for manslaughter, upon the death of the man assaulted, consequent upon the same assault. —*R.* v. *Morris,* 10 *Cox,* 480; *R.* v. *Basset, Greaves, Cons. Acts,* 72.

Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day, it is *primâ facie*

evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day if he alleges that such is the case. The defendant having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made and of a summons having been issued is sufficient evidence of those facts.—*R.* v. *Westley*, 11 *Cox*, 139.

When a question of title to lands arises before him, the magistrate's jurisdiction is at an end, and he cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands.—*R.* v. *Pearson*, 11 *Cox*, 493.

A person making a bonâ fide claim of right to be present as one of the public in a law court at the hearing of a suit is not justified in committing an assault upon a police constable and an official who endeavor to remove him, Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim.—*R.* v. *Eardley*, 49 *J. P.* 551.

Indictment for an assault occasioning actual bodily harm.—..... that J. S., on ..... in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, thereby then occasioning to the said J. N. actual bodily harm, and other wrongs to the said J. N. then did, to the great damage of the said J. N. against the form ..... —*Archbold.*

Indictment for a common assault.—..... that C. D., on the ....., at..... in and upon one A. B. an assault did make, and him the said A. B. then and there did beat, wound and ill-treat, and then and there to him other wrongs and injuries did, against the form.....

The defendant may be convicted of a common assault upon an indictment for occasioning actual bodily harm.—*R.* v. *Oliver, Bell, C. C.* 287; *R.* v. *Yeadon, L. & C.* 281.

The intent to do bodily harm, or premeditation, is not necessary to convict upon an indictment under this section; thus a man who commits an assault the result of which is to produce bodily harm is liable to be convicted under this section, though the jury find that the bodily harm formed no part of the prisoner's intention, and was done without premeditation, under the influence of passion.—*R.* v. *Sparrow, Bell, C. C.* 298.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass, with intent to wound or strike, presenting a loaded gun or pistol at a person within the distance to which the gun or pistol will carry, or pointing a pitchfork at a person standing within reach; holding up one's fist at him, in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against his person, will amount to an assault.—1 *Burn*, 308.

It had been said that the presenting a gun or pistol at a person within the distance to which it will carry, though in fact not loaded, was an assault, but later authorities have held that if it be not loaded it would be no assault to present it and pull the trigger.—1 *Burn, loc. cit.*

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault; therefore on an indictment for assault and battery, in which the assault is ill-

laid, if the defendant be found guilty of the battery it is sufficient.—1 *Hawkins*, 110.

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action.—1 *Burn*, 309.

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. But if A. advances in a threatening attitude with his fists clenched towards B., with an intention of striking him, so that his blow would have almost immediately reached B., if he had not been stopped by a third person, this would be an assault in point of law, though at the particular moment when A. was stopped, he was not near enough for his blow to take effect.—*Stephen* v. *Meyers*, 4 *C. & P.* 349.

To collect a number of workmen round a person who tuck up their sleeves and aprons and threaten to break his neck, if he did not go out of the place, through fear of whom he did go out, amounts to an assault. There is the intention and present ability and a threat of violence causing fear.—*Read* v. *Coker*, 13 *C. B.* 850.

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault.—*Martin* v. *Shoppee*, 3 *C. & P.* 373.

Any man wantonly doing an act of which the direct consequence is that another person is injured commits an assault at common law, though a third body is interposed between the person doing the act and the person injured. Thus to drive a carriage against another carriage in which a person is sitting, or to throw over a chair on which a person is sitting, whereby the person in the carriage or on the chair, as the case may be, is injured, is an assault. So by encouraging a dog to bite, or by wantonly riding over a person with a horse, is an assault.—1 *Burn*, 309; 1 *Russ.* 1021.

Where an act is done with the consent of the party it is not an assault; for in order to support a charge of assault, such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded; attempting therefore to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's con sent, is not an assault.—*R.* v. *Connolly*, 26 *U. C. Q. B.* 317. If the girl is between ten and twelve, the indictment in such a case should be for an attempt to commit a misdemeanor: if the girl is under ten, the indictment should be for an attempt to commit a felony.—1 *Russ.* 933, 1023; *R.* v. *Martin*, 9 *C. & P.* 213; *R.* v. *Meredith*, 8 *C. & P.* 589; *R.* v. *Cockburn* 3 *Cox*, 543; *R.* v. *Mehegan*, 7 *Cox*, 145; *R.* v. *Read*, 1 *Den.* 377; *R.* v. *Johnston*, 10 *Cox*, 114; *L. & C.* 132; *R.* v. *Ryland*, 11 *Cox*, 101; *R.* v. *Guthrie*, 11 *Cox*, 523. By sec. 183 of the Procedure Act, the defendant may be convicted of the attempt to commit the offence charged upon any indictment for any felony or misdemeanor, if the evidence warrants it, and the fact that the girl consented is immaterial, upon an indictment for an attempt to commit the felony or the misdemeanor.—*R.* v. *Beale*, 10 *Cox* 157.

In *R.* v. *Wollaston*, 12 *Cox*, 182, Kelly, C. B., said: "If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case, there was actual participation by both parties in the act done, and complete mutuality:" and the defendant was acquitted as the boys, aged above fourteen, upon whom he

was accused of having indulged in indecent practices, had been willing and assenting parties to what was done.

But if resistance be prevented by fraud, it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault.—*R.* v. *Williams*, 8 *C. & P.* 286; *R.* v. *Saunders*, 8 *C. & P.* 265.

In *R.* v. *Mayers*, 12 *Cox*, 311, it was held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting.

In *R.* v. *Lock*, 12 *Cox*, 244, upon a case reserved, it was held, that the definition of an assault that the act must be *against the will* of the patient, implies the possession of an active will on his part, and, therefore, the mere submission by a child of tender years (eight years old) to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.

In *R.* v. *Woodhurst*, 12 *Cox*, 443, on an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, it was held on the latter count that although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power the girl feels herself, is not really such consent as will have that effect; following *R.* v. *Day*, 9 *C. & P.* 722; *R.* v. *Nicholl*, *R. & R.* 130; *R.* v. *Rosinski*, 1 *Moo. C. C.* 19; *R.* v. *Case*, 1 *Den.* 580.

An unlawful imprisonment is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach

of the King's Peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society. 4 *Blackstone*, 518. It has been supposed that every imprisonment includes a battery, but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery.—1 *Russ.* 1025.

A battery in the legal acceptation of the word includes beating and wounding. *Archbold*, 659. Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to the person of a man in an angry or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, or violently jostling him out of the way.—1 *Hawkins*, *c.* 15, *sec.* 2. For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.—1 *Russ.* 1021.

The touch or hurt must be with a hostile intention, and, therefore, a touch given by a constable's staff, for the purpose of engaging a person's attention only, is not a battery. —1 *Burn*, 312.

Whether the act shall amount to an assault must in every case be collected from the intention; and if the injury committed were accidental and undesigned, it will not amount to a battery.—1 *Russ.* 1025.

Striking a horse, whereon a person is riding and whereby he is thrown, is a battery on him, and the rider is justified in striking a person who wrongfully seizes the reins of his horse, and in using all the violence necessary to make him loose his hold. A wounding is where the violence is such that the flesh is opened; a mere scratch may constitute a wounding.—1 *Burn*, *loc. cit.*

The actual bodily harm mentioned in this section would include any hurt or injury calculated to interfere with the health or comfort of the prosecutors; it need not be an injury of a *permanent* character, nor need it amount to what would be considered to be *grievous* bodily harm.—*Archbold*, 660.

Even a mayhem is justifiable if committed in a party's own defence. But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary, he commits an assault and battery. And in no case should the battery be more than necessary for self defence.—1 *Burn*, 312.

The mere offer of a person to strike another is sufficient to justify the latter's striking him: he need not stay till the other has actually struck him.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant and a servant in defence of his master; but in all these cases the battery must be such only as was necessary to the defence of the party or his relation, for it were excessive, if it were greater than was necessary for mere defence; the prior offence will be no justification. So a person may lay hands upon another to prevent him from fighting, or committing a breach of the peace, using no unnecessary violence. If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service, and turning them out of church. — 1 *Burn*, 314.

A parent may in a reasonable manner chastise his child or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves.—1 *Burn loc. cit.*

So might a military officer order a moderate correction for disobedience of orders.—1 *Burn, loc. cit.*

A party may justify a battery by showing that he committed it in defence of his possession, as, for instance, to remove the prosecutor out of his close or house,—or to remove a servant, who, at night, is so misconducting himself as to disturb the peace of the household,—or to remove a person out of a public house, if the party be misconducting himself, or to prevent him from entering the defendant's close or house,—to restrain him from taking or destroying his goods,—from taking or rescuing cattle, etc., in his custody upon a distress,—or to retake personal property improperly detained or taken away,—or the like.

In the case of a trespass in law merely *without actual force*, the owner of the close, or house, etc., must first request the trespasser to depart, before he can justify, laying his hands on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. But if the trespasser use force, then the owner may oppose force to force; and in such a case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer to a justification in defence of his possession, it may be shown that the battery was excessive, or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like.—1 *Burn*, 313; *Archbold*, 661. On this part of

the subject, 1 Russ. 1028, has the following remarks: "It should be observed with respect to an assault by a man on a party endeavoring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such a case to oppose force by force; therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence, the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without previous request."

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence; but a subsequent decision has established the contrary.—1 *Russ.* 1030.

If a man, who suffers from gonorrhœa, has connection with a woman, ignorant of his disease, and communicates it to her, this is an assault occasioning actual bodily harm. —*R.* v. *Sinclair*, 13 *Cox*, 28; *Contrà Hegarty* v. *Shine*, 14 *Cox*, 124, 145.

There is a manifest distinction between endeavoring to turn a person out of a house, into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first case a request to depart is necessary but not in the latter.

In a criminal prosecution by the wife of O., for assault made upon her in entering her husband's house, the defence

was that she had no right to enter, and that her intention was to take away property which she had no legal right to take, but *held*, on a case reserved, that this would not justify the assault, there being no previous request made of her to leave the house, nor any statement of her intention, or of an attempt to take anything.—*The Queen* v. *O'Neill*, 3 *P. & B. (N. B.)* 49.

An indictment declaring that the prisoner did "beat, wound and ill-treat" A. was held to be substantially an indictment for a common assault.—*The Queen* v. *Shannon*, 23 *N. B. Rep.* 1.

RAPE.

37. Every one who commits the crime of rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years.—*36 V., c. 50, s. 1, part. 24-25 V., c. 100, s. 48, Imp.*

38. Every one who assaults any woman or girl with intent to commit rape is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding seven years and not less than two years.—*36 V., c. 50, s. 1, part.*

This last section is not in the Imperial Act.

Sect. 226 of the Procedure Act enacts what constitutes a sufficient proof of carnal knowledge.

Rape is not triable at quarter sessions.—Sec. 4 Procedure Act. See Appendix; note on Rape by Greaves.

Indictment.— ..... That A. B., on ..... in the year ..... in and upon one C. D. in the peace of God and Our Lady the Queen, then and there being, violently and feloniously did make an assault, and her, the said C. D., violently and against her will feloniously did ravish and carnally know; 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.*

Averment of woman's age unnecessary.—2 *Bishop, Cr. Proc.* 954.

Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will.—1 *Russ.* 904.

To constitute the offence there must be a penetration, or *res in re*, in order to constitute the "carnal knowledge" which is a necessary part of this offence. But a very slight penetration is sufficient, though not attended with the deprivation of the marks of virginity.—1 *Russ.* 912.

A boy under fourteen years of age is presumed by law incapable to commit a rape, and therefore he cannot be guilty of it, nor of an assault with intent to commit it; and no evidence is admissible to show that, in point of fact, he could commit the offence of rape. But on an indictment for rape he may be found guilty of a common assault.—*R.* v. *Brimilow*, 2 *Moo. C. C.* 122. A husband cannot be guilty of a rape upon his wife. The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.

It will not be any excuse that the woman was first taken with her own consent if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favor of the party accused, especially in doubtful cases. The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded.—1 *Russ.* 905.

Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband does not amount to a rape.—*R.* v. *Williams*, 8 *C. & P.* 286; *R.* v. *Clarke, Dear.* 397; 1 *Russ.* 908; *R.* v. *Barrow*, 11 *Cox*, 191; *R.* v. *Francis*, 13 *U. C. Q. B.* 116; *Contrà*, *R.* v. *Dee*, 15 *Cox*, 579. *But it is an assault.* See cases, *ante*, under sec. 36. In England, now, by 48-49 V., c. 69, it is rape.

A woman, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened, she found the man was not her husband, and awoke her husband. The Court of Criminal Appeal held that a conviction for a rape upon this evidence could not be sustained.—*R.* v. *Barrow*, 11 *Cox*, 191.

See, also, R. v. *Jackson*, *R. & R.* 487; and *contrà R.* v. *Young*, 14 *Cox*, 114.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty.—*R.* v. *Barratt*, 12 *Cox*, 498. In *R.* v. *Fletcher*, 10 *Cox*, 248, the law was so given, but the evidence of non-consent was declared insufficient.

If a woman is incapable of resisting, it is no defence that she did not resist.—*R.* v. *Fletcher*, 8 *Cox*, 131; *Bell, C. C.* 63; *R.* v. *Camplin*, 1 *Den.* 89; *R.* v. *Flattery*, 13 *Cox*, 388. If a man has or attempts to have connection

with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape.—*R.* v. *Mayers*, 12 *Cox*, 311.

It is clear that the party ravished is a competent witness. But the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus if she be of good fame; if she presently discovered the offence, and made search for the offender; if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the act was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if without being under the control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned.—1 *Russ.* 692.

The character of the prosecutrix, as to general chastity, may be impeached by *general* evidence, as by showing her general light character, etc., but evidence of connection with other persons than the prisoner cannot be received.

In *R.* v. *Hodgson*, *R.* & *R.* 211, the woman in the witness box was asked: Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person (named). The Court ruled that she was not obliged to answer the question. In the same case, the prisoner's counsel offered a witness to prove that the woman had been caught in bed about a year before this charge with a young man. The Court ruled that this evidence could not be received. These rulings were subsequently maintained by all the judges.

Although you may cross-examine the prosecutrix as to particular acts of connection with other men (and she need not answer the question, unless she likes), you cannot, if she deny it, call witnesses to contradict her.—*R.* v. *Cockcroft*, 11 *Cox*, 410; *R.* v. *Laliberté*, 1 *S. C. R.* 117.

But she may be cross-examined as to particular acts of connection with the prisoner, and if she denies them, witnesses may be called to contradict her.—*R.* v. *Martin*, 6 *C.* & *P.* 562; *R.* v. *Riley*, 16 *Cox*, 191.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S. *Held*, that S. could not be examined to contradict her upon this answer. This rule applies to cases of rape, attempt to commit a rape, and indecent assault in the nature of attempts to commit a rape.—*R.* v. *Holmes*, 12 *Cox*, 137.

This decision is by the Court of Criminal Appeal, composed of five judges, confirming *R.* v. *Hodgson*, and *R.* v. *Cockcroft*. The case of *R.* v. *Robins*, 2 *M. and Rob.* 512 is now overruled.—*Taylor, Evidence, par.* 336.

It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation

easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.—1 *Hale*, 634.

Upon an indictment under section 37, the jury may find the prisoner guilty of an attempt to commit a rape. —*R.* v. *Hapgood*, 11 *Cox*, 471; or may find a verdict of common assault.

Under section 38, for an assault with intent to commit rape (misdemeanor), the indictment may be as follows: ..... in and upon one A. B., a woman (or girl), unlawfully did make an assault, with intent, her, the said A. B., violently and against her will, feloniously, to ravish and carnally know, against the form ..... *(Add a count for a common assault).—Archbold.*

If upon trial for this misdemeanor, the felony under section 37 be proved, the defendant is not therefore entitled to an acquittal.—*Sec.* 184 *Procedure Act.*

On an indictment for an assault with intent to commit a rape, Pateson, J., held that the evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix, was not receivable to show the prisoner's intent; also, that in order to convict of assault with intent to commit rape, the jury must be satisfied, not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part.—*R.* v. *Loyd*, 7 *C. & P.* 318.

When a man is charged with rape, all that the woman said to other persons in his absence shortly after the alleged offence is admissible in evidence.—*R.* v. *Wood*, 14 *Cox*, 47. See *R.* v. *Little*, 15 *Cox*, 319.

In *R.* v. *Gisson*, 2 *C. & K.* 781, it was held that an

acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault with intent to commit a rape, because a verdict for the attempt to commit the offence could not be received on an indictment changing the offence itself. But that case was before 14-15 V., c. 156, s. 9, Imp. (Sec. 183 Proced. Act), which gives the right to convict of an attempt upon an indictment charging the offence. And the case of *R.* v. *Dungey*, 4 *F. & F.* 99, is a clear authority, that upon a trial for rape the defendant may be found guilty of an attempt to commit it. In fact there can now be no doubt upon this; sect. 183 of the Procedure Act is clear. See cases cited under that section.

An assault with intent to commit a rape, is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force and against the will of the woman.—*R.* v. *Stanton*, 1 *C. & K.* 415; *R.* v. *Wright*, 4 *F. & F.* 967; *R.* v. *Rudland*, 4 *F. & F.* 495; *R.* v. *Dungey*, 4 *F. & F.* 99.

An indictment for an attempt to commit rape is always in the form of an assault with intent to commit rape, as in *R.* v. *Riley*, 16 *Cox*, 191, for instance, and in *R.* v. *Dungey*, *ubi supra*, the judge charged the jury that they could, on an indictment for rape, find the prisoner guilty of an assault with intent to commit rape.

Sec. 38, *ante*, does not create the offence of attempt to commit a rape; that is and has always been a misdemeanor at common law. But this section merely provides for the punishment of the offence, and makes it greater than it would be either at common law or by sec. 34 of the same Act. The same as to sec. 37. It does not create the crime of rape, but merely provides for its punishment,

and as in cases of murder, larceny, sodomy, etc., the offence remains what it is at common law.

In a case of *R.* v. *John*, in British Columbia, November, 1887, upon a writ of error, the Supreme Court were divided on the question whether, upon an indictment for rape, the prisoner in that case had been lawfully convicted of an assault with intent to commit rape. An appeal has since been taken to the federal Supreme Court and is now pending.

In *R.* v. *Wright*, 4 *F. & F.*, 967, the prisoner was indicted for rape and for assault with intent to commit rape. It is now allowed, to join a felony with a misdemeanor in all cases where by statute, a verdict for the misdemeanor may be received on an indictment for the felony, though altogether unnecessary.

In a case of rape, the counsel for the prosecution should not tell the jury that to acquit the prisoner is to find the woman guilty of perjury.—*R.* v. *Rudland, and R.* v. *Puddick*, 4 *F. & F.* 495, 497.

39. Every one who unlawfully and carnally knows and abuses any girl under the age of ten years is guilty of felony, and liable to imprisonment for life or for any term not less than five years.—40 *V.*, *c.* 28, *s.* 2. 48-49 *V.*, *c.* 69, *s.* 4, *Imp.*

Indictment— ..... in and upon one A. N., a girl under the age of ten years, to wit, of the age of nine years, feloniously did make an assault, and her, the said A. N., then and there feloniously did unlawfully and carnally know and abuse, against the form .....—*Archbold*, 708.

The evidence is the same as in rape, with the exception that the consent or non-consent of the girl is immaterial. —*Archbold*, 709.

Upon the trial of an indictment under this clause, the jury may, under sect. 191 of the Procedure Act, find the defendant guilty of a common assault, in certain cases. But no such verdict can be returned, if the girl assented. —*R.* v. *Read*, 1 *Den.* 377; *R.* v. *Connolly*, 26 *U. C. Q. B.* 317; *R.* v. *Roadley*, 14 *Cox*, 463.

Under sect. 183 of the Procedure Act, the defendant may be convicted of an attempt to commit the offence charged, if the evidence warrants it. A boy under fourteen years of age cannot be convicted of this offence, nor of the attempt to commit it.—1 *Russ.* 931.

40. Every one who unlawfully and carnally knows and abuses any girl above the age of ten years and under the age of twelve years is guilty of a misdemeanor, and liable to seven years' imprisonment. —31-33 *V.*, *c.* 20, *s.* 52. This offence is now in England a felony.—48-49 *V.*, *c.* 69, *s.* 4, *Imp.*

Indictment.— ..... in and upon one A. N., a girl above the age of ten years and under the age of twelve years, to wit, of the age of eleven years, unlawfully did make an assault, and her the said A. N. did then unlawfully and carnally know and abuse, against the form ..... —*Archbold*, 709.

Same evidence as in rape; but it will be no defence that the girl consented.

Remarks under preceding section are applicable here.

An indictment charged that G. in and upon D., a girl above the age of ten, and under the age of twelve, unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse. *Held*, by the Court of Criminal Appeal, that the indictment contained two charges, one of common assault, and the other of the statutable misdemeanor (under this section), and that the prisoner might be convicted of a common assault upon it, *as*

no consent on the part of the girl had been proved.—*R.* v. *Guthrie*, 11 *Cox*, 522 ; *R.* v. *Catherall*, 13 *Cox*, 109.

On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault: *Held*, Lush, J., on the count for assault, that although consent would be a defence, consent extorted by terror, or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.—*R.* v. *Woodhurst*, 12 *Cox*, 443 ; *R.* v. *Lock*, 12 *Cox*, 244.

Upon an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence.—*R.* v. *Ryland*, 11 *Cox*, 101 ; *R.* v. *Catherall*, 13 *Cox*, 109.

The punishment would then be under next section.—*R.* v. *Meredith*, 8 *C. & P.* 589 ; *R.* v. *Webster*, 9 *L. C. R.*, 196.

If the girl has consented, there can be no verdict of assault.—*R.* v. *Johnston*, *L. & C.* 632 ; 1 *Russ.* 934 ; *R.* v. *Cockburn*, 3 *Cox*, 543; *R.* v. *Martin*, 2 *Moo. C. C.* 123; *R.* v. *Wollaston*, 12 *Cox*, 180.

But there is a difference between consent and submission.—1 *Russ.* 934; *R.* v. *Lock*, 12 *Cox*, 244.

If upon an indictment for having a carnal knowledge of a girl between ten and twelve years of age, it appear that in fact the girl was under ten, the indictment cannot be amended to make it agree *quoad hoc* with the proof, and the prisoner must be acquitted.—*R.* v. *Shott*, 3 *C. & K.* 206.

An indictment for the felony of rape still lies against one who ravishes a female between the age of ten and twelve.—*R.* v. *Dicken*, 14 *Cox*, 8; *R.* v. *Radcliffe*, 15 *Cox*, 127.

41. Every one who commits any indecent assault upon any female, or attempts to have carnal knowledge of any girl under twelve years of age, is guilty of a misdemeanor and liable to imprisonment for any term less than two years, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 53. 24-25 *V.*, *c.* 100, *s.* 52 ; *and* 48-49 *V.*, *c.* 69, *s.* 4, *Imp.*

Indictment.—..... one A. D. unlawfully and indecently did assault, and her, the said A. D., did then beat, wound and ill treat, and other wrongs to the said A. D. did, to the great damage of the said A. D., against the form. —*Archbold.*

Sec. 140 of the Procedure Act applies to indictments for indecent assaults.

Consent is immaterial upon an indictments for the attempt to have carnal knowledge of a girl under twelve, but upon an indictment for indecent assault, if the girl, although under twelve, consented, the prisoner must be acquitted, as there can be no assault on a person consenting.—*R.* v. *Holmes*, 12 *Cox*, 137. *R.* v. *Paquet*, 9 *Q. L. R.* 361. See *R.* v. *Roadley*, 14 *Cox*, 463. See now as to England, 43-44 V., c. 45, Imp.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault evidence was tendered of the conduct of the prisoner towards her subsequent to the assault.

Held, that the evidence was admissible as tending to show the indecent quality of the assault, and as being, in effect, a part or continuation of the same transaction as that with which the prisoner was charged.—*R.* v. *Chute*, 46 *U. C. Q. B.* 555.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial ; but in such a

case there can be no conviction for assault if there was consent.—*R.* v. *Connolly*, 26 *U. C. Q. B.* 317.

42. Every one who,—

(*a.*) From motives of lucre, takes away or detains against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, any woman of any age, who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, or—

(*b.*) Fraudulently allures, takes away or detains such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person,—

Is guilty of felony, and liable to fourteen years' imprisonment.

2. Every one convicted of any offence under this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place, such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information, at the instance of the Attorney General for the Province in which the property is situate, appoints.—32-33 *V., c.* 20, *s.* 54. 24-25 *V., c.* 100, *s.* 53, *Imp.*

On the trial of an indictment for an offence under sub-sec. *b.* of this section, it is not necessary to prove that the accused knew that the girl he abducted had an interest in any property.—*R.* v. *Kaylor*, 1 *Q. B. R.* 364.

It is not necessary that an actual marriage or defilement should take place. Under the first part of this section, the taking or detaining must be *from motives of lucre* and *against the will of the woman*, coupled with an intent to marry or carnally know her or cause her to be married or carnally known by another person.

Indictment under first part of this section.—.....

feloniously and from motives of lucre did take away and detain (*"take away* or *detain"*) one A. N. against her will, she, the said A. N., then having a certain present and absolute interest in certain real estate (*any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate*) with intent her, the said A. N., to marry (*or carnally know her, or cause her to be married or carnally known by.....*) against the form ..... (*Add a count stating generally the nature of some part of the property, and if the intent be doubtful, add counts varying the intent.*) *Archbold*, 699. The value of the property should be stated. See another form, in Chitty, C. L. 3rd V., 818.

Indictment under second part of this section.—..... feloniously and fraudulently allured (*took away or detained*) one A. B. out of the possession and against the will of C. D., her father, she, the said A. B., then being under the age of twenty-one years, and having a certain present interest in.....with intent, her, the said A. B., to marry (*or carnally know, or cause to be married or, etc., etc., etc.,*) contrary to the statute, etc. (*Add counts, if necessary, varying the statement as to the property, possession, or intents.*)

Under the second part of the section, the offence consists in the fraudulent allurement of a woman under twenty-one out of the possession of or against the will of her parent or guardian, coupled with an intent to marry or carnally know her, or cause her to be married or carnally known by another person, but, for this offence, no motives of lucre are mentioned, nor should it have been committed against the will of the woman, though she must be an heiress, or such a woman as described in the first lines of this section.

The taking under the first part of this section must be against the will of the woman; but it would seem that, although it be with her will, yet, if that be obtained by fraud practised upon her, the case will be within the Act; for she cannot whilst under the influence of fraud be considered to be a free agent.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, the offence is complete, because if she so refuse, she may from that time as properly be said to be taken against her will as if she had never given her consent at all, for, till the force was put upon her, she was in her own power.—1 *Burn*, 8.

Moreover the *detaining against* her will is by itself an offence.

It seems, also, it is not material whether a woman so taken contrary to her will at last consents thereto or not, for if she were in force at the time, the offence is complete at the time of the taking, and the offender is not to escape from the provisions of the statute by having prevailed over the weakness of the woman by such means.

The second part of this section expressly contemplates the case of a girl, under twenty-one, whose co-operation has been obtained by influence over her mind, and who has been taken out of the possession of her parent or guardian by means of a fraud practised upon them and against their will, or by force, against their will, but with her consent. If a girl, under twenty-one, is taken away or detained against her own will, or her consent is obtained through fear, that case would be within the first part of this section. The woman, though married, may be a witness against the offender.—*Archbold*, 700.

"If, therefore," says Taylor, on Evidence, No. 1236, "a

"man be indicted for the forcible abduction of a woman "with intent to marry her, she is clearly a competent "witness against him, if the force were continuing against "her till the marriage. Of this last fact also she is a com- "petent witness, and the better opinion seems to be that "she is still competent, notwithstanding her subsequent "assent to the marriage and her voluntary co-habitation: "for otherwise, the offender would take advantage of his "own wrong."

Under sec. 183 of the Procedure Act, the prisoner charged with the felony aforesaid may be found guilty of an attempt to commit the same, which is a misdemeanor at common law, *Roscoe*, 283, and punishable by fine, or imprisonment, or both. The Court may also, in misdemeanors, require the defendant to find sureties to keep the peace and be of good behaviour, at common law, and may order him to be imprisoned until such security is found—*R.* v. *Dunn*, 12 *Q. B.* 1026.—*Greaves' Cons. Acts*, 7. *See sects.* 24 *and* 31, *c.* 181, *post.*

Under sec. 191 of the Procedure Act, the prisoner may be acquitted of the felony, and found guilty of an assault, if the evidence warrants such finding.

43. Every one who, by force, takes away or detains against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, is guilty of felony, and liable to fourteen years' imprisonment. —32-33 *V.*, *c.* 20, *s.* 55. 24-25 *V.*, *c.* 100, *s.* 54, *Imp.*

The observations upon the last section will apply for the most part to this, which provides a very proper protection to women who happen to have neither any present nor future interest in any property.—*Greaves' Cons. Acts*, 80.

It may be that manual force may not in all cases be necessary, and, that though no actual force was used, yet,

if the taking away was accomplished under the fear and apprehension of a *present immediate threatened* injury, depriving the woman of freedom of action, the statute would be satisfied.—1 *Burn*, 9.

Indictment.— ..... feloniously and by force did take away *(or detain)* one A. B. against her will, with intent her, the said A. B., to marry ..... *(or .....)* against the form of the statute ..... *(If the intent is doubtful, add a count stating it to be to "carnally know," or to cause her to be married to one N. S., or to some persons to the jurors unknown, or to cause her to be carnally known by, etc.)*—1 *Burn*, 12.

A verdict for assault or for an attempt to commit the offence charged, may be given, as under the next preceding section.

ABDUCTION OF GIRLS UNDER SIXTEEN.

44. Every one who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 56. 24-25 *V.*, *c.* 100, *s.* 55, *and* 48-49 *V.*, *c.* 69, *s.* 7, *Imp.*

The intent to marry, or carnally know is not an ingredient of this offence. The only intent which is material is the intent to deprive the parent or legal guardian of the possession of the child. — *Roscoe*, 248. No motives of lucre are necessary. A woman may be guilty of this offence.

It is immaterial whether the girl consents or not, and the taking need not be by force, actual or constructive. —*R.* v. *Mankletow*, 1 *Russ.* 954; *Dears*, 159. Where a parent countenances the loose conduct of the girl,

the jury may infer that the taking is not against the parent's will. Ignorance of the girl's age is no defence.— 1 *Russ.* 952; *R.* v. *Robins*, 1 *C. & K.* 456. It is not necessary that the taking away should be for a permanency; it is sufficient if for the temporary keeping of the girl.— *R.* v. *Timmins*, *Bell*, *C. C.* 276.

On an indictment for abducting a girl under sixteen years of age, it appeared that the girl, when abducted, had left her guardian's house for a particular purpose with his sanction: *Held*, that she had not ceased to be in his possession under the statute.— *R.* v. *Mondelet*, 21 *L. C. J.* 154.

On a trial for taking an unmarried girl under the age of sixteen out of the possession of her guardian:

Held, 1st. That evidence of her being badly treated by her guardian is inadmissible. 2nd. That secondary evidence of the age of the child is admissible. 3rd. That in this case the defendant is not guilty of taking the child out of the possession of the guardian.—*R.* v. *Hollis*, 8 *L. N* 299.

To pick up a girl in the streets and take her away is not to take her out of the possession of any one. The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her, and she returned home to her father. In the absence of any evidence that the prisoner knew, or had reason for knowing, or [illegible] believed that the girl was under the care of her father at the time, *held* by the Court of Criminal Appeal that a conviction under this section could not be sustained.—*R.* v. *Green*, 3 *F. & F.* 274; *R.* v. *Hibbert*, 11 *Cox* 246.

One who takes an unmarried girl under the age of sixteen

years out of the possession and against the will of her father or mother is guilty of this offence, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go.—*R.* v. *Booth*, 12 *Cox*, 231; *R.* v. *Kipps*, 4 *Cox*, 167; *R.* v. *Prince*, 13 *Cox*, 138.

The defence in Booth's case was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent. He was found guilty and sentenced.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return; it is not necessary to prove that the prisoner knew the girl to be under sixteen; the fact of the girl being a consenting party cannot absolve the prisoner from the charge of abduction; this section is for the protection of parents.—*R.* v. *Mycock*, 12 *Cox*, 28; *R.* v. *Olifier*, 10 *Cox*, 402; *R.* v. *Miller*, 13 *Cox*, 179.

Indictment.—.....unlawfully did take *(or cause to be taken)* one A. B. out of the possession and against the will of E. F., her father, she, the said A. B., being then an unmarried girl, and under the age of sixteen years, to wit, of the age of ..... against the form, etc. *(if necessary add a count stating E. F. to be a person having the lawful care and charge of the said A. B.. or that the defendant unlawfully did cause to be taken one .....)*—*Archbold. See R.* v. *Johnson*, 15 *Cox*, 481.

It is no defence to an indictment under this section that the prisoner believed the girl to be eighteen.—*See R.* v. *Prince*, 13 *Cox*, 138.

It was held in *R.* v. *Bishop*, 5 *Q. B. D.* 259, that under a statute which prohibits the receiving of lunatics for treatment in a house not duly licensed, the owner of a house who had received lunatics was guilty of the offence created by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

"I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have. In old times, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created."—*Per Stephen, J. Cundy* v. *Lecocq*, 13 *Q. B. D.* 207.

CHILD STEALING.

45. Every one who,—

(*a*) Unlawfully, either by force or fraud, leads or takes away or decoys or entices away, or detains any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article belongs, or—

(*b*) With any such intent receives or harbors any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained, as in this section before mentioned,—

Is guilty of felony, and liable to seven years' imprisonment;

2. No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof. —32-33 *V., c.* 20, *s.* 57. 24-25 *V., c.* 100, *s.* 56, *Imp.*

See R. v. *Johnson*, 15 *Cox*, 481; *and R.* v. *Barrett*, 15 *Cox*, 658.

Indictment.—..... feloniously and unlawfully did by force *(or fraud)* lead and take away *(lead or take away, or decoy, or entice away, or detain)* one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one A. S., the father of the said A. N., of the possession of the said A. N., his said child, against.....And the jurors ..... that the said ..... afterwards, to wit, on the day and year aforesaid, feloniously and unlawfully did by force *(or fraud)* lead and take away *(or etc..)* the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then feloniously to steal, take and carry away divers articles, that is to say ..... then being upon and about the person of the said child, against ..... *(Add counts stating that the defendant did by fraud entice away,* or *did by fraud detain,* or *did by force detain,* if necessary*).—Archbold.*

Upon the trial of any offence contained in this section, the defendant may, under sec. 183 of the Procedure Act, be convicted of an attempt to commit the same.—1 *Russ.* 966.

All those claiming a right to the possession of the child are specially exempted from the operation of this section, by the proviso.

KIDNAPPING.

46. Every one who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent,—

(*a.*) To cause such other person to be secretly confined or imprisoned in Canada against his will,—

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

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

Is guilty of felony, and liable to seven years' imprisonment;

2. Upon the trial of any offence under this section, the non-resistance of the person so kidnapped or unlawfully confined thereto shall not be a defence, unless it appears that it was not caused by threats, duress or force or exhibition of force.—32-33 *V., c.* 20, *ss.* 69 *and* 70.

At common law, kidnapping is a misdemeanor punishable by fine and imprisonment.—1 *Russ.* 962.

The above sections are taken from the 29 V., c. 14. (1865).

The forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish and also by the civil law. This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships.— 4 *Blackstone,* 219.

By our statute, transportation to a foreign country is not necessarily an ingredient in this offence.—See sec. 19 of Procedure Act, *post,* as to venue in such cases.

Under sec. 183 of the Procedure Act, the defendant may be found guilty of an attempt to kidnap, upon an indictment for kidnapping.

A verdict of assault may also be given, if the evidence warrants it.—*Sec.* 191 *Procedure Act.*

Indictment.— ..... with force and arms unlawfully and feloniously an assault did make on one A. B., and did then and there, without lawful authority, feloniously and forcibly seize and imprison the said A. B. within the Dominion of Canada (*or confine or kidnap*) with intent the said A. B. unlawfully, forcibly and feloniously to cause to be unlawfully transported out of Canada, against his will ..... against the form .....—2 *Bishop, Cr. L.* 750; 2 *Bishop, Cr. Proc.* 690.

Held, on the trial of an indictment for kidnapping

under 32-33 V., c. 20, s. 69, that the intent required applies to the seizure and confinement as well as to the kidnapping, and the indictment should state such intent.

Held, also, that an amendment changing the name Rufus Bratton to James Rufus Bratton was properly made.—*Cornwall* v. *The Queen*, 33 *U. C. Q. B.* 106.

ABORTION.

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

Every one who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent,—

Is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 59. 24-25 *V.*, *c.* 100, *s.* 58, *Imp.*

Greaves' Note.—This clause is framed on the 1 V., c. 85, s. 6.

The first part of it is new, and extends the former enactment to any woman, who, being with child, attempts to procure her own miscarriage.

The second part in terms makes it immaterial whether the woman were or were not with child, in accordance with the decision in *R.* v .*Goodhall*, 1 *Den.* 187

Indictment for woman administering poison to herself, with intent or, etc. ..... that C. D. late of ..... on ..... at ..... and being then with child, with intent to procure her own miscarriage, did unlawfully and feloniously administer to herself one drachm of a certain poison (or *noxious thing)* called ..... *(or did unlawfully and feloniously use a certain instrument* or *means) to wit,* ..... contrary to the statute ..... —1 *Burn*, 16.

Indictment for administering poison to a woman, with intent to procure abortion.—..... that C. D. on ..... unlawfully and feloniously did administer to (or *cause to be taken by)* one S. P. one ounce weight of a certain poison, called ..... *(or noxious thing called.....)* with intent then and thereby to cause the miscarriage of the said S. P. contrary to the statute. ..... 1 *Burn*, 16.

Indictment for using instrument with the like intent. —..... unlawfully and feloniously did use a certain instrument called a ..... upon the person of one S. P., with intent then and thereby to cause the miscarriage of the said S. P. .....—1 *Burn*, 16.

In order to constitute an offence under the first part of section 47, the woman must be with child, though not necessarily quick with child. The poison or other noxious thing must have been administered, or the instrument used, with the intent to procure the miscarriage. It must be proved, according to the fact stated in the indictment, that the woman administered to herself, etc., or that the defendant administered, etc., or caused to be taken, etc., the drug, as therein stated, and that the drug was noxious, or that the defendant used the instrument, *or other means*, mentioned in the manner described in the indictment.—1 *Burn*, 14.

Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix takes it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within the statute.—*R.* v. *Wilson, Dears & B.* 127; *R.* v. *Farrow, Dears & B.* 164.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown with intent to procure miscarriage. C. being in the family way, went to the male prisoner, who said he would give

her some stuff to put her right, and gave her a light colored medicine, and told her to take two spoonfuls till she became in pain. She did so and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L. and gave her some more of the stuff, which he said would take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain and told the female prisoner. Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff, in the female prisoner's presence, and told her to take it like the other. She did so and became very ill, and the next day had a miscarriage, the female prisoner attending her and providing all things: *Held*, that there was evidence that the stuff administered was a noxious thing within the 24-25 V., c. 100, s. 58, Imp. Also that there was evidence of the female being an accessory before the fact, and a party, therefore, to the administration of the noxious thing.—*R.* v. *Hollis*, 12 *Cox*, 463.

Under the second part of this section, the fact of the woman being pregnant is immaterial. *R.* v. *Goodall*, 1 *Den*, 187. But the prisoner must have believed her to be pregnant, otherwise there could be no intent under the statute. Under an indictment for this offence the prisoner may be convicted of an attempt to commit it. Sec. 183 Procedure Act.—*See R.* v. *Cramp*, 14 *Cox*, 390 *and* 401.

48. Every one who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, is guilty of a misdemeanor, and liable to two years' imprisonment.—32-33 *V., c.* 20, *s.* 60. 24-25 *V., c.* 100, *s.* 59, *Imp.*

Indictment ..... unlawfully did procure *(supply or procure)* a large quantity, to wit, two ounces of a certain noxious thing called savin, he the said *(defendant)* then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N. against the form ..... — *Archbold.*

The drug supplied must be a poison or noxious thing, and the supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against this enactment.—*R.* v. *Isaacs*, *L. & C.* 220.

In order to constitute the offence within the meaning of this section, it is not necessary that the intention of employing the noxious drug should exist in the mind of the woman: it is sufficient, if the intention to procure abortion exists in the mind of the defendant.—*R.* v. *Hillman*, *L. & C.* 343.

The prisoner may be convicted of an attempt to commit this offence, upon an indictment under this section. Sect. 183 of the Procedure Act.

Supplying a noxious thing with the intent to procure abortion is an offence under this section, whether the woman is pregnant or not.—*R.* v. *Titley*, 14 *Cox*, 502.

Giving oil of savin to procure abortion is indictable under 32-33 V., c. 20, s. 60.—*R.* v. *Stitt*, 30 *U. C. C. P.* 30.

CONCEALING THE BIRTH OF A CHILD.

49. Every one who, by any secret disposition of the dead body of any child of which any woman is delivered, whether such child died before, at or after its birth, endeavors to conceal the birth thereof, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 61, *part.* 24-25 *V., c.* 100 *s.* 60, *Imp.*

See Greaves' note under sec. 188 of the Procedure Act.

Indictment.— ..... that A. S. on ..... was delivered of a child; and that the A. S., being so delivered of the said child as aforesaid, did then unlawfully endeavor to conceal the birth of the said child by secretly burying *(by any secret disposition of)* the dead body of the said child, against the form, etc., ... *(State the means of concealment specially, when it is otherwise than by secret burying.)*—*Archbold.*

In *R.* v. *Berriman*, 6 *Cox*, 388, Erle, J., told the jury that this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. But in a later case, *R.* v. *Colmer*, 9 *Cox*, 506, Martin, J., ruled that the offence is complete on a fœtus delivered in the fourth or fifth month of pregnancy, not longer than a man's finger, but having the shape of a child.

Final disposing of the body is not material, and hiding it in a place from which a further removal was contemplated, would support the indictment.—*R.* v. *Goldthorpe*, 2 *Moo. C. C.* 244; *R.* v. *Perry*, *Dears.* 471.

Leaving the dead body of a child in two boxes, closed but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body, within the meaning of the statute.—*R.* v. *George*, 11 *Cox*, 41.

What is a secret disposition of the dead body of a child within the statute is a question for the jury, depending on the circumstances of the particular case: where the dead body of a child was thrown into a field, over a wall 4½ feet high, separating the yard of a public house from the field, and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held, on a case reserved, that this was an offence within the statute.—*R.* v. *Brown*, 11 *Cox*, 517.

Athough the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of a criminal concealment of birth, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence has been committed.—*R.* v. *Cook*, 11 *Cox*, 542.

In order to convict a woman of attempting to conceal the birth of her child, see sec. 188 of the Procedure Act, a dead body must be found, and identified as that of the child of which she is alleged to have been delivered. A woman, apparently pregnant, while staying at an inn, at *Stafford*, received by post, on the *28th of August*, 1870, *a Rugby newspaper with the Rugby postmark upon it.* On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at *Stafford* station. It contained the dead body of a newly-born child, wrapped in *a Rugby Gazette, of August 27th, bearing the Rugby postmark.* There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station: *Held*, Montague Smith, J., that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for concealment of birth.—*R.* v. *Williams*, 11 *Cox*, 684.

Where death not proved conviction is illegal.—*R.* v. *Bell*, 8 *Ir. R. C. L.* 541.

A. being questioned by a police-constable about the

concealment of a birth, gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie." *Held*, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary. A. was taken into custody the same day, placed with two accomplices, B. and C. and charged with concealment of birth. All three then made statements. *Held*, that those made by B. and C. could not be deemed to be affected by the previous inducement to A. and were, therefore, admissible against B. and C. respectively, although that made by A. was not so. The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the deposition: *Held*, that this latter statement of A. might be read at the trial as evidence against herself. Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth.—*R.* v. *Bate*, 11 *Cox*, 686.

A woman delivered of a child born alive, endeavored to conceal the birth thereof by depositing the child while alive in a corner of a field, when it died from exposure. *Held*, that she could not be indicted under the above section.—*R.* v. *May*, 16 *L. T. Rep.* 362.

The prisoner who lived alone had placed the dead body of her new born child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child, she at first denied it. *Held*, sufficient to support a conviction for concealment of birth.—*R.* v. *Piché*, 30 *U. C. C. P.* 409.

CHAPTER 163.

AN ACT RESPECTING LIBEL.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every one who publishes or threatens to publish any libel upon any other person, or directly or indirectly threatens to print or publish, or proposes to abstain from printing or publishing of, or offers to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money or any valuable thing, from such person or from any other person, or with intent to induce any person to confer upon or procure for any person any appointment or office of profit or trust, is guilty of a misdemeanor, and liable to a fine not exceeding six hundred dollars, or to imprisonment for any term less than two years, or to both.—37 *V.*, *c.* 38, *s.* 1, *part.* 6-7 *V.*, *c.* 96, *s.* 3, *Imp.*

2. Every one who maliciously publishes any defamatory libel, knowing the same to be false, is guilty of a misdemeanor, and liable to a fine not exceeding four hundred dollars, or to imprisonment for any term less than two years, or to both.—37 *V.*, *c.* 38, *s.* 2. 6-7 *V.*, *c.* 96, *s.* 4, *Imp.*

3. Every one who maliciously publishes any defamatory libel is guilty of a misdemeanor, and liable to a fine not exceeding two hundred dollars, or to imprisonment for any term not exceeding one year, or to both.—37 *V.*, *c.* 38, *s.* 3. 6-7 *V.*, *c.* 96, *s.* 5, *Imp.*

4. It shall, if pleaded, be a defence to an indictment or information for a defamatory libel, that the defamatory matter was true, and that it was for the public benefit that such matter should be published.—37 *V.*, *c.* 38, *ss.* 5 *and* 6, *parts.* 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

5. Whenever, upon the trial of any indictment or information for the publication of a defamatory libel, to which a plea of not guilty has been pleaded, evidence is given which establishes against the defendant a presumptive case of publication by his authority, by the act of any other person, the defendant may prove, and, if proved, it shall be a good defence, that such publication was made without his authority, consent or knowledge, and that such publication did not arise from want of due care or caution on his part.—37 *V.*, *c.* 38, *s.* 10. 6-7 *V.*, *c.* 96, *s.* 7, *Imp.*

6. Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof.—24 *V.* (*P. E. I.*), *c.* 31, *s.* 1. 3-4 *V.*, *c.* 9, *s.* 1, *Imp.*

7. In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof.—24 *V.* (*P. E. I.*, *c.* 31, *s.* 2. 3-4 *V.*, *c.* 9, *s.* 2, *Imp.*

8. In any criminal proceeding commenced or prosecuted, for printing any extract from or abstract of any such report, paper, votes or proceedings, such report, paper, votes or proceedings may be given in evidence, and it may be shown that such extract or abstract was published *bonâ fide* and without malice, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. —24 *V.* (*P. E. I.*), *c.* 31, *s.* 3. 3-4 *V.*, *c.* 9, *s.* 3, *Imp.*

PROCEDURE ACT.

SECTIONS ON LIBEL.

148. Every one accused of publishing a defamatory libel may plead that the defamatory matter was true, and that it was for the public benefit that such matter should be published, to which plea the prosecutor may reply generally, denying the whole thereof.—37 *V.*, *c.* 38, *s.* 5, *part, and s.* 6, *part.* 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

149. Without such plea, the truth of the matters charged as libellous in any such indictment or information, or that it was for the public benefit that such matters should have been published, shall in no case be inquired into.—37 *V.*, *c.* 38, *s.* 7. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

150. If, after such plea, the defendant is convicted on such indictment or information, the court, in pronouncing sentence, may consider whether the guilt of the defendant is aggravated or mitigated by such plea, and by the evidence given to prove or disprove the same.—37 *V.*, *c.* 38, *s.* 8. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

151. In addition to such plea of justification, the defendant may plead not guilty; and no defence otherwise open to the defendant under the plea of not guilty shall be taken away or prejudiced by reason of such special plea.—37 *V.*, *c.* 38, *s.* 9. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

152. On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty, merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury, on the matter in issue, as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act.—37 *V.*, *c.* 38, *s.* 4. 32 *G.* 3, *c.* 60, *ss.* 1, 2, 3, 4, *Imp.*

153. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given against the defendant he shall be liable for the costs sustained by the prosecutor, by reason of such indictment or information; and if judgment is given for the defendant he shall be entitled to recover from such prosecutor the costs incurred by him, by reason of such indictment or information; and such costs, so to be recovered by the prosecutor or defendant respectively, shall be taxed by the court, judge or the proper officer of the court before which such indictment or information is tried.—37 *V.*, *c.* 38, *s.* 12. 6-7 *V.*, *c.* 96, *s.* 8, *Imp.*

154. The costs mentioned in the next preceding section shall be recoverable, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt.—37 *V.*, *c.* 38, *s.* 13.

The costs of showing cause against a rule for the filing of an information are covered by sec. 153.—*R.* v. *Steel*, 13 *Cox*, 159.

Indictment for a false defamatory Libel.—The Jurors for Our Lady the Queen upon their oath present, that J. S., contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit and reputation, and to bring him into public contempt, scandal, infamy and disgrace, on the first day of June, in the year of our Lord ....., unlawfully, wickedly, and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel, in the form of a letter directed to the said J. N. *(or, if the publication were in any other manner, omit the words* "in the form," etc.), containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said J. N., and of and concerning, *etc. (here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel)*, according to the tenor and effect following, that is to say (*here, set out the libel, together*

with such innuendoes as may be necessary to render it intelligible), he the said J. S. then well knowing the said defamatory libel to be false ; to the great damage, scandal and disgrace of the said J. N.. to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Imprisonment not exceeding two years, and fine, c. 163, *s.* 2. *If the prosecutor fail to prove the scienter, the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both.—Id. s.* 3. *The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts, by reason of which the publication was for the public benefit.*

The offence of libel is not triable at quarter sessions. Sec. 4, *Procedure Act.*

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned.—*S.* 4, *c.* 163, *and s.* 148 *of the Procedure Act.*

The following may be the form of the special plea.—*And for a further plea in this behalf, the said* J. S. *saith that Our Lady the Queen ought not further to prosecute the said indictment against him, because he saith that it is true that* (etc., alleging the truth of every libellous part of the publication) : *and the said* J. S. *further saith, that before and at the time of the publication in the said indictment mentioned* (state here the facts which rendered the publication of benefit to the public); *by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this, etc.* This plea may be pleaded with the general

issue. Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under this section. *R.* v. *Newman, Dears.* 85; 1 *E. & B.* 268. Where the plea contains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown; and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and form its own conclusion on the whole case.—*Id.* 1 *E. & B.* 558.

The replication may be as follows:—*And as to the plea of the said* J. S., *by him secondly above pleaded, the said* A. B. (the clerk of assize or clerk of the peace) *saith that by reason of anything in the said second plea alleged, Our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said* J. S., *because he saith, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true. And this he the said* A. B. *prays may be inquired of by the country, etc. And the said* J. S. *doth the like. Therefore, etc.*

Indictment for treatening to publish a libel, etc., with intent to extort money, etc......unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. (*"if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person"*), with intent thereby then to extort money from the said J. N. (*"with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust"*). *If it be doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant* "did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. (or one J. F.) with intent, etc."

What is a libel? Duties of grand jurors on an indictment for libel.—*Chief Justice Dorion*, 10 *L. N.* 361.

Information for a libel.—*Ex parte Gugy*, 8 *L. C. R.* 353.

Under sec. 4, *ante*, and sec. 148 of the Procedure Act, the magistrate has no jurisdiction to receive evidence of the truth of the libel, upon an information.—*R.* v. *Carden*, 5 *Q. B. D.* 1, 14 *Cox*, 359.

In a case of libel, it is no ground to change the venue that a fair trial cannot be had in a particular venue, that many of the defendant's witnesses reside at a distance, and the defendant has no funds to bring them to that venue.—*R.* v. *Casey*, 13 *Cox*, 614.

On sec. 4 of the Act, see *R.* v. *Laurier*, 11 *R. L.* 184.—On sec. 5, see *R.* v. *Holbrook*, 3 *Q. B. D.* 60; 4 *Q. B. D.* 42; 13 *Cox*, 650; 14 *Cox*, 185. As to right of the Crown to set aside jurors in cases of libel, see *R.* v. *Pateson*, 36, *U. C. Q. B*, 127, and *R.* v. *Maguire*, 13 *Q. L. R.* 99, under sec. 165 of the Procedure Act, *post.*

It must be proved that the defendant was proprietor or publisher of the journal at the time of the publication of the libel. That he is at the time of the trial is not sufficient.—*R.* v. *Sellars*, 6 *L. N.* 197.

Under sec. 152 of the Procedure Act, *ante*, see R. v. Dougall, 18 L. C. J. 85.

The defendant was indicted for a malicious libel, and specially pleaded the truth of the libel as well as the plea of not guilty. Under this plea he endeavoured to prove justification. *Held*, that evidence not admissible, as, under the statute, to be allowed to justify, the defendant has to plead not only that the publication was true, but also that it was made for the public good.—*R.* v. *Hickson*, 3 *L. N.* 139.

See *R.* v. *Labouchère*, 14 *Cox*, 419, as to the sufficiency of a plea of justification.

As to what constitutes a guilty knowledge under section 2 of the Libel Act, and that it is for the jury to decide under a plea of justification if the statement complained of is true, and if it was published for the public benefit. *See R.* v. *Tassé*, 8 *L. N.* 98.

No action for libel by a wife against her husband.—*R.* v. *Lord Mayor*, 16 *Q. B. D.* 772; 16 *Cox*, 81.

On an accusation for libel, it is no defence that the libel was published with "no personal malice."—*R.* v. "*The World*," 13 *Cox*, 305.

On an indictment for publishing an obscene book, the passages of the book upon which the charge is brought must be set out.—*R.* v. *Bradlaugh*, 14 *Cox*, 68.

The truth of a seditious or blasphemous libel cannot be pleaded to an indictment for such libel. Sec. 4, *ante*, of the Act does not apply to such libels, but sec. 5 applies.—*R.* v. *Bradlaugh*, 15 *Cox*, 217; *R.* v. *Ramsay*, 15 *Cox*, 231. *Ex parte O'Brien*, 15 *Cox*, 180.

Held, 1. A criminal information (for libel) will not be granted except in case of a libel on a person in authority, and in respect of duties pertaining to his office.

2. Where a libel was directed against M., who was at the time attorney general, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the court for redress, and must come there entirely free from blame.

4. Where there is foundation for a libel, though it falls far short of justification, an information will not be granted. —*The Queen* v. *Biggs*, 2 *Man. L. R.* 18.

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 color of right to excuse the act, and the "intent" being to deprive the owner permanently of his property.—*R.* v. *Thurborn*, 1 *Den.* 388; *R.* v. *Guernsey*, 1 *F. & F.* 394; *R.* v. *Holloway*, 1 *Den.* 370; 3 *Burn*, 198; 2 *Russ.* 146, *note by Greaves*; *R.* v. *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 formerly divided into grand larceny and petit larceny; but this distinction is now abolished. See *post*, sect. 3 of the Larceny Act.

By sect. 86 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 5 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.* v. *Willis*, 1 *Moo. C. C.* 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 o

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*, 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 bonâ 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*, 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., it is larceny, and so it is of a shepherd, for these things be in *onere et non in possessione promi, coci, pastoris*, 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.* v. *McNamee*, 1 *Moo. C. C.* 368; although the intention to convert them were not conceived until after they were delivered to him.—*R.* v. *Harvey*, 9 *C. & P.* 353; *R.* v. *Jackson*, 2 *Moo. C. C.* 32. So a carter going away with his master's cart was holden to have been guilty of felony.—*R.* v. *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.* v. *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.—*R.* v. *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.* v. *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.* v. *William*, 6 *C. & P.* 390; *R.* v. *Robson, R. & R.* 413.

And if a bag of wheat be delivered to a warehouseman merely for safe custody, and he takes all the wheat out of the bag, and dispose of it, it is larceny.—*R.* v. *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.—*R.* v. *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.* v. *Spears*, 2 East, P. C. 568; *R.* v. *Abrahat*, 2 *East, P. C.* 569; *R.* v. *Reed, 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.—*R.* v. *Frances*, 1 *C. & 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.* v. *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.* v. *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.* v. *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 sec. 52 of the Larceny Act. See *post*.

2. *The taking where the possession of the goods has been obtained animo furandi.* Where the offender unlawfully acquired 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.* v. *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.* v. *Sample*, 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.* v. *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.* v. *Stock*, 1 *Moo. C. C.* 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.* v. *Bramley, L. & C.* 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.* v. *Campbell*, 1 *Moo. C. C.* 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.—*R.* v. *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.—*R.* v. *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.—*R.* v. *Slowly, et 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.* v. *Gilbert*, 1 *Moo. C. C.* 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.* v. *Pratt*, 1 *Moo. C. C.* 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 color of an exchange for another, intending all the while to steal it; this was holden to be larceny.—*R.* v. *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.* v. *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 putting 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.—*R.* v. *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; *R.* v. *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.—*R.* v. *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.* v. *Thompson*, *L. & C.* 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.* v. *Barnes*, 12 *Jur. N. S.* 549. *And see* *R.* v. *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. *R.* v. *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.* v. *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.—*R.* v. *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.* v. *Nicholson*, 2 *Leach*, 610.

To constitute larceny, there must 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 neighbor 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.—*R.* v. *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. —*R.* v. *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. 4 of the Larceny Act., it is provided that: "Every one who 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 does 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.* v. *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.* v. *Hoare*, 1 *F. & F.* 647; *R.* v. *Garrett*, 2 *F. & F.* 14; *R.* v. *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.* v. *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.—*R.* v. *Davies*, 10 *Cox*, 239.

It seems that a married woman may be a bailee within the meaning of sect. 4 of the Larceny Act; *R.* v. *Robson*, *L. & C.* 93, notwithstanding a previous ruling to the contrary by Martin, B., in *R.* v. *Denmour*, 8 *Cox*, 440.

See, *post*, remarks under section 4 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.* v. *Harrison*, 1 *Leach*, 47 ; *R.* v. *Avery*, *Bell*, *C. C.* 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.* v. *Tolfree*, 1 *Moo. C. C.* 243, *overruling R.* v *Clarke*, 1 *Moo. C. C.* 376, *note a.*

Also, in *R.* v. *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 R.* v. *Berry*, *Bell*, *C. C.* 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.* v. *Tollett*, *C. & M.* 112 ; *R.* v. *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.* v. *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.* v. *Fitch*, *Dears. & B.* 187, overruling on this point the direction of Coleridge, J., in *R.* v. *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.* v. *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.* v. *Rosenberg*, 1 *C. & K.* 233. When a wife absconds from the house of her husband with her avowterer, the latter cannot be convicted of stealing the husband's money missing on their departure, unless he be proved to have taken some active part, either in carrying away or in spending the money stolen.—*R.* v. *Taylor*, 12 *Cox*, 627.

Nor can an avowterer be found guilty of felonious receiving of the husband's property taken by the wife, as a wife cannot steal her husband's property.—*R.* v. *Kenny*, 13 *Cox*, 397.

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. *R.* v. *Harrison*, 12 *Cox*, 19.—*R.* v. *Flatman*, 14 *Cox*, 396.

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.* v. *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.* v. *Bramley*, *R. & R.* 478. See *post*, sect. 58 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.* v. *Morris*, *R. & R.* 270; *R.* v. *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.—*R.* v. *Cohen*, 11 *Cox*, 99.

The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favor, 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.—*R.* v. *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*, 214. Or if a servant, *animo furandi*, take his master's hay from his stable, and put it into his master's waggon.—*R.* v. *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 specified part occupied: *Held*, that this was a complete *asportation.—R.* v. *Walsh*, 1 *Moo. C. C.* 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.* v. *Thompson*, 1 *Moo. C. C.* 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.* v. *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.—R.* v. *White*, 1 *Dears. & B.* 203.

The same principle was upheld in R. v. Firth, 11 Cox, 234; see *post*, under section 202 of the Procedure 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 183 of the Procedure Act.

If the thief once take possession of the thing, the offence is complete, though he afterwards return it.—3 *Burn*, 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.* v. *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.* v. *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.—*R.* v. *Morris*, 9 *C. & P.* 349; 3 *Burn*, 216; *R.* v. *Walker*, 1 *Moo. C. C.* 155.

Things real, or which savour of the realty, choses in action, as deeds, bonds, notes, 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 sec. 2, Larceny Act.

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.* v. *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—*R.* v. *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.—*R.* v. *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.—*R.* v. *Townley*, 12 *Cox*, 59. Water in the pipes of a company may be the subject of larceny.—*Ferens* v. *O'Brien*, 15 *Cox*, 332.

The flesh of such animals as are *feræ naturæ* may be

the subject of larceny. In *R.* v. *Gallears*, 1 *Den.* 501, the prisoner was indicted for stealing a ham. The prisoner objected that it did not appear by the indictement that the article stolen was the subject of larceny; that it might have been the ham of an animal *ferœ 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.

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*, 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.—*R.* v. *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 —*R.* v. *Jacobs*, 12 *Cox*, 151. Obtaining money from any one by frightening him, is larceny.—*R.* v. *Lovell*, 8 *Q. B. D.* 185.

6.—THE FELONIOUS INTENT.

The taking and carrying away must, to constitute lar-

ceny, 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 *Hawkins*, 142.

For it is the mind that make the taking of another's goods to be felony, or a bare tresspass 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 felony.—1 *Hale*, 507. *Lemott's case and Farre's case, Kelyng's, C. C.*, 64, 65, *reprint by Stevens and Haynes.*

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 *bonâ 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.* v. *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 *Moo. C. C.* 160;

And to constitute larceny, the intent must be to deprive the owner, not temporarily, but permanently, of his property. *R.* v. *Phillips*, 2 *East, P. C.* 662; *Archbold*, 326; 3 *Burn*, 220. But see *post*, sect. 85 of the Larceny Act, and remarks thereon.—*See R.* v. *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, and that the question of felonious intention had been distinctly left to the jury, the Court quashed the conviction.—*R.* v. *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 *bonâ 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*, 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 colorable pretence to obtain possession of the umbrella: verdict, not guilty.—*R.* v. *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.—*R.* v. *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 the doctrine must be taken with great limitation, and

can only apply where the finder *bonâ fide* supposes the goods to have been lost or abandoned by the owner, and not to a case in which he colors a felonious taking under that pretence.—*Archbold*, 330; *R.* v. *Kerr*, 8 *C. & P.* 176; *R.* v. *Reed*, *C. & M.* 306; *R.* v. *Peters*, 1 *C. & K.* 245; *R.* v. *Mole*, 1 *C. & K.* 417.

The true rule of law resulting from the authorities on the subject has been 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.* v. *Thurborn*, 1 *Den.* 388; *R.* v. *Dixon*, *Dears.* 580; *R.* v. *Christopher*, *Bell*, *C. C.* 27.

In *R.* v. *Moore*, *L. & C.* 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 case of *R.* v. *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.* v. *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 *R.* v. *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.—*R.* v. *Knight*, 12 *Cox*, 102.

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 knows the owner, or if he took him or set him down at any particular place, where he might have inquired for him.—*R.* v. *Wynne*, 2 *East, P. C.* 664; *R.* v. *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.* v. *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.* v. *Pope*, 6 *C. & P.* 346; *R.* v. *Mole*, 1 *C. & K.* 417; *R.* v. *Preston*, 2 *Den.* 353; *Archbold*, 331.

Doing an act openly doth not make it the less a felony, in certain cases. 3 *Burn*, 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 *R.* v. *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*, 224; *R.* v. *Morfit*, *R. & R.* 307; *R.* v. *Gruncell*, 9 *C. & P.* 365; *R.* v. *Handley*, 1 *C. & M.* 547; *R.* v. *Privett*, 1 *Den.* 193; *R.* v. *Jones*, 1 *Den.* 188; *R.* v. *Cabbage*, *R. & R.* 292.

"The English courts seem 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?"—*R.* v. *Jones*, 1 *Den.* 188; 2 *Bishop, Cr. L.* 486.

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.* v. *Partridge*, 7 *C. & P.* 551; 3 *Burn*, 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.—*R.* v. *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.—*R.* v. *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 from, may be added, under sect. 134 of the Procedure Act

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. 5 and 86 of the Larceny Act, *post*.

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 sect. 86 of the Larceny Act, where an additional punishment is decreed, in cases where the value of the property stolen exceeds two hundred dollars. But some value must be proved at the trial.—2 *Russ.* 344.

By sect. 195 of the Procedure Act, 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 198 of the Procedure Act, 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 201 of the Procedure Act, 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 sec. 85 of the Larceny Act, they may find him so guilty.

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 85 of the Larceny Act, the conviction is illegal.—*R.* v. *Gorbutt, Dears. & B.* 166; the offence found by the jury must be the offence proved.

By section 183 of the Procedure Act, 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, etc., see sections 10, 11, 12, 16, 20, 21, 22, of the Procedure Act.

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 sect. 128 of the Procedure Act.

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 V., c. 100, s. 1, (sect. 238 of the Procedure Act).—*R.* v. *Gumble*, 12 *Cox*, 248; *R.* v. *Marks*, 10 *Cox*, 167.

See section 117 of the Procedure Act, as to cases where property need not be laid in any person.

See sections 118 and 119 of the said Procedure Act, as to stating the ownership, in cases of partnerships, joint-tenancies, or joint stock companies; also sections 120, 121, 122 of the said Act as to the statement of the ownership in certain other cases, and sections 129 and 130 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.—*R.* v. *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.—*R.* v. *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.—*R.* v. *Kendall*, 12 *Cox*, 598.

By section 135 of the Procedure Act, *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.—*R.* v. *Hilton*, *Bell. C. C.* 20; *R.* v. *Langmead*, *L. & C.* 427; *and Greaves' remarks upon it*, 3 *Russ.* 668.

See secs. 21 and 22 of the Procedure Act as to venue in certain cases; sec. 25 as to arrest without warrant of any person found committing any offence against the Larceny Act; sec. 52 as to search warrants; sec. 125 as to indictments for stealing postal cards, stamps, etc.; sec. 127 as to indictments for stealing by lodgers; secs. 134 and 135 as to joinder of offences; secs. 195, 196, 198, 199, 201, 202 as to verdict in certain cases; secs. 250 and 251 as to restitution of stolen property.

To obtain money by the trick known as "ringing the changes" is larceny.—*R.* v. *Hollis*, 15 *Cox*, 345.

A. was indicted for larceny under the following circumstances:—R., intending to lend A. a shilling, handed him a sovereign, believing it to be a shilling. A., when he received the sovereign, believed it to be a shilling, and did not know until subsequently that it was not a shilling. Immediately A. became aware that it was a sovereign, and although he knew that R. had not intended to part with the possession of a sovereign, but only with the possession of a shilling, and although he could easily have returned the sovereign to R., fraudulently appropriated it to his own use. Prisoner convicted of larceny. Upon a case reserved, seven judges held the conviction right, and seven were of opinion that these facts did not constitute larceny.—*R.* v. *Ashwell*, 16 *Cox*, 1.

In *R.* v. *Flowers*, 16 *Cox*, 33, *held*, that where money or goods have been innocently received, a subsequent fraudulent appropriation will not render the receiver guilty of larceny, the above lastly cited case not being an authority to the contrary.

A declaration made by a prisoner tried on an indictment for larceny, before he was charged with the crime in answer to a question asked him where he got the property, is evidence on his behalf.

On the trial of an indictment for larceny of a watch, the prisoner's counsel called a witness, W., who stated that the prisoner was drinking at a public house on the evening when the alleged offence was committed, and had the watch with him; that W. went home with the prisoner, and they sat down in the house; that while they where sitting there the prisoner fell upon the floor and the watch fell out of his pocket, and W. picked it up and asked him

where he got it. His answer to this question was rejected. The prisoner being convicted, it was *held* by the court on a case reserved, that the evidence should have been received, and the conviction was quashed.—*The Queen* v. *Ferguson*, 3 *Pugs. (N. B.)* 612.

H. and W. were jointly indicted for stealing. H. was found guilty, but the jury could not agree as to W. and were discharged from giving a verdict as to him. *Held*, that the verdict warranted the conviction of H.—*The Queen* v. *Hamilton and Walsh*, 23 *N. B. Rep.* 540.

CHAPTER 164.

AN ACT RESPECTING LARCENY AND SIMILAR OFFENCES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

SHORT TITLE.

1. This Act may be cited as "*The Larceny Act.*"

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(*a.*) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehousekeeper'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;

(*b.*) The expression "document of title to lands" includes 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, to any real property, or to any interest in any real property, 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;

(*c.*) The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or a trustee of personal property created by parol, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any 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 expression "trust," includes whatever is by that law an "*administration;*"

(*d.*) The expression "valuable security" includes 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 thereof, 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 also includes 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 thereof, 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;

(*e.*) The expression "property" includes 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 also not only such property as was originally in the possessi or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise, and also any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the Legislature of any Province of Canada, for the payment of any fee, rate or duty whatsoever, and whether still in the possession of the Crown, or of any person or corporation, or of 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; and such postal card or stamp shall be held to be a chattel, 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;

(*f*.) The expression "cattle" includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and whatever is the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it is known, and shall apply to one animal as well as to many;

(*g*.) The expression "banker" includes any director of any incorporated bank or banking company;

(*h*.) The expression "writing" includes 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 plan is inscribed;

(*i*.) The expression "testamentary instrument" includes 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, whether the same relates to real or personal property, or both;

(*j*.) The expression "municipality" includes 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;

(*k*.) The night shall, for the purpose of this Act, 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;

(*l*.) 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 inclosed, whether belonging to or occupied by himself or not, and whether such matter or thing is 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 if 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.—32-33 *V.*, *c.* 21, *s.* 1. 35 *V.*, *c.* 33, *s.* 1, *part.* 40 *V.*, *c.* 29, *s.* 1. 24-25 *V.*, *c.* 96, *s.* 1, *Imp.*

SIMPLE LARCENY.

3. Every larceny, whatever is 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.—32-33 *V.*, *c.* 21, *s.* 2. 24-25 *V.*, *c.* 96, *s.* 2, *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.

4. Every one who, 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 does 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.—32-33 *V.*, *c.* 21, *s.* 3. 24-25 *V.*, *c.* 96, *s.* 3, *Imp.*

See *R.* v. *Macdonald*, 15 *Cox*, 757, 15 *Q. B. D.* 323.

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, *R.* v. *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 V., c. 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.—*R.* v. *Hassall*, *L. & C.* 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 *R.* v. *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.—*R.* v. *Robson*, *L. & C.* 93. The authority of *R.* v. *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*, *L. & C.* 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 redelivered, 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* v. *Bernard, Lord Raym.* 909, 1 *Smith's L. C.* 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.* See also *R.* v. *Oxenham*, 13 *Cox*, 349.

A carrier who receives money to procure goods obtains and duly delivers the goods, but fraudulently retains the money, is within this section.—*R.* v. *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.* v. *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.—*R.* v. *Hassall, L. & C.*, 58; *R.* v. *Garratt*, 2 *F. & F.* 14; *R.* v. *Hoare*, 1 *F. & F.* 647. See *R.* v. *de Banks*, 15 *Cox*, 450.

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.—*R.* v. *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.—*R.* v. *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 V., c. 63, s.

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.—*R.* v. *Loose, Bell, C. C.* 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.—*R.* v. *Jackson*, 9 *Cox*, 505.

Greaves, on this case, says: If the 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 *Russ.* 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 4th section of the Larceny Act; also that the property was rightly laid in M.—*R.* v. *Clegg*, 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 sec. 4 of the Larceny Act.—*R.* v. *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 adresses 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.—*R.* v. *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 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.—*R.* v. *Matthews*, 12 *Cox*, 489; *R.* v. *Cosser*, 13 *Cox*, 187.

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.—*R.* v. *Aden*, 12 *Cox*, 512. *See R.* v. *Tonkinson*, 14 *Cox*, 603; *R.* v. *Wynn*, 16 *Cox*, 231.

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, c. 8.—*R.* v. *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*, 305.

The prisoner was indicted for larceny as a bailee of a sum of money. The complainant produced a receipt taken at the time of the deposit in the hands of the prisoner by which it appeared that the deposit was "en attendant le paiement qu'il pourrait faire d'une même somme à L. A. Benoit." *Held*, that this receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money. That parol testimony could not be admitted to vary the nature of the transaction.—*R.* v. *Berthiaume*, 10 *L. N.* 365.

5. Every one who commits simple larceny or any felony hereby made punishable in the same manner as simple larceny is guilty of a felony, and, except in the cases hereinafter otherwise provided for, is liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 4. 40 *V.*, *c.* 29, *s.* 3. 24-25 *V.*, *c.* 96, *s.* 4, *Imp.*

6. Every one who, having been convicted either summarily or upon indictment of a felony, commits the offence of simple larceny, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 7. 24-25 *V.*, *c.* 96, *s.* 7, *Imp.*

As to form of indictment and procedure in such cases, see Procedure Act, secs. 139 and 207, corresponding to s. 116 of the Imperial Larceny Act.

STEALING CATTLE.

7. Every one who steals any cattle is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 10. 24-25 *V.*, *c.* 96, *s.* 10, *Imp.*

See, *ante*, sect. 2, 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, etc., 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.* v. *Beaney*, *R.* & *R.* 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.* v. *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.* v. *Philipps*, 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.—*R.* v. *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.—*R.* v. *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*.—R. v. *Pear*, 1 *Leach*, 212; *R.* v. *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.—*R.* v. *Stock*, 1 *Moo. C. C.* 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.* v. *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, so as to constitute larceny of it.—*R.* v. *Williams*, 1 *Moo., C. C.* 107.—*See* 2 *Russ.* 361, *and R.* v. *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. 238 Procedure Act.—*R.* v. *Gumble*, 12 *Cox*, 248.

8. Every one who wilfully kills any animal, with intent to steal the carcase, skin or any part of the animal so killed, is guilty of felony, and 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.—32-33 *V., c.* 21, *s.* 11. 24-25 *V., c.* 96, *s.* 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 .....

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.* v. *Clay, R. & R.* 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. —*R.* v. *Sutton*, 8 *C. & P.* 291. It is immaterial whether the intent was to steal the whole or part only of the carcase. —*R.* v. *Williams*, 1 *Moo. C. C.* 187.

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

2. Every one who, having been convicted of any such offence either against this or any other Act or Law, afterwards commits any offence in this section mentioned, is liable to three months' imprisonment with hard labor.—32-33 *V., c.* 21, *s.* 12. 24-25 *V., c.* 96, *ss.* 18-21, *Imp.*

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

10. Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon under such circumstances as do not amount to larceny at common law, shall, on summary conviction, be liable to a penalty not exceeding ten dollars over and above the value of the bird.—32-33 *V., c.* 21, *s.* 13. 24-25 *V., c.* 96, *s.* 23, *Imp.*

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

11. Every one who steals any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, is guilty of felony, and liable to be punished as in the case of simple larceny;

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

3. Nothing in this section contained shall prevent any person from fishing for or catching any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only.—32-33 *V., c.* 21, *s.* 14, *part.* 24-25 *V., c.* 96, *s.* 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 .....

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.

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.—*R.* v. *Downing*, 11 *Cox*, 580.

See sec. 123 of the Procedure Act for form of indictment.

STEALING WRITTEN INSTRUMENTS.

12. Every one who 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 had stolen any chattel, of like value as the share, interest or deposit to which the security so stolen relates, or as the money due on the security so stolen or secured thereby and remaining unsatisfied, or as the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.—32-33 *V., c.* 21, *s.* 15. 24-25 *V., c.* 96, *s.* 27, *Imp.*

See R. v. Scott, 21 L. C. J. 225, reversed by Supreme Court, as follows:

S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A., McC. and another. The evidence showed that the promissory note in question was drawn by A., McC. and C. R., and made payable to S.'s order. The said note was given by mistake to S., it being supposed that the sum of $258.33 was due to him by the drawers, instead of a less sum of $145.00. The mistake being immediately discovered, S. gave back the note to the drawers, unstamped and unindorsed, in exchange for another note of $175.00. An opportunity occurring, S. afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

Held, that S. was not guilty of larceny of "a note" or of a "valuable security," within the meaning of the statute, and that the offence for which he was guilty was not correctly described in the indictment.—*Scott* v. *The Queen*, 2 *S. C. R.* 349.

As to the interpretation of the words "valuable security," see, *ante*, sect. 2.

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 .....

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.* v. *Walsh*, *R. & R.* 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.* v. *Metcalfe*, 1 *Moo. C. C.* 433; *R.* v. *Heath*, 2 *Moo. C. C.* 33.

With respect to what instrument or security is within the Act, the following decisions are cited:

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, c. 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 possession 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. See now sec. 5, c. 173, *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 Bosanquet 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.* v. *Minter Hart*, 6 *C. & P.* 106.

This offence would now be punishable under sect. 78, *post*. *R.* v. *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.* v. *Yates*, 1 *Moo. C. C.* 170.

The case of *R.* v. *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.* v. *Ransom*, 2 *Leach*, 1090, which was against a clerk in the post-office for secreting a letter containing country bank-notes paid in London and not re-issued, it was contended that they were not available within the Act, but the majority of the judges 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 case of *R.* v. *Vyse*, 1 *Moo. C. C.* 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 posses-

sion 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*, 237.

In *R.* v. *West*, *Dears. & B.* 109, the case of *R.* v. *Ramson* 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, *R.* v. *Gilchrist*, 2 *Moo. C. C.* 233; a cheque on a banker, *R.* v. *Heath*, 2 *Moo. C. C.* 33; a pawnbroker's certificate, *R.* v. *Morrison*, *Bell, C. C.* 158; and a scrip certificate, of a foreign railway company, *R.* v. *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. 2, 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.—*R.* v. *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.—*R.* v. *West*, 7 *Cox*, 183.

Halves of notes should be described as goods and chattels.—*R.* v. *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.* v. *Pooley*, *R. & R.* 12; *R.* v. *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.—*R.* v. *Watts*, 6 *Cox*, 304.

An insufficient or defectively stamped promissory note, the holder being ignorant of the defect in the stamping, may be the subject of larceny as a valuable security under 32-33 V., c. 21, s. 15.—*The Queen* v. *Dewitt*, 21 *N. B. Rep.* 17.

13. Every one who 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 liable to three years' imprisonment.—32-33 *V., c.* 21, *s.* 16, *part.* 24-25 *V., c.* 96, *s.* 28, *Imp.*

As to form of indictment. See sec. 110 of Procedure Act.

As to the interpretation of the words "document of title to lands," see sec. 2, *ante*.

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, etc., for a fraudulent purpose the purpose should be stated.—*R.* v. *Morris*, 9 *C. & P.* 89.

A mortgage deed cannot be described as goods and chattels.—*R.* v. *Powell*, 2 *Den.* 403. See sub-sec. 3 of next section.

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

2. Nothing in this or the next preceding section mentioned, and no proceeding, conviction or judgment had or taken thereupon, shall prevent, lessen or impeach any remedy at law or in equity, which any person aggrieved by any such offence might or would have had if this Act had not been passed;

3. No conviction of any such offender shall be received in evidence in any action or suit against him; and no person shall be liable to be convicted of any of the felonies in this and the next 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, in any action, suit or proceeding *bonâ fide* instituted by any person aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.—32-33 *V.*, *c.* 21, *s.* 17, *part.* 24-25 *V.*, *c.* 96, *s.* 29, *Imp.*

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

The cases of *R.* v. *Skeen*, *Bell*, *C. C.* 97, and *R.* v. *Strahan*, 7 *Cox*, 85, are not now law.—*Greaves*, *Cons. Acts*, 126.

15. Every one who steals or, for any fraudulent purpose, takes from its place of deposit, for the time being, or from any person having the custody thereof, or unlawfully and maliciously cancels,

obliterates, injures or destroys the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever, of or belonging to any court of justice, or relating to any cause or matter, begun, depending or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office, is guilty of felony, and liable to three years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 18, *part.* 24-25 *V.*, *c.* 96, *s.* 30, *Imp.*

The words "*court of justice*" are not in the English Act.

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, etc., say, feloniously, unlawfully and maliciously did obliterate, etc.)* .....—*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.* v. *Walker*, 1 *Moo. C. C.* 155; but it is not so if they concern the realty.—*R.* v. *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.* v. *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 a 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 causâ*, 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."—*R.* v. *Bailey*, 12 *Cox*, 129.

Maliciously destroying an information or record of the police court is a felony within 32-33 V., c. 21, s. 18.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

An indictment describing an offence within 32-33 V., c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

16. Every one who steals any railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamer or other vessel, is guilty of felony, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 19.

This clause is not in the Imperial Statute.

STEALING THINGS ATTACHED TO OR GROWING ON LAND.

17. Every one who steals, or rips, cuts, severs or breaks, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 20, *part.* 24-25 *V.*, *c.* 96, *s.* 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. 5.

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 building 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.* v. *Parker*, 1 *East, P. C.* 592; *R.* v. *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.* v. *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.—*R.* v. *Rice, Bell, C. C.* 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.* v. *Reece*, 2 *Russ.* 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.* v. *Munday*, 2 *Leach*, 850.

A prisoner, however, cannot, upon an indictment for this statutable felony, be convicted of simple larceny.—*R.* v. *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.—*R.* v. *Jones, Dears. & B.* 655.

The ownership of the building from which the fixture is stolen must be correctly laid in the indictment.—2 *Russ.* 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.*

18. Every one who steals, or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, 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 liable to be punished as in the case of simple larceny;

2. Every one who steals, or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned (if 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 liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 21. 24-25 *V.*, *c.* 96, *s.* 32, *Imp.*

See sect. 5, *ante*, as to punishment for simple larceny.

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.* v. *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.—*R.* v. *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.—*R.* v. *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.*

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.

19. Every one who steals, or cuts, breaks, roots up or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is respectively growing (the stealing of such article, or the injury done, being to the amount of twenty-five cents at the least), shall, on summary conviction, be liable to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done;

2. Every one who, having been convicted of any such offence, either against this or any other act or law, afterwards commits any of the said offences in this section before mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor;

3. Every one who, having been 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 offences in this section before mentioned, is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V., c.* 21, *s.* 22. 24-25 *V., c.* 96, *s.* 33, *Imp.*

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 her 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. 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 ; *R.* v. *Martin*, 11 *Cox*, 343.

See secs. 139 and 207 of the Procedure Act as to form of indictment and proceedings on trials when previous offences are charged.

20. Every one who receives or purchases any tree or sapling, 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, is guilty of a misdemeanor, and liable to the same punishment as the principal offender, and may be indicted and convicted thereof, whether the principal offender has or has not been convicted, or is or is not amenable to justice;

2. Nothing in this or in either of the two sections next preceding contained, and no proceeding, conviction or judgment had or taken thereupon, shall prevent, lessen or impeach any remedy which any person 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 or suit 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, in any action, suit or proceeding instituted by any person aggrieved.—32-33 *V.*, *c.* 21, *s.* 23.

This clause is not in the English Act.

21. Every one who steals, cuts or breaks or throws down, with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars, over and above the value of the article or articles so stolen, or the amount of the injury done;

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the said offences in this section mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor. —32-33 *V.*, *c.* 21, *s.* 24. 24-25 *V.*, *c.* 96, *s.* 34, *Imp.*

22. Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, shall, on summary conviction, be liable to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises.—32-33 *V.*, *c.* 21, *s.* 25. 24-25 *V.*, *c.* 96, *s.* 35, *Imp.*

This sect. does not apply to cordwood.—*R.* v. *Caswell*, 33 *U. C. Q. B.* 303.

23. Every one who steals or destroys, or damages with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars, over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment, with or without hard labor;

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, is guilty of felony and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 26. 24-25 *V.*, *c.* 96, *s.* 36, *Imp.*

The words *plant* and *vegetable production* do not apply to young fruit trees.—*R.* v. *Hodges*, *M. & M.* 341. Stealing trees would fall under sections 18 and 19.

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 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.*

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

2. Every one who, having been convicted of any such offence, either against this or any other act or law, afterwards commits any of the offences in this section mentioned, is liable to three month's imprisonment with hard labor.—32-33 *V.*, *c.* 21, *s.* 27. 24-25 *V.*, *c.* 96, *s.* 37, *Imp.*

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

STEALING ORES OR MINERALS.

25. Every one who steals, or severs with intent to steal, ore of any metal, or any quartz, lapis calaminaris, manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, 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 liable to imprisonment for any term less than two years;

2. No person shall be deemed guilty of any offence for having, for the purpose of exploration or scientific investigation, taken any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. —32 33 *V.*, *c.* 21, *s.* 28. 24-25 *V.*, *c.* 96, *s.* 38, *Imp.*

26. Every one who, 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, mundic, or any piece of gold, silver or 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 liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 29. 24-25 *V.*, *c.* 96, *s.* 39, *Imp.*

The words "or any marble, stone, or other mineral," in sec. 25 are not in the English Act.

The words "or any piece of gold, silver or any other metal" in sec. 26 are not in the English Act.

R. v. *Webb*, 1 *Moo. C. C.* 421; *R.* v. *Holloway*, 1 *Den.* 370; *R.* v. *Poole*, *Dears. & B.* 345, would now fall under sect. 26. It must be alleged and proved that the ore was stolen from the mine.—*R.* v. *Trevenner*, 2 *M. & Rob.* 476.

Indictment under sect. 25..... 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.*

Indictment under sect. 26 ..... 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*, 313.

See sec. 124 of the Procedure Act as to form of indictment for offence under secs. 25 to 29 of this Act.

27. Every one who, being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any person owning land supposed to contain any gold or silver, by any fraudulent device or contrivance, defrauds or attempts to defraud Her Majesty, or any person, 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 liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 30.

28. Every one who, not being the owner or agent of mining claims then being worked, and not being thereunto authorized in writing by the 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 liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 31.

29. Every one who 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 next 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 with the officer in the next preceding section mentioned, within twenty days next after the date of such purchase, is guilty of a misdemeanor, and liable to a penalty not exceeding in amount double the value of the gold or silver purchased, and to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 32.

30. The possession, contrary to the provisions of any law in that behalf of any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or laborer actively engaged in or on any mine, is *primâ facie* evidence that the same had been stolen by him.—32-33 *V.*, *c.* 21, *s.* 35.

See sec. 53 Procedure Act as to search warrants.

31. Every one who, 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 liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 37.

The above five sections are not in the English Act.

STEALING FROM THE PERSON, AND OTHER LIKE OFFENCES.

32. Every one who robs any person, or steals any chattel, money or valuable security from the person of another, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 39. 24-25 *V.*, *c.* 96, *s.* 40, *Imp.*

On trial for robbery, conviction may be under next clause. Sec. 192 Procedure Act.

33. Every one who assaults any person with intent to rob is guilty of felony, and, except in cases where a greater punishment is provided by this Act, liable to three years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 41. 24-25 *V.*, *c.* 96, *s.* 42, *Imp.*

Indictment for stealing from the person under sect. 32:— ..... 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.* v. *Robinson*, *R. & R.* 321; *R.* v. *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. Of ten judges, four were of opinion that the stealing from the person was complete.—*R.* v. *Thompson*, 1 *Moo. C. C.* 78.

Where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waiscoat, 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. —*R.* v. *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.* v. *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. 183 of the Procedure Act.

In *R.* v. *Collins*, *L. & C.* 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. 47 and 48 of c. 162, 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. 33.—..... 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.*

The indictment may charge the defendant with having

assaulted several persons, and stolen different sums from such, if the whole was one transaction.—*Archbold.*

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.—2 *Bishop, 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; 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 it a larceny to steal a thing of which there could be no larceny at 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.—2 *Bishop, 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 colorable 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.* v. *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.* v. *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.—*R.* v. *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.—*Fost.* 128; *R.* v. *Davies*; 2 *East, P. C.* 709.

One 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 head-dress 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.* v. *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.* v. *Mason, R. & R.* 419. But merely snatching property from a person unawares, and running away with it, will not be robbery.—*R.* v. *Steward*, 2 *East, P. C.* 702; *R.* v. *Horner, Id.* 703; *R.* v. *Baker*, 1 *Leach*, 290; *R.* v. *Robins, do. do.*; *R.* v. *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, nor did the force used afterwards in the scuffle; for the force necessary to

constitute robbery must be either immediately before or at the time of the larceny, and not after it.—*R.* v. *Gnosil*, 1 *C. & P.* 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.—*Archbold, loc. cit.*; 2 *Russ.* 104.

If a man take another's child, and threaten to destroy him, unless the other give him money, this is robbery.—*R.* v. *Reane*, 2 *East, P. C.* 735; *R.* v. *Donally, Id.* 713. So where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destory the house unless the money were given, the prosecutor therefore gave him five shillings, but he insisted on more, and the prosecutor, being terrified, gave him five shillings more; the defendant and the mob then took bread, cheese and cider from the prosecutor's house, without his permission, and departed, this was holden to be a robbery as well of the money as of the bread, cheese and cider.—*R.* v. *Simons*, 2 *East, P. C.* 731; *R.* v. *Brown, Id.* So where during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give a certain sum of money, he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery.—*R.* v. *Astley*, 2 *East, P. C.* 729. So where during the riots of 1780, a mob headed by the defendant came to the prosecutor's house, and demanded half a crown, which the prosecutor, from terror of the mob, gave, this was holden to be robbery, although no threats were uttered.—*R.* v. *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.* v. *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.* v. *Knewland*, 2 *Leach*, 721; 2 *Russ.* 118. This case is now provided for by sect. 2, c. 173, post. In *R.* v. *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 prevented from going out. She then paid 26 shil-

lings 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.* v. *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.* v. *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. 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* v. *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 *Russ.* 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.* v. *Harman*, 1 *Hale*, 534; *and R.* v. *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 nowhere 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. Staundford 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 *Donally'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.* v. *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. 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.—2 *Bishop*, *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 apprehending and bringing to punishment the wrong doer.—1 *Bishop*, *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, come into the presence of A., and, with violence and putting A. in fear, drive 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 not robbery.—2 *Bishop, Cr. Law*, 1178; *Blackstone Com.* 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 it 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.* v. *Fallows*, 2 *Russ.* 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.* v. *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.—*R.* v. *Selway*, 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.—*R.* v. *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 corporal 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.* v. *Pelfryman*, 2 *Leach*, 563; 2 *Bishop, Cr. Proc.* 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 Donally'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 *R.* v. *Bingly*, 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.

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 sec. 33. By sec. 191 of the Procedure Act, if the intent be not proved, a verdict of common assault may be given.—*R.* v. *Archer*, 2 *Moo. C. C.* 283; *R.* v. *Hagan*, 8 *C. & P.* 174; *R.* v. *Ellis*, 8 *C. & P.* 654; *R.* v. *Nicholls*, 8 *C. & P.* 269. *R.* v. *Woodhall*, 12 *Cox*, 240, is not to be followed here, as the enactment to the same effect is now, in England, repealed.

The word "together" is not essential in an indictment for robbery against two persons to show that the offence was a joint one.—*R.* v. *Provost*, 1 *M. L. R. Q. B.* 477.

A prisoner accused of assault with intent to rob may be found guilty of simple assault.—*R.* v. *Oneil*, 11 *R. L.* 334.

34. Every one who, being armed with an 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 liable to imprisonment for life.—32-33 *V., c.* 21, *s.* 42. 24-25 *V., c.* 96, *s.* 43, *Imp.*

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 imme-

diately 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 *Russ.* 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.*—That J. N. at ..... on ..... in and upon one A. M. feloniously die 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 indictments numbers 3 and 5. And wherever a robbery with aggravating 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 intend to rob, attended with the like aggravation, the assault following the nature of the robbery.—*R.* v. *Mitchell*, 2 *Den.* 468, *and remarks upon it, in Dears.* 19.

By sect. 191 of the Procedure Act, a verdict of common assault may be returned, if the evidence warrants it. And by sect. 183, 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 sec. 189 of the Procedure Act, convict of unlawfully wounding.—2 *Russ.* 144.

See *R.* v. *Provost*, under preceding section.

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. —*Stephens' Blackstone, Vol.* 4, 104.

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 *Russ.* 1. 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 sect. 2 of the Larceny Act, 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." 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 versâ*, 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 *Russ.* 39. The breaking on Friday night with intent to enter at a future time, and the entering on the Sunday night constitute burglary.—*R.* v. *Smith*, *R.* & *R.* 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 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 35 and 42 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.* v. *Lyons*, 1 *Leach*, 185; in this case, neither 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.—*See R.* v. *Martin*, *R.* & *R.* 108.

If a porter lie in a warehouse for the purpose of protecting goods. *R.* v. *Smith*, 2 *East*, 497, or a servant lie in a barn in order to watch thieves, *R.* v. *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.* v. *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.* v. *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.* v. *Hallard*, 2 *East*, 498; *R.* v. *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.* v. *Harris*, 2 *Leach*, 701; *R.* v. *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.* v.

Murray, 2 *East*, 496; and in *R.* v. *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*, *Nutbrown'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.* v. *Gibbons*, *R. & R.* 442. But where the prosecutor and 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.* v. *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.* v. *Stock*, *R. & R.* 185; *R.* v. *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.* v. *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.* v. *Jarvis*, 1 *Moo. C. C.* 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 or 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.* v. *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.* v. *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.* v. *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.* v. *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 reside in it.—*R.* v. *Athea*, 1 *Moo. C. C.* 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.* v. *Rodgers*, *R.* v. *Carrell*, *R.* v. *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.* v. *Bailey*, 1 *Moo. C. C.* 23; *R.* v. *Jenkins*, *R. & R.* 244; *R.* v. *Carrell*, 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 sec. 36 of the Larceny Act, *post*, 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 bedrooms upstairs, 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 communication 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.* v. *Burrowes*, 1 *Moo. C. C.* 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.* v. *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 could not be considered a part of the dwelling-house of A.—*R.* v. *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. 40, *post*.

It is necessary to state with accuracy in the indictment, to whom the dwelling-house belongs.—1 *Burn*, 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 *Russ.* 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, etc., 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 sufficient breaking.—*R.* v. *Smith*, 1 *Moo. C. C.* 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.* v. *Lewis*, 2 *C. & P.* 628; *R.* v. *Spriggs*, 1 *M. & Rob.* 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 Chambers' 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 Tracy, justices; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C. J., and Powell, 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 burglarious breaking, though none of the rooms of the house are entered. Thus in *R.* v. *Brice*, *R. & R.* 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 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.* v. *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.* v. *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.* v. *Robinson*, 1 *Moo. C. C.* 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.* v. *Callan*, *R. & R.* 157. It was holden in *Brown's Case* that it was.—2 *East*, 487. In *R.* v. *Lawrence*, 4 *C. & P.* 231, it was holden that it was not. In *R.* v. *Russell*, 1 *Moo. C. C.* 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 color of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. In *Haukins' 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.—*R.* v. *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 got 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; *R.* v. *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.* v. *Davis*, *R. & R.* 322; *R.* v. *Bennett*, *R. & R.* 289; *R.* v. *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; *R.* v. *Davis*, 6 *Cox*, 369; *R.* v. *Smith*, *R. & R.* 417. 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, etc. 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.* v. *Bailey*, *R. & R.* 341. So would the mere introduction of the offender's finger.—*R.* v. *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.* v. *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*? 2 East, 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.* v. *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* 550.

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

In *R.* v. *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.* v. *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.* v. *Brice, R. & R.* 450; *R.* v. *Spanner*, 12 *Cox*, 155. If the intent be at all doubtful, it may be laid in different ways in different counts.—*R.* v. *Thomson*, 2 *East, P. C.* 515; 2 *Russ.* 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.* v. *Furnival, R. & R.* 445.

As to punishment, see *post*, on sect. 38.

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. 37 of the Larceny Act, *post*.

BURGLARY AND HOUSE-BREAKING.

35. Every one who breaks and enters any church, chapel, meeting-house or other place of divine worship, and commits any felony therein; or being in any church, chapel, meeting-house or other place of divine worship, commits any felony therein and breaks out of the same, is guilty of felony, and liable to imprisonment for life.—*32-33 V., c. 21, s. 49. 24-25 V., c. 96, s. 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 c. 92 Cons. Stat. Can.) Therefore stealing fixtures was not within them.—*R.* v. *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. 42, *post*. A tower of a parish church is parcel of a

church; *R.* v. *Wheeler*, 3 *C. & P.* 585; so is the vestry.—*R.* v. *Evans*, *C. & M.* 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.* v. *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 *Russ.* 73.

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.*

Local description is necessary in the body of the indictment.—*R.* v. *Jarrald*, *L. & C.* 320.

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, etc., the defendant may be convicted of simple larceny.—*Archbold*, 396. Upon the trial of any offence under this section, the jury may, under sect. 183 of the Procedure Act, convict of an attempt to commit such offence.—2 *Russ.* 74.

36. 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 is a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.—32-33 *V., c.* 21, *s.* 52. 24-25 *V., c.* 96, *s.* 53, *Imp.*

See remarks on burglary, and under sect. 40 *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.* v. *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.*

37. Every one who 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 such dwelling-house in the night, is guilty of burglary.—32-33 *V., c.* 21, *s.* 50. 24-25 *V., c.* 96, *s.* 51, *Imp.*

Sect. 2, *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. Comm.* 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.—*R.* v. *Wheeldon*, 8 *C. & P.* 747.

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.* v. *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.* v. *Russell*, 1 *Moo. C. C.* 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.—(*R.* v. *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.—*R.* v. *Davis*, 6 *Cox*, 369; 2 *Bishop Cr. L.* 100. But in Kelyng's Cr. C. 104, *Stevens & Haynes' re-print*, it is said that if 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 is burglary.

See next section for punishment and form of indictment.

Local description is necessary in the indictment.—2 *Russ.* 47.

38. Every one who commits the crime of burglary is liable to imprisonment for life.—32-33 *V., c.* 21, *s.* 51. 24-25 *V., c.* 96, *s.* 52, *Imp.*

On any indictment for burglary the prisoner may be convicted of the offence of breaking the dwelling-house with intent to commit a felony therein under sec. 42, *post*; sec. 193 Procedure Act.

On an indictment for burglary, the prisoner cannot be found guilty of felonious receiving.—*St. Laurent* v. *R.* 7 *Q. L. R.* 47. (But see sec. 135 Procedure Act.)

Indictment for burglary and larceny to the value of twenty-five dollars.—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 ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, 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. *(Local description necessary.)*—*R.* v. *Jarrald, L. & C.* 320.

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. 41, *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. 45, *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 twenty-five dollars still the defendant may be convicted of a simple larceny.—1 *Taylor, Evid.* 216; *Archbold*, 489 ; *R.* v. *Withal*, 1 *Leach*, 88 ; *R.* v. *Comer*, 1 *Leach*, 36 ; *R.* v. *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.* v. *Butterworth R. & R.* 520. See *post* remarks under sec. 39.

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 ..... 3 *Chitty*, 1118.

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 *Russ.* 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 *Russ.* 46 ; 1 *Hale*, 550. It has been said that the indictment need not state whose goods were intended to be stolen, or were stolen.—*R.* v. *Clarke*, 1 *C. & K.* 421 ; *R.* v. *Nicholas*, 1 *Cox*, 218 ; *R.* v. *Lawes*, 1 *C. & K.* 62 ; nor specify which goods, if an attempt or an intent to steal only is charged.—*R.* v. *Johnson*, *L. & C.* 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 *R.* v. *Thompson*, 2 *Cox*, 377, it was held that the hour need not be specified, and that it will be sufficient if the indictment alleges *in the night*.

The particular felony intended must be specified in the indictment.—2 *Bishop, Cr. Proc.* 142.

Indictment under sect. 37, *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 ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, 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.*

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.* v. *Compton*, 7 *C. & P.* 139. See, *ante*, *R.* v. *Lawrence*, 4 *C. & P.* 231; *R.* v. *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. 183 of the Procedure Act.

39. Every one who enters any dwelling-house in the night, with intent to commit any felony therein, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 53. 24-25 *V.*, *c.* 96, *s.* 54, *Imp.*

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. 183 of the Procedure Act, the jury may, if the evidence warrants it,

convict of an attempt to commit the offence charged, upon an indictment under this section.

Local description is necessary in the indictment. See next section.

40. Every one who 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 liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 54. 24-25 *V., c.* 96, *s.* 55, *Imp.*

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 passage leading from the one to the other." 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. v. *Clayburn, R. & R.* 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a work-shop, 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.* v. *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.* v. *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.* v. *Walters*, 1 *Moo. C. C.* 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.* v. *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.* v. *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.* v. *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.* v. *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.* v. *Gilbert*, 1 *C. & K.* 84. *See R.* v. *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 twenty-five dollars, 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. 42, *post*, as this indictment alleges the intent as well as the act.—*Archbold*, 404.

Under sect. 183 of the Procedure Act, 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.

Local description is necessary in the indictment.—*R.* v. *Bullock*, 1 *Moo. C. C.* 324, *note a*.

41. Every one who breaks and enters any dwelling-house, school-house, shop, warehouse or counting-house, and commits any felony therein, or being in any dwelling-house, school-house, shop, warehouse or counting-house, commits any felony therein, and breaks out of the same, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 55. 24-25 *V.*, *c.* 96, *s.* 56, *Imp.*

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.* v. *Pearce, R. & R.* 174; *R.* v. *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.—*R.* v. *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. 45, *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.—2 *Russ.* 76.

Sec. 36, *ante*, applies to this clause, as well as the rules which govern the interpretation of the words *dwelling-house* in burglary.—2 *Russ.* 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.* v. *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.—*R.* v. *Sanders*, 9 *C. & P.* 79; but in *R.* v. *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.—*R.* v. *Hill*, 2 *Russ.* 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.—*R.* v. *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.—*R.* v. *Andrews, C. & M.* 121, overruling *R.* v. *Smith*, 2 *M. & Rob.* 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided.—2 *Russ.* 76, *note by Greaves.*

Indictment.— ..... the dwelling-house of J. N., situate ..... 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. 183 of the Procedure Act, 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.—*R.* v. *McPherson, Dears. & B.* 197. 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. 42, *post.* But only if, as in the form above given, the intent is alleged, which was not the case in *R.* v. *McPherson, ubi supra.*

Local description necessary in the indictment.—*R.* v. *Bullock*, 1 *Moo. C. C.* 324, *note a.*

42. Every one who breaks and enters any dwelling-house, church, chapel, meeting-house or other place of divine worship, or any building within the curtilage, or school-house, shop, warehouse or counting-house, with intent to commit any felony therein, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V., c.* 21, *s.* 56. 24-25 *V., c.* 96, *s.* 57, *Imp.*

See sec. 193 of Procedure Act.

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 there being, then feloniously to steal, take and carry away against the form of the statute is 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.—*R.* v. *Johnson, L. & C.* 489.

Upon an indictment under this section the prisoner may be convicted, under sec. 183 of the Procedure Act, of the misdemeanor of attempting to commit the felony charged.—*R.* v. *Bain, L. & C.* 129.

Greaves says: "This clause is new, and contains a very

important improvement in the law. Formerly 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.

Under any indictment under this section, it is no defence that the prosecution has proved a burglary.—*Sect.* 194 *Procedure Act.*

Local description necessary in the indictment.—*R.* v. *Bullock*, 1 *Moo. C. C.* 324. *Note a.*

43. Every one who 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 him—any picklock 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 liable to three years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 59. 24-25 *V.*, *c.* 96, *s.* 58, *Imp.*

44. Every one who, having been convicted of any such misdemeanor as in the next preceding section mentioned, or of any felony, commits any such misdemeanor, is liable to ten years' imprisonment. —32-33 *V.*, *c.* 21, *s.* 60. 24-25 *V.*, *c.* 96, *s.* 59, *Imp.*

The distinction between this clause and sect. 39, as far as relates to being in a dwelling-house with intent to commit a felony, is this, that under the previous section 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.

Indictment for being found by night armed, with intent, 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.* v. *Lawes*, 1 *C. & K.* 62; *R.* v. *Nicholas*, 1 *Cox*, 218; *R.* v. *Clarke*, 1 *C. & K.* 421.

See, *ante*, sect. 2, as to the interpretation of the word "night."

In *R.* v. *Jarrald*, *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 *Russ.* 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*, 252, *note a*): "..... But a close consideration of the statute appears to confirm it (the decision in *Jarrald's Case*): it may well be that in all the other cases except "having implements of house-breaking" 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.—*R.* v. *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.

It seems that local description is necessary.—*R.* v. *Jarrald*, *L. & C.* 301.

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 house-breaking, and that the prisoner intended to use it as an implement of house-breaking, when found, at night, in possession of it.—*R.* v. *Oldham*, 2 *Den.* 472.

Where, on an indictment for having in possession without lawful excuse certain implements of house-breaking, 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 indictment 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. *R.* v. *Bailey*, *Dears.* 244.

Indictment for being found by night with a disguised face with intent to commit felony ..... Somersetshire (to wit.)—The Jurors for Our Lady the Queen upon their oath present that on the *first* day of *May*, in the year of our Lord 1852, about the hour of eleven in the night of the same day, at the parish of *Swindon*, in the county of *Somerset*, A. B. was found by night as aforesaid then and there having his face blackened *(blackened or otherwise disguised)*, with intent then and there by night as aforesaid feloniously, wilfully, and of his malice aforethought, to kill and murder one C. D. *(to commit any felony)*.

Indictment for being found by night in a house with intent to commit a felony therein ..... Yorkshire (to wit.)—The Jurors for Our Lady the Queen upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852, about the hour of eleven in the night of the the same day, at the parish of *Filey*, in the county of *York*, A. B. was found by night as aforesaid in the dwelling-house *(dwelling-house or other building whatsoever)* of one C. D., there situate, with intent then and there by night as aforesaid in the said *dwelling-house* feloniously to steal, take, and carry away the goods and chattels of the said C. D. then and there being in the said dwelling-house *(to commit any felony therein.)*

In *R.* v. *Thompson*, 11 *Cox*, 362, *held*, that where several persons are found out together by night, for the common purpose of house-breaking, and one only is in possession of house-breaking implements, all may be found guilty of the misdemeanor created by this section, for the possession of one is in such case the possession of all.

STEALING IN THE HOUSE.

45. Every one who 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 liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 61. 24-25 *V.*, *c.* 96, *s.* 60, *Imp.*

As to the meaning of the words "valuable security." *See*, *ante*, sect. 2.

Local description necessary in the indictment.—*R.* v. *Napper*, 1 *Moo. C. C.* 44.

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 sec. 183 of the Procedure Act, but the jury could not find him guilty of an attempt to commit simple larceny.—*R.* v. *McPherson, Dears. & B.* 197. See *supra*, under sect. 41.

The word "*dwelling-house*" has the same meaning as in burglary and sec. 36, *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.* v. *Petrie*, 1 *Leach*, 294; *R.* v. *Hamilton*, 1 *Leach*, 348 ; 2 *Russ.* 85.

It had been held in several cases that, if a man steal the goods of another in his own house, *R.* v. *Thompson*, *R.* v. *Gould*, 1 *Leach*, 338, it is not within the statute, but these cases appear to be overruled by R. v. *Bowden*, 2 *Moo. C.C.* 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.* v. *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.* v. *Campbell*, 2 *Leach*, 564, 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.* v. *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.* v. *Carroll*, 1 *Moo. C.C.* 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.* v. *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.* v. *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 *Russ.* 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.* v. *Rosser*, 7 *C. & P.* 648.

46. Every one who steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 62. 24-25 *V.*, *c.* 96, *s.* 61, *Imp.*

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

Sect. 36, *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 *Russ.* 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. 45. 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 gesture.—*R.* v. *Jackson*, 1 *Leach*, 267.

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 prosecuter 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.—*R.* v. *Leonard*, 2 *Russ* 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 *Russ.*, *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.

To this remark, in the first edition of this work, Greaves replied: "When an offence is committed through the agency of an innocent person, the employer, though absent when the act is done, is answerable as principal.—1 *Russ.* 53;

Kel. 52. If a madman, or a child not at years of discretion, commits murder or other felony on the incitement of another, the latter, though absent, is guilty as principal; otherwise he would be wholly unpunishable.—*Fost.* 349. Every act done by an innocent agent is in point of law exactly the same as if it were done at the same time and place by the employer. In burglary, if a man in the night breaks a window and inserts an instrument through the hole, and draws out any chattel, he is not only guilty of burglary with intent to steal, but of burglary *and* stealing *in* the house. The amotion by the instrument is the same as if it were by the prisoner's hand. Now, an innocent agent is merely the living instrument (Εμψυχον όργανον. Arist. Eth. 8, c. 13) of the employer. Then it is clear that any terror, which is sufficient to overpower a reasonably firm mind, will make an innocent agent; and the threats of an *armed mob* to a *single* individual are certainly sufficient to constitute such terror. In Leonard's case, therefore, the prosecutor was an innocent agent; and the moment he asported any of the provisions in the house a single inch, a larceny was committed *in the house;* and that was a larceny by the prisoner, for the prosecutor was his innocent agent. In the case put, therefore, the prisoner was guilty of larceny, though he never had the provisions; just as the inciter of an innocent agent is guilty of murder, though he may be miles off when the murder is committed. The rule as to innocent agency is exactly the same, whether the offence consists of an asportation, as in larceny, or of a single act, as in murder, by stabbing or shooting. The act is the act of the inciter in every case alike."

Obtaining money from any one by frightening him is larceny.—*R.* v. *Lovell,* 8 *Q. B. D.* 185.

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 *Russ.* 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.—R. v. *Murphy,* 6 *Cox,* 340.

Upon the trial of any offence mentioned in this section the jury may, under sec. 183 of the Procedure Act, convict of an attempt to commit such offence.—2 *Russ.* 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.* (As to value, see *ante.*)

Local description necessary in the indictment.—*R.* v. *Napper,* 1 *Moo. C. C.* 44.

STEALING IN MANUFACTORIES.

47. Every one who steals to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials mixed with each other or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 63. 24-25 *V., c.* 96, *s.* 62, *Imp.*

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.* v. *Woodhead,* 1 *M. & Rob.* 549. See *R.* v. *Hugill,* 2 *Russ.* 517; *R.* v. *Dixon, R. & R.* 53.

Upon the trial of any offence mentioned in this section, the jury may, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 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.*

48. Every one who, 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 or 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, secretes, embezzles, exchanges or otherwise fraudulently disposes of the same, or any part thereof, when the offence is not within the next preceding section, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 21, *s.* 64. 6-7 *V., c.* 40, *s.* 2, *Imp.*

STEALING FROM SHIPS, WHARVES, ETC.

49. Every one who 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 liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 65. 24-25 *V., c.* 96, *s.* 63, *Imp.*

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.*

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.*

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.*

The construction of the repealed statute was generally confined to such goods and merchandise 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.* v. *Grimes, Fost.* 79; *R.* v. *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.*

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.* v. *Pike*, 1 *Leach*, 317. 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*, 254.

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

A man cannot be guilty of this offence in his own ship.—*R.* v. *Madox, R. & R.* 92; but see *R.* v. *Bowden*,

2 *Moo. C. C.* 285. And now, sect. 4, *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.* v. *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 sec. 183 of the Procedure Act if the evidence warrants it.—2 *Russ.* 381.

STEALING THINGS UNDER SEIZURE.

50. Every one who, whether pretending to be the owner or not, secretly or openly, and whether with or without force or violence, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention, steals such property, and is guilty of felony and liable to be punished accordingly.—43 *V.*, *c.* 28, *s.* 66, *part.* 46 *V.*, *c.* 17, *s.* 67. *C. S. C.*, *c.* 23, *s.* 10.

This is a new enactment. It is an extension of statutes relating to Indians and to timber seized by Crown officers. —At common law, a man may be guilty of larceny by taking his own goods *in custodiâ legis*.—2 *Bishop. Cr. Proc.* 749.

STEALING OR EMBEZZLEMENT BY CLERKS OR SERVANTS OR PERSONS IN THE PUBLIC SERVICE.

51. Every one who, 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 liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 69. 24-25 *V.*, *c.* 96, *s.* 67, *Imp.*

As to what is a "valuable security," see, *ante*, sect. 2. 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 forty dollars, 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.*

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; *R.* v. *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, etc., 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. Sec. 195 Procedure Act.

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 sec. 183 of the Procedure Act.

As to what is sufficient evidence of an attempt to steal, see *R.* v. *Cheeseman*, *L. & C.* 140.

On an indictment for larceny as servants, the evidence showed that the complainant advanced money to the prisoners to buy rags, which they were to sell to the complainant at a certain price, their profit to consist in the difference between the rate they could buy the rags, and this fixed price. The prisoners consumed the money in drinks and bought no rags: *Held*, no larceny.—*R.* v. *Charest*, 9 *L. N.* 114.

52. Every one who, 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, or any part thereof, delivered to or received or taken into possession by him, for or in the name or on the account of his master or employer, feloniously steals 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 is liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 70. 24-25 *V.*, *c.* 96, *s.* 68, *Imp.*

See sec. 195 of Procedure Act, and R. v. *De Banks*, 15 *Cox*, 450.

It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th of April, he received money in county. On the 19th and 20th, he wrote to his employers not mentioning that he had received the money; on the 21st, by another letter, he gave them to understand that he had not received

the money. The letters were posted in county Y. and received in county M. *Held*, that the prisoner might be tried in county M. for the offence of embezzling the money. —*R.* v. *Rogers*, 14 *Cox*, 22.

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.

Greaves says: "The words of the former enactments were "shall *by virtue of such employment* receive or take into his possession any chattel, etc., 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, etc., 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.* v. *Snowley*, 4 *C. & P.* 390; *Crow's Case*, 1 *Lewin*, 88: *R.* v. *Thorley*, 1 *Moo. C. C.* 343; *R.* v. *Hawtin*, 7 *C. & P.* 281; *R.* v. *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. 195 of the Procedure Act, 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.—*R.* v. *Gorbutt, Dears. & B.* 166; *R.* v. *Betts, Bell, C. C.* 90; *Broom's Comment.* 973; *Stephens Cr. L. XL.* See *Rudge's Case*, 13 *Cox*, 17.

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, (s. 111 of Procedure Act,) 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.*

The indictment must show *by express words* that the different sums were embezzled within the six months.—*R.* v. *Noake*, 2 *C. & K.* 620; *R.* v. *Purchase, C. & M.* 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.—*R.* v. *Balls*, 12 *Cox*, 96; *R.* v. *Furneaux*, *R. & R.* 325; *R.* v. *Flower*, 8 *D. & R.* 512; *R.* v. *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 sec. 111 of the Procedure Act 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; 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.—*R.* v. *Keena*, 11 *Cox*, 123. The indictment must allege the goods embezzled to be the property of the master, *R.* v. *McGregor*, 3 *B. & P.* 106, *R. & R.* 23; *R.* v. *Beacall*, 1 *Moo. C. C.* 15; and it has been said that it must show that the defendant was servant at the time.—*R.* v. *Somerton*, 7 *B. & C.* 463. See, however,

R. v. *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.* v. *Crighton*, *R. & R.* 62. It is not necessary to state from whom the money was received.—*R.* v. *Beacall*, 1 *C. & P.* 454; and note in *R.* v. *Crighton*, *R. & R.* 62. But the judge may order a particular of the charge to be furnished to the prisoner.—*R.* v. *Bootyman*, 5 *C. & P.* 300; *R.* v. *Hodgson*, 3 *C. & P.* 422—*Archbold.*

A female servant is within the meaning of the Act.—*R.* v. *Smith*, *R. & &.* 267; so is an apprentice though under age, *R.* v. *Mellish*, *R. & R.* 80; and any clerk or servant, whether to person in trade or otherwise.—*R.* v. *Squire*, *R. & R.* 349; *R.* v. *Townsend*, 1 *Den.* 167; *R.* v. *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.* v. *Jenson*, 1 *Moo. C. C.* 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. 58, *post.*—*R.* v. *Hartley*, *R. & R.* 139; *R.* v. *Macdonald*, *L. & C.* 85; *R.* v. *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.* v. *Carr*, *R. & R.* 198; *R.* v. *Hoggins*, *R. & R.* 145; *R.* v. *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.—*R.* v. *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.* v. *Walker*, *Dears. & R.* 600; *R.* v. *May*, *L. & C.* 13; *R.* v. *Hall*, 13 *Cox*, 49. 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.—*R.* v. *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.—*R.* v. *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.—*R.* v. *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.—*R.* v. *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 *R.* v. *Bowers*, and *R.* v. *Marshall*, *supra*. So, in *R.* v. *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." See *R.* v. *Foulkes*, 13 *Cox*, 63.

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 person: *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.—*R.* v. *Negus*, 12 *Cox*, 492; *R.* v. *Hall*, 13 *Cox*, 49; *R.* v. *Coley*, 16 *Cox*, 227.

Prisoner was employed by O. 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

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.—*R.* v. *Cullum*, 12 *Cox*, 469. *See R.* v. *Gale*, 13 *Cox*, 340.

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.* v. *Spencer*, *R. & R.* 299; *R.* v. *Smith*, *R. & R.* 516. And in *R.* v. *Hughes*, 1 *Moo. C. C.* 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.* v. *Nettleton*, 1 *Moo. C. C.* 259; *R.* v. *Burton*, 1 *Moo. C.C.* 237, appear to be adverse to *R.* v. *Hughes*. See *R.* v. *Tongue*, *Bell* 289; *R.* v. *Hall*, 1 *Moo. C.C.* 374; *R.* v. *Miller*, 2 *Moo. C.C.* 249; *R.* v. *Proud*, *L. & C*, 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 countersigned 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.—*R.* v. *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.* v. *Diprose*, 11 *Cox*, 185; *R.* v. *Tuffs*, 4 *Cox*, 169; *R.* v. *Bren*, *L. & C.* 346. But a stealing or embezzlement by a partner is now provided for by sec. 58, *post*.

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.—*R.* v. *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.* v. *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.—*R.* v. *Stainer*, 11 *Cox*, 483. 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.* v. *Carr*, *R. & R.* 198; *R.* v. *Batty*, 2 *Moo. C. C.* 257; *R.* v. *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.* v. *White*, 2 *Moo.* 91.

In *R.* v. *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.* v. *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.* v. *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.* v. *Peck*, 2 *Russ.* 449; *R.* v. *Smith*, *R. & R.* 267; *R.* v. *Hawkins*, 1 *Den.* 584; *R.* v. *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, etc., 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.* v. *Murray*, 1 *Moo. C. C.* 276; *R.* v. *Watts*, 2 *Den.* 15; *R.* v. *Reed*, *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.* v. *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.* v. *Masters*, 1 *Den.* 332. *Greaves*, *note d*, 2 *Russ.* 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.* v. *Headge*, *R. & R.* 160; *R.* v. *Gill*, *Dears.* 289. Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling account with his master weekly, and upon such a sale the defendant fraudulenty 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.* v. *Betts*, *Bell*, *C. C.* 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.* v. *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.* v. *Wil-*

son, 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.—*R.* v. *Cooke*, 12 *Cox*, 10. See *R.* v. *Beaumont*, *Dears.* 270; *R.* v. *Thorp*, *Dears. & B.* 262; *R.* v. *Harris* *Dears.* 344; *R.* v. *Sullens*, 1 *Moo. C. C.* 129. A correct entry of money received in one book out of several is not answer to a charge of embezzlement, where the prisoner has actually appropriated the money.—*R.* v. *Lister*, *Dears. & B.* 118.

The usual presumptive evidence of embezzlement is that the defendant never accounted with his master for the money, etc., 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.—*R.* v. *Lister*, *supra*. Greaves says, *note n*, 2 *Russ.* 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 *R.* v. *Guelder*, *Bell*, 284, and Brett's, J., remarks in *R.* v. *Walstenholme*, 11 *Cox*. 313; *R.* v. *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 to have been done fraudulently.—*R.* v. *Welch*, 1 *Den.* 199; *R.* v. *Wortley*, 2 *Den.* 333.

In *R.* v. *Grove*, 1 *Moo. C. C.* 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.* v. *Lambert*, 2 *Cox*, 309; *R.* v. *Moah*, *Dears.* 626. But in *R.* v. *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, Anderson, B., said: "Whatever difference of opinion there might be in *R.* v. *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. v. *Chapman*, 1 *C. & K.* 119, 2 *Russ.* 460, and *R.* v. *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 1s. 9d., according to his way bills for the day, but he paid in only £3 0s. 8d. *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.—*R.* v. *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.* v. *Williams*, 6 *C. & P.* 626.

The prisoner, not having been in the employment of the prosecutor, was sent by him to one Milner with a horse as to which Milner and the prosecutor, who owned the horse, had had some negotiations, with an order to Milner to give the bearer a cheque if the horse suited. On account of a difference as to the price the horse was not taken and the prisoner brought him back. Afterwards the prisoner, without any authority from the owner, took the horse to

Milner and sold it as his own property, or professing to have a right to dispose of it, and received the money, giving a receipt in his own name.

Held, that a conviction for embezzlement could not be sustained as the prisoner, when he received the money, did not receive it as a servant or clerk but sold the horse as his own and received the money to his own use.—*The Queen* v. *Topple*, 3 *R. & C.* (*N. S.*) 566.

Upon the trial for any offence, mentioned in these sections, the jury may convict of an attempt to commit the same, under sec. 183 of the Procedure Act, if the evidence warrants it.

On a trial for embezzlement, *held*, that evidence of a general deficiency having been given, the conviction was right, though it was not proved that a particular sum coming from a particular person on a particular occasion, was embezzled by the prisoner.—*R.* v. *Glass*, 1 *L. N.* 41.

But a general deficiency alone is not sufficient.—*R.* v. *Glass, Ramsay's App. Cas.* 186-195.

53. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor or government of any Province of Canada, or of any municipality, 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 liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 71. 24-25 *V., c.* 96, *s.* 69, *Imp.*

54. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor, or government of any Province in 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, intrusted to or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently applies or disposes of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever

except for the public service, or for the service of such Lieutenant Governor, government or municipality, feloniously steals the same from Her Majesty, or from such municipality, and is liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 72, *part.* 24-25 *V.*, *c.* 96, *s.* 70, *Imp.*

55. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor, or government of any Province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it, is guilty of a fraudulent embezzlement thereof, and liable to fourteen years' imprisonment;

2. Nothing herein shall affect any remedy of Her Majesty, of the municipality, or of any person against the offender or his sureties, or any other person, nor shall the conviction of such offender be receivable in evidence in any suit or action against him.—41 *V.*, *c.* 7, *s.* 70, *part.* *C. S. C. c.* 16, *s.* 40, *part.* 29-30 *V.* (*Can.*), *c.* 51, *s.* 157, *part.*

See sec. 16 of Procedure Act, *post*, for venue in cases under the three preceding sections.

Where the registrar and treasurer of the late Trinity House was charged with embezzling a portion of the fund known as "The Decayed Pilots Fund." *Held*, that this was an embezzlement of moneys the property of "Our Lady the Queen."—*R.* v. *David*, 17 *L. C. J.* 310. (under sec. 54 of the Larceny Act.) See *R.* v. *Graham*, 13 *Cox*, 57.

These clauses have the effect of extending sections 51 and 52, as to larceny and embezzlement by clerks or servants, to public and municipal officers, and the remarks under the said sections, *ante*, may be applied here.

Indictment under sect. 53.— ..... 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*, 319.

This form has not the word "feloniously" in 3 *Burn*, *loc. cit.*

Indictment under sec. 54.— ..... 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*, 319. *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.—*R.* v. *Townsend*, *C. & M.* 178; *R.* v. *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 under sec. 52.

Sec. 126 of the Procedure Act contains an enactment as to the form of indictment under these three clauses.

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

felony, and liable to a fine, in the discretion of the court, or to seven years' imprisonment, or to both fine and imprisonment.—29-30 *V.* (*Can.*), *c.* 51, *s.* 188, *part.* *R. S. B. C.*, *c.* 157, *ss.* 99 *and* 100, *parts.*

This clause does not apply to writs of election or documents relating to elections for the Dominion Parliament.

STEALING BY TENANTS OR LODGERS.

57. Every one who steals any chattel or fixture let to be used by him, or her, in or with any house or lodging, whether the contract has been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, is guilty of felony, and liable to imprisonment for any term less than two years, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars, is liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 75, *part.* 24-25 *V.*, *c.* 96, *s.* 74, *Imp.*

If the indictment be for stealing a chattel, it may be, by sec. 127 of the Procedure Act, 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 sec. 17, *ante*, and describe the dwelling-house as that of the landlord, as in burglary.—3 *Burn.* 319.

There may be a conviction of an attempt to commit any offence mentioned in this section, upon a trial for that offence. Sec. 183 of the Procedure Act.

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 *Russ.* 519; *R.* v. *Belstead*, *R. & R.* 411. Hence, the statutory enactments on the subject.

STEALING BY PARTNERS.

58. Every one who, 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, is 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.—32-33 *V.*, *c.* 21, *s.* 38. 31-32 *V.*, *c.* 116, *s.* 1 *Imp.*

The Imperial clause reads as follows: "If any person being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods or effects, bills, notes, securities or other property, of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon under the 31-32 V., c. 116, sect. 1 *(the present clause)*, 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, but might have been convicted as an accessory after the fact on an indictment properly framed.—*R.* v. *Smith*, 11 *Cox*, 511.

An indictment framed upon the 31-32 V., c. 116, sect. 1, alleged that B. was a member of a co-partnership consisting of B. and L., and that B., then being a member of the same, eleven bags of cotton waste, the property of the said co-partnership, feloniously did steal, take and carry away: *Held*, that the indictment was not bad for introduc-

ing the word "feloniously."—R. v. *Butterworth*, 12 *Cox*, 132. In this case, Cottingham, for the prisoner, said: "The indictment is bad because it does not follow the words of the statute. That enactment creates a new offence, one which did not exist at common law; it does not say that the offence shall be a felony, and the indictment is bad for using the word "feloniously." There are offences of stealing, which are not felonious, 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.—*R.* v. *Butterworth*, *supra.*

See *R.* v. *Ball*, 12 *Cox*, 96, for an indictment against a partner for embezzlement of partnership property; also, *R.* v. *Blackburn*, 11 *Cox*, 157.

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; *R.* v. *Webster*, *L. & C.* 77; *R.* v. *Burgess*, *L. & C.* 299; *R.* v. *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 *R.* v. *Diprose*, 11 *Cox*, 185. Upon an indictment for larceny, under this section, the prisoner may be found guilty of embezzlement.—*R.* v. *Rudge*, 13 *Cox*, 17.

FRAUDS BY AGENTS, BANKERS OR FACTORS.

59. Every one who, being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, secretes, embezzles or absconds with any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects intrusted to him as such cashier, assistant cashier, manager, officer, clerk or servant, whether the same belongs to the bank or belongs to any person, body corporate, society or institution, and is lodged with such bank, is guilty of felony, and liable to imprisonment for life or for any term not less than two years.—34 *V., c.* 5, *s.* 60, *and c.* 7, *s.* 32. 24-25 *V., c.* 96, *s.* 73, *Imp.*

60. Every one who,—

(*a.*) Having been intrusted, either solely or jointly with any other person, as a banker, merchant, 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 anywise 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, or—

(*b.*) 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 Canada, or of 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 liable to seven years' imprisonment.

2. 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.—32-33 *V., c.* 21, *s.* 76. 24-25 *V., c.* 96, *s.* 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, etc., 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.

By sec. 6 of the Procedure Act, no court of general or quarter sessions has power to try any offence under sects. 60 to 76 of the Larceny Act. And by sec. 197, the defendant, under said sections, is not to be acquitted, if larceny is proved.

Sub sec. *b* of sec. 60 applies only to persons whose occupation is similar to those specially enumerated in the section, and does not include any ordinary agent who may from time to time be entrusted with valuable securities. *R.* v. *Portugal*, 16 *Q. B. D.* 487.

61. Every one who, 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 liable to seven years' imprisonment.—32-33 *V., c.* 21, *s.* 77. 24-25 *V., c.* 96, *s.* 76, *Imp.*

62. Every one who, 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 liable to seven years' imprisonment.—32-33 *V., c.* 21, *s.* 78. 24-25 *V., c.* 96, *s.* 77, *Imp.*

63. Every one who, 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 or 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 deliver any such goods or document of title, is guilty of a misdemeanor, and liable to seven years' imprisonment;

2. Every one 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 liable to the same punishment;

3. No such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, if the same are not made a 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.—32-33 *V.*, *c.* 21, *s.* 79. 24-25 *V.*, *c.* 96, *s.* 78, *Imp.*

64. 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 whenever 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 next preceding section, though such goods or document of title are not actually received by the person making such loan or advance till a period subsequent 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 next preceding section; and a factor or agent in possession, as aforesaid, of such goods or document, shall be taken, for the purpose of the next preceding section, to have been intrusted therewith by the owner thereof, unless the contrary is shown in evidence.—32-33 *V.*, *c.* 21, *s.* 80. 24-25 *V.*, *c.* 96, *s.* 79, *Imp.*

65. Every one who, being a trustee of any property for the use or benefit, either in whole or in part, 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 liable to seven years' imprisonment;

2. No proceeding or prosecution for any offence mentioned in this section shall be commenced without the sanction of the attorney general or solicitor general for the province in which the same is to be instituted;

3. When any civil proceeding has been taken against any person to whom the provisions of this section 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.—32-33 *V.*, *c.* 21, *s.* 81. 24-25 *V.*, *c.* 96, *s.* 80, *Imp.*

66. Every one who, being a director, member, manager or officer of any body corporate or company, fraudulently takes or applies, for his own use or benefit, or for any use or purpose other than the use or purpose of such body corporate or company, any of the property of such body corporate or company is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 82. 24-25 *V.*, *c.* 96, *s.* 81, *Imp.*

67. Every one who, being a director, member, manager or officer of any body corporate or company, as such receives or possesses himself of any of the property of such body corporate or 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 company, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 83. 24-25 *V.*, *c.* 96, *s.* 82, *Imp.*

68. Every one who, being a director, manager, officer or member of any body corporate or company, with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or company, or makes or concurs in the making of any false entry, or omits or concurs in omitting any material particular in any book of account or document, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 84. 24-25 *V.*, *c.* 96, *s.* 83, *Imp.*

69. Every one who, being a director, manager, officer or member of any body corporate or 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 body corporate or 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 company, or to enter into any security for the benefit thereof, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 85. 24-25 *V.*, *c.* 96, *s.* 84, *Imp.*

70. Every one who, being an officer or member of any unincorporated body or society, associated together for any lawful purpose, fraudulently takes or applies to his own use or benefit, or for any use or purpose other than the use or purpose of such body or society, the whole or any portion of the funds, moneys or other property of the society, and continues to withhold such property after due demand has been made for the restoration and payment of the same by some one or more of the members or officers duly appointed by and on behalf of the body or society, is guilty of a misdemeanor, and liable to three years' imprisonment.—*C. S. C.*, *c.* 71, *s.* 8. *R. S. B. C.*, *c.* 126, *s.* 9.

Not in the English Act.

71. Nothing in any of the twelve sections next preceding 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 whatsoever, in respect of any act done by him, if, at 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 *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.—32-33 *V.*, *c.* 21, *s.* 86. 24-25 *V.*, *c.* 96, *s.* 85, *Imp.*

72. Nothing in the thirteen sections next preceding, nor any proceeding, conviction or judgment 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 person aggrieved by any offence against any of the said sections 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 or suit 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 payment of any trust property misappropriated.—32-33 *V.*, *c.* 21, *s.* 87. 24-25 *V.*, *c.* 96, *s.* 86, *Imp.*

73. Every one who,—

(*a.*) Being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbor or other place for storing timber, deals, staves, boards or lumber, curer or

packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, 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 into his warehouse, vessel, cove, wharf or other place, or in any such place 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, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person whomsoever, although such person is then unknown to him, or—

(*b.*) Knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing,—

Is guilty of a misdemeanor, and liable to three years' imprisonment. —32-33 *V.*, *c.* 21, *s.* 88. 34 *V.*, *c.* 5, *s.* 64.

Not in the English Act.

74. Every one who,—

(*a.*) Having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise, upon which the consignee has advanced any money or given any valuable security, afterwards with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced, or such negotiable security so given, or—

(*b.*) Knowingly and wilfully acts and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee,—

Is guilty of a misdemeanor, and liable to three years' imprisonment;

2. No person shall be subject to prosecution under this section who, before making such disposition of the merchandise aforesaid, pays or tenders to the consignee the full amount of any advance made thereon. —32-33 *V.*, *c.* 21, *s.* 89.

Not in the English Act.

75. Every one who,—

(*a.*) Wilfully makes any false statement in 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 Bank Act*," or—

(*b.*) 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 such receipt, certificate or acknowledgment, for any such grain, timber or other goods or property, or having obtained any such receipt, certificate or acknowledgment, and after having indorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or indorsee, 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 indorsee of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned,

Is guilty of a misdemeanor, and liable to three years' imprisonment. —32-33 *V.*, *c.* 21, *s.* 90, *part.* 34 *V.*, *c.* 5, *s.* 65.

Not in the English Act.

76. If any misdemeanor mentioned in any of the three sections next preceding is 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, is guilty of the misdemeanor and not any other person.—32-33 *V.*, *c.* 21, *s.* 91. 34 *V.*, *c.* 5, *s.* 66.

Not in the English Act.

By sec. 197 of the Procedure Act, if upon the trial of any person for any misdemeanor under sects. 60 to 76, both inclusive, of the Larceny Act, it appears that the offence proved amounts to larceny, he shall not by reason there of be entitled to be acquitted of the misdemeanor.—14-15 *V.*, *c.* 100, *s.* 12, *Imp.*

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 sec. 75 of the Larceny Act, sec. 60 of our statute; *Held*, also, that he was not guilty under sect. 76, sec. 61 of our statute.—*R.* v. *Cooper*, 12 *Cox*, 600. *See R.* v. *Golde*, 2 *Russ.* 481; *R.* v. *Prince*, 2 *C. & P.* 517; *R.* v. *White*, 4 *C. & P.* 46; *R.* v. *Gomm*, 3 *Cox*, 64; *R.* v. *Fletcher*, *L. & C.* 180.—*R.* v. *Tatlock*, 13 *Cox*, 328; *R.* v. *Brownlow*, 14 *Cox*, 216; *R.* v. *Fullagar*, 14 *Cox*, 370.

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 V., c. 96, sect. 75 (sect. 60, *ante*, of Canadian Statute) to apply the cheque to a particular purpose, viz., in payment for the bonds.—*R.* v. *Christian*, 12 *Cox*, 502.

Indictment, under sect. 60, *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*, 320. See *R.* v. *Cronmire*, 16 *Cox*, 42.

Indictment, under sect. 60, *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*, 320.

Indictments, under sections 61 and 62, may readily be

framed from the above, omitting the special allegations as to safe custody, etc.—3 *Burn*, 320.

Indictment under sect. 63 *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*, 320.

Indictment under sect. 65, *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*, 321. See *R.* v. *Townshend*, 15 *Cox*, 466.

Indictment under sect. 66 *against a director for fraudulent 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*, 321.

Indictment, under sect 67 *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 lawfully, 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*, 321.

Indictment under sect. 68 *against a director for destroying or falsifying books, etc.*—..... ...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*, 321.

Indictment under sect. 69 *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*, 321; *Archbold*, 467.

Offences against sects. 60 to 76 of Larceny Act, not triable at quarter sessions. Sec. 6 Procedure Act.

As to who is an agent under sec. 60. See *R.* v. *Cosser*, 13 *Cox*, 187.

The power of attorney mentioned in sec. 62 of the Larceny Act, must be a written power of attorney.—*R.* v. *Chouinard*, 4 *Q. L. R.* 220.

In an indictment of a trustee for fraudulently converting property, under sec. 65 of Larceny Act, it is sufficient to set out that A. "being a trustee" did, etc., instead of that A. "was a trustee and being such trustee" did ..... It is not necessary to set out the trust in the indictment. —*R.* v. *Stansfield*, 8 *L. N.* 123.

OBTAINING MONEY BY FALSE PRETENCES.

77. Every one who, 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 liable to three years' imprisonment;

2. Every one who, 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 next preceding sub-section. —32-33 *V., c.* 21, *s.* 93, *part, and s.* 94.

The first part of this section is based on 24-25 V., c. 96, s. 88 of the Imperial Act, the second part, on s. 89 of the said Imperial Act. See sec. 198 of the Procedure Act.

By sect. 183 of the Procedure Act, 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.—*R.* v. *Roebuck*, *Dears. & B.* 24; *R.* v. *Eagleton*, *Dears.* 376, 515; *R.* v. *Hensler*, 11 *Cox*, 570; *R.* v. *Goff*, 9 *U. C. C. P.* 438. A verdict under sec. 85 may also be given, sec. 201 Procedure Act. 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. 140 of the Procedure Act has been taken.

By sec. 112 of the Procedure Act, in indictments for obtaining or attempting to obtain under false pretences, a general intent to defraud is a sufficient allegation, and it is not necessary to allege any ownership of the chattel, money or valuable security; and on the trial, it is not necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the defendant did the act charged with an intent to defraud.

To constitute the offence of obtaining goods by false pretences, three elements are necessary. 1st, the statement upon which the goods are obtained must be untrue; 2nd, the prisoner must have known at the time he made the statement that it was untrue; 3rd, the goods must have been obtained by reason and on the representation of that false statement.—*R.* v. *Burton*, 16 *Cox*, 62.

The following is quoted from an American case, reported in 12 *Cox*, 208, *the Commonwealth* v. *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 rest 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.* "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." See *R.* v. *Feithenheimer*, 26 *U. C. C. P.* 139.

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.*

By sec. 196 of the Procedure Act, 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 198, 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 *R.* v. *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.—*R.* v. *Adam*, 1 *Den.* 38; *R.* v. *Rudge*, 13 *Cox*, 17.

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 196 of the Procedure Act, 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 *R.* v. *Bryan*, 2 *Russ.* 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 sec. 184 of the Procedure Act.

A defendant indicted for misdemeanor in obtaining money under false pretences, cannot under C. S. C. c. 99, s. 62, be found guilty of larceny, that clause only authorizes a conviction for the misdemeanor, though the facts proved amount to larceny.—*R.* v. *Ewing*, 21 *U. C. Q. B.* 523; *R.* v. *Bertles*, 13 *U. C. C. P.* 607.

The pretence must be set out in the indictment.—*R.* v. *Mason*, 2 *T. R.* 581; *R.* v. *Goldsmith*, 12 *Cox*, 479. See notes to form in 2d schedule of Procedure Act. And it must be stated to be false.—*R.* v. *Airey*, 2 *East, P. C.* 30. And it must be 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.* v. *Goodall*, *R. & R.* 461; *R.* v. *Johnston*, 2 *Moo. C. C.* 254; *R.* v. *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.—*R.* v. *Fry*, *Dears. & B.* 449; *R.* v. *West*, *Dears. & B.* 575; *R* v. *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.—*R.* v. *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.—*R.* v. *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 14s. 6d. of which £0 4s. 6d. had been paid on account, and £0 10s. 0d. 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 14s. 6d. coat for him, subject to its fitting him, and had paid £0 4s. 6d. 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 14s. 6d. and also £0 10s. 0d. to the prosecutor, saying "There is £0 10s. 0d. 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 10s. 0d. otherwise he should not have done so; *Held*, that there was evidence to support a conviction on the indictment.—*R.* v. *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.* v. *Wickham*, 10 *A. & E.* 34; *R.* v. *Woolley*, 1 *Den.* 559; *R.* v. *Ball*, *C. & M.* 249; *R.* v *Roebuck*, *Dears. & B.* 24; or against which common prudence might have guarded; *R.* v. *Young*, 3 *T. R.* 98; *R.* v. *Jessop*, *Dears. & B.* 442; *R.* v. *Hughes*, 1 *F. & F.* 355. If, however, the prosecutor knows the pretence to be false, *R.* v. *Mills*, *Dears. & B.* 205; or does not part with the goods in consequence of defendant's representation, *R.* v. *Roebuck*, *Dears. & B.* 24; or parts with them before the representation is made, *R.* v. *Brooks*, 1 *F. & F.* 502; or in consequence of a representation as to some future fact, *R.* v. *Dale*, 7 *C. & P.* 352; or if the obtaining of the goods is too remotely connected with the false pretence, which is a question for the jury, *R.* v. *Gardner*, *Dears. & B.* 40; *R.* v. *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, *R.* v. *Watson*, *Dears. & B.* 348; *R.* v. *Evans*, *L. & C.* 252; or the object of the false pretence is something else than the obtaining of the money, *R.* v. *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.* v. *Barnes*, 2 *Den.* 59; or overstating a sum due for dock dues or custom duties, *R.* v. *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.* v. *Flint*, *R. & R.* 460; *R.* v. *Jackson*, 3 *Camp.* 370; *R.* v. *Parker*, 2 *Moo. C. C.* 1; *R.* v. *Spencer*, 3 *C. & P.* 420; *R.* v. *Wickman*, 10 *A. & E.* 34; *R.* v. *Philpott*, 1 *C. & K.* 112; *R.* v. *Freeth*, *R. & R.* 127, or the fraudulently assuming the name of another to whom money is payable, *R.* v. *Story*, *R. & R.* 81; *R.* v. *Jones*, 1 *Den.* 551; or the fraudulently assuming the dress of a member of one of the universities, *R.* v. *Barnard*, 2 *C. & 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.—*R.* v. *Crab*, 11 *Cox*, 85; *R.* v. *Cooper*, 13 *Cox*, 617.

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.—*R.* v. *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 learned 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.—*R.* v. *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 than 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.—*R.* v. *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.—*R.* v. *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.—*R.* v. *Williamson*, 11 *Cox*, 328.

It has been seen, *ante*, that in *R.* v. *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. 183 of the Procedure Act, be found guilty of an attempt to commit the offence charged. Or be, in the first instance, indicted for the attempt. In *R.* v. *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.—*R.* v. *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 *Russ.* 698. But it must be remembered that by sect. 185 of the Procedure Act, "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.—*R.* v. *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 work-house 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.—*R.* v. *Carpenter*, 11 *Cox*, 600.

In *R.* v. *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.—See *R.* v. *Speed*, 15 *Cox*, 24.

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.—*R.* v. *Kilham*, 11 *Cox*, 561. But see now, for Canada, sec. 85, *post.*

There may be a false pretence made in the course of a contract, by which money is obtained under the contract; *R.* v. *Kenrick*, *D. & M.* 203; *R.* v. *Abbott*, 2 *Cox*, 430; *R.* v. *Burgon*, *Dears. & B.* 11; *R.* v. *Roebuck*, *Dears. & B.* 24; as to weight or quantity of goods sold when sold by weight or quantity, *R.* v. *Sherwood*, *Dears. & B.* 251; *R.* v. *Bryan*, *Dears. & B.* 265; *R.* v. *Ragg*, *Bell*, *C. C.* 214; *R.* v. *Goss*, *Bell*, *C. C.* 208; *R.* v. *Lees*, *L. & C.* 418; *R.* v. *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; *R.* v. *Bryan*, *Dears. & B.* 265, and the comments upon it by the judges, in *Ragg's case*, *Bell*, *C. C.* 214; *R.* v. *Pratt*, 8 *Cox*, 334. *See R.* v. *Foster*, 13 *Cox*, 393. 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.—*R.* v. *Lee*, 8 *Cox*, 233; *sed quære?* And see Greaves' observations, 2 *Russ.* 664, and *R.* v. *Suter*, 10 *Cox*, 577; also, *R.* v. *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.—*R.* v. *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.* v. *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.—*R.* v. *Copeland*, *C. & M.* 516; *R.* v. *Jennison*, *L. & C.* 157.

Where the prisonner 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.—*R.* v. *Archer*, *Dears.* 449. Obtaining by falsely pretending to be a medical man or an attorney is within the statute.—*R.* v. *Bloomfield*, *C. & M.* 537; *R.* v. *Asterley*, 7 *C. & P.* 191.

It is no objection that the moneys have been obtained only by way of a loan, *R.* v. *Crossley*, 2 *M. & Rob.* 17; but perhaps this is true only of moneys, and not of other goods, 2 *Russ.* 668, and *R.* v. *Kilham*, 11 *Cox*, 561.

Obtaining goods by false pretences intending to pay for them is within the statute.—*R.* v. *Naylor*, 10 *Cox*, 149.

It must be alleged and proved that the defendant knew the pretence to be false at the time of making it.—*R.* v. *Henderson*, 2 *Moo. C C.* 192; *R.* v. *Philpotts*, 1 *C. & K.* 112. After verdict, however, an indictment following the words of the statute is sufficient.—*R.* v. *Bowen*, 3 *Cox*, 483; *Hamilton* v. *R. 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.—*R.* v. *Adamson*, 2 *Moo. C. C.* 286; *R.* v. *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.—*R.* v. *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*, 277. But proof of part of the pretence, and that the money was obtained by such proof is sufficient.—*R.* v. *Hill, R. & R.* 190; *R.* v. *Wickham*, 10 *A. & E.* 34; *R.* v. *Bates*, 3 *Cox*, 201.

But the goods must be obtained by means of some of the pretences laid.—*R.* v. *Dale*, 7 *C. & P.* 352; *R.* v. *Hunt*, 8 *Cox*, 495; *R.* v. *Jones*, 15 *Cox*, 475. 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.* v. *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, *R.* v. *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.—*R.* v. *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.—*R.* v. *Adamson*, 2 *Moo. C. C.* 286. So also parol evidence of a lost written pretence may be given.—*R.* v. *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.—*R.* v. *Holt*, 8 *Cox*, 411; *Bell*, *C. C.* 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.—*R.* v. *Welman, Dears.* 188; 6 *Cox*, 153.

Inducing a person by a false pretence to accept a bill of exchange is not within this section.—*R.* v. *Danger, Dears. & B.* 307. In such a case the indictment should be under sect. 78, *post*.

A railway ticket obtained by false pretences is within the statute, *R.* v. *Boulton*, 1 *Den.* 508; *R.* v. *Beecham*, 5 *Cox*, 181; and so is an order by the president of a burial society on a treasurer for the payment of money.—*R.* v. *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.* v. *Wavill*, 1 *Moo. C. C.* 224; *R.* v. *Garrett, Dears.* 233; *R.* v. *Crosby*, 1 *Cox*, 10.

There must be an intent to defraud. Where C. B.'s servant obtained goods from A.'s wife by false pretences, in order to enable B., his master, to pay himself a debt due from A., on which he could not obtain payment from A., it was held that C. could not be convicted.—*R.* v. *Williams*, 7 *C. & P.* 554. But it is not necessary to allege nor to prove the intent to defraud any person in particular. *With intent to defraud* are the words of the statute.

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., *R.* v. *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 coals 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.—*R.* v. *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.—*R.* v. *Ardley*, 12 *Cox*, 23; *R.* v. *Bryan, Dears. & B.* 265, was said by the judges not to be a different decision, but that 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.—*R.* v. *English*, 12 *Cox*, 171.

The prisoner had obtained goods from the prosecutor, upon the false pretences, as charged in the indictment, that he then lived at and was then the landlord of a certain beer house. At the trial, it was proved that the prisoner had never stated that he was the landlord of the beer house, but only that he lived there. *Held*, that he was guilty of the offence charged; that the statement might be divided, and that it is sufficient to prove part only of the false pretences charged. Also, that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged.—*R.* v. *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.—*R.* v. *Radcliffe*, 12 *Cox*, 474.

All persons who concur and assist in the fraud are principals, though not present at the time of making the pretence or obtaining the property.—*R.* v. *Mooland*, 2 *Moo. C. C.* 376; *R.* v. *Kerrigan, L. & C.* 383.

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 see fit to discharge the jury, and direct the prisoner to be indicted for the felony: sec. 184 of the Procedure Act. 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 *Russ.* 677.

On the second part of this section 77, 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 *R.* v. *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 *R.* v. *Garrett*, 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."

Prisoner was indicted for an attempt to obtain money from a pawnbroker by false pretences, *(inter alia)* that a ring was a diamond ring. To show guilty knowledge, evidence that he had shortly before offered other false articles of jewellery to other pawnbrokers was held to be properly admissible.—*R.* v. *Francis*, 12 *Cox*, 612.

Goods fraudulently obtained by prisoner on his cheque on a bank where he had no funds: *Held*, that he cannot be found guilty of having falsely represented that he had money in the bank, but that he was guilty of falsely representing that he had authority to draw the cheque, and that they were good and valid orders for the payment of money.—*R.* v. *Hazelton*, 13 *Cox*, 1.

See *R.* v. *Holmes*, 15 *Cox*, 343, as to where is the jurisdiction when offence is committed by a letter.

Prisoner convicted of obtaining his wages by false pretences in representing falsely that he had performed, a condition precedent to his right to be paid. —*R.* v. *Bull*, 13 *Cox*, 608.

The indictment must state the pretence which is pretended to have been false, and must negative the truth of the matter so pretended with precision.—*R.* v. *Kelleher*, 14 *Cox*, 48. See *R.* v. *Perrott*, 2 *M. & S.* 379.

Obtaining by false pretences. What constitutes false pretences.—*R.* v. *Durocher*, 12 *R. L.* 697; *R.* v. *Judah*, 7 *L. N.* 385.

To prove intent to defraud, evidence of similar frauds having recently been practised upon others is admissible. —*R.* v. *Durocher*, 12 *R. L.* 697.

An indictment for obtaining board under false pretences, is too general.—*R.* v. *McQuarrie*, 22 *U. C. Q. B.* 600.

A clause of a deed by which the borrower of a sum of money falsely declares a property well and truly to belong to him may constitute a false pretence.—*R.* v. *Judah*, 8 *L. N.* 122.

On a trial for obtaining under false pretences property of a joint stock company, parol evidence that the company has acted as an incorporated company is sufficient evidence of its incorporation.—*R.* v. *Langton*, 13 *Cox*, 345.

The prisoner who had been discharged from the service of A. went to the store of D. and S. and represented herself as still in the employ of A., who was in the habit of dealing there, and asked for goods in A.'s name, which were put up accordingly, but sent to A.'s house instead of being delivered to the prisoner. The prisoner, however, went directly from the store to A.'s house, and remaining in the kitchen with the servant until the clerk delivered the parcel, snatched it from the servant, saying "that is for me, I was going to see A." but, instead of going in to see A., went out of the house with the parcel.—Conviction for having obtained goods from D. & S. by false pretences, held good.—*R.* v. *Robinson*, 9 *L. C. R.* 278.

Where the prosecutor had laid a trap for the prisoner who had writien to induce him to buy counterfeit notes, and prisoner gave him a box which he pretended contained the notes, but which, in fact, contained waste paper and received the prosecutor's watch and $50.

Held, that the prisoner was rightly convicted of obtaining the prosecutor's property under false pretences.—*The Queen* v. *Corey*, 22 *N. B. Rep.* 543.

78. Every one who, with intent to defraud or injure any other person, by any false pretence fraudulently causes or induces any other person to execute, make, accept, indorse 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, so 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 liable to three years' imprisonment.—32-33 *V., c.* 21, *s.* 95. 24-25 *V., c.* 96, *s.* 90, *Imp.*

79. Every one who, for any purpose or with any intent, wrongfully and with wilful falsehood, pretends or alleges that he inclosed and sent or caused to be inclosed and sent in any post letter, any money, valuable security or chattel, which, in fact, he did not so inclose and send, or cause to be inclosed and sent therein, is guilty of a misdemeanor, and liable to be punished as if he had obtained the money, valuable security or chattel so pretended to be inclosed or sent by false pretences.—32-33 *V., c.* 21, *s.* 96, *part.*

Not in the English Act.

See sec 113 Procedure Act as to this clause 79.

On clause 78, Greaves says: "This clause is principally, new ..... it will include such cases as *R.* v. *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.* 77, *ante)* against the form .....

Prisoner was indicted at the Court of Queen's Bench for having induced, by false and fraudulent pretences, one B., a farmer, to endorse a promissory note for $170.45 and moved to quash on the ground that the indictment did not state that the endorsement in question had been declared false in any manner by competent authority, etc., nor that the said endorsement had been obtained for the purpose of converting the said note or paper-writing into money. Motion rejected. And a motion to quash, on the ground that the crown prosecutor, representing the attorney general, had refused to furnish to prisoner the particulars of the false pretences charged, although demanded, was refused. —*R.* v. *Boucher*, 10 *R. L.* 183.

Proof that the defendant had obtained from the prosecutor a promissory note on a promise to pay the plaintiff what